This report talks about some difficult themes, including suicide, self-harm and mental ill-health. Readers may find parts of the report distressing. These are some support services which might be helpful if you or someone you know needs help:

- Lifeline 13 11 14 (24/7 crisis support line)
- Beyond Blue 1300 224 636 (24/7 telephone, website or email short-term counselling)
- Suicide Call Back Service 1300 659 467 (24/7 counselling for suicide prevention and mental health)

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7 July 2023

His Excellency General the Honourable David Hurley AC DSC (Retd)
Governor-General of the Commonwealth of Australia
Government House
CANBERRA ACT  2600

Your Excellency

Report of the Royal Commission into the Robodebt Scheme

In accordance with the Letters Patent issued to me on 18 August 2022, and amendments to the Letters Patent issued on 16 February and 11 May 2023, I have made inquiries and now have the honour to present to you the Report of the Royal Commission into the Robodebt Scheme.

I have provided to you an additional chapter of the report which has not been included in the bound report and is sealed. It recommends the referral of individuals for civil action or criminal prosecution. I recommend that this additional chapter remain sealed and not be tabled with the rest of the report so as not to prejudice the conduct of any future civil action or criminal prosecution.

I am also submitting relevant parts of the additional chapter of the report to heads of various Commonwealth agencies; the Australian Public Service Commissioner, the National Anti-Corruption Commissioner, the President of the Law Society of the Australian Capital Territory and the Australian Federal Police.

I also return herewith the Letters Patent.

Yours faithfully

Catherine Holmes AC SC
Royal Commissioner
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Introductory Section
Preface

At the outset of my inquiry, I had anticipated that the Commission would uncover how such a patently unreliable methodology as income averaging, without other evidence, to determine entitlement to benefit could become part of an Australian Government debt raising and recovery scheme. What has been startling in the Commission’s investigation of the Robodebt scheme has been the myriad of other ways in which it failed the public interest.

It is remarkable how little interest there seems to have been in ensuring the Scheme’s legality, how rushed its implementation was, how little thought was given to how it would affect welfare recipients and the lengths to which public servants were prepared to go to oblige ministers on a quest for savings. Truly dismaying was the revelation of dishonesty and collusion to prevent the Scheme’s lack of legal foundation coming to light. Equally disheartening was the ineffectiveness of what one might consider institutional checks and balances – the Commonwealth Ombudsman’s Office, the Office of Legal Services Coordination, the Office of the Australian Information Commissioner and the Administrative Appeals Tribunal – in presenting any hindrance to the Scheme’s continuance.

The report makes a number of recommendations. Some are directed at strengthening the public service more broadly, some to improving the processes of the Department of Social Services and Services Australia. Others are concerned with reinforcing the capability of oversight agencies. A sealed chapter contains referrals of information concerning some persons for further investigation by other bodies. That in part is intended as a means of holding individuals to account, in order to reinforce the importance of public service officers’ acting with integrity.

But as to how effective any recommended change can be, I want to make two points. First, whether a public service can be developed with sufficient robustness to ensure that something of the like of the Robodebt scheme could not occur again will depend on the will of the government of the day, because culture is set from the top down.

Second, politicians need to lead a change in social attitudes to people receiving welfare payments. The evidence before the Commission was that fraud in the welfare system was miniscule, but that is not the impression one would get from what ministers responsible for social security payments have said over the years. Anti-welfare rhetoric is easy populism, useful for campaign purposes. It is not recent, nor is it confined to one side of politics, as some of the quoted material in this report demonstrates. It may be that the evidence in this Royal Commission has gone some way to changing public perceptions. But largely, those attitudes are set by politicians, who need to abandon for good (in every sense) the narrative of taxpayer versus welfare recipient.

My thanks go to Counsel Assisting, the Official Secretary, the Solicitors Assisting, the legal and research teams, the media officers and the administrative staff of the Royal Commission for their stalwart efforts in bringing together hearings at short notice and in working to analyse massive amounts of evidence for the preparation of this report. It has been an arduous ten months, with many late nights and missed weekends.
Introduction

The Royal Commission into the Robodebt Scheme was established by Letters Patent on 18 August 2022 under the *Royal Commissions Act 1902* (Cth) to inquire into the Robodebt Scheme (the Scheme), and I was appointed Royal Commissioner. The Scheme was a proposal developed by the Department of Human Services (DHS), put forward as a budget measure by the Minister for Social Services in 2015 and begun that year (initially in pilot form and expanded in subsequent budgets). It was designed to recover supposed overpayments from welfare recipients going back to the financial year 2010-11 and relied heavily on a process known as “income averaging” to assess income and entitlement to benefit. As used, it neither produced accurate results nor complied with the income calculation provisions of the *Social Security Act 1991* (Cth). By the end of 2016, the scheme was the subject of heavy public criticism but was nonetheless persisted with until November 2019, when it was announced that debts would no longer be raised solely on the basis of averaged income. That was followed in 2020 by the settlement of a class action and a decision to reduce all debts raised in whole or part through averaging to zero. In June 2020 then prime minister, the Hon Scott Morrison MP, apologised for the Scheme.\(^1\)

The matters into which I was directed to inquire were (in summary): how, by whom and why the scheme was established, designed, implemented; how risks and concerns in relation to it were dealt with and how complaints and challenges were managed by the Government; the use of third-party debt collectors; and the effects of the scheme – human and economic. The full terms of reference appear at the end of this Introduction. I was directed by the Letters Patent to provide the Governor-General with a report of the results of my inquiry and my recommendations not later than 18 April 2023, but, having regard to the number of issues which emerged, the extent of the evidence requiring consideration and delays in the production of that evidence, that date was extended to 30 June 2023, and, for different reasons, to 7 July 2023.

The workings of the Commission

Five counsel assisting were appointed: Justin Greggery KC, Angus Scott KC, Renee Berry, Salwa Marsh and Douglas Freeburn. Jane Lye was engaged as Official Secretary and the firm of Gilbert + Tobin was appointed as Official Solicitors to the Commission. Staff from a range of disciplines were appointed; a full list appears in the Appendix.

The Commission exercised its powers under the Royal Commissions Act to issue 200 Notices to Give Information and 180 Notices to Produce Documents. In response the Commonwealth produced over 958,000 documents. Unfortunately, the Commonwealth’s document production systems were not as efficient as one would hope. Documents were often produced long after they were first sought by notice, while the amount of duplication was a constant hindrance to the Commission’s work.

The Commission held four separate blocks of hearings between October 2022 and March 2023, the first three hearing blocks comprising a fortnight each and the final hearing block, three weeks. During those hearings 115 witnesses were called. A schedule of the hearings is in the Appendix. The hearings were open to the public and live streamed (other than during legal arguments concerning whether public interest immunity attached to prospective exhibits). The viewing audience for the live stream peaked at 57,511 and extended as far afield as England, Canada and the United States.

Witnesses included:

- ministers responsible for DHS and DSS and, later, Services Australia
- public servants from those departments who were involved with the Scheme’s development and implementation
- officers from two agencies with relevant oversight responsibilities, the Office of Legal Services Coordination and the Office of the Commonwealth Ombudsman
individuals and members of organisations who, in different ways, had represented the interests of people caught up in the Scheme

DHS officers who were affected by the work they did during the implementation of the Scheme

representatives of the debt collectors contracted by DHS under the Scheme

individuals who had themselves, or through a family member, suffered the effects of receiving a demand under the Scheme.

Some DHS employees and some of the people who were harmed by the Scheme appeared under a pseudonym or gave evidence in such a way that their identity was not revealed.

Witness statements, exhibits and hearing transcripts were placed on the Commission’s website, as were practice guidelines, directions, rulings and orders. Witnesses were granted leave to appear, which meant they were entitled to be represented and their legal representatives could seek leave to cross-examine other witnesses. The Commonwealth was represented throughout the hearings with standing leave to question witnesses.

In response to a general invitation to the public to make submissions to the Commission, individuals and organisations sent 1092 submissions which were, unless non-publication was requested, published on the Commission website. There was a mix of submissions: they came from people directly affected by the Scheme, individuals and organisations who represented people who had been directly affected by the Scheme, present and former public servants who had been involved in its administration or knew something about it, and people who were generally interested in the subject.

The Commission used a range of communication media, including press releases, social media and direct emails to subscribers to keep those interested informed as to its progress.

Procedural fairness and the standard of proof

The Commission applied the rules of procedural fairness, which are concerned with giving an individual liable to be affected by a decision a fair and impartial hearing before any such decision is made. It is to be noted that those rules are not a rigid, one-size-fits-all prescription; they entail a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.²

In this instance, prior to the publication of this report, persons who were likely to have findings made against them were given a Notice of Proposed Adverse Finding (and in some instances, a Notice of Proposed Referral) which told them of the factors and evidence on which the finding was likely to turn and given the opportunity to respond.

There were complaints from some individuals that they had been denied procedural fairness because they had not had the opportunity to cross-examine other witnesses. The Commission’s Practice Guideline, Cross-examination of Witnesses dated 28 September 2022, made it clear that applications for leave to cross-examine could be made before or after a witness gave evidence. None of the persons who complained about not being able to cross-examine had, in fact, made any application for leave to do so.

There was a very limited number of statements received from witnesses to clarify particular issues after the public hearings had closed. The fact that their evidence was not taken orally and that they were not cross-examined did not mean that their evidence cannot be accepted, but it did affect the weight of the evidence, a fact which has been taken into account by the Commission. No evidence of that kind has been relied on adversely to anyone in any instance where it is the only evidence on the point.

Some individuals complained that they were not forewarned before or during the Commission’s hearings of matters that were later put to them in Notices of Proposed Adverse Findings. Some suggested that those allegations should have been contained in the Notice to Give Information they received before giving evidence, or that they should have been cross-examined on every point later the subject of a proposed adverse finding; an absurd proposition, because the whole inquiry process is about discovering
what happened and what allegations flow through that questioning. Many of the complaints confused the inquiry process with the trial process, where counsel for a party has an obligation to put their client’s case to opposing witnesses. The Commission’s processes are inquisitorial, not adversarial; it is not a party advancing any particular case.

Where notices were given to individuals and organisations against whom it was contemplated adverse findings might be made, the notices were not published and a non-publication direction was made in respect of them, because the contemplated findings might never be made. Where individuals responded with submissions and statements, again they were not published because to do so would reveal the content of possible adverse findings. The non-publication direction against the publication of Notices of Proposed Adverse Findings is, however, qualified so that individuals, if they wish, can publish their own submissions and statements although they contain content from the notices they received.

Where I have made findings against individuals that were liable to cause real damage to reputation, as many of the findings in this report unquestionably do, I have acted on the Briginshaw standard. I have not reached those conclusions without a high degree of satisfaction about the evidence.

Despite what was said in some submissions, the absence of direct evidence against an individual did not mean that a finding could not be made. In many instances, the combination of circumstances and documentary evidence pointed to a clear conclusion about what had occurred.

The challenges

The Commission had to act very quickly to assemble hearings and proceed to take evidence without much of the information needed. When the documents did come, they came in great numbers, some of them frustratingly close to the end of the hearings. There was no one witness who gave any connected account of what had occurred. Those at the Scheme’s heart were not always very forthcoming.

Making the process of getting to the bottom of what had occurred all the harder was the absence of documentation of decisions made throughout the life of the Scheme. There simply were not records kept of who decided what, when. Occasionally, a brief to a minister would disclose a little information but they were usually couched in very careful terms. The Commission found itself piecing together emails to track through what had happened. The process was rather like putting together a second-hand jigsaw puzzle: a reasonably clear picture emerged, but there will always be some pieces missing.

The Commission has done its best to synthesise the enormous amount of evidence it received into this report. No doubt with more time it could have been sleeker, but the fact it has been able to be produced so quickly is a marvel and a credit to the dedication and energy of the Commission’s staff.

Parliamentary privilege

A question that was asked of Commission staff was why the Commission was making no use of the evidence given to, and reports of, the Senate Inquiries which had examined the Scheme between 2017 and 2022. (The Senate Standing Committee on Community Affairs produced a series of reports.) The answer is that parliamentary privilege prevented the material put to the Senate hearings and the reports the Senate Committee produced from being tendered in evidence or asked about for the purposes of relying on what was said in them.

To explain: section 16 of the Parliamentary Privileges Act 1987 (Cth) prohibits evidence concerning “proceedings in Parliament” from being tendered in evidence for specified purposes. In that context, “proceedings in Parliament” means “all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House [of Parliament] or of a committee.” The purpose of the privilege is to protect free speech and debate in Parliament. The exceptions to the privilege are extremely limited.
As a result of that broad prohibition, documents relating to several prior investigations, inquiries, and reports involving the Scheme are either not in evidence,9 or else were tendered only for a limited purpose consistent with section 16 of the Parliamentary Privileges Act 1987 (Cth).10

Many of the same people who gave evidence before this Commission had given evidence before the Senate Standing Committee on Community Affairs and the Senate Community Affairs Legislation Committee. Without making any formal recommendation on the topic, I strongly suggest that a copy of this report be provided to the Clerk of the Senate, and perhaps the chairs of each of those committees in case they are interested in seeing how the evidence developed in the Commission.

Structure of the report

The first section begins with an overview of the Scheme and summarises my conclusions about it. The bases for those conclusions are set out in subsequent chapters, the first of which gives some background to the departments and agencies involved in the Scheme’s introduction and administration and the processes for data matching and income averaging which were integral to it.

The second part of the report begins with the design of the Scheme and its adoption by Cabinet as a Budget measure, with a particular exploration of how concerns about its legality were put to one side. The following chapters chart the life of the Scheme, over the period between April 2015, when a pilot was commenced, and November 2019, when averaging (as the sole basis of raising debts) was abandoned. They contain extensive detail and often quote emails and other documents. Because direct evidence of what happened has been so lacking it has been important to refer at some length to the emails, briefs and other documents to explain how the Commission has reached its conclusions.

The next part of the report is concerned with the Scheme’s impact on those income support recipients to whom it was directed and also with the effects on DHS staff of having to administer it. Then there is a chapter which makes clear the Scheme’s economic costs, including the unreality of its projected savings, the costs of administering it, the costs of seeking expert assistance to try to remedy its failings, the costs of inquiries into it, including this one, and the costs of settling the class action and cancelling those debts based on averaging.

What follows is some description and discussion of automated decision making and data matching, both of which were features of the Scheme, and a chapter which is concerned with the debt recovery processes used.

The following section of the report deals with what might loosely be described as the checks and balances which might have operated to prevent the Scheme’s continuation, but did not or could not: the parts played by the lawyers involved, the Administrative Appeals Tribunal, the Commonwealth Ombudsman and the Office of the Australian Information Commissioner.

There is then a chapter with some modest proposals concerning the Australian Public Service, followed by my conclusions.

Use of language

The Commission has tried, as far as possible, to avoid falling into what, without wishing to offend, might be called public service jargon. It has, however, had to resort to the use of acronyms because the report would be considerably longer if, for example, every time the Department of Social Services were referred to, its name had to be set out in full.

One term which appears throughout the report is “recipient” to signify people who, during the Robodebt Scheme, were receiving benefit or pension or had formerly received benefit or pension. The departmental word is “customer” but since the experience of those individuals during the Scheme had so little to do with service it seemed appropriate to adopt a different term. The term “recipient” has been adopted in respect
of both past and former recipients except where it was relevant to distinguish between them (because, for example, some debt recovery methods can only be applied against former recipients).

Although in this chapter and the closing chapter I have occasionally spoken directly, most of the report is not written in the first person. The usual mode of expression is “the Commission finds.” Under the terms of reference I am, in fact, the Royal Commission, an odd state of being, so that reference is to me. Of course, during the work of the Commission, the term has referred to the collective work of the Commission’s legal, research and administrative teams.

Finally on the subject of language, the Commission staff are not to be blamed for the archaic forms of syntax “a number of people was” and use of the subjunctive “if he were” throughout the report. That is my doing; my staff did their best to correct what they were convinced were errors, only to have me stubbornly reinsert them. (I have grudgingly succumbed to the use of “their” in the singular.)
Terms of reference

ACKNOWLEDGING the harm caused to affected members of the Australian community by the debt assessment and recovery scheme known as Robodebt (the Robodebt scheme) which reportedly comprised, from 1 July 2015, the PAYG Manual Compliance Intervention program, including associated pilot programs from early 2015 to 30 June 2015, and the following iterations of this program:

a. Online Compliance Intervention, which applied to assessments initiated in the period from on or around 1 July 2016 to on or around 10 February 2017;

b. Employment Income Confirmation, which applied to assessments initiated in the period from on or around 11 February 2017 to on or around 30 September 2018;

c. Check and Update Past Income, which applied to assessments initiated after on or around 30 September 2018

AND that:

d. in November 2019 the Federal Court of Australia declared, with the consent of the Australian Government, that a demand for payment of an alleged debt under the Robodebt scheme was not validly made; and

e. the Australian Government had adopted the same or a similar approach in calculating and raising debts against hundreds of thousands of other individuals under the Robodebt scheme; and

f. the Australian Government subsequently announced that over 400,000 debts raised under the Robodebt scheme would be zeroed or repaid.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the Royal Commissions Act 1902 and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you to inquire into the following matters:

g. the establishment, design and implementation of the Robodebt scheme, including:
   i. who was responsible for its design, development and establishment; and
   ii. why those who were responsible for its design, development and establishment considered the Robodebt scheme necessary or desirable; and
   iii. the advice, process or processes that informed its design and implementation; and
   iv. any concerns raised regarding the legality or fairness of the Robodebt scheme;

h. the use of third party debt collectors under the Robodebt scheme;

i. in relation to concerns raised about the Robodebt scheme following its implementation:
   i. how risks relating to the Robodebt scheme were identified, assessed and managed by the Australian Government in response to concerns raised by the Australian Taxation Office, other departments and agencies, affected individuals and other people and entities; and
   ii. the systems, processes and administrative arrangements that were in place to handle complaints about the Robodebt scheme from members of the public affected by the scheme, their representatives or government officials and staff; and
   iii. whether complaints were handled in accordance with those systems, processes and administrative arrangements, and, in any event, handled fairly; and
iv. how the Australian Government responded to adverse decisions made by the Administrative Appeals Tribunal; and
v. how the Australian Government responded to legal challenges or threatened legal challenges; and
vi. approximately when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised; and
vii. whether the Australian Government sought to prevent, inhibit or discourage scrutiny of the Robodebt scheme, whether by moving departmental or other officials or otherwise;
j. the intended and actual outcomes of the Robodebt scheme, in particular:
i. the kinds of non-pecuniary impacts the scheme had on individuals, particularly vulnerable individuals, and their families; and
ii. the approximate total cost of implementing, administering, suspending and winding back the Robodebt scheme, including costs incidental to those matters (such as obtaining external advice and legal costs);

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including measures needed to prevent a recurrence of any failures of public administration you identify.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to focus on decisions and actions taken, or not taken, by those in positions of seniority.

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the Royal Commissions Act 1902.

AND We declare that you are a Royal Commission to which item 5 of the table in subsection 355-70(1) in Schedule 1 to the Taxation Administration Act 1953 applies.

AND We:
k. require you to begin your inquiry as soon as practicable; and
l. require you to make your inquiry as expeditiously as possible; and
m. require you to ensure the inquiry is conducted in a professional, impartial, respectful and courteous manner, including appropriately managing any actual or perceived conflicts of interest; and
n. require you to submit to Our Governor-General any recommendations that you make before making them public; and
o. require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 30 June 2023.
2 Kioa v West (1985) 159 CLR 550, 585.
3 Non-publication direction number 22.
4 Briginshaw v Briginshaw (1938) 60 CLR 336.
5 Parliamentary Privilege 1987 (Cth) s 16(3).
6 Parliamentary Privilege 1987 (Cth) s 16(2).
7 See, eg, Sankey v Whitlam (1978) 142 CLR 1, 35 (Gibbs ACJ).
8 See, eg, Sankey v Whitlam (1978) 142 CLR 1, 35 (Gibbs ACJ); Amann Aviation Pty Ltd v Commonwealth of Australia (1988) 19 FCR 223, 232 (Beaumont J).
9 See, eg, Australian National Audit Office, Management of Selected Fraud Prevention and Compliance Budget Measures (Report No 41, 28 February 2017); The Senate Standing Committee on Community Affairs References Committee, Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (Report, 21 June 2017); The Senate Standing Committee on Community Affairs References Committee, Centrelink’s compliance program (Interim report, February 2020); The Senate Standing Committee on Community Affairs References Committee, Centrelink’s compliance program (Second interim report, September 2020); The Senate Standing Committee on Community Affairs References Committee, Centrelink’s compliance program (Third interim report, September 2020); Senate Standing Committee on Community Affairs References Committee, Centrelink’s compliance program (Fourth interim report, August 2021); Senate Standing Committee on Community Affairs References Committee, Centrelink’s compliance program (Fifth interim report, November 2021); Senate Standing Committee on Community Affairs References Committee, Accountability and justice: Why we need a Royal Commission into Robodebt (Final report, May 2022).
List of Recommendations

The following is a list of 57 recommendations of this Commission. Recommendations have been grouped and numbered according to the chapter in which they appear.

Effects of Robodebt on individuals

Recommendation 10.1: Design policies and processes with emphasis on the people they are meant to serve

Services Australia design its policies and processes with a primary emphasis on the recipients it is meant to serve. That should entail:

• avoiding language and conduct which reinforces feelings of stigma and shame associated with the receipt of government support when it is needed
• facilitating easy and efficient engagement with options of online, in person and telephone communication which is sensitive to the particular circumstances of the customer cohort, including itinerant lifestyles, lack of access to technology, lack of digital literacy and the particular difficulties rural and remote living
• explaining processes in clear terms and plain language in communication to customers, and acting with sensitivity to financial and other forms of stress experienced by the customer cohort and taking all practicable steps to avoid the possibility that interactions with the government might exacerbate those stresses or introduce new ones.

The concept of vulnerability

Recommendation 11.1: Clear documentation of exclusion criteria

Services Australia should ensure that for any cohort of recipients that is intended to be excluded from a compliance process or activity, there is clear documentation of the exclusion criteria, and, unless there is a technical reason it cannot be, the mechanism by which that is to occur should be reflected in the relevant technical specification documents.

Recommendation 11.2: Identification of circumstances affecting the capacity to engage with compliance activity

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities extend to the identification of circumstances affecting a recipient’s capacity to engage with any form of compliance activity. To this end, circumstances likely to affect a recipient’s capacity to engage with compliance activities should be recorded on their file regardless of whether they are in receipt of a payment that gives rise to mutual obligations.
Recommendation 11.3: Engagement prior to removing a vulnerability indicator from a file

Services Australia should ensure that its processes and policies in relation to the identification of potential vulnerabilities require staff to engage with a recipient prior to the removal of an indicator on their file. For this purpose, Services Australia should remove any feature that would allow for the automatic expiry of a vulnerability indicator (or equivalent flagging tool). An indicator should only be removed where a recipient, or evidence provided to the Agency in relation to the recipient, confirms that they are no longer suffering from the vulnerability to which the indicator relates.

Recommendation 11.4: Consideration of vulnerabilities affected by each compliance program, including consultation with advocacy bodies

Services Australia should incorporate a process in the design of compliance programs to consider and document the categories of vulnerable recipients who may be affected by the program, and how those recipients will be dealt with. Services Australia should consult stakeholders (including peak advocacy bodies) as part of this process to ensure that adequate provision is made to accommodate vulnerable recipients who may encounter particular difficulties engaging with the program.

The roles of advocacy groups and legal services

Recommendation 12.1: Easier engagement with Centrelink

Options for easier engagement with Centrelink by advocacy groups – for example, through the creation of a national advocates line – should be considered.

Recommendation 12.2: Customer experience reference group

The government should consider establishing a customer experience reference group, which would provide streamlined insight to government regarding the experiences of people accessing income support.

Recommendation 12.3: Consultation

Peak advocacy bodies should be consulted prior to the implementation of projects involving the modification of the social security system.

Recommendation 12.4: Regard for funding for legal aid commissions and community legal centres

When it next conducts a review of the National Legal Assistance Partnership, the Commonwealth should have regard, in considering funding for legal aid commissions and community legal centres, to the importance of the public interest role played by those services as exemplified in their work during the Scheme.

Experiences of Human Services employees

Recommendation 13.1: Consultation process

Services Australia should put in place processes for genuine and receptive consultation with frontline staff when new programs are being designed and implemented.

Recommendation 13.2: Feedback processes

Better feedback processes should be put in place so that frontline staff can communicate their feedback in an open and consultative environment. Management should have constructive processes in place to review and respond to staff feedback.
**Recommendation 13.3: “Face-to-face” support**

More “face-to-face” customer service support options should be available for vulnerable recipients needing support.

**Recommendation 13.4: Increased number of social workers**

Increased social worker support (for both recipients and staff), and better referral processes to enable this support, should be implemented.

**Failures in the Budget process**

**Recommendation 15.1: Legislative change better defined in New Policy Proposals**

The Budget Process Operational Rules should include a requirement that all New Policy Proposals contain a statement as to whether the proposal requires legislative change in order to be lawfully implemented, as distinct from legislative change to authorise expenditure.

**Recommendation 15.2: Include legal advices with New Policy Proposals**

The Budget Process Operational Rules should include a requirement that any legal advice (either internal or external) relating to whether the proposal requires legislative change in order to be implemented be included with the New Policy Proposal in any versions of the Portfolio Budget Submission circulated to other agencies or Cabinet ministers.

**Recommendation 15.3: Australian Government Solicitor statement in the NPP**

The Budget Process Operational Rules should include a requirement that where legal advice has been given in relation to whether the proposal requires legislative change in order to be implemented, the New Policy Proposal includes a statement as to whether the Australian Government Solicitor has reviewed and agreed with the advice.

**Recommendation 15.4: Standard, specific language on legal risks in the NPP**

The standard language used in the NPP Checklist should be sufficiently specific to make it obvious on the face of the document what advice is being provided, in respect of what legal risks and by whom it is being provided.

**Recommendation 15.5: Documented assumptions for compliance Budget measures**

That in developing compliance Budget measures, Services Australia and DSS document the basis for the assumptions and inputs used, including the sources of the data relied on.

**Recommendation 15.6: Documentation on the basis for assumptions provided to Finance**

That in seeking agreement from Finance for costings of compliance Budget measures, Services Australia and DSS provide Finance with documentation setting out the basis for the assumptions and inputs used, including related data sources, to allow Finance to properly investigate and test those assumptions and inputs.
Data-matching and exchanges

Recommendation 16.1: Legal advice on end-to-end data exchanges
The Commonwealth should seek legal advice on the end-to-end data exchange processes which are currently operating between Services Australia and the ATO to ensure they are lawful.

Recommendation 16.2: Review and strengthen governance of data-matching programs
The ATO and DHS should take immediate steps to review and strengthen their operational governance practices as applied to jointly conducted data-matching programs. This should include:

• reviews to ensure that all steps and operations relating to existing or proposed data-matching programs are properly documented
• a review of all existing framework documents for existing or proposed data-matching programs
• a review of the operations of the ATO/DHS Consultative Forum and the ATO/DHS Data Management Forum
• a review of the existing Head Agreement/s, Memoranda of Understanding and Services Schedule
• a joint review of any existing or proposed data-matching program protocols to ensure they are legally compliant in respect of their provision for the data exchanges contemplated for the relevant data-matching program.

Automated decision making

Recommendation 17.1: Reform of legislation and implementation of regulation
The Commonwealth should consider legislative reform to introduce a consistent legal framework in which automation in government services can operate.

Where automated decision-making is implemented:

• there should be a clear path for those affected by decisions to seek review
• departmental websites should contain information advising that automated decision-making is used and explaining in plain language how the process works
• business rules and algorithms should be made available, to enable independent expert scrutiny.

Recommendation 17.2: Establishment of a body to monitor and audit automated decision-making
The Commonwealth should consider establishing a body, or expanding an existing body, with the power to monitor and audit automate decision-making processes with regard to their technical aspects and their impact in respect of fairness, the avoiding of bias, and client usability.

Debt recovery and debt collectors

Recommendation 18.1: Comprehensive debt recovery policy for Services Australia
Services Australia should develop a comprehensive debt recovery management policy which among other things should incorporate the Guideline for Collectors and Creditors’ issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC). Examples of such documents already exist at both federal and state levels. Any such policy should also prescribe how Services Australia undertakes to engage with debtors, including that staff must:
• ensure any debt recovery action is always ethical, proportionate, consistent and transparent
• treat all recipients fairly and with dignity, taking each person’s circumstances into account before commencing recovery action
• subject to any express legal authority to do so, refrain from commencing or continuing recovery action while a debt is being reviewed or disputed, and
• in accordance with legal authority, consider and respond appropriately and proportionately to cases of hardship.

Services Australia should ensure that recipients are given ample and appropriate opportunities to challenge, review and seek guidance on any proposed debts before they are referred for debt recovery.

**Recommendation 18.2: Reinstate the limitation of six years on debt recovery**

The Commonwealth should repeal s 1234B of the Social Security Act and reinstate the effective limitation period of six years for the bringing of proceedings to recover debts under Part 5.2 of the Act formerly contained in s 1232 and s 1236 of that Act, before repeal of the relevant sub-sections by the *Budget Savings (Omnibus) Act (No 55) 2016* (Cth). There is no reason that current and former social security recipients should be on any different footing from other debtors.

**Lawyers and legal services**

**Recommendation 19.1: Selection of chief counsel**

The selection panel for the appointment of chief counsel of Services Australia or DSS (chief counsel being the head of the entity’s legal practice) should include as a member of the panel, the Australian Government Solicitor.

**Recommendation 19.2: Training for lawyers – Services Australia**

Services Australia should provide regular training to its in-house lawyers on the core duties and responsibilities set out in the Legal Practice Standards, including:

• an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation.
• appropriate statutory and case authority references in advice writing.

**Recommendation 19.3: Legal practice standards – Social Services**

DSS should develop Legal Practice Standards which set out the core duties and responsibilities of all legal officers working at DSS.

**Recommendation 19.4: Training for lawyers – Social Services**

DSS should provide regular training on the core duties and responsibilities to be set out in the Legal Practice Standards which should include:

an emphasis on the duty to avoid any compromise to their integrity and professional independence and the challenges that may be presented to a government lawyer in fulfilling that obligation appropriate statutory and case authority references in advice writing.
Recommendation 19.5: Draft advice – Social Services

DSS should issue a further direction providing that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

Recommendation 19.6: Draft advice – Services Australia

Services Australia should issue a direction that legal advice is to be left in draft form only to the extent that the administrative step of finalising it has not yet been undertaken by lawyers or there are remaining questions to be answered in relation to the issues under consideration and that, if the administering agency decides that a draft advice need not be provided in final form, that decision and the reasons for it must be documented. One of those steps – finalisation, or a documented decision against finalisation – should have been taken within three months of the receipt of the draft advice.

Recommendation 19.7: The Directions 1

*The Legal Services Directions 2017* should be reviewed and simplified.

Recommendation 19.8: Office of Legal Services Coordination to assist agencies with significant issues reporting

The OLSC should provide more extensive information and feedback to assist agencies with the significant legal issues process.

Recommendation 19.9: Recording of reporting obligations

The OLSC should ensure a documentary record is made of substantive inquiries made with and responses given by agencies concerning their obligations to report significant issues pursuant to para 3.1 of the Directions.

Recommendation 19.10: The Directions 2

The OLSC should issue guidance material on the obligations to consult on and disclose advice in clause 10 of the Legal Services Directions 2017.

Recommendation 19.11: Resourcing the Office of Legal Services Coordination

The OLSC should be properly resourced to deliver these functions.

Recommendation 19.12: Chief counsel

The Australian Government Legal Service's General Counsel Charter be amended to place a positive obligation on chief counsel to ensure that the Legal Services Directions 2017 (Cth) are complied with and to document interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under those Directions.

Recommendation 19.13: Review of the Bilateral Management Agreement

The revised Bilateral Management Agreement should set out the requirement to consult on and disclose legal advices between the two agencies where any intersection of work is identified.
Administrative Appeals Tribunal

Recommendation 20.1: AAT cases with significant legal and policy issues

Services Australia should put in place a system for identifying AAT1 cases which raise significant legal and policy issues and ensuring that they are brought to the attention of senior DSS and Services Australia officers.

Recommendation 20.2: Training for DHS legal officers

Services Australia legal officers whose duties involve the preparation of advices in relation to AAT1 decisions should receive training which emphasises the requirements of the Standing Operational Statements in relation to appeal recommendations and referral to DSS; Services Australia’s obligations as a model litigant; and the obligation to pay due regard to AAT decisions and directions.

Recommendation 20.3: Identifying significant AAT decisions

DSS should establish, or if it is established, maintain, a system for identifying all significant AAT decisions and bringing them to the attention of its secretary.

Recommendation 20.4: Publication of first instance AAT decisions

The federal administrative review body which replaces the AAT should devise a system for publication on a readily accessible platform of first instance social security decisions which involve significant conclusions of law or have implications for social security policy.

Recommendation 20.5: Administrative Review Council

Re-instate the Administrative Review Council or a body with similar membership and similar functions, with consideration given to a particular role in review of Commonwealth administrative decision-making processes.

The Commonwealth Ombudsman

Recommendation 21.1: Statutory duty to assist

A statutory duty be imposed on departmental secretaries and agency chief executive officers to ensure that their department or agency use its best endeavours to assist the Ombudsman in any investigation concerning it, with a corresponding statutory duty on the part of Commonwealth public servants within a department or agency being investigated to use their best endeavours to assist the Ombudsman in the investigation.

Recommendation 21.2: Another power to obtain information

The Ombudsman Act be amended to confer on the Ombudsman a power in equivalent terms to that in s 33(3) of the Auditor-General Act.

Recommendation 21.3: Oversight of the legal services division

Departmental and agency responses to own motion investigations by the Ombudsman should be overseen by the legal services division of the relevant department or agency.
Recommendation 21.4: Log of communications
The Ombudsman maintain a log, recording communications with a department or agency for the purposes of an own motion investigation.

Recommendation 21.5: Powers of referral
The AAT is soon to be replaced by a new administrative review body. S 10A and s 11 of the Ombudsman Act should be amended so as to ensure the Ombudsman has the powers of referral and recommendation of referral in respect of that new administrative review body.

Improving the Australian Public Service

Recommendation 23.1: Structure of government departments
The Australian Government should undertake an immediate and full review to examine whether the existing structure of the social services portfolio, and the status of Services Australia as an entity, are optimal.

Recommendation 23.2: Obligations of public servants
The APSC should, as recommended by the Thodey Review, deliver whole-of-service induction on essential knowledge required for public servants.

Recommendation 23.3: Fresh focus on “customer service”
Services Australia and DSS should introduce mechanisms to ensure that all new programs and schemes are developed with a customer centric focus, and that specific testing is done to ensure that recipients are at the forefront of each new initiative.

Recommendation 23.4: Administrative Review Council
The reinstated Administrative Review Council (or similar body) should provide training and develop resources to inform APS members about the Commonwealth administrative law system. (see Automated Decision-Making and the Administrative Appeals Tribunal chapters)

Recommendation 23.5: “Knowledge College”
The Commonwealth should explore the feasibility of establishing an internal college within Services Australia to provide training and development to staff linked to the skills and knowledge required to undertake their duties.

Recommendation 23.6: Front-line Service
SES staff at Services Australia should spend some time in a front-line service delivery role and with other community partnerships.

Recommendation 23.7: Agency heads being held to account
The Public Service Act should be amended to make it clear that the Australian Public Service Commissioner can inquire into the conduct of former Agency Heads. Also, the Public Service Act should be amended to allow for a disciplinary declaration to be made against former APS employees and former Agency Heads.
Recommendation 23.8: Documenting decisions and discussions
The Australian Public Service Commission should develop standards for documenting important decisions and discussions, and the delivery of training on those standards.

Closing observations

Section 34 of the Cth FOI Act should be repealed
The Commonwealth Cabinet Handbook should be amended so that the description of a document as a Cabinet document is no longer itself justification for maintaining the confidentiality of the document. The amendment should make clear that confidentiality should only be maintained over any Cabinet documents or parts of Cabinet documents where it is reasonably justified for an identifiable public interest reason.
Overview of Robodebt

There are different mindsets one can adopt in relation to social welfare policy. One is to recognise that many citizens will at different times in their lives need income support - on a temporary basis for some as they study or look for work; longer-term for others, for reasons of age, disadvantage or disability - and to provide that support willingly, adequately and with respect. An alternative approach is to regard those in receipt of social security benefits as a drag on the national economy, an entry on the debit side of the Budget to be reduced by any means available: by casting recipients as a burden on the taxpayer, by making onerous requirements of those who are claiming or have claimed benefit, by minimising the availability of assistance from departmental staff, by clawing back benefits whether justly or not, and by generally making the condition of the social security recipient unpleasant and undesirable. The Robodebt scheme exemplifies the latter.

This chapter is a broad reflection on the scheme: how and why it came into being, how it operated and why it continued to operate, and what was wrong with it. Later chapters give more detail and explanation.

In September 2013, the Liberal-National Coalition, led by the Hon Tony Abbott MP, won government. Interviewed by the Australian Financial Review in December 2012, Mr Abbott had made some expectations clear, in what the writer described as a “blunt warning to public servants:”

Because what normally happens is that a government comes in, they’ve got all these policies and they rely for the implementation on the public service … There’s nothing wrong with that as such, but what I’d like to be able to say to the public service is, ‘Look, this is how we think it needs to be done’. Rather than relying on them to tell us, I’d like to be in a position to tell them on day one.

The executive government depends on the public service for its administration, but the more authoritatively the government of the day can speak to the public service, the more likely it is that the public service will administer your policy in a way which recognises its spirit and its letter.

Budget control and debt reduction had been second in the Coalition’s list of policy priorities in its election manifesto. Consistent with that policy, in July 2014 the Hon Kevin Andrews MP, the Minister responsible for the Department of Social Services (DSS), proposed the setting up of an interdepartmental committee to develop a whole-of-government strategy for recovery of debt owed by members of the public to the Australian Government. The terms of reference included examining data matching, using online and self-servicing options, using external debt collection agencies and applying a standardised interest charge to debts. And in relation to welfare services, in January 2015 the newly-appointed Minister for Social Services, Mr Morrison described himself in an interview as planning to be a “strong welfare cop on the beat;” because Australians were

“not going to cop people who are going to rort [the social security] system.”

It was in this climate that the essential features of the Robodebt scheme were conceived by employees of the Department of Human Services (DHS), were put by way of an Executive Minute in February 2015 to the Minister for Human Services, Senator the Hon Marise Payne, and to Mr Morrison as Minister for Social Services. Approved by the latter, they made their way in the form of a New Policy Proposal (NPP) through Cabinet with remarkable speed. In May 2015, as part of its 201516 Budget, the government adopted a measure named Strengthening the Integrity of Welfare Payments. Described as a package for “enhancing … fraud prevention and debt recovery and improving assessment processes” in relation to the payment of social security benefits, it was expected to save $1.7 billion over five years. Most of those savings were to come from the Employment Income Matching measure, the initiative which began Robodebt, which was proposed to recover overpayments resulting from incorrect declarations of income. Another measure in the package, titled “Taskforce Integrity”, involved the secondment of Australian Federal Police officers and was designed to crack down on welfare fraud. The two were often, and not coincidentally, mentioned in the same breath.
In summary, the Employment Income Matching measure entailed a process of data-matching and debt raising to be applied to some 866,857 instances of possible overpayment for the financial years 201011, 201112 and 201213 identified through a comparison of Australian Taxation Office (“ATO”) and DHS data. DHS would obtain information from the ATO as to what a benefit recipient’s employers had returned as the income earned by the recipient in the relevant financial year (“PAYG data”), compare it through an automated system with what had been declared to DHS by the recipient, and in the event of discrepancy would require the recipient to go online to explain it.

If the recipient did not respond or provide details which explained the discrepancy, or agreed with the PAYG data, the amount declared by the employer would be averaged across a period of time, which was often whatever employment period the employer had indicated. The system applied some rules which attempted to account for the varied circumstances of income support recipients; however, the basic premise was that the amount declared by the employer would be divided up evenly, and allocated into the number of fortnights included in the period being reviewed. (That process was variously referred to income “averaging”, “smoothing” or “apportioning”.)

Where, in any given fortnight, the averaged fortnightly amount exceeded the income the recipient was entitled to receive before reduction of benefit, it would be taken that there had been an overpayment, a debt would be raised accordingly and steps would be taken to recover it. Where the recipient was still on benefit, deductions would be made from the income support currently being paid. Where the recipient was no longer on benefit, they would be required to enter a repayment arrangement. Debt collectors would be involved if they did not respond, and they were liable to have any income tax refund they were entitled to receive garnished. Robodebt began with some pilots in 2015, was rolled out with its online platform in September 2016 and continued in various iterations for four years.

In a broad sense, certain elements of the Robodebt scheme were not new. DHS had for some years undertaken data-matching with the ATO to identify discrepancies between employer-reported and recipient-declared income. In the past, such discrepancies had served as a trigger for a manual review of those files exhibiting the strongest likelihood of overpayment and the highest levels of discrepancy (about 20,000 such files a year). Those reviews involved a DHS compliance officer checking the file for relevant information, contacting the recipient to see if any discrepancy could be readily reconciled and, if not, requiring their employers to provide more specific payment information. The raising of a debt and its recovery might then follow.

There were five significant differences under Robodebt.

The first and major difference was that the PAYG data was to be regarded as the primary source of earned income information, which could be acted on to raise debts although unconfirmed by the employer or the recipient.

Secondly, where in the past compliance officers had engaged with recipients, examined the file and used powers under the Act to seek information from employers in order to determine whether a debt existed, now recipients were given a gross income figure with a period which might or might not accurately reflect the period worked, with the onus placed on them to provide details to contradict it, or have a debt and, prospectively, a 10 per cent penalty automatically raised against them.

Thirdly, where averaging had previously been used to arrive at a fortnightly income figure in limited circumstances and often with the agreement of the recipient that it gave a figure which reflected his or her actual income, the PAYG data averaged on a fortnightly basis for the declared period was now applied automatically where alternative information was not provided and accepted. That was despite the fact that entitlement to income support was to be determined under the Social Security Act 1991 by reference to the actual fortnightly income of the recipient, and it could not safely be assumed that recipients earned precisely the same amounts each fortnight they worked or that they worked every fortnight during the period nominated by an employer (which did not need to be more precisely stated than the relevant financial year). In basing entitlement on actual fortnightly income, the Social Security Act reflected the policy aim of social welfare payments: to support people in their periods of real need so that a recipient who earned little or nothing in a given fortnight would be assisted then.
Fourthly, critical to achieving the predicted savings, where previously compliance officers had been involved, it was now anticipated that in most instances the entire process would be conducted online, the aim being to reduce (and preferably obviate) human involvement at the DHS end.

The fifth and final difference: where data-matching and consequent reviews had in the past been conducted on an annual basis, now recovery efforts would be directed over several years, going back some five years from the implementation of the program. (The measure was extended to include the 2013-14 and 2014-15 financial years in the 2015 MYEFO, and the 2015-16, 2016-17 and 2017-18 years in the 2016-17 MYEFO.) This seems to have been based on a notion that because discrepancies in the hundreds of thousands had been identified in previous financial years there must also be debts in the hundreds of thousands of dollars in those years awaiting recovery; ignoring the facts, firstly, that a discrepancy did not necessarily indicate an overpayment and secondly, that the 20,000 or so files involving discrepancy which had already been reviewed for each of those years had probably already yielded the bulk, in monetary terms, of the overpayments in those years.

In late 2014, in response to DHS’s initial canvassing of the Robodebt concept, DSS had obtained an opinion from its employed “in-house” lawyers. Their advice had emphasised the requirement in the statutory benefit entitlement rate calculators to consider actual fortnightly earning or receipt of income, expressing concern that averaging might, therefore, not be consistent with the legislative framework. A policy advice given at the same time similarly pointed out that calculation by averaging did not accord with the legislation and a debt amount calculated in that way might be wrong.

In February the following year, DHS officers provided the Ministers for Social Services and Human Services with the Executive Minute containing a number of proposals including Employment Income Matching (Robodebt). It pointed out that (consistently with its 2014 advice) DSS had advised policy change might be, and legislative change would be, needed to implement the Employment Income Matching initiative. On 20 February 2015, Mr Morrison signed the Minute, indicating his agreement that initiatives including Employment Income Matching be developed as a package of NPPs and that DHS work with DSS to advance consideration of the necessary policy and legislative change.

By 3 March 2015 an NPP reflecting the Employment Income Matching initiative had been prepared for inclusion in an exposure draft of a Social Security Portfolio Budget Submission. It contained no reference to legal risks and said that legislation was not required. The Scheme was approved by Cabinet and proceeded without the legislative change to support averaging which DSS had said was needed. That awkward question was avoided in the NPP by the simple expedient of not mentioning averaging and saying instead, falsely, that the new approach would not change how income was assessed or payments calculated.

Given that it was still proposed to undertake 866,857 compliance reviews (or “interventions”) for the 2010-13 financial years producing gross savings of $1.1 billion (as compared with an estimated $1.2 billion in the Executive Minute) and given the speed with which the NPP was developed and approved for presentation to Cabinet, it is not credible that anyone closely involved with the measure could have believed that there had been some fundamental change to the proposal so that it no longer entailed averaging or for some other reason ceased to require legislative change. It is worth considering for a moment what legislative change to enable the reliance on averaging inherent in the Robodebt scheme would have entailed: a retrospective change to the statutory basis on which social security recipients had been entitled to receive, and had received, income support going back years. It would certainly have encountered parliamentary and public opposition.

The use of averaging was by no means the only in the Robodebt scheme. No consideration seems to have been given to the legal basis on which DHS could ask recipients to provide information in response to it. The letters sent to recipients during the various iterations of the program used language indicating that a response was required, not just requested (“You need to tell us …”) but they were not said to be notices from the secretary of DHS requiring information under any of the provisions of the Social Security (Administration) Act which enabled information to be obtained in that way. Similarly, there is no evidence that any thought was given to the grounds on which a penalty of 10 per cent (euphemistically called a
“recovery fee”) was added to the debts raised against recipients. In subsequent internal legal advice, there seems to have been an assumption that if averaging resulted in a debt, it could be assumed that the recipient must have failed to inform DHS of a change in their income. That was an extraordinary assumption. The notion that averaging without more could prove a debt was unsound in the first place, but to charge a penalty required a conclusion that the recipient had committed a breach of the Social Security (Administration) Act by failing to report a change in income, and required correspondingly compelling evidence to justify it. That seems not to have crossed anyone’s mind.

Those were respects in which the Scheme was devised without regard to the social security law. More fundamentally, the way averaging was used in the Scheme was essentially unfair, treating many people as though they had received income at a time when they had not, and did not need support when they did, with the further fiction that they now owed something back to the government. It subverted the rationale on which income support was provided in the first place: as a safety net to ensure that people received help when they most needed it.

There were other fundamental unfairnesses in the program. No regard was had to the sheer unreasonableness of placing the onus on recipients to attempt to establish what their earnings were for periods going back as long as five years when they had been given no reason to expect anything of the kind at the time they declared their income and received their benefits. (DHS’s own website, at least at the start of the Robodebt scheme, contained the information that it was necessary to retain payslips only for a period of six months.) Some recipients were unable to produce payslips because employers had gone out of business or were unhelpful. Others were reluctant to approach employers for a variety of reasons, including poor relations with them, an unwillingness to trouble them, or embarrassment at having to disclose receipt of welfare benefits.

The system was set up with the intention of forcing recipients to respond online to the PAYG data and to minimise contact with DHS officers, in the interests of economy; this was vital to the anticipated savings. (Indeed, having had the benefit of “behavioural insights,” DHS employees setting up the system made a conscious decision not to include any telephone number for the Customer Compliance division in the letters sent to recipients, so as to force them to respond online, while compliance officers were told to direct recipients online.) No outside parties with an interest in welfare were consulted in order to understand how the Scheme might actually affect people. There appears to have been an obliviousness to, or worse a callous disregard, of the fact that many welfare recipients had neither the means nor the ability to negotiate an online system. The effect on a largely disadvantaged, vulnerable population of suddenly making demands on them for payment of debts, often in the thousands of dollars, seems not to have been the subject of any behavioural insight at all.

Some of the difficulties in the system in its initial online iteration (the Online Compliance Intervention (OCI)) were the result of its being put into operation in haste, rather than conscious decision-making. A pilot and a manual version of the program were conducted in 2015, using manual rather than automated intervention but relying on the PAYG data to raise a debt in the absence of a response. The online component of the Scheme was the subject of a limited release in July 2016, but it was fully rolled out in September of that year although no proper evaluation of the pilot or manual program had taken place and there were numbers of unresolved problems. The system sometimes deleted details of previously declared income; there were failures in employer name matches which led to wrong duplication of earnings; particular allowances and payments were wrongly treated. No user testing had been done on the screens presented to recipients when they responded to the DHS initial letter; that was supposed to be done in 2017. Recipients had difficulty uploading data and from time to time the platform went down altogether. It was not just recipients who struggled with the system; so did DHS compliance officers.

Other problems were inevitable. Former recipients were contacted through the addresses held for them on DHS records – a postal address or a myGov account – although, since the debts went back some years, they might well have moved away or ceased to monitor their myGov account for any Centrelink notices. Their inevitable failure to respond resulted in income averaging being applied and debts raised against them. The 2015 pilots showed that only about 40 per cent of customers were making contact. On
that evidence it could reasonably be expected that a majority of recipients would, when the automated system began, be the subject of automated debt raising using averaging because they did not receive the notifications, did not understand what they needed to do, or thought their dealings with Centrelink were long past. Others did log on and, as the initial letter instructed, confirmed the information presented – the employer’s name and the amount of earnings in the period nominated by the employer – on the basis that it did represent their income for the financial year in question. They were given no warning that their answer would then be used to raise a debt against them by way of averaging over the employer-nominated period, often the entire financial year, even where they had worked for shorter periods. (DHS’s own figures showed that as at 27 January 2017, 76 per cent of those who were subject to the OCI had debts raised based on averaging of their earnings: 99,404 recipients). And no-one could understand how the debts were calculated, because the debt notices gave no explanation.

The disastrous effects of Robodebt became apparent soon after it moved, in September 2016, from the last part of the limited release, involving around 1000 recipients, to sending out 20,000 notifications per week. In December 2016 and January 2017 the media, traditional and social, were saturated with articles about people who had had demonstrably wrong debts raised against them, and in many instances heard of it first when contacted by debt collectors. The human impacts of Robodebt were being reported: families struggling to make ends meet receiving a debt notice at Christmas, young people being driven to despair by demands for payment, and, horribly, an account of a young man’s suicide. The Australian Council of Social Services, the peak body for community services supporting recipients, wrote to the Minister for Human Services in December 2016, pointing out the inaccuracies which were being produced by averaging instead of applying actual fortnightly income figures, the unfairness of charging a penalty where it was not established that a recipient had even been contacted, the difficulty for people in recovering information from employment years past, the technical difficulties with the online system, the lack of assistance from Centrelink officers and the commencing of debt collection often without warning to the recipient.

The beginning of 2017 was the point at which Robodebt’s unfairness, probable illegality and cruelty became apparent. It should then have been abandoned or revised drastically, and an enormous amount of hardship and misery (as well as the expense the government was so anxious to minimise) would have been averted. Instead the path taken was to double down, to go on the attack in the media against those who complained and to maintain the falsehood that in fact the system had not changed at all. The government was, the DHS and DSS ministers maintained, acting righteously to recoup taxpayers’ money from the undeserving.

DSS obtained cover in the form of what was called a “legal” advice supporting averaging from one of its in-house lawyers. That advice expressed the view that it was open to the DHS secretary “as a last resort” to act on averaged income to raise and recover a debt where a recipient did not provide income information after being given an opportunity to do so. No legislative provision or case law was cited to support that proposition. That advice – but not the 2014 advice pointing out the inconsistency of averaging with the legislative framework – was provided to the Commonwealth Ombudsman, who was conducting an own motion investigation into the Scheme, including a consideration of its legality.

When the Ombudsman pressed for any advice DSS had given about legislative change needed for the use of ATO data prior to the February 2015 Executive Minute, senior DSS officers provided the 2014 advice and offered this justification of its obvious inconsistency with the 2017 advice. After the 2014 advice was given, DHS had adjusted the process, giving recipients the opportunity to correct the PAYG data, so as to assuage DSS’s concerns and satisfy it that legislation would not be needed. This explanation suffered from two deficiencies: it was untrue – the opportunity to correct information had always been part of the proposal – and it made no sense. DSS reinforced its position with a letter from its secretary to the Ombudsman asserting DSS’s satisfaction that the system operated “in line with legislative requirements” and that DHS had made no changes to the way it assessed PAYG employment income.

Uncompelling though DSS’s 2017 advice and explanation were, the Ombudsman decided against raising questions in his report about whether averaging under the scheme had legislative authority. With a good deal of input from DHS employees, he reported in April 2017 that, while there were numerous
technical problems with the operation of the OCI, after examination of the underpinning business rules, he was satisfied that it raised accurate debts based on the available information. Those business rules, the Ombudsman concluded, “accurately capture[d] the legislative and policy requirements.” Thereafter, ministers and departmental representatives relied on the Ombudsman’s report as proof of the legality and appropriateness of Robodebt against all comers: the media, opposition politicians, social welfare bodies, critics in academia and a Senate Committee which made adverse findings.

(In 2018, the Ombudsman again raised concerns about the legality of averaging but was fobbed off with explanations that it involved the best available evidence and was only used where the customer had not taken the opportunity to provide information. DHS dissuaded the Ombudsman from mentioning the legality issue at all in his 2019 report into implementation of the recommendations in the 2017 report.)

Meanwhile, the Scheme trundled on, with the government engaging PricewaterhouseCoopers to assist with some of its clumier components (although never taking receipt of a critical report prepared by the consultancy). It had to accept that the Scheme was not functional in many respects. One was that the online component was an abject failure, with the result that large numbers of employees had to be drafted on short-term contracts or by way of labour hire into the DHS to cope with enquiries. And it became apparent, partly as a result of that factor, but also because of the overestimation in the first place of the numbers of debts and their average amount, that the touted savings would never be reached.

The cover-up continued. Social Security recipients against whom a debt was raised could seek review from the first level, or Tier 1, of the Administrative Appeals Tribunal (the AAT). To do so required some understanding of what had actually happened, which was virtually impossible to ascertain on the DHS documents, as well as the confidence and capacity to seek review. Still, a number of decisions was made by AAT members setting aside debts raised under Robodebt in its various incarnations for the reason that averaging, of itself, could not provide evidence of actual income or, it followed, overpayment and debt. Section 8(f) of the Social Security (Administration) Act requires the DSS secretary to apply government policy with due regard to relevant decisions of the AAT. If the secretary disagreed with them, Tier 1 decisions could be appealed to Tier 2, a higher level of the AAT. Arrangements between DHS and DSS required that DHS refer AAT decisions to DSS where there was a significant error of law, a significant issue of policy or administrative practice, or the matter had attracted or was likely to attract media or parliamentary attention. And DHS and DSS had adopted joint litigation principles, which required that the decision whether to appeal any decision would be made with regard to whether there was need for clarification of a significant point of law or stated Government policy.

The AAT decisions setting aside Robodebts on the ground that evidence of averaging was not capable, without more, of proving a debt met those criteria. Because DHS disagreed with them, it ought to have referred them to DSS for consideration of appeals and it certainly should not have continued to use averaging in disregard of what was said in them. However, DHS took the course instead of taking whatever steps were directed by the AAT to rectify the individual cases by obtaining other evidence, but otherwise ignoring the decisions. The fact that Tier 1 AAT decisions were not published made it easier for it to do so.

DSS seems to have taken little interest in the AAT cases until mid-2018, when DHS referred an AAT decision that income averaging was unlawful to it. The AAT member had placed reliance on an article by Professor Carney, a former AAT member, raising a number of legally-based criticisms of averaging. The combination of the case and article prompted a decision to obtain an advice from solicitors, Clayton Utz, as to the lawfulness of using averaging to determine income. The draft advice which the solicitors provided said that it was not permissible to determine a recipient’s entitlement to benefit by averaging employer-reported income from the ATO. It was received in August 2018 and should have prompted, if not the immediate suspension of Robodebt averaging, at the least the immediate obtaining of further advice from the Solicitor-General. However, it was never put into final form or acted on.

It took two applications for judicial review made to the Federal Court in 2019, Masterton and Amato, to finally change the government’s position on Robodebt averaging, but that did not come quickly. In relation to the first, Masterton, lawyers with the Australian Government Solicitor’s office advised DHS in March
2019 that, given that the applicant had not been receiving a consistent fortnightly income, averaging could not provide an accurate assessment of her income or establish the existence of a debt, and there was no statutory basis for deeming that it could. DHS then had two options: it could run its averaging argument and get a Federal Court ruling as to its legality or it could recalculate on other evidence to arrive at a nil debt figure in the hope of ending the proceeding. Digging in, DHS chose the second course but, at the Australian Government Solicitor’s suggestion, took steps to obtain further advice from the Solicitor-General. In September 2019, the Solicitor-General advised that averaged PAYG data could not support a conclusion as to the amount or existence of a debt in the absence of further evidence that the recipient earned a consistent fortnightly income over periods precisely aligning with the periods declared by the employer to the ATO. That advice led to the settlement of the second application for review, Amato, with an accompanying declaration by the Federal Court that averaged PAYG income information was not capable of satisfying a decision-maker of the existence of a debt.

Shortly before the settlement of Amato was formalised, on 19 November 2019 the Minister for Government Services announced that debts would no longer be raised solely on the basis of PAYG data. On the same day, recipients present and past, against whom debts had been raised using the averaging process, commenced a class action against the Australian Government. (Soon after, DHS, which had been renamed Services Australia, ceased to exist, being recreated as an agency within the Social Services portfolio.) In May 2020, the Solicitor-General advised that the government was bound to fail in defending the claim for unjust enrichment made in the class action. That was followed by the government’s announcement that it would refund debts raised wholly or partly on the basis of averaging if they had been repaid, and would reduce them to zero (“zero” them) if they had not. This involved reimbursement of $746 million to some 381,000 affected individuals and writing off debts amounting in total to $1.751 billion. In November 2020, on the day it was set for trial, the government settled the class action.

Declaring income earned was not necessarily straightforward for income support recipients because their earnings might be irregular and the periods over which they earned would not necessarily match the Centrelink fortnight on which income was calculated. Inaccuracies could be hard to avoid. But DHS did nothing by way of investigation of discrepancies before demanding explanations from recipients. For people who were able to prove they did not owe a debt, it was a stressful and time-consuming process. Undoubtedly some people paid amounts they did not owe because they were not in a position, practically or psychologically, to demonstrate otherwise.

For other people who might have owed what would, certainly to them, have been significant amounts, the process was unreasonable: suddenly and unexpectedly being confronted with demands for information and payment in respect of benefits which might have been received and spent long ago. People who did owe some amount were unable to get any clear information as to what they owed and why. Of those people who were overpaid, it is questionable how many of them owed debts at a level which justified interrupting their lives years later to demand repayment and it is unknown how many of the debts recovered during the life of the Robodebt scheme actually proved, once payslips were provided, to have been of too small an amount to meet the cost of recovery.

Robodebt was a crude and cruel mechanism, neither fair nor legal, and it made many people feel like criminals. In essence, people were traumatised on the off-chance they might owe money. It was a costly failure of public administration, in both human and economic terms.
## Robodebt Scheme Timeline

### 2015
- May 2015
  - 2015-16 Budget presented
- June 2014
  - Minute drafted within DHS about “Trusted Data Assessment” Concept
- March 2015
  - ERC New Policy Proposal
- May 2015
  - EIC implemented
- June 2015
  - Commonwealth Ombudsman Report
- September 2015
  - CUPI implemented
- October 2015
  - AGS advice to DHS
- November 2015
  - Federal Court declares income averaging unlawful; Minister notifies PM of AGS advice;
- December 2015
  - Solicitor-General’s advice
- December 2015
  - Associated pilot programs and PAYG Manual Compliance Intervention

### 2017
- February 2017
  - Senate Committee inquiry
- May 2017
  - Second Senate Committee inquiry
- September 2017
  - Solicitor-General’s advice

### 2019
- February 2019
  - Federal Court challenge (Masterton test case)
- September 2019
  - Gordon Legal announces intention to file class action
- November 2019
  - Robodebt scheme ends
- December 2019
  - AGS advice to DHS
- March 2020
  - OCI implemented
- June 2020
  - Robodebt scheme ends

### 2020
- August 2020
  - Solicitor-General’s advice
- December 2020
  - AGS advice to DHS

### 2021
- March 2021
  - Solicitor-General’s advice
- July 2021
  - AGS advice to DHS
- September 2021
  - Solicitor-General’s advice
- November 2021
  - AGS advice to DHS

### 2022
- January 2022
  - Solicitor-General’s advice
- March 2022
  - AGS advice to DHS
- June 2022
  - Solicitor-General’s advice
- September 2022
  - AGS advice to DHS
- November 2022
  - Solicitor-General’s advice
- December 2022
  - AGS advice to DHS

### 2023
- January 2023
  - Solicitor-General’s advice
- March 2023
  - AGS advice to DHS
- June 2023
  - Solicitor-General’s advice
- September 2023
  - AGS advice to DHS
- November 2023
  - Solicitor-General’s advice
- December 2023
  - AGS advice to DHS

### 2024
- January 2024
  - Solicitor-General’s advice
- March 2024
  - AGS advice to DHS
- June 2024
  - Solicitor-General’s advice
- September 2024
  - AGS advice to DHS
- November 2024
  - Solicitor-General’s advice
- December 2024
  - AGS advice to DHS

### 2025
- January 2025
  - Solicitor-General’s advice
- March 2025
  - AGS advice to DHS
- June 2025
  - Solicitor-General’s advice
- September 2025
  - AGS advice to DHS
- November 2025
  - Solicitor-General’s advice
- December 2025
  - AGS advice to DHS

### 2026
- January 2026
  - Solicitor-General’s advice
- March 2026
  - AGS advice to DHS
- June 2026
  - Solicitor-General’s advice
- September 2026
  - AGS advice to DHS
- November 2026
  - Solicitor-General’s advice
- December 2026
  - AGS advice to DHS
Phases of the Robodebt Scheme

Early 2015

Pilots including PAYG Manual Compliance Intervention

July 2016

Online Compliance Intervention (OCI)

February 2017

Employment Income Confirmation (EIC)

October 2018

Check and Update Past Information (CUPI)

November 2019
Chapter 1: 
Legal and historical context of the Scheme
1 Introduction

This chapter gives some context for the Robodebt Scheme (the Scheme) with a brief history of the departments and agencies which administered the social security law, some relevant details of that law and an account of how data matching and income averaging were used to identify and raise debts before the Scheme came into being.
2 The different incarnations of the Department of Social Services

The Department of Social Services (DSS) was established on 26 April 1939, but did not immediately begin operating independently. The Administrative Arrangements Order of November 1939 identified invalid and old age pensions, maternity allowances, and national health and pensions insurance as matters within the Department’s responsibilities, but it was not until 1941 that it actually assumed administration of the Invalid and Old-age Pensions Act 1908 and the Maternity Allowance Act 1912 from the Department of Treasury. In the decade following DSS’ commencement in 1941, the Commonwealth implemented a series of initiatives said to have been broadly reflective of recommendations made by the Commonwealth Parliamentary Joint Committee on Social Security, which reported between 1941 and 1946. Those initiatives, including “special” benefits for those “who had no other entitlement and, for good reason, were unable to provide for themselves and had little or no other means of support”, formed the basis of the social security system which developed in succeeding decades.

In 1947, the Social Services Consolidation Act 1947 brought together in one Act a range of welfare payments, including age and invalid pensions and unemployment and sickness benefits. The Administrative Arrangements Order of July 1951 assigned responsibility for those benefits to the Department of Social Services, but receipt, investigation and payment of claims for unemployment and sickness benefit was delegated to the Department of Labour and National Service as agent for the Department of Social Services. That Department was also responsible for the payment of allowances to returned service personnel. By 1958, though, the Department of Social Services had resumed sole responsibility for pensions, allowances and benefits under the Social Services Act 1947.

In 1972, the Whitlam Government replaced the Department of Social Services with the Department of Social Security, which continued to make all welfare payments under the Social Services Act 1947 and its successor, the Social Security Act 1991, until the establishment of Centrelink in 1997. The Department of Education was responsible for the payment of student allowances after the enactment of the Student Assistance Act in 1973 until 1998, when student payments were replaced by Youth Allowance and Austudy, administered under the Social Security Act. The Department of Social Security was succeeded in turn by the Department of Family and Community Services in 1998, the Department of Families, Community Services and Indigenous Affairs in 2006, and the Department of Families, Housing, Community Services and Indigenous Affairs in 2007, before the current Department of Social Services (DSS) was formed at the end of 2013.
3  A brief history of Centrelink, and the beginnings of Human Services

In July 1997, the Commonwealth Services Delivery Agency Act 1997 established an independent statutory agency designed to undertake the delivery of social welfare services and benefits which had previously been provided by the Department of Employment, Education, Training and Youth Affairs (in the case of Austudy and Youth Allowance for students) and DSS (in respect of all other welfare payments). Those Departments were the clients of the new agency, which began operation in September 1997 under the name Centrelink, and the secretaries of the Departments were members of the Board of Management which managed Centrelink. Section 1299 of the Social Security Act 1991 gave the Secretary of DSS power to delegate his or her powers under the Social Security Act to the Chief Executive Officer of Centrelink or, in some instances, to employees of Centrelink.

Centrelink was intended to improve services for recipients, but it was also designed to return substantial savings by amalgamating the service arms of the two parent Departments and reducing the costs of administration.

In 1998, Centrelink added to its responsibilities the delivery of services formerly provided by the Department of Health and Family Services. The three Departments retained responsibility for policy development and design of programs, but according to Sue Vardon, the inaugural Chief Executive Officer of Centrelink, collaborative solutions were found between the departments and Centrelink. The agency, she says, placed a strong emphasis on front line service delivery, listening to front line workers and to advocacy groups. Staff were trained for their positions in an in-house College.

In 2000, the Social Security (Administration) Act 1999 (the Administration Act) came into effect. Section 7 of that Act conferred on the DSS secretary responsibility, subject to the Minister’s direction, for the administration of the social security law. Section 8 set out the principles of administration, in a provision which remained unchanged for the duration of the Robodebt Scheme.

In administering the social security law, the Secretary is to have regard to:

(a) the desirability of achieving the following results:

... (ii) the ready availability of publications containing clear statements about income support entitlements and procedural requirements;

...

(iv) the development of a process of monitoring and evaluating delivery of programs with an emphasis on the impact of programs on social security recipients;

...

(b) the special needs of disadvantaged groups in the community; and

...

(d) the importance of the system of review of decisions under the social security law; and

(e) the need to ensure that social security recipients have adequate information regarding the system of review of decisions under the social security law; and

(f) the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal.

Section 234 of the Social Security Administration Act enabled the Secretary of DSS to delegate all or any of his or her powers under the social security law to the Chief Executive Officer of Centrelink.
On 26 October 2004 the Department of Human Services – DHS – was established within the Finance and Administration portfolio as a small “core department” for improving social and health service delivery. Six existing agencies, one of which was Centrelink, were brought under its umbrella. Centrelink’s Board of Management was disbanded, with its powers and responsibilities transferred, in a more traditional model, to the Chief Executive Officer of Centrelink, who then reported directly to the Minister for Human Services. On the policy side, the Department of Education, Science and Training (now a separate department from Employment) dealt with income support, policies and programs for students and apprentices; the Department of Employment and Workplace Relations with income support policies and programs for people of working age, including Disability Support pension and Newstart allowance for unemployed persons; and the Department of Family and Community Services with income security policies and programs for others: families with children, carers, the aged and people in hardship. In 2007, DHS and the agencies became part of the newly-created Human Services Portfolio. The following year, the Department was given responsibility for the development of service delivery policy.

From 1 July 2011, Centrelink ceased to exist at all as an entity. It was absorbed with the other agencies into a massively expanded DHS, which, with a staff of 37,500, became one of the biggest departments in the Australian Government. The term “Centrelink” was now used to describe a collection of Commonwealth programs, benefits and services managed under the auspices of DHS. Statutory responsibility for their delivery was attached to the newly-created position of Chief Executive Centrelink, occupied by an SES employee of DHS, appointed by the DHS Secretary pursuant to section 7(2)(b) of the Human Services (Centrelink) Act. (Kathryn Campbell had become DHS Secretary early in 2011, succeeding Finn Pratt in the role; he became secretary of the Department of Families, Housing, Community Services and Indigenous Affairs, and, in 2013, DSS.)

The DSS Secretary’s power to delegate his or her powers under the social security law was now exercisable in favour of the Chief Executive Centrelink or, with the exception of one particular power, employees of DHS. The Chief Executive Centrelink, in turn, was able to delegate powers to DHS officers. In the years during which the Scheme was operating, the Secretary appointed the Deputy Secretary, Service Delivery Operations, as Chief Executive Centrelink. (The Scheme, however, fell under the control of a different Deputy Secretary, whose responsibilities were originally entitled “Participation, Aged Care Service Strategy and Integrity” and eventually became “Integrity and Information”.)

When, in December 2019, DHS’ successor in name, Services Australia, ceased to exist as a department and was replaced by an executive agency within the Social Services portfolio, the Human Services (Centrelink) Act 1997 was amended so that Services Australia’s Chief Executive Officer automatically became Chief Executive Centrelink.
4 The relationship between the departments

In late 2013, the Department of Employment ceased to have any responsibility for income support policy and the minister of that department no longer administered the Social Security Act or the Administration Act in relation to support payments to people of working age. The Minister for Social Services assumed sole responsibility for the administration of both Acts. The Minister for Human Services was responsible for administration of the Human Services (Centrelink) Act 1997 as well as legislation relating to hearing services, Child Support and Medicare. DSS’s policy responsibilities were explicitly expanded by an Administrative Arrangements Order (AAO) in December 2014 to include income support and participation policy for people of working age, while DHS retained responsibility for development of policy on services delivery. The distinction has not been well-understood. Mr Pratt, secretary of DSS, observed in evidence to the Commission that he was unable to identify the demarcation between what he described as “pure” policy, for which DSS was responsible, and “operational” policy, for which DHS was responsible.

In October 2014, Mr Pratt and Ms Campbell signed a Bilateral Management Arrangement said to be intended to “support an effective working arrangement” between DHS and DSS. It established a Bilateral Management Committee to be jointly chaired by the departments’ deputy secretaries, composed of them and other SES members. The Committee was to provide “direction on matters jointly affecting the departments” and provide guidance on operational issues and monitoring and mitigating risks.

Significantly in the Scheme context, the Bilateral Management Arrangement contained a bilateral assurance framework which proposed as a mitigation for risk, early engagement between the departments during policy development, including advice on service delivery options, and communication in advance of proposed changes to policy or service delivery arrangements to make sure both departments agreed. Both were to have timely access to comprehensive data and analysis to enable well-informed program management and service design and delivery decisions.

The Bilateral Management Agreement was supported by various protocols and service arrangements. The Corporate Services Protocol dealt with, among other things, “legal issues.” Of particular note here is its expression of a shared commitment between the departments:

• consistent and accurate interpretation, understanding and application of the relevant social security, family assistance and other laws for which DSS has responsibility (the DSS portfolio legislation)
• the provision of legal advice prepared or procured, consulted on and shared in accordance with the Legal Services Directions
• a commitment to achieving a fair, courteous, prompt and cost-efficient internal review and appeal system that applies the DSS portfolio legislation and the Australian Government’s policy.

The departments accepted joint responsibility “for ensuring the proper and consistent application of DSS administered legislation by consulting closely on legal matters in accordance with the Legal Services’s Directions.”

The Payment Assurance Service Arrangement set out the different roles and accountabilities of the departments. One of DSS’s roles was “monitoring the effectiveness of compliance management in respect of the overall accuracy of payment outlays and debt management;” it was left to DHS to develop and undertake compliance strategies. Each department was to give priority to providing “quality and timely information” about matters affecting the other’s responsibilities. The arrangement provided for the exchange of information between the departments on, among other things, “data relating to Budget measures (including Strengthening the Integrity of Welfare Payments)” for DSS to monitor and report on outlays and savings and advice on appeal decisions.
5 Entitlement to social security benefits and pensions and calculating the rate of payment

Unlike the contributory social insurance schemes which exist in other countries, the Australian social welfare system is needs-based. Indeed, in December 1975 the government ratified the International Covenant on Economic, Social and Cultural Rights, and as a party to the Covenant recognized by Article 9 “...the right of everyone to social security.”

The scheme of the Social Security Act 1991, as it was in the Social Services Act 1947, is to set the conditions for qualification for a pension or benefit and provide for the rate of its payment to be determined by application of rate calculators which incorporate income and assets tests. As enacted, the Act distinguished between benefits (such as youth allowance) and pensions (such as the age pension and disability support pension) by providing that the rate of benefits was a fortnightly rate while the rate of pension was an annual rate. That was changed in 1999 to provide that both pensions and benefits were to be paid at a daily rate.

The ordinary income “test” to be applied by the rate calculators for a pension, however, requires that the person’s ordinary income be worked out on a yearly basis, while for benefits it is calculated on a fortnightly basis. “Income” is defined as including “an income amount earned, derived or received by the person for the person’s own use or benefit” and “income amount,” in turn, includes “personal earnings.” “Ordinary income” was, in the Act as enacted, “income that is not maintenance income;” that definition was subsequently amended to exclude exempt lump sums as well.

A further complication in the rate calculators comes with the concept of “ordinary income-free area.” Professor Peter Whiteford, in his report to the Commission, has set out some of the concept’s history in income testing under the social security legislation. Until 1969, benefit payments reduced by a dollar for every dollar a recipient received as income (a 100 per cent withdrawal rate). That constituted a disincentive for unemployed people to take part-time or low paid work, so from the 1980s adjustments were made to create “free areas” of income below which a recipient would not lose benefits, with more generous withdrawal rates above the free area. Professor Whiteford explains that, for example, an adult on Jobseeker payment has a free area of $150 per fortnight with a withdrawal rate above that of 50 per cent - that is to say, a reduction of 50 cents in benefit for every dollar earned over $150 per fortnight – up to income of $256 per fortnight, after which the withdrawal rate increases to 60 per cent in the dollar and cuts out altogether when the individual receives $1231.50 per fortnight.

The income test in the rate calculators involves working out what a person has earned, derived or received by way of ordinary income, for benefits on a fortnightly basis, and for pensions on a yearly basis; making some adjustments in relation to the person’s partner income; and determining whether the prospective recipient’s ordinary income exceeds their ordinary income-free area; and if there is an excess of their ordinary income over their ordinary income-free area, applying an ordinary income reduction (the percentage Professor Whiteford refers to as a withdrawal rate).

Section 79 of the Administration Act provides that if the secretary is satisfied that the rate at which a social security payment has been paid is more than the rate which the social security law provides for, the secretary can determine that the rate is to be reduced to the rate provided for by the social security law. Section 80 requires the secretary, if they determine that there has been an overpayment, to make a determination that the payment be cancelled or suspended.
DHS provided a list of payment types that were, at different times, subject to the Scheme:

- Newstart Allowance
- Youth Allowance
- Disability Support Pension
- Austudy Allowance
- Age Pension
- Carer Payment
- Parenting Payment
- Special Benefit
- Bereavement Allowance
- Wife’s Pension
- ABSTUDY
- Widow A Allowance
- Widow B Pension
- Sickness Allowance
- Partner Allowance

Newstart Allowance and Youth Allowance formed the bulk of the payments subject to the Scheme. Professor Whiteford points out that between 5 per cent and 6 per cent of Newstart recipients and between 2.2 per cent and 2.5 per cent of Youth Allowance recipients had stable earnings over the financial years over which the Scheme operated; information which was available to DHS and DSS.

The secretary of DSS (or their delegate) has power under section 68 of the Administration Act to seek information about events or changes of circumstances which might affect the payment of a person’s social security payment. That power was (and is) used to require recipients of most forms of continuing payments to provide details each fortnight of the income they had earned and the period over which it was earned.

In addition, section 66A of the Administration Act requires a person who is, or has been, in receipt of benefits to notify the department within 14 days if an event or a change in circumstance has occurred which is likely to affect the rate of payment.

In addition to the section 68 power, the secretary can also, under section 69, seek information about events and changes of circumstances from a person who has been in receipt of a social security payment in the past, but they are not required to comply with a notice unless the event or change of circumstances in question happened longer than 13 weeks before the notice was given. Notices under sections 68 and 69 are, themselves, subject to some requirements set out in section 72, failure to comply with some of which (such as the requirement to specify the period for response) will render the notice invalid. The secretary also has a broad power under section 192 to require a person to give information or produce a document where, among other things, it is relevant to whether a social security payment was payable. Section 196 requires that the notice be in writing and specify that it is given under that section.

5.1 Reporting requirements
Social security benefits are not payable if a person fails, without reasonable excuse, to comply with a requirement under the Administration Act.  

5.2 Debt recovery

A debt is due to the Commonwealth “if, and only if” a provision of the Social Security Act expressly provides that it was or is.  The key provision is s 1223(1) of the Social Security Act, which provides that where a person has had the benefit of a social security payment to which they were not entitled, they owe the amount of that payment to the Commonwealth as a debt which is deemed to have arisen when they got the benefit of the payment. A person is not entitled to obtain the payment if, for example, they were not qualified to receive it or it was otherwise not payable.

Section 1228B of the Social Security Act provides for an additional 10 per cent of any debt to be added by way of penalty if the debt arose wholly or in part because the recipient refused or failed to provide information about their earnings or knowingly or recklessly gave false or misleading information “when required under a provision of the Social Security law, to provide information in relation to the person’s income from personal exertion.” The section does not apply if the secretary is satisfied the person had a reasonable excuse for refusing or failing to provide the information.

Section 1230C of the Social Security Act sets out the methods by which the Commonwealth can recover debts due to it: by deductions from the person’s social security payment, by an arrangement for repayment by instalments, by legal proceedings or by a garnishee notice; although the last two are only available if the Commonwealth first has tried to recover the debt through deductions from a social security payment or by a repayment arrangement and the recipient has either refused to enter a reasonable repayment arrangement, or has not honoured it once entered.
6 The history of data matching in the Social Security context

6.1 Early data matching

In March 1989 a memorandum[^67] produced for Cabinet, titled *Savings Paper Social Security: Increased matching of records between Australian Taxation Office (ATO) and the Department of Social Security (DSS)* advocated matching DSS payments with prescribed payment system data in respect of self-employed people and details of interest paid by financial institutions held by the ATO with DSS payments. The memorandum noted by way of background that there was currently some very limited cross-checking of records: ATO provided the DSS with completed Employment Declaration forms to enable it to detect circumstances where recipients had commenced employment without telling DSS. There was, however, a question mark over that practice; the Privacy Commissioner had raised an issue about its legality in light of recent tax file number and privacy legislation. The memorandum observed, acutely:

> Existence of employment income in ATO records does not necessarily mean wrong payment of unemployment benefit because time periods may not coincide.

However, the proposed option would provide previously unavailable data for record-matching purposes. Cabinet adopted the measure.

6.2 Data matching under the Data matching Program (Assistance and Tax) Act 1990

On 23 January 1991 the *Data-matching Program (Assistance and Tax) Act 1990* commenced. It established a matching agency consisting of officers of the then Department of Social Security[^68] and by section 6 permitted the transfer of data between agencies, and its matching by the matching agency or the tax agency (defined as the Commissioner of Taxation).[^69] The results of the matching could be given to source agencies (which at that time included DSS and the Department of Employment, Education and Training (DEET)) in accordance with a data-matching program which was to be made up of data matching cycles in a form prescribed by the Act.[^70]

Section 7 of the Act provided for the Commissioner of Taxation to be given a person’s tax file number (TFN) and to return to the matching agency information including the income of the individual as declared in their tax return. The matching agency was then able to carry out income matching to compare the income the person had declared for benefit entitlement purposes with what they had declared to the Commissioner of Taxation. If the results indicated that someone who was not entitled was receiving any one of a variety of prescribed forms of assistance (including DSS benefits and pensions) the matching agency would give the relevant department the results. (In conjunction with the legislation, all social security recipients (except pensioners over 80) were now required to provide a TFN. In July 1994 the *Social Security Act 1991* was amended to make possession of a TFN a requirement of eligibility for a benefit.)

A media release from the Minister for Social Security, Senator Graham Richardson,[^71] announced that the process would close two loopholes. The first related to eligibility for income support; the process would, he said, provide a reliable and efficient mechanism for reviewing income. In righteous-toned rhetoric of a kind often used by politicians announcing measures involving social security recipients, he continued:

> It means our income-support system is further protected against overpayments. This is only fair since the welfare system is funded by the taxpayers of Australia who expect it to be run fairly, efficiently and at the least possible cost. We should not be in the business of protecting cheats.
The second loophole to be closed was “double-dipping,” where an individual claimed, in excess of their entitlements, payments from more than one income support agency.

As enacted, the Data-matching Program Assistance and Tax Act contained a sunset clause: it would expire after two years. Its operation was, however, repeatedly extended until 1998 when the sunset provision was repealed.\textsuperscript{72}

Section 10 of the Act permitted DSS and DEET to take action on the basis of information received through data-matching to cancel, suspend or reject a claim for a benefit or to change the rate being paid or to recover an overpayment. It did not, however, give the information any particular evidentiary status. (In June 1992 the Act was amended to expand the possible action to include granting a claim for benefit or informing a person they might be entitled to it.) The department had 12 months to take any action under s 10(1) unless an extension was granted by its secretary or the Commissioner of Taxation.\textsuperscript{73}

However, s 11 prohibited the taking of any such action unless the individual concerned had been given notice of the information and the proposed action and informed they had 21 days to show cause why it should not be taken. Under section 11(6)(b), where the person failed to show cause, any amount they were paid above the reduced rate of their benefit during the 21 days was a debt due to the Commonwealth; which was then recoverable by the Commonwealth. (Section 1224C of the Social Security Act 1991 contains a corresponding provision, making a debt due under subsection 11(6) recoverable by the Commonwealth.) Plainly enough, there is a distinction between the effect of section 7, which gives permission to use the information obtained for prescribed purposes, but does not ascribe it any particular status, and that of section 11(6)(b), which creates a statutory debt.

The data-matching process was under the supervision of the Office of the Privacy Commissioner, who could (and did in 1992) issue guidelines under the Act\textsuperscript{74} and report on any matters requiring action in the interests of individuals’ privacy. The Act was subsequently amended to require each agency using it to provide a report for presentation to Parliament.\textsuperscript{75}

In 1997, the newly established Centrelink took responsibility for the functions of the data-matching agency\textsuperscript{76} and continued to perform data matching under the Act.

### 6.3 Data matching outside the Data-matching Program Assistance and Tax Act

In the 2001-2002 financial year, Centrelink began to operate a parallel data-matching system which did not involve the use of TFNs. Instead, it took advantage of the newly introduced PAYG reporting system. A PAYG data-matching pilot was announced in the 2000-2001 Budget. The intention was that income details reported by a recipient to Centrelink would be compared with the details contained in the PAYG payment summary that their employer had provided to the ATO, and where discrepancies were detected, cases could be selected for review.

In 2004, in accordance with the Privacy Commissioner’s Guidelines, Centrelink prepared a protocol for the new program (the 2004 PAYG Data-matching protocol).\textsuperscript{77} It identified the source agencies supplying data as ATO and Centrelink, with Centrelink as both the matching agency and the primary user of the data.\textsuperscript{78} Although the ATO’s role featured heavily in the protocol and in the data-matching it purported to govern, the ATO does not appear to have played any part in its preparation; indeed, ATO officers who gave evidence before the Commission appeared to be largely oblivious to its existence.\textsuperscript{79} As was the case under the Data-matching Program (Assistance and Tax) Act 1990, the protocol required all PAYG data to be destroyed within 12 months.\textsuperscript{80}

The protocol cited sections 192, 195 and 196 of the Administration Act as the authority for Centrelink to request PAYG data.\textsuperscript{81} (Section 192 enabled the DHS secretary to require a person to give information or produce a document relevant to whether an individual was qualified for a social security payment. Section
195 enables the DHS secretary to require the giving of information about classes of person in order to verify claims and detect overpayments, while section 196 provides for written notice of the information requirements to be given to the ATO.) However, the protocol noted that while the ATO was obliged to comply with notices issued under sections 192 and 195, it was currently providing information to Centrelink on a voluntary basis.

Clause 6 of the protocol prescribed the action which could result from the program. Before a review resulting from the data-match, Centrelink staff would check the recipient’s record to determine if the discrepancy could be explained and, if not, contact the recipient by letter. If the recipient were unable to provide sufficient evidence of their income, the employer could be contacted to provide further information.

The 2004 PAYG Data-matching Protocol reveals that the PAYG Data-matching Program had been the subject of a pilot conducted in two phases between December 2001 and June 2003, involving some 33,000 case selections and 8,151 reviews. A customer contact letter was attached to the protocol. It advised the putative customer that the information received from the ATO had disclosed income from named employers between specified dates and requested that they make contact to confirm the details. Failing contact, the payment would be stopped. The letter was said to be an information notice given under the social security law. If the information received indicated a change to payments and an overpayment the customer would be contacted again.

The 2004 Protocol was gazetted in the Commonwealth Gazette. It was not subsequently made publicly available by, for example, publication on the Centrelink or DHS website.

In 2011, when Centrelink was folded into DHS, that department became the matching agency. In the same year, the Minister for Human Services, the Hon Tanya Plibersek MP, and the Assistant Treasurer, the Hon Bill Shorten MP, jointly announced a new data-matching initiative which would involve automatic matching of data between Centrelink and the ATO on a daily basis, in conjunction with the automation of the tax garnishee process in respect of former recipients who had not entered a repayment arrangement.
The history of income averaging in the social security context

Income averaging is not, per se, unlawful. Some provisions of the Social Security Act prescribe it as a method for calculating income, usually over short periods. For example, section 1068-G7A (part of the Newstart Rate Calculator) provides that ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received, with two exceptions, one of which is where a person receives arrears of periodic compensation (section 1068-G8A) and the other, where a person does not receive fortnightly wages in which case section 1068-G8 comes into operation.

Section 1068-G8 applies in the limited circumstance where a recipient is paid for work periods greater than a fortnight (the example given in the section as enacted was of someone paid $600 at 25-day intervals) and then only if the timing of the payments is reasonably predictable and regular and their quantum is reasonably predictable. The provision then allows calculation of a daily rate by division of the amount actually earned in the work period by the number of days in it, which can then be used to arrive at a fortnightly rate. It can be seen that it is likely to be applied across relatively short periods (not many people get paid at intervals longer than a month) and only where the result is likely to be a reliable indicator of the rate of earning.

Even when there is no specific provision for averaging, and income earned, derived or received in the fortnight must be worked out, it may be permissible to calculate that income using an averaging method if it can be shown that the person is on a regular wage with no variation in their hours. What cannot be done is to take income over a period of time and divide it into equal fortnightly amounts in the absence of information that it was actually received in that way, because the Act does not provide for entitlement on the basis of average fortnightly income. What matters is the income the person actually earned, derived or received in the fortnight.

However, there is some evidence that the Department of Social Security, when it was responsible for welfare payments before the advent of Centrelink did at least threaten the use of ATO income information where a recipient did not respond to a letter requiring income details; which suggests that income averaging was probably contemplated. That was in the context of data matching under the Data Matching Program (Assistance and Tax) Act which entailed comparing what the individual had declared in their tax return and what they had declared to Centrelink. It seems reasonable to infer that an individual would identify the dates between which they had worked more accurately than an employer, who had no need to refer to anything but the financial year; but it is still the case that variations in hours as between weeks would not be taken into account in that process. There is no evidence that that practice continued when Centrelink took over responsibility of payments and it seems clear, at the least, that it was not happening in connection with PAYG income data matching. The “approved version” of the customer contact letter attached to the 2004 PAYG data matching protocol requires the recipient to provide information pursuant to section 192 of the Social Security (Administration) Act and says that if the information received shows there may be a change to payments and an overpayment, Centrelink will write again; but there is no suggestion of any use of ATO information to calculate entitlement. The content of the initial letters sent to recipients during the balance of Centrelink’s existence up to 2011 remained in similar terms, with no reference to use of ATO PAYG data to assess income and entitlement.

That seems to have remained the case under DHS’s watch. Historical letters provided by Services Australia for the period September 2011 to July 2015 advised the recipient that they needed to provide income details and if they did not, their employer might be contacted to confirm their earnings; there was no reference to use of ATO data.
In addition to evidence in the form of those letters, Services Australia provided another record from the 2011-15 years a workflow procedure called Actioning Pay As You Go (PAYG) Reviews\textsuperscript{87} which set out the steps a compliance officer was to follow in an entitlement review. Where a recipient was contacted about a PAYG review resulting from data matching, various steps were set out, including the sending of a letter of the type just described. If the recipient was not forthcoming with the information sought the compliance officer was to contact the employer for employment and income details. Where the employer, in turn, was not cooperative, a Request for Income and Employer Details form could be issued to the ATO (pursuant to what authority is not explained) for details of what the recipient had declared on their Income Tax Return. If all else failed, the workflow procedure, while noting that employment income was to be assessed for the fortnight in which it was earned, said that if every means of obtaining actual information had been attempted it was possible to use any evidence a compliance officer had, including an annual figure, to raise a debt. The workflow procedure did not go into details of how that was to be done.

DHS workers also had available to them what was called an Operational Blueprint,\textsuperscript{88} the longer title of which was Acceptable Documents for Verifying Income When Investigating Debts.\textsuperscript{89} (The Operational Blueprint remained in the same terms for the entirety of the Scheme period.) Consistently with the workflow procedure, where fortnightly income details were unobtainable, it said:

> Employment income for workforce age customer should be assessed for the fortnightly income as earned. Sometimes it is not possible to determine a fortnightly breakdown and the only means to assess the income is as an annual amount, such as using Income Tax Returns (ITRs), payment summaries (Group Certificates), or other annual amounts. If every possible means of obtaining the actual income information has been attempted, it is possible to use any evidence available to raise a debt including an annual figure.

However, the Operational Blueprint goes on to point out some of the hazards: if the recipient had only been employed for part of the year, averaging over 12 months would not give a correct result and if their income had varied greatly during the year the result might be incorrect. This caution was sounded: “The raising and recovering of debts must satisfy legislative requirements. Evidence is required to support the claim that a legally recoverable debt exists.”

## 7.2 Evidence of actual use of averaging

Services Australia was unable to provide the Commission with figures for the incidence of averaging before the Scheme, because each individual debt in the system would have to be examined and the debt management information system was old and was not functional for that type of request.\textsuperscript{90} However, it does not seem to have loomed large in DHS’s practices. Mr Pratt, chief executive officer of Centrelink in 2008 and secretary of DHS from 2009 to 2013, was not aware, as DHS Secretary, of averaging ever being used as a means of determining and raising debt.\textsuperscript{91}

Mark Withnell, who from 2008-2017 had been general manager of Business Integrity at DHS, said that income “smoothing” or “averaging” was able to be used in “exceptional cases.”\textsuperscript{92} By way of example, where an employer had gone out of business there would be discussion with a recipient about how to overcome that obstacle; if the person had a relatively consistent income they might reach an agreed position with DHS that averaging was appropriate.\textsuperscript{93}

The evidence of Scott Britton, who had been national manager for the Compliance and Risk Branch, Participation Aged Care and Integrity Group of DHS between 2010 and 2016, was that if fortnightly pay slips were unavailable because businesses had failed or their records were lost and the recipient could not provide any evidence, a compliance officer, if the customer was agreeable, would apply averaging.\textsuperscript{94} It was an “exceptions process.”\textsuperscript{95}

Christopher Birrer, a deputy chief executive officer with Services Australia, observed that the Operational Blueprint and all of the examples of staff guidance in the pre-Scheme period that he had seen, showed a marked and substantial difference from the staff guidance\textsuperscript{96} issued for the 2015-16 manual process at the beginning of Robodebt, which used the methodology later adopted during the OCI iteration. He
explained that pre-Robodebt the PAYG information was used as part of a “broader review process, not as the primary tool in terms of identifying that potential overpayment and raising a debt on it.” Mr Birrer gave a hypothetical example of how the PAYG information might be used pre-Robodebt; if a recipient were providing PAYG information over a three-month period and could find fortnightly pay slips for two and a half months but could not find the last pay slip, it would be reasonable to apply averaging. (It is questionable whether that is properly called income averaging, as opposed to drawing an inference from the consistency of someone’s fortnightly income that the actual amount of their income in a particular fortnight was the same.)

A number of frontline compliance officers gave evidence of how they actually applied income averaging in the years leading up to the Scheme. Colleen Taylor, who had been a Centrelink compliance officer from 2010, said in her statement that it would be “very rare” to use income averaging over the period of a PAYG summary to calculate the debt, for the unsurprising reason that it resulted in inaccurate calculations. She found, through speaking to recipients, that they often had not worked for the full financial year, although the PAYG summary was for the entire period; and she also appreciated that most recipients did not earn their income evenly over fortnights. An additional unfairness associated with averaging was that because the income was applied uniformly across the relevant period, recipients could lose the benefit of accruing income bank benefits for the fortnights where they were not working or earning very much.

Jeannie-Marie Blake, who had worked as a compliance officer at DHS from 2007, said that she had never herself used averaging but that her team had used it as a last resort after discussion with a customer; it was rarely used.

Tenille Collins, who had worked in compliance review teams over some years, explained that if an employer did not respond to requests for information or the recipient did not want the employer approached, the compliance officer would talk to the recipient about the best approach to work out their income. Sometimes recipients would provide pay slips; on other occasions they would invite the use of the PAYG income. She would then look at the information on the recipient’s file, conversations previously had, separation certificates, start and end dates of employment, and the reporting behavior to see if inferences could be drawn about whether the recipient’s income was consistent.

The consistent evidence was that income averaging was used relatively seldom, usually by agreement with the recipient, and in the context of other information which provided some assurance that it would give a reliable answer.

### 7.2 Post facto attempts to establish the incidence of averaging

In mid-2020, when the government was in the awkward position of having received advice from the Solicitor-General that it would fail in the impending class action Prygodicz and it was apparent that debts based on averaging would have to be reimbursed if they had been paid or written-off if they remained outstanding, some work was done to try and establish what support there was for the departmental and ministerial narrative that nothing had changed during the Scheme and that income averaging had a long history.

No doubt encountering the same difficulty as Services Australia had in responding to the Commission, that an antiquated system was incapable of giving the information, resort was had to sampling. An email produced to the Commission showed that a sample of 500 files was checked for each of the years 2009 and 2011. Figures were given for those said to involve debt raising through the “sole use of averaging” or the “partial use of averaging.” In 2009, the table in the email shows that 34 debts were raised through the sole use of averaging and 50 through its partial use, while in 2011 57 debts were raised through the sole use of averaging and 65 through its partial use. As a percentage of the thousand files sampled over the two years, 9.1 per cent involved debts raised solely through averaging and 11.5 per cent through the

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partial use of averaging. The balance of the cases involved, over the two years, full verification of the debt in 75.6 per cent of cases: an inability to determine what had happened in 1.8 per cent of cases; while 2 per cent of cases were said to be “not relevant,” for unexplained reasons.

There are some difficulties. There is no evidence as to how the files sampled were identified. Assuming they were sampled at random, there are still these problems. There is no definition of what was considered “partial” averaging, as opposed to “sole use.” More importantly, there is no information as to the circumstances in which the averaging, sole or partial was undertaken. As has been explained, some income averaging was, in fact, prescribed by the Social Security Act, for example pursuant to section 1068-G8. Even where there was no such statutory prescription, averaging was a legitimate course of action if there were other evidence to show that the amount arrived at through it was representative of actual income; which might be the case if the recipient were able to confirm that they had, indeed, received a regular income for the period in question. Without that information, there is no way of knowing whether any of the sampled cases involved averaging as it was used in the Scheme. All the evidence of those who had worked for DHS was to the contrary.

Commonwealth, Commonwealth of Australia Gazette, No 153, 30 November 1939.


Commonwealth, Administrative Arrangements Order and the Abolition, Establishment and Renaming of Departments of State, No C2013G01404, 18 September 2013.


The social security law is defined in s 23(17) of the Social Security Act 1991 (Cth), to include the Social Security Act 1991, the Social Security (Administration) Act 1999 (Cth), any other Act or statutory provision expressed to form part of it and any legislative instruments made under such an Act.


Others included the Child Support Agency, CRS Australia, Australian Hearing, Health Services Australia and the Health Insurance Commission.


Human Services Legislation Amendment Act 2011 (Cth).

Human Services (Centrelink) Act 1997 (Cth) s 8A.

Social Security (Administration) Act 1999 (Cth) s 234.

Human Services (Centrelink) Act 1997 (Cth) s 12.

Human Services (Centrelink) Act 1997 (Cth) s 7(2)(b).


Services Australia Governance Amendment Act 2020 (Cth) sch 2 cl 3; Human Services (Centrelink) Act 1997 (Cth) s 7.

Commonwealth, Administrative Arrangements Order and the Abolition, Establishment and Renaming of Departments of State, No C2013G01404, 18 September 2013.


Exhibit 1-1224 - CTH.3001.0021.8820 - Attachment B BMA, 22 October 2014; Transcript, Finn Pratt, 10 November 2022 [p 855: lines 12-15].


Professor Whiteford, in his Report, set out the eligibility conditions for most income support benefits, such as age requirements for aged pension, being unemployed and actively looking for work for unemployment benefit as well as a resident’s requirements: Exhibit 4-8342 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March [p 11: para 3.5].
Legal and historical context of the Scheme

40 Payment Processing Legislation Amendment (Social Security and Veterans’ Entitlements) Act 1998 (Cth).
42 Social Security Act 1991 (Cth) s 8.
43 Exhibit 4-3842 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March_clean, RBD.9999.0001.0505, 10 March 2023.
44 NTG-0014, Response to Paragraphs 1-6, CTH.9999.0001.0041_R, Exhibit 8737.
46 Social Security Act 1991 (Cth) ch 2 pt 2.11.
47 Social Security Act 1991 (Cth) ch 2 pt 2.3.
48 Social Security Act 1991 (Cth) ch 2 pt 2.11A.
50 Social Security Act 1991 (Cth) ch 2 pt 2.5.
52 Social Security Act 1991 (Cth) ch 2 pt 2.15.
54 Social Security Act 1991 (Cth) ch 2 pt 2.4.
55 Student Assistance Act 1973 (Cth) s 7B.
58 ‘Fact Sheet – Cessation of Sickness Allowance’, Department of Social Services (Web Page, 3 March 2022), accessed on 27 March 2023
59 ‘Fact Sheet – Cessation of Partner Allowance’, Department of Social Services (Web Page, March 2020), accessed on 27 March 2023
60 Exhibit 4-3842 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March_clean [p 11-12: para 3.6].
61 Exhibit 4-3842 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March_clean [p 25: para 6.5].
62 NTG-0014, Response to Paragraphs 1-4, CTH.9999.0001.0441_R, Exhibit 8737.
63 Social Security (Administration) Act 1999 (Cth) s 66A (1).
64 Social Security (Administration) Act 1999 (Cth) ss 67 and 68.
65 Social Security Act 1991 (Cth) ch 2 pt 2.11.
66 Social Security Act 1991 (Cth) ss 1222A(a).
67 Social Security Act 1991 (Cth) ss 1223(1 A8) (b)-(c).
69 Data-matching Program (Assistance and Tax) Act 1990 (Cth) s 3.
70 Data-matching Program (Assistance and Tax) Act 1990 (Cth) s 6(c).
72 Data-matching Program (Assistance and Tax) Amendment Act 1998 (Cth) sch 1.
73 Data-matching Program (Assistance and Tax) Act 1990 (Cth) s 10(3)(a).
75 Data-matching Program (Assistance and Tax) Act 1990 (Cth) s 6.
76 Commonwealth Services Delivery Agency (Consequential Amendments) Act 1997 (Cth) sch 1 cl 3.


Exhibit 9494 - CTH.9999.0001.0219 - SA response to NTG-0260.pdf [p 3 para 2.11].

Exhibit 1-1140 - CTH.3007.0004.5154 - Recommendations 6A and B of OCI Own Motion investigation report -DHS Comments (v1.0).

Transcript, Christopher Birrer, 23 January 2023 [p 2215: lines 29-48].

Transcript, Finn Pratt, 10 November 2022 [p 847: lines 14-18].

Transcript, Mark Withnell, 9 December 2022 [p 1496: lines 36-37].

Transcript, Mark Withnell, 9 December 2022 [p 1496: line 47 – p 1497: line 20].

Transcript, Scott Britton, 8 November 2022 [p 669: lines 25-31].

Transcript of evidence of Scott Britton, Day 9 (08/11/22), P-670 line 25-29.

Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 10-25].

Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 42-43].

Transcript, Christopher Birrer, 7 November 2022 [p 615: lines 32-38].

Show more
Section 1: Chronology of the Robodebt Scheme
Chapter 2: Overview of the origins of Robodebt
1 The Robodebt scheme

The Australian system of government includes a number of checks and balances, protections against abuses of power, and mechanisms for external oversight and scrutiny. Ministers bear responsibility for their portfolios; secretaries have duties and responsibilities with respect to the departments they administer; and public servants have standards of conduct to which they must adhere, which include acting with care and diligence, integrity and, importantly, providing the government with advice that is frank and honest.

How, then, in such a system, did it come to pass that the government implemented, and continued, an unlawful scheme that has been described as a “shameful chapter in the administration of the Commonwealth social security system” and “a massive failure of public administration”?

This part of the report tells the story of Robodebt – from the frenetic, confused machinations of a pressured bureaucracy, to its ignominious end, ultimately brought about by a legal advice which, in essence, made precisely the same point as had been made in the first legal advice provided on the concept of what would become the Robodebt scheme.

The Scheme’s demise, for all of its seeming inevitability, took far longer than it should have, particularly for all of those harmed by a Scheme to which they should never have been subject.
2 From concept to Budget measure – an overview

Throughout 2014, officers of the Customer Compliance Branch of the Department of Human Services (DHS) had been developing “Concepts for Future Compliance Activity.” Jason Ryman was a Director in that Branch. One of his Assistant Directors was Tenille Collins. Mr Ryman reported to the National Manager of that Branch, Scott Britton. Mr Britton reported to the General Manager of the Business Integrity Division of DHS, Mark Withnell.

The Customer Compliance Branch was responsible for investigating possible instances of under-reporting by social security recipients of their income, with a view to recovery of overpayments caused by that under-reporting. In the language of DHS at the time, this was known as “non-compliance”, and the steps taken to investigate and act on it were “compliance activities,” often undertaken as part of a process called a “review.”

By November 2014, although it was still very much in development, one such “concept” had been discussed at more senior levels at DHS. It was described as a “broad scale cleanup [sic] of the PAYG reviews,” which involved a new method of review by which a debt could be automatically calculated using employer-reported PAYG information received from the Australian Taxation Office (ATO). The email noted that for this PAYG concept, “the savings over 4 years will likely approach $1b.”

In late 2014, DHS officers met with officers from the Department of Social Services (DSS) to discuss possible measures for the 2015-16 Budget. In a general sense, if one of the ideas were to be put forward as a Budget measure, it would eventually be developed into a proposal for government, known as a New Policy Proposal (NPP). NPPs would be presented to Cabinet under the umbrella of DSS. That meant that in circumstances where DHS had the idea for a proposal, or responsibility for its implementation, it was necessary for them to take part in a collaborative process with DSS, in order that both departments would have an understanding of the proposal and could advise their respective ministers.

In some of those meetings in late 2014, DHS told DSS about the PAYG concept upon which they were working. The reaction within DSS to the potential proposal was negative. A number of DSS officers recognised that the proposal, as they understood it, was likely contrary to both policy and law. By December 2014, DSS had received internal advice, which was as they had expected: the proposal did not align with social security policy, and it was unlawful. The extent to which this advice was communicated to DHS, and at what points in time, is the subject of detailed consideration in the sections that follow.

Despite that advice, this did not necessarily mean the end of the proposal. It was possible that a proposal that was unlawful could be made lawful, by amending the legislation under which it would operate. As discussed further later, at this particular point in time, that was an unpalatable proposition for a minister; however, the possibility remained that, with legislative change, the proposal could be implemented.

In January 2015, in response to a request by the Minister for Social Services, the Hon Scott Morrison MP, for a brief on “options to strengthen the integrity of the welfare system,” the PAYG proposal had progressed to him in the form of an “Executive Minute”, through the Minister for Human Services, Ms Marise Payne. The PAYG proposal was one of a number of proposals in the Executive Minute, but it was the one from which the bulk of anticipated savings were to be derived. It was expected to result in an estimated $1.2 billion in savings, offsetting not only its own costs, but also the costs of the other proposals, and other contemplated initiatives.

As a result of communications between DSS and DHS about the PAYG proposal, the Executive Minute said that “DSS has also advised that legislative change would be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so”.

On 12 February 2015, Mr Morrison signed the Executive Minute, indicating a desire to pursue the PAYG proposal.
DHS subsequently developed the Strengthening the Integrity of Welfare Payments (SIWP) NPP which included, as one element, the PAYG proposal. This document would form the basis of what would be presented to Cabinet at a meeting of the Expenditure Review Committee (ERC) in March 2015, and would subsequently become the Strengthening the Integrity of Welfare Payments Budget measure in the 2015-16 Budget. The PAYG element of that Budget measure provided the basis for the first iteration of the Scheme.

At the time the Scheme was developed into an NPP, approved by Cabinet, and announced as an element of a Budget measure, DSS already had advice that concluded that the Scheme, as it was introduced, was contrary to policy, and was unlawful.
3 How did this happen?

The environment in which the development of what would become the Scheme occurred was fraught. It was characterised by a powerful drive for savings, strongly expressed ministerial policy positions, cultural conflicts on an inter and intra-departmental level and intense pressure experienced by public servants, including those in positions of seniority. It was not an environment which was conducive to instances of careful consideration, well-reasoned decision making, and proper scrutiny and supervision.

3.1 The savings agenda and policy direction

An enthusiasm for savings would seem an anathema to the underlying policy and rationale for social security spending, of supporting those in need; however, it appears that the social security portfolio was generally perceived as a reliable source for such savings. It was understood within that portfolio that the government’s ambition to achieve a Budget surplus depended for success on the delivery of substantial savings from departments that were responsible for a significant portion of Commonwealth expenditure. There was also a requirement that the cost of policy proposals be fully offset by a reduction in spending or increase in revenue elsewhere.

Mr Morrison was appointed as the Minister for Social Services in December 2014. His approach as a minister, including as the Minister for Social Services, was to:

Respect the experience, professionalism and capability that the Public Service brings to the table, both in terms of policy advice and implementation skills, and then having set the policy direction, expect them to get on and deliver it.

The policy direction set by Mr Morrison in the Social Services portfolio, which was publicly communicated by him, was one of “ensuring welfare integrity”.

Inadvertent non-compliance was often mentioned in the same breath as cases of fraud, and no pains were taken to emphasise any distinction.

As would be expected, members of the senior executive of both DSS and DHS were aware of Mr Morrison’s policy direction, and the drive for savings. In this context, a pervasive sense of pressure filtered down the management hierarchy.

The evidence of Serena Wilson (deputy secretary, DSS) was that discussions with ministerial staff about addressing problems were rare, and instead, proposals were “directed at finding cost savings”. She felt pressure in her day-to-day work activities and felt constrained in the final years of her public service career, in respect of her role in the implementation of social security policies, which she perceived were limited by the government’s focus on identifying options to cut social security expenditure.

Andrew Whitecross (acting group manager, DSS) described a meeting in which the PAYG proposal was discussed with Mark Withnell (general manager, DHS). He formed the impression that “there was quite an attachment at more senior levels to that level of savings”, and that the estimated $1.2 billion in savings was not a number “that had come out of a methodology, but that the number itself was a goal of the process”.

Mr Withnell’s evidence was that he recalled a sense of urgency to provide a brief to the new minister (Mr Morrison). With respect to meetings and the proposals generally, he felt that he was “under considerable pressure from the [DHS] deputy secretary”. He was involved in the development and progression of the PAYG proposal, despite being of the view that the measure “still had a way to go”.

Mr Britton described feeling increasing pressure to put forward proposals that provided savings to the government. The environment at the time, he said, was “unrelenting”, with the focus on savings as part of the government’s budget recovery strategy.
There were concerns within DHS that the proposal was not ready to be put forward as a Budget measure; however, its progress to being developed into an NPP was rapid and unchecked. Mr Morrison’s expectation, having set the policy direction, that public servants would “get on and deliver it” was echoed in Mr Britton’s sense of pressure to “…get on with it. Just get on with it…And we collectively got on with it.”

The suite of proposals in the SIWP NPP were, unsurprisingly, neatly aligned with both the policy direction of the social services portfolio and the drive for savings. The PAYG proposal was the lynchpin of that proposal. It provided most of the proposed savings for the measure, and offset not only its own costs, but also those of the other elements, and other potential initiatives. It is no stretch to say that the suite of measures outlined in the NPP rose and fell on the acceptance of the PAYG proposal, in that the loss of that element, for whatever reason, would likely endanger the viability of the entire proposal.

### 3.2 A rushed proposal

There were misgivings at some levels of DHS about whether the PAYG proposal had been developed to a point where it could be progressed to the NPP stage.

Tenille Collins expressed reservations that the proposal was being put forward where the final process had not yet been determined, and where there had been no testing of the process with “policy, legal or external stakeholders”.

Jason Ryman shared Ms Collins’ reservations, and the view that they “had not done enough work at that stage” to put the measure forward, but he had been instructed to develop it nonetheless. He considered that they had not done the work necessary to “bring together something that we would have significant confidence in”. His team had not yet looked at the idea of an online process other than as a “broader concept” of engagement of customers online, and the application of data sources, such as ATO PAYG data. They were “in really preliminary research stages”.

Mr Ryman gave evidence that ordinarily there would have been some level of testing. They would have developed specifications for the process, including details of why and how customers would engage with an online process. It would be a lot further developed than “we want a digital solution”. In late 2014, Mr Ryman’s understanding was that a measure which utilised the proposed PAYG process would commence in July 2016, rather than July 2015, and that they would have sufficient lead time, some 12 months, to develop an online solution and do the necessary preparation. However, he was then informed that all the preliminary work was to be ready by early January, including the data to inform discussions with DSS as to the possible savings attached to the measure.

Mr Ryman accepted that the analysis done to inform the underlying assumptions for the Budget measures was “not a perfect way to do it”. However, given the time pressures under which his team were being asked to provide data, that was the way they were able to provide the information in the time that they had.

Mr Britton similarly felt that the measure needed more work. He was worried about the pressure he felt was being applied by his manager, Mr Withnell. Though the proposal was, in his view, “hugely complex”, there was an imperative “to get the savings, to get the investment, to build the platform”. He said:

... not only through this measure but, we will come to the other ones, there was a lot of pressure – like, a lot of pressure to get it – to get it through.

Mr Withnell was also of the view that the measure still had some distance to go. He said that DHS had been asked to bring forward possible ideas, rather than fully formed measures. He had thought that there would have then been “robust discussion, as had often been the case in the past”, about each of those proposals before deciding whether to proceed. Those discussions would involve working through possible proposals in some detail, and determining which ones were ready to take forward. That did not happen as he had hoped. He recalled that:
...a lot of time was spent on – how can I put it – finessing the brief, I guess, in terms of wording of the brief, rather than – I would have preferred to spend time on more robust discussion about the measures themselves.\textsuperscript{53}

Mr Withnell considered that the scale and “transformative nature” of the PAYG proposal was significantly larger than other Budget measures in which he had been involved. Given the nature of the measure, the period of time in which it progressed from a concept into an NPP was “very quick”.\textsuperscript{54} Mr Withnell’s experience was that for two other “transformational” measures that were much smaller than the PAYG proposal, DHS had much more lead time before they even put the measure forward.\textsuperscript{55} Around this point in time, and with respect to meetings and the proposals generally, he felt that he was under considerable pressure from the deputy secretary, Ms Golightly.\textsuperscript{56}

However, whether these concerns went unarticulated, or unheard, the receipt by DHS of the Executive Minute signed by Mr Morrison resulted in the inclusion of the proposal in an NPP to be developed in “unprecedented” timeframes.\textsuperscript{57}

\textbf{3.3 “We know boats”}

There was also a level of reluctance in DHS to share information about the proposal with DSS.

This reticence was demonstrated in an email Mr Withnell sent to Mr Britton reproaching him for sending preliminary data about the proposal to officers of DSS, expostulating that DHS was “giv[ing] away control of it!”\textsuperscript{58} The following day, Mr Britton seems ruefully to have commented to other DHS officers that the proposal would need to be advanced by DHS alone, with little to no involvement from DSS.\textsuperscript{59} Mr Britton recalled that Mr Withnell’s approach was that DHS “were the experts”, and that “we know boats”,\textsuperscript{60} by which he meant that DHS knew the detail of the work that they did, and there was a particular level of expertise within DHS about that work.\textsuperscript{61}

This hesitance about sharing information resulted in less collaboration between the two departments about the proposal than might otherwise have been expected.\textsuperscript{62} Its effect was compounded by some DHS officers’ lack of understanding of the fundamental legal or policy problems with the proposal early in its development, when it might have been modified or stopped.
4 Conclusions on why this happened

Mr Morrison’s evidence was that the SIWP measure:43

...was not a measure that the government initiated, ie, Ministers. This was a measure that was initiated within the Public Service and brought to us, which we agreed to take forward based on those representations.

On one view, that statement is entirely correct. However, to attribute the birth of the Scheme entirely to the public servants who initiated the measure is to ignore part of the story. It fails to take into account the context and environment in which the measure was conceived.

The proposal was precisely responsive to the policy agenda that had been communicated to the social security portfolio departments, both in private meetings and in the public sphere, by the Minister for Social Services.

It came into being against the backdrop of a drive for savings, in a pressured public service where officers were acutely aware of the importance of those savings to the government.

The perceived need to “just get it done” meant that concerns about the immature level of development of the proposal went either unexpressed or unheard.

The assumptions and estimates upon which the proposal was based were conceived in haste and were predicated on a process which was under-developed and untested.

The relationship between DSS and DHS meant that the sharing of information about the proposal had been somewhat inhibited, and this was further complicated by the sometimes direct communications between DHS and the Social Services Minister.

The ministerial imprimatur to pursue the process led to the presentation of the SIWP NPP to government, for inclusion in the 2015-16 Budget. Once it had been announced, it represented the beginning of a scheme that would unlawfully take money from social security recipients on a massive scale, and ultimately fail to come anywhere close to the savings which had been promised in order to justify its adoption.
Overview of the origins of Robodebt

39 Transcript, Jason Ryman, 22 February 2023 [p 3548: lines 1-2].
40 Transcript, Jason Ryman, 22 February 2023 [p 3548: line 13].
41 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 13-16].
42 Transcript, Jason Ryman, 22 February 2023 [p 3546: lines 16-17].
43 Transcript, Jason Ryman, 22 February 2023 [p 3558: lines 7-21].
44 Transcript, Jason Ryman, 22 February 2023 [p 3557: lines 5-20].
45 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 37-41].
46 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 37-41].
47 Transcript, Scott Britton, 23 February 2023 [p 3692: lines 27-28].
48 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 36-37].
49 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 38-39].
50 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 39-42].
51 Transcript, Mark Withnell, 24 February 2023 [p 3749: lines 1-10].
52 Transcript, Mark Withnell, 24 February 2023 [p 3748: lines 39-42].
53 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 1-4].
54 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 31-33].
55 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 35-42].
56 Transcript, Mark Withnell, 24 February 2023 [p 3750: lines 35-42].
57 Transcript, Scott Britton, 23 February 2023 [p 3686: lines 38-46].
58 Transcript, Scott Britton, 23 February 2023 [p 3687: lines 5-10].
59 Transcript, Jason Ryman, 22 February 2023 [p 3549: lines 1-7]; Transcript, Scott Britton, 23 February 2023 [p 3690: lines 21-23; p 3691: lines 19-30].
60 Transcript, Scott Morrison, 14 December 2022, [p 1874: lines 42-45].
Chapter 3: 2014 - Conceptual development
1 The origins of Robodebt

Robodebt originated as an idea from within the Customer Compliance Branch of the Department of Human Services (DHS). In oral evidence, Jason Ryman (director, Customer Compliance Branch, DHS) outlined various forms of compliance activity, one of which was to use PAYG employer-reported income data obtained from the ATO and match it with the income social security recipients had reported to Centrelink to identify discrepancies between those two sets of data. Those discrepancies would then be investigated, with a view to identifying and acting on instances of non-compliance.

By 2014, members of the Customer Compliance Branch, including Scott Britton (national manager, Customer Compliance Branch, DHS) and Mr Ryman, were under increasing pressure to increase the volume of the branch’s compliance activity.

The primary driver seems to have been a general perception that the social security portfolio, and particularly the compliance areas within that portfolio, were fertile ground for the generation of savings and “efficiencies” for the government. The size of the social security portfolio, including the monetary amounts outlaid on social security payments, meant that even small percentage deviations in payment accuracy could represent millions of dollars.

There was a perception that the scale of possible non-compliance vastly exceeded the resources available to DHS to investigate and recover overpayments arising from it. Mr Britton said it was thought that historically, there had been significant levels of non-compliance in the welfare program, in volumes beyond what DHS was able to cope with. Mr Ryman gave a similar account: each year, the Customer Compliance Branch identified a significantly higher volume of potential “non-compliance” than it had capacity to investigate and manage. A strategic priority for the branch was to close the gap between the volume of prospective instances of non-compliance and what it could deal with “within an affordable budget”.

At this time, Mr Britton felt increasing pressure to bring forward budget measures which would provide savings to the government. That pressure had built from around 2010 or 2012, with an increase in the number of budget measures administered by the compliance area. Mr Britton recalled the savings being described as part of the government’s budget recovery strategy.

In this context, in June 2014, Mr Ryman authored a Minute to Mr Britton, entitled Concepts for Future Compliance Activity, which Mr Britton approved (the June 2014 Minute).

The June 2014 Minute proposed a Trusted Data Assessment process. It involved the essential features of what became the Scheme: the use of data obtained from a third party, such as PAYG income data received from the ATO; a reassessment of the relevant social security recipient’s entitlement based on that data; and communication of the result of the assessment to the recipient, with the opportunity to dispute the assessment before it was applied to the recipient’s record (by raising an overpayment and debt).

In particular, the June 2014 Minute proposed the use of averaging of PAYG income data to determine social security entitlement. The Minute identified some possible obstacles to the proposal, but said “...legislation itself is not a barrier as we are able to average income as per section 1068-G8 of the Social Security Act 1991”.

That was a complete misunderstanding of that provision’s effect. Section 1068-G8 of the Social Security Act 1991 (the Social Security Act) authorised a form of averaging to calculate entitlement in specific circumstances which were expressly outlined in the terms of the section. It contained no general authorisation to use income averaging, and it did not authorise averaging in the circumstances that occurred under the Scheme. On the contrary, the fact that it authorised income averaging in very limited circumstances positively suggested that outside those circumstances it would likely be unlawful.

The use of income averaging, in the way it was proposed, was in fact inconsistent with social security legislation (that is, it was unlawful). This was, in a general sense, because social security legislation required a person’s income support entitlement to be calculated on the basis of the income that they had...
actually “earned, derived or received” in a fortnight. The average of someone’s income over a period was no indication of what they had earned in any particular fortnight, unless there was also evidence that they had earned their income at a regular fortnightly rate over that period.

Both Mr Britton and Mr Ryman explained that they believed that there was no inconsistency with the requirement to use fortnightly amounts, because using averaging resulted in a notional fortnightly income amount, and had “always been used” to calculate debts. It appears that this erroneous understanding was partly based on failure to distinguish between, on one hand, the use of averaging to arrive at a fortnightly figure and, on the other hand, the subsequent apportionment (or allocation) of that figure into each fortnightly period (within a total period under investigation) to calculate a debt. Their understanding seemed to be that the fact that, under the proposed process, income amounts were still allocated into discrete fortnights during the process of calculating a debt meant that it was still a calculation of the individual’s income on a fortnightly basis.

The problem with this is that averaging, in the absence of other information, was liable to produce inaccurate fortnightly amounts, which were not representative of actual income. This meant that the proposed process was not actually assessing income on a fortnightly basis, regardless of the fact that the averaged (and likely inaccurate) amount was then allocated into fortnights to perform the calculation. It was also inconsistent with the social security policy rationale for assessing income on a fortnightly basis, which was that individuals received income support payments at the time (and in the fortnight) that they needed them.

Neither Mr Britton nor Mr Ryman is a lawyer, and there is no evidence that they knew then that the use of income averaging, as it was later used in the Scheme, was unlawful. That was part of the reason why close collaboration with the Department of Social Services (DSS), whose officers had expertise in general social security policy and legislation, was critical to the development of the proposal.

The June 2014 Minute did consider one aspect of policy, albeit at a departmental policy level, rather than with respect to the social security portfolio generally. The Minute identified, as a possible barrier to the proposal, “the current departmental policy” which was that “apportionment of match data is only suitable as a last resort where customer or third-party information cannot be obtained”. That was a reference to DHS’s practice that, in some limited circumstances, the process of income averaging was used to calculate a debt. That was to be overcome by “influencing policy through the de-regulation agenda”. In other words, the Minute suggested that in order for the proposal to progress, income averaging would need to be used in a wider range of circumstances than DHS policy currently allowed, and the way to overcome that obstacle was to promote the proposed process’ potential to relieve the regulatory burden on third parties. Those third parties were primarily employers and banks, who, under the current policy, were required to provide details to DHS to verify recipients’ income.

DHS officers subsequently used the phrase “last resort” with metronomic regularity when they sought to defend the use of income averaging in the face of sustained public criticism of the practice in late 2016 and 2017. The narrative adopted was that averaging had always been used as a “last resort”, and its use in the Scheme was merely the continuation of a longstanding practice. However, it is plain from the June 2014 Minute that the narrative was false. The explicit proposal in the Minute was that there be a departure from the stipulation that averaging could only be used as a “last resort”, so that it would become the default methodology for calculating overpayment of social security benefits.

Despite what would later be said by those defending the Scheme, from the beginning, the Scheme involved a dramatic departure from how DHS had, in the past, assessed social security recipients’ income and calculated overpayments. Importantly, the June 2014 Minute characterised this departure as a departure from “policy”, rather than from legislative requirements, when it was in fact both.
2 Initial discussions of the concept between Human Services and Social Services

Over a number of meetings between DHS and DSS officers in October 2014, DSS was told about the proposal that would later become the Scheme. These meetings were relatively informal. The officers from both departments were in buildings across the road from each other. The meetings were not conducted according to any agenda and no minutes were taken.

On Tuesday 14 October 2014, there was a meeting between DHS and DSS officers to discuss possible budget measures for the 2015/16 Budget. Mr Britton was one of the DHS officers in attendance. The DSS officers attending were Murray Kimber, Cameron Brown and Mark Jones. At the time, Mr Kimber was the branch manager of the Social Security Performance and Analysis Branch of DSS. Mr Brown reported to Mr Kimber as the director of the Payment Integrity and Debt section, and Mr Jones, an assistant director, reported to Mr Brown. At the meeting, DHS officers outlined an initial description of what became the Scheme.

Between 14 and 27 October 2014, when another meeting took place, DHS officers undertook more work on the proposal, and more details of the proposal were outlined to DSS personnel. In an email on 14 October 2014 to other members of DHS, including Mr Ryman, Mr Britton indicated that there would be a “focus on PAYG...so we will need detail of what’s in the pool for each year back to 2010/11”. In subsequent emails, DHS officers detailed analyses of PAYG data in the possession of DHS. This included an email sent to Mr Britton and Mr Ryman on 24 October 2014, attaching “the PAYG information for DSS”. The document recorded that there was a total of 866,857 uninitiated PAYG compliance matches from the 2010/11, 2011/12 and 2012/13 financial years. A further email on 27 October 2014 clarified that the 866,857 figure represented unique recipients, and that there were 1,080,028 matches.

What that meant was that DHS had “matched” the ATO PAYG information for each of those people with the amount of income that they had reported to DHS while they were on income support payments. That matching process had resulted in a discrepancy, or difference, between the two amounts.

On the afternoon of 27 October 2014, there was a meeting between DHS and DSS officers for “15-16 Budget follow up” on the matters discussed earlier that month, including what would become the Scheme. At 8:36 am that morning, Mr Britton sent an email to DSS officers, including Mr Kimber, attaching the DSS-PAYG analysis “for discussion this afternoon.” At 8:41 am, Mark Withnell (general manager) replied to Mr Britton’s email:

Why has this gone to DSS? I haven’t seen it, we have no authority even for the measure as yet and now we have given away control of it!

Mr Withnell’s reluctance to share information about the proposal with DSS was a departure from what Mr Britton and Mr Ryman said was their usual experience of working with DSS. According to them, DHS had regular engagement with DSS and kept DSS informed of DHS’s research and testing for ideas or concepts it was developing, before the point at which a written briefing was provided to a Minister. There would “traditionally be DSS – heavily DSS involvement, if not led, particularly through the formal phase”.

Mr Withnell’s explanation for this departure was that there had been some lack of clarity as to which of DHS and DSS had ownership of information; DHS was concerned that DSS would assume control over its information or projects. He may also have regarded DHS as having greater expertise in the subject matter than DSS. Mr Britton could remember Mr Withnell being angry with him, though not why; but he recalled that Mr Withnell’s approach was that it was DHS which had the expertise, delivered the detail and completed the work.
According to Mr Britton, there was “definitely a view formed that we [DHS] wanted to take this forward”. That was reflected in an email another DHS officer sent on 28 October 2014, referring to a discussion with Mr Britton in which he said, “He [Mr Britton] thinks that a new initiative around the automation of debt notification will need to be put up by DHS alone (with minimal to no joint involvement from DSS)”. Mr Britton gave evidence that his state of mind as expressed in that email would have come from Mr Withnell directing him to that effect.

The product of Mr Withnell’s direction to Mr Britton was that DHS continued to work on the proposal until early 2015. This was without any further consultation with DSS about the proposal. According to Mr Britton, this was unusual.

As will appear, after the meeting between DHS and DSS on 27 October 2014, DSS obtained legal advice to the effect that the use of income averaging in the way that had been proposed by DHS was unlawful. However, DSS was not informed of the further work that DHS was undertaking on the proposal until early 2015, after a meeting between DHS secretary, Kathryn Campbell, and Scott Morrison, Minister for Social Services, on 30 December 2014.
3 The Department of Social Services’ reaction to the concept

While DHS continued to work on the proposal, the reaction to the concept within DSS was negative, to say the least.

In oral evidence, Mr Brown said that “almost immediately”, his team recognised that the proposal was inconsistent with the legislative requirement that social security entitlement be based on fortnightly income. In his mind, the proposal involved what he described as “speculative invoicing”, by which (he explained) he meant speculatively asserting en masse the existence of debts owed by social security recipients who then had the options of accepting the existence of the asserted debts or assuming the onus of disproving them. He noted the difficulties that social security recipients, who included very vulnerable cohorts, would have in disputing the asserted debts, particularly where they related to periods of time years before. This, he expected, would result in social security recipients entering into agreements to repay debts that they did not owe. He had no doubt that the proposal was unethical.

On 31 October 2014 Mr Jones, in consultation with Mr Brown, sought policy advice and legal advice in respect of the proposal DHS had outlined. Both requests for advice described the proposal. He sought the legal advice from Anne Pulford (principal legal officer, Public Law Branch, Legal Services Group, DSS). Ms Pulford delegated responsibility for the advice to Simon Jordan (senior legal officer, Public Law Branch, Legal Services Group, DSS). The request for policy advice went to the Rates and Means Testing Policy Branch, whose acting director, David Mason, responded promptly with an advice (the 2014 DSS policy advice) a week later, on 7 November 2014. His email said:

Hi [Mr Brown and Mr Jones],

Thanks for the opportunity to meet with you and discuss this proposal.

Similarly to the view you expressed when we met, we would not support this proposal. It is flawed as the suggested calculation method (averaging employment income over an extended period) does not accord with legislation, which specifies that employment income is assessed fortnightly. It follows that the debt amount calculated could be incorrect according to law, and it is unclear how a DHS delegate could validly make a determination about the amount of a debt in these circumstances. Further, we can’t see how such decisions could be defended in a tribunal or court, particularly when DHS have the legislative authority to seek employment income information from employers.

Mr Mason sent the 2014 DSS policy advice to a number of people, including Ms Pulford.

Before the legal advice was provided, on 12 November 2014 Mr Kimber sent an email to DSS officers, including Serena Wilson (deputy secretary, Social Security Division, DSS) and copied Mr Brown. Mr Kimber’s email said:

Hi Serena,

A heads up on the development of the fraud + compliance NPP for 15-16. You will recall a week or so back we were tossing around the idea to streamline compliance matches and subsequent follow up / debt raising - in essence this would allow DHS to move toward a process that would bypass the current detailed investigation of fortnightly income match discrepancies, smooth the income reported over a period, notify the customer of a potential debt and then place the onus on the individual customer to either accept or challenge the debt. As a broad concept it sounded OK, however, as we discussed it did have a number of issues. Following further investigation we have confirmed as much. We expect legal advice in coming days to confirm that it is not appropriate under current provisions and would not be expected to hold up to scrutiny or challenge. We will now take this off the table for further consideration and advise DHS once we get the final legal advice.
In oral evidence, Ms Wilson accepted that the proposal discussed in that email contained the key features of what became the Scheme.\textsuperscript{51} She accepted that it raised for her legal and policy questions about which it was DSS's responsibility to advise DHS.\textsuperscript{52}

On 18 December 2014 Ms Pulford “second counselled”\textsuperscript{53} the legal advice Mr Jordan had prepared in response to Mr Jones’ request,\textsuperscript{54} and Mr Jordan emailed the advice to Mr Jones that day (the 2014 DSS legal advice).\textsuperscript{55} The question the advice answered was “whether a debt amount derived from annual smoothing or smoothing over a defined period of time [ie averaging] is legally defensible”. The advice said, “a debt amount derived from annual smoothing [ie averaging] over a defined period of time may not be derived consistently with the legislative framework”. The advice explained this conclusion by reference to the legislative requirement for social security entitlement to be calculated based on actual fortnightly income.

The reasoning set out in the email was not complex. It did not rely on obscure principles of law or use dense language. It simply identified that the legislative requirement for entitlement based on fortnightly income could not be met because “smoothing” (that is, averaging) might not correctly identify the amount of income a social security recipient earned or received in each fortnight under consideration.

The use of income averaging, as was being proposed by DHS, was unlawful.

In her oral evidence, Ms Pulford agreed that the gist of the legal advice was “a very strong ‘no’”.\textsuperscript{56} She also agreed that, except in “unusual circumstances”, the proposal to average income from a broader period and allocate it equally to fortnights during that period would not identify the actual amount of income the recipient received; that is, it would lead to, at least, inaccurate allegations of debt.\textsuperscript{57}

Mr Brown was similarly emphatic as to his understanding of the implications of the legal advice. To him, the advice was clear, and should have meant the end of the DHS proposal.\textsuperscript{58}

There is no clear evidence that the conclusions in the 2014 DSS policy and legal advices were communicated to DHS at this time; certainly the advices themselves do not appear to have been passed on. Mr Kimber had referred in his 12 November email to Ms Wilson to letting DHS know of the outcome once the final legal advice had arrived. Mr Jones thought the information would have been passed on, possibly by email, although none has come to light. He could not remember if he made a telephone call to let DHS know that DSS did not support the proposal on either a legal or policy basis.\textsuperscript{59} While it seems likely that DSS would pass the effect of the advices on to DHS, it is possible that Christmas 2014 overtook the intention to do so and it was forgotten by the new year.
4 The Department of Human Services
analysis and red flags

While officers of DSS sought internal legal and policy advice that could have resulted in the end of the DHS proposal, momentum towards its development accelerated in DHS.

From late October 2014, the Customer Compliance Branch continued to work on the concepts outlined in the June 2014 Minute, including further analysis with respect to the PAYG match data. One aspect of analysis was directed at the impact of apportionment (averaging) of match data on debt outcomes. A comparison was undertaken of approximately 100 compliance review outcomes, in which a “hypothetical” calculation was generated by averaging the PAYG match data, which was then compared against the original calculations undertaken and recorded on the customer record.

The findings of this analysis were that 66 per cent of cases resulted in the debt being higher than the actual debt for the match period, and 31 per cent of cases resulted in the debt being lower the actual debt for the match period. Presciently, the document identified two important factors. Firstly, it noted that “where the debt is higher as a result of the hypothetical smoothing, this seems to be a result due to customers not actually working every day/week/fortnight during the match period”; and secondly, it recorded that “81 cases [out of the 106 total] had a match period over the whole financial year, however the verified earnings did not cover the whole financial year”.

The analysis continued. On 6 November 2014, Tenille Collins (assistant director, Customer Compliance Branch, DHS) emailed Mr Ryman attaching an analysis of 229 cases, observing that “the findings have not differed from the first 100 cases”. Consistent with Ms Collins’ observation, the attachment demonstrated that 55.9 per cent of cases using apportioned data resulted in a debt higher than the originally calculated debt, and 39.3 per cent of cases using apportioned data resulted in a debt lower than the originally calculated debt. Out of the 229 cases, 94 had a match period over the whole financial year, and cases that resulted in a higher debt due to income smoothing seemed to result where there was casual employment income.

By November 2014, the analysis demonstrated that just over 95% of the debts calculated using income averaging differed from the manually calculated amount. The work to date had shown that using an income averaging methodology to calculate debts overwhelmingly resulted in an inaccurate result, whether the manually calculated debt amount was lower (the majority of cases) or higher than the debt calculated using income averaging.

This was profoundly significant; social security legislation determined entitlement, and overpayment, on the basis of actual amounts of income, and these results showed that averaged income did not correspond with actual income, usually to the disadvantage of the recipient.

Ms Collins was also involved in developing process maps for the PAYG Trusted Data Process, which, by 5 November 2014, she referred to as “the budget measure”. On that day, she emailed the process maps to Mr Ryman with another officer’s summary of the changes:

I have amended the PAYG Trusted Data Process Maps as discussed to reflect that the customer will be required to confirm or update the match data information before an assessment on the income is undertaken.

I have made some assumptions on the process pending further discussion, and in particular that where the customer does not contact or action digital intervention then the PAYG income data as provided in match will be applied to the customer record, and we will not go to third parties. The customer can then go through normal EIR processes if they disagree.
5 One billion dollars

Despite what the internal DHS analysis revealed about the inaccuracy of debts which would be calculated under the proposal, momentum continued to build. It had apparently reached, or was about to reach, more senior levels at DHS. There were emails in November 2014, commencing with one from a DHS deputy secretary to Mr Withnell, seeking details that DSS may have been wanting, with respect to a possible new compliance measure. The details were sought for the information of Ms Campbell, the Secretary of DHS, who wanted to know “what they [DSS] might be looking at”. The deputy secretary asked for some key points to be provided for Ms Campbell’s next meeting with Mr Pratt. Mr Withnell replied that there were two possibilities, one of which was “a clean up of PAYG matches”; however, he also noted that this was “less certain” because it depended on policy advice regarding treatment of income. He indicated that he would get some dot points put together.

A DHS officer duly provided a set of dot points for Mr Withnell’s approval. Under the heading “Streamlined PAYG reviews”, the following point appeared:

This measure is a broad scale cleanup of the PAYG reviews in preparation for One Touch Payroll due to roll out in 2016. It is proposed to introduce a new method of review that includes an automated debt calculation based on the information received from the ATO without verification from employers. **The measure is dependent on a variation to the policy on the treatment of earned income under the income test for welfare payments.** It is proposed that income treatment for earned income include an option to annualise income rather than use the point of earnings calculation. Each year DHS receives far more PAYG matches (260,000 customers for 2013/14 financial year) than we can process with the traditional method of review that requires verification from the employer and/or the customer. The department currently has the resources to process approximately 30,000 of the highest risk reviews this year under the traditional method. The new streamlined method of review would allow the department to review customers not captured in the high risk pool. The method of review would remain unchanged for the highest risk reviews.

**The costs of these measures will be offset from the broader savings under the DSS proposals. The PAYG measure requires a policy change and DSS are yet to advise if this change is supported.**

Mr Withnell replied with “a slight amendment”, noting:

In the last para I suspect the PAYG measure will need to offset against itself. I doubt that it figures in the DSS calculations. We could leave it open for DHS to use as an offset – the savings over 4 years will likely approach $1b.

Two important features emerge from this exchange. First, the DHS view was that which Mr Ryman had expressed in the June 2014 Minute: the only prospective barrier to the proposal was that it would require a “change of policy”. Evidently that view was persisting in DHS in November 2014, in contrast to DSS’s concerns about the legality of the proposal. Secondly, DHS was aware by this time that the proposal could result in very substantial savings to government.
6 More evidence of inaccuracy

On 12 December 2014, Ms Collins emailed Mr Ryman about the PAYG measure.69 Among the attachments to her email was a document which referred, among other things, to an analysis of the PAYG records for the 2010-11, 2011-12 and 2012-13 financial years. Although the methodology is unclear, the document said, “The analysis identified that debts were increased by 13.06 per cent when income smoothing was applied”.70

Mr Ryman’s understanding (as given in evidence) of how that 13 per cent figure was derived was that it was based on a review of recipients’ actual files.71 He described a process of comparing the actual debt raised through a manual compliance review with a hypothetical debt calculated using income averaging. The result of the analysis was that using income averaging resulted in debts that were, on average, 13 per cent higher than when they were calculated using a manual compliance review process.72
7 The New Policy Proposal – December 2014

By December 2014, initial drafts of an NPP for what would become the Scheme were being circulated within DHS. Mr Ryman’s recall of how those drafts came about was that he would have been asked by Mr Britton to start to prepare Budgetary documentation. The only “build-up” to that, that he could recall, were the discussions that Mr Britton and Mr Withnell had with DSS in late 2014, and subsequent discussions about bringing forward ideas for DSS.

On 10 December 2014, a member of Mr Ryman’s team sent Ms Collins the first draft of the NPP, entitled “Digital Compliance for Customers with Earned Income”. Two days later, Ms Collins emailed a further version of the draft NPP to Mr Ryman. That version included the following words:

...there would need to be a change in departmental policy in relation to the application of income smoothing to assess a customer’s income from employment.

The reference to the need for a “change in departmental policy in relation to the application of income smoothing”, and the absence of a reference to any need for legislative change, echoed the DHS misapprehension that the only barrier to the proposal lay in policy rather than law.

As has already been detailed, it is also evident that there was a drive from the higher levels of DHS to move the proposal forward at a rate that was faster than that at which staff at lower levels of DHS were comfortable. Ms Collins recalled that she was very surprised that the process was being considered for, and developed into, an NPP. She had reservations about progressing to that stage in circumstances where there was not yet a final process, let alone one that had undergone testing and consultation. She regarded it as “highly unusual” that, as of 8 December, it was proposed that further testing and development of the PAYG process would occur, but just two days later a draft NPP had been produced.

Ms Collins said she expressed her reservations to Mr Ryman and another staff member, both of whom agreed with her. Mr Ryman indicated his frustration, caused by “others” who were putting this forward; Ms Collins inferred, given the management hierarchy, that he was referring to Mr Britton and Mr Withnell.

Mr Ryman did not specifically recall such a conversation with Ms Collins, or feeling frustration, but he did recall sharing Ms Collins’ reservations about putting the measure forward at that stage. He was concerned that preliminary work which would normally have been done for the measure had not been done, but he had been instructed to develop it nonetheless.

Mr Britton recalled that in late 2014, he felt that the measure needed more work to “make sure that it was validated.” He was worried about the pressure that he felt was being applied. From his perspective, the pressure came from Mr Withnell, who was “very hands on”. Mr Britton described the proposal as “hugely complex”. There was an imperative “to get the savings, to get the investment, to build the platform”, and “a lot of pressure to get it – to get it through”. 
8 2015 and the first Department of Human Services legal advice

On 8 January 2015 Mr Ryman sought legal advice from the Program Advice Legal and Ombudsman Branch of the Legal Services Division of DHS about the proposed PAYG process. That request was centred around the ability of DHS to compel a recipient to provide information or perform certain tasks online, and the question of whether there could be an automatic application of an “assessment outcome” if a recipient did not act. It did not ask about income averaging. This was consistent with the position expressed in the June 2014 Minute, which referred to a need for legal advice with respect to “automatic applications of data to customer records”. Questions associated with income averaging were considered to be policy-based.

On 14 January 2015 a government lawyer emailed Mr Ryman attaching a memorandum of advice (the January 2015 DHS legal advice). The advice was “second counselled” by John Barnett (deputy general counsel, DHS).

Presumably because of the way the instructions were framed, the advice assumed that the “information” involved in the process was derived from one of three sources: tip offs, internal profiling and data matching. With respect to the third, data matching, the advice was confined in its analysis to information collected under the Data-matching Program (Assistance and Tax) Act 1990 (Cth). None of the three categories reflected the nature of the PAYG information that was to be used in the process. Nonetheless, the advice still said some things relevant to the proposed process.

Firstly, the advice was that DHS could give customers a legal notice that required them to do something online, “provided the notice is of a kind that provides for the Secretary (or delegate) to prescribe the manner in which the information is to be provided”. The advice concluded that the letter that DHS planned to send under the proposed process was not such a notice.

Because the letter was not a coercive notice, but was rather a “request” to a recipient to provide information voluntarily, there were no legal requirements as to the form that the letter should take. However, the advice recommended that, when sending a person such a letter, the process should allow a recipient sufficient time to provide the requested information. It also recommended that, if a recipient could not provide the information online, there be another means by which they could provide the information. The advice then stated:

Additionally this may impact on the decision making process. That is if the information is not provided but known to exist then the veracity of the decision and the process may be brought into question by any review authority.

That was important, because one of the problems with the proposed process was that DHS already had the fortnightly income amounts that a recipient had reported to them while they were on income support payments. DHS had used that information to match with the ATO data to identify a discrepancy. What the advice was suggesting was that ignoring that information, or other information that was available to DHS (for example, on a recipient’s Centrelink record), might compromise the decision-making process.

The advice also stated that, in circumstances where a person had been given sufficient time and opportunity to respond, and chose not to, it was open to a decision-maker to use the “new” information to inform their decision-making process.

The advice concluded:

There is no discussion about the use of coercive information powers. If no information is provided by the customer then the fresh decision will be based on the available information. This may be an imperfect outcome and a process that may be challenged by customers and other stakeholders. Ultimately it is a matter of accepting the risks.
Accepting that the PAYG process was still being developed, and its precise formulation was as yet unclear, it is still obvious that the instructions provided to the Legal Services Division lacked sufficient detail and clarity, imposing limitations on the scope and depth of any advice that could be provided in response. Mr Ryman agreed, in his oral evidence, that none of the staff members in his project team or section were lawyers, and they were at a disadvantage in identifying legal issues that would require advice in the development of the project.97

Mr Barnett’s evidence was that it was unclear to him what the term “assessment outcome” actually entailed,98 and whether it meant an assessment of an income amount which was of itself to be used to assess a recipient’s entitlements. However, he proceeded on the basis that the process described in the instructions involved an automated assessment of an income amount which would then be a piece of information to be used in the context of other information available to a decision maker in a decision-making process which was not automated.99 As will be seen, that was not the process that was subsequently implemented under the Scheme.
Mr Morrison appointed as Social Services Minister

On 23 December 2014 Mr Morrison was appointed Minister for Social Services, an appointment which involved being a member of the Expenditure Review Committee (ERC), a committee of Cabinet.

The Social Services Portfolio was comprised of DSS and DHS. At that time, Marise Payne was the Minister for Human Services, having commenced her appointment on 18 September 2013. Both Mr Morrison and Ms Payne remained in their respective roles until 21 September 2015.

During that period, Finn Pratt was the secretary of DSS and Kathryn Campbell was the secretary of DHS. Mr Pratt and Ms Campbell were the principal policy advisors to their respective ministers.

The framework in which Mr Morrison, Ms Payne and their respective departments operated was established by an Administrative Arrangements Order (AAO) made on 23 December 2014.

Under the AAO, Mr Morrison was responsible for administering various pieces of legislation including the Social Security Act and the Social Security (Administration) Act (except to the extent they were administered by the Attorney-General or the Minister for Employment). His department, DSS, was responsible for dealing with various matters including: income security and support policies and programmes for families with children, carers, the aged, people with disabilities and people in hardship; income support policies for students and apprentices; and income support and participation policy for people of working age.

DHS was responsible for dealing with development, delivery and co-ordination of government services, development of policy on service delivery and monitoring and management of service delivery arrangements including social security.

On the day of Mr Morrison’s appointment, Ms Payne signed a letter to him, noting an arrangement for Ms Campbell to meet with him in order to brief him on the key priorities and challenges for DHS. That meeting took place on 30 December 2014 while Ms Payne was on leave.

Ms Campbell, who was also on leave at the time, travelled from Queensland to Sydney for the meeting.

Ms Campbell recalled that, at the time of the meeting with Mr Morrison, significant media attention was focused on “the integrity of welfare outlays” a phrase which she said meant “payments to [sic] which the recipient may not be eligible”. It is likely Ms Campbell had some knowledge of the DHS PAYG proposal, a deputy secretary of DHS having sought information about it on her behalf in November 2014. Ms Campbell could not remember if she was aware of whether DHS had sought or obtained policy advice or legal advice in respect of any particular proposal before she met with Mr Morrison. As noted above, there is no clear evidence that either of the 2014 DSS policy or legal advice had been communicated to DHS at this time.

Mr Morrison described the purpose and content of the discussion with Ms Campbell in the following terms:

So the purpose of that conversation, which was, I think, sought in concert both with Ms Campbell as well as Minister Payne, was of a general nature to understand how the Department of Services (sic) operated, what their systems were, to understand how they communicated benefits and dealt with the processing of payments. I remember spending quite a bit of time as we went through the Centrelink handbook and the various benefits that were there, which was explained to me, and how they work through their very difficult task.
Within that discussion, I obviously expressed interest about how they ensured the integrity of the welfare system.

And as a result of that general conversation, I asked that they advise me of ways we could do that better, which seemed to me to be consistent with my responsibilities as Minister.

This was a Budget which was a third of the Federal Budget, and I was very aware from that discussion that even the smallest changes to entitlements and programs and how things are managed can have very serious implications for taxpayers. Of course, social welfare system - the social security system is paid for by taxpayers, and the system needs to be fair to those who receive benefits as well as those who pay for them, the taxpayers. And that was a very strong view of our government and the principle of mutual obligation which was established in particular by Prime Minister Howard.

Mr Morrison said he talked with Ms Campbell about the number of social security payments and the interactions with recipients in Centrelink officers. He said that he was not aware, at the time of the meeting with Ms Campbell, that DHS was developing the PAYG proposal. Given the content of the discussion as outlined by Mr Morrison (and the notes of Charles Wann below), and the likelihood that Ms Campbell was aware of the proposal in a general sense, it is likely that it was raised, at least in broad terms.

Mr Wann, senior advisor to Mr Morrison, took notes of the meeting. Those notes contained the following references: “Policy – reliance on payment; entitlements based” and a short list of matters under the heading “most excited” which included “MyGov website – move everyone online” and “Integrity package”. It is inferred that it was Mr Morrison who was “most excited” about the integrity package.

Mr Morrison gave evidence that he considered that the brief prepared by DHS following his meeting with Ms Campbell, Executive Minute B15/125 (the Executive Minute), was responsive to his discussion with her on 30 December 2014. The content of the Executive Minute was introduced under the heading “Key Points”:

Following your meeting with [Ms Campbell], the department was asked to prepare a brief outlining the department’s current approach to protecting the integrity of the welfare system outlays and options for strengthening those arrangements, in particular those associated with fraud.

Mr Morrison explained in his oral evidence that his request for options to strengthen the integrity of the welfare system, particularly in relation to fraud, was focused on one of the most important issues that “Australians, and particularly taxpayers, had expressed great concern about”; they did not want to see the system “rorted”.

The AAO allowed for the possible overlap of the DSS responsibility for income support policy with the DHS responsibility for the development of policy on service delivery. It was in this context that Mr Morrison met with Ms Campbell and made the request to which the Executive Minute referred, and in which DHS offered to develop what would become the SIWP NPP. Under the AAO, that NPP fell within the responsibilities of both DSS and DHS. From DHS’s perspective, it was within the scope of “development of policy on service delivery” and a matter “dealt with by [DHS as] a Department of State” in accordance with the AAO.
In 2014-15, DSS managed a budget of $128.9 billion, which represented almost one third of the Commonwealth Government Budget (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 143]. At a general level, the monitoring of the accuracy of social security payments occurred through the “Random Sample Survey Programme.” A random sample of persons representing each payment type administered through the social security income support portfolio was analysed to assess whether people had been payed accurately, and determine the reasons for any debt, error or change in payment rate. This process provided benchmark data on the level of inaccurate payments made (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 126].

At the time, and subject to some exceptions, those circumstances were that a person received ordinary income payments in respect of periods greater than a fortnight, and there was reasonable predictability or regularity as to the timing and the quantum of those payments.

At 2023, Scott Britton, 23 February 2023 [p 3697: lines 33-47; p 3723: lines 22-30]; Transcript, Jason Ryman, 22 February 2023 [p 3563: lines 15-24; 41-45; p 3564: lines 1-5; 27-31].

1 Transcript, Jason Ryman, 8 November 2022 [p 722: line 37 – p 724: line 10].
2 “Payment accuracy” refers to DHS’s ability to pay the right person the right amount of money, through the right programme, at the right time, and takes into account customer and administrative error (See: Department of Human Services, 2014-15 Annual Report (Report, 25 June 2015) [p 99]).
3 Transcript, Scott Britton, 8 November 2022, [p 653: lines 19-21].
4 Exhibit 2-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 29].
5 Transcript, Scott Britton, 8 November 2022, [p 652: lines 30-47].
6 Transcript, Cameron Brown, 3 November 2022 [p 304: lines 40 – p 305: line 12].
7 Transcript, Cameron Brown, 3 November 2022 [p 305: lines 30-35].
8 Transcript, Scott Britton, 23 February 2023 [p 3690: lines 27 – 33].
A manually calculated debt was based upon a compliance officer performing calculations based on relevant information obtained for the purposes of that calculation. Whilst that process would necessarily involve the possibility of error, through factors such as deficiencies in information or human error, it must nonetheless be assumed to represent an accurate calculation of debt in the majority of cases.

Other attachments to the email included a proposed process map for the “PAYG – New Compliance Process” (Exhibit 4-6403 - CTH.3002.0006.5496 - PAYG - New Compliance Process (Proposed) v0.16), a document entitled “PAYG High Level Assumptions” (Exhibit 9003 - CTH.3002.0006.5508 - PAYG High Level Assumptions) and a spreadsheet entitled “Trusted Data – Draft De regulation” (sic) (Exhibit 4-6404 - CTH.3002.0006.5514 - Trusted Data- Draft De regulation).
Chapter 4:
2015 - Articulations of the Scheme
1 Drafting the Executive Minute

On Monday 5 January 2015, Kathryn Campbell (secretary, DHS) met with Malisa Golightly (deputy secretary, DHS) (since deceased), and asked for a brief to be prepared in response to a request from the Minister for Social Services, Scott Morrison. This brief was later titled an Executive Minute. The work that had been done on the New Policy Proposal (NPP) in 2014 was provided to Mark Withnell (general manager, Business Integrity, DHS), who developed this into the first draft of the brief.

By that Friday, Mr Withnell had sent an email attaching the first draft of the brief to Scott Britton (national manager, Customer Compliance Branch) and others within DHS. The draft referred to risks to the integrity of the welfare system, and outlined how traditional compliance reviews were a “staff intensive verification process involving obtaining information from customers and third parties.”

The brief described a limited ability to change the process “due to legislative and policy constraints” but outlined how the estimated “PAYG clean-up” savings “would more than offset the cost of all other proposals.” The draft referred to the fact “that this specific proposal requires changes to the treatment of income away from fortnightly attribution” and that changes to the PAYG clean-up process would relate “to the application of income smoothing to assess a customer’s income from employment.”

DHS communicated its intention to develop the Executive Minute to DSS at an early stage, and a meeting was proposed for 12 January 2015 between representatives of the two departments.
2 Social Services’ concerns with the proposal

On 12 January Andrew Whitecross (who acted in Paul McBride’s position as group manager, Social Policy Group, DSS until 2 February 2015) was invited to a meeting which had been arranged by Cath Halbert (group manager, Payments Policy Group, DSS). The meeting was likely an internal DSS meeting in advance of the discussion between DSS and DHS later that day, which was attended by Murray Kimber (DSS), and Mr Withnell (DHS).

After the meeting Mr Kimber sent an email to Ms Halbert, Alanna Foster and Mr Whitecross in which he expressed some uncertainty, shared by both DSS and DHS, as to the “particular focus that the Minister [Mr Morrison] may take.” Mr Kimber identified one of the options proposed by DHS in the following terms:

PAYG / income declaration data matching debt clean up thru application of streamlining of income process - consistent with idea that was being considered as part of initial 15-16 Budget thinking – does require lego change and also different way of considering how debt is established...

Mr Kimber also referred to “a Dep Secs [meeting] later today at which this will be explored.”
Mr Kimber’s indication that the PAYG proposal, at that point, “does require lego change” was a reference to DSS’s view that if the proposal were to be pursued legislative change would be required. The effect of the 2014 DSS legal advice was that, if there were to be no change to legislation, the proposal would be unlawful.

DSS’s view that legislative change was required to implement the DHS proposal presented a significant problem for the viability of the proposal.

The issue was not that a requirement for legislative change would, in and of itself, necessarily spell the end of any proposal. It may be accepted that it is generally not unusual for a Department to put forward proposals that may require policy or legislative change. The issue was that in the specific context of this particular proposal, a need for legislative change presented two obstacles to the progress of the proposal.

Firstly, at the time, the composition of the Senate meant that there was very little prospect of being able to pass contentious legislation. There was a number of measures from the previous year’s Budget that were awaiting passage through the Senate. There was a significant number of members on the crossbench, and it was necessary to have the support of “a substantial subset” of them to get more “difficult” legislation through. Legislative change which required a fundamental change to the nature of assessment of income under social security legislation was likely to be just such a “difficult” piece of legislation.

Secondly, and relatedly, there was little likelihood that the necessary legislative change could have been achieved in the timeframes anticipated for the commencement of the measure (which, it should be noted, were explicitly stated in the NPP, but not in the Executive Minute). Finn Pratt considered that it was practically impossible to achieve legislative change in the confined period between the approval of the measure for inclusion in the Budget in March 2015, and the intended commencement of the measure on 1 July 2015, for reasons including the proposal’s potential for controversy.

Those difficulties were obvious considerations for the development of any proposal.

In any event, Mr Morrison’s evidence was that:

...had [the DHS proposal] required legislation, then we may well not have pursued it. In fact, it would have been unlikely that we would, because there were many other issues that we were pursuing.
Human Services briefs Ms Payne

Although Mr Morrison made his request directly to Ms Campbell, Ms Payne was responsible for the administration of DHS’s policy development on service delivery. Ms Payne met with Ms Campbell on 13 January 2015. Ms Payne’s notes confirm that they discussed Mr Morrison’s meeting with Ms Campbell on 30 December 2014 and the prospect of an NPP which addressed his request:

- Minister Morrison – compliance;
- Focus on integrity of system + integrity of outlays;
- NPP compliance now/ options for further?

The brief to Mr Morrison was to be provided to him through Ms Payne. Ms Golightly finalised an early draft of the Morrison brief as an attachment to a brief to Ms Payne (B15/39), on 15 January 2015. Ms Golightly sent Ms Payne’s brief (including the attachment comprising the draft brief to Mr Morrison) by email to a departmental liaison officer (DLO) who was in Ms Payne’s office that evening. Ms Golightly then sent the brief to Ms Campbell and said:

[[it incorporates the changes we discussed and hopefully addresses the issues you raised. I did confirm with [Mr Withnell] that the income smoothing option (ie, the Business Integrity $1.2 billion gross savings measure) has been discussed with DSS. I also raised it with Serena [Ms Wilson] this afternoon to make sure.

Ms Payne’s brief was forwarded to Megan Lees (Ms Payne’s chief of staff), with the following note:

I understand the Secretary is very keen to get this brief in front of the Minister ASAP, to give her as much time as possible to consider it before the meeting on Tuesday.

The brief was sent to Ms Payne by email on 16 January 2015 and she later received a hard copy.

The attached draft brief to Mr Morrison (by way of Executive Minute) itself included four attachments, of which two are relevant. The first described the “current arrangements to maintain the integrity of welfare payment outlays,” and the second set out a range of suggested proposals to “strengthen the integrity of welfare payments,” for Mr Morrison’s consideration.

The existing process for ascertaining overpayment of welfare payments was described as follows:

- The traditional compliance reviews are a manual staff intensive verification process involving obtaining information from customers and third parties often going back over a number of years. The ability to change the process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the Australian Tax Office so is therefore only available on an annual basis).

... 

- However, the department cannot ignore the fact that there is a stock of payments already in the system which are likely being paid in error. When left in the system, such payments can continue for long periods of time, meaning that even small weekly overpayments can add up to significant levels of wasteful expenditure. Addressing this in a cost effective manner will require reconsideration of the policy and legislative constrains [sic] that mean income has to be determined and applied fortnightly instead using the data available from the Australian Tax Office (ATO) on an annual basis as discussed in paragraph 16 above.

There were 10 Potential Priority New Policy Proposals contained in the draft. The introductory section, Proposed Changes to Strengthen the Integrity of the Welfare System, stated:
The first option outlined below (and others) would need policy, and possibly legislative, changes to proceed. However, the estimated savings are substantial and would more than off-set the cost of all other proposals. This specific proposal requires changes to the treatment of income away from fortnightly attribution to an annualised approach. The first option was called “PAYG clean up.” It was DHS’s proposed solution to the problem of recovering “wasteful expenditure” said to have been caused by erroneous overpayments to social security recipients, and noted the prospect of the significant savings that could be recovered if policy, and possibly legislation, were able to be changed to accommodate its implementation. It was described in these terms:

Potential Priority New Policy Proposals

PAYG clean-up

a) The proposal will introduce a digital approach to interventions with customers when historical information from the ATO indicates the customer may have incorrectly declared income from employment.

b) Interventions will be undertaken in a digital environment using the myGov portal. The customer will be presented, via their online account, with the information obtained from the ATO and an assessment of their correct welfare entitlement based on this information. The assessment will use an income smoothing methodology to apportion the customer’s income over the time of employment (rather than the current cumbersome process whereby the department has to determine and apply income on a fortnightly basis). The customer will have an opportunity to update the information prior to it being applied to their Centrelink record.

c) The proposal removes the need for the department to be dependent on customer and business information as the default and instead relies on the use of data already collected by the ATO as the default unless customers want to, and are able to, provide information that varies the outcome. The digital process will enable the department to undertake a much greater number of compliance reviews.

d) The proposal will provide for a four year measure to undertake 866,857 interventions for customers at risk of undeclared or under declared income from employment. It is anticipated that this would result in an estimated $1.2 billion gross savings and debt due to returned outlays.

e) There would need to be a change of policy to enable the application of income smoothing to assess a customer’s income. It may also need change to legislation. As a result, we have been working with DSS on developing this proposal and will continue to do so.

[emphasis added]

The emphasised sub-paragraph shows that by the time Ms Golightly finalised the B15/39 brief on 15 January 2015, DSS had advised DHS that implementation of the “PAYG clean-up” proposal raised a real question about the need for legislative change. Mr Whitecross and Mr Kimber (and possibly Ms Halbert) were likely to have provided that advice to Mr Withnell on 12 January 2015 with Ms Wilson confirming it to Ms Golightly on 15 January 2015.

Ms Payne, Ms Campbell, Ms Golightly and Mr Withnell subsequently met on 20 January 2015. Ms Payne did not sign the brief with which she had been provided. Her note of the meeting referred to the “Data Matching Act,” but otherwise no record was made of the brief, or any discussion about it. It seems likely, however (for reasons which appear below) that at the meeting there was a suggestion that the draft brief to Mr Morrison be divided into two briefs, reflecting the two matters he was most interested in, fraud and participation compliance.
On the same day that the brief had been sent to Ms Payne, 16 January 2015, Serena Wilson (deputy secretary, DSS), received advice from Mr Whitecross.

Ms Wilson gave evidence that she could not recall what led to her request for advice from Mr Whitecross. Mr Whitecross gave evidence that he thought a deputy secretaries’ meeting had occurred on 16 January 2015 which involved Ms Wilson, who had “visibility of this idea” and wanted his advice.

Earlier that day, at Mr Whitecross’s request, Mark Jones (assistant director, DSS) had sent him a chain of emails which included the 2014 DSS policy advice and the 2014 DSS legal advice.

In his email to Ms Wilson, Mr Whitecross strongly advised against the DHS proposal. Mr Whitecross set out that proposal, as DSS understood it, which involved identifying and raising employment income related debts based upon data received from the ATO. He understood that the ATO data would be assumed to have been earned evenly, or “smoothed,” across a financial year to calculate a debt.

Mr Whitecross said that this was very different from the current approach, under which income support entitlements (and debts) were calculated using amounts of employment income earned in fortnightly increments, which were allocated to the fortnight in which they were actually earned. That approach was consistent with the principle that income support payments should be available for people when they were most in need of support.

Mr Whitecross informed Ms Wilson that DSS did not support the proposal, for a number of reasons. He set out DSS’s concerns in detail, including the substance of the 2014 DSS legal advice: DSS Public Law Branch had confirmed that the smoothing method proposed did “not accord with social security legislation,” which specified that employment income was assessed fortnightly. It followed that the debt amount calculated would not be supported by law.

He also pointed out that the proposal was “counter to the policy rationale for assessing employment income on a fortnightly basis, which is to ensure that income support payments are made when income support recipients are most in need.”

Other problems Mr Whitecross identified with the proposal were the dubious ability of an algorithm to accurately identify incorrectly declared income, “problematic” review rights, a lack of clarity on how much detail would be provided to recipients as to how any purported debt had been calculated, and an effective “reversal of onus” onto a recipient to provide information to enable accurate calculation of a debt.

Essentially, Mr Whitecross’s advice set out many of the problems which later emerged in the Scheme. At least for someone with Mr Whitecross’s level of experience in the social security portfolio and knowledge of the proposed process, these problems were both obvious and inevitable.
6 Ms Wilson’s discussions with Mr Pratt and Ms Golightly

Ms Wilson replied to Mr Whitecross the following Monday, 19 January 2015, saying:

Thanks - I was concerned when [Ms Golightly] described it to me. I will go back to [Ms Golightly] and let Finn [Pratt] know.35

In her evidence, Ms Wilson agreed that the legal advice described by Mr Whitecross “was unequivocal”36 and the policy advice weighed heavily against the DHS proposal.37

Ms Wilson could not recall telephoning Ms Golightly;38 however, she said that it would have been her practice to give Ms Golightly a call and let her know DSS’s concerns.39

In circumstances where Ms Wilson indicated in her email to Mr Whitecross that she would inform Ms Golightly of DSS’s position, and that it was her practice to telephone her in such circumstances, it is likely that Ms Wilson did telephone Ms Golightly as her DHS counterpart and convey the substance of DSS’s concerns with the proposal to her. It is consistent with the later communications between DSS and DHS staff at lower levels about those concerns.

It is likely that the call took place on or around 19 or 20 January 2015, between Ms Wilson’s email on 19 January expressing her intention to call Ms Golightly40 and her email on 20 January (detailed below) stating that she had “expressed her reservations to Malisa” about the proposal.41

Ms Wilson agreed that the subject of Mr Whitecross’s advice was significant and there was no reason to doubt that she conveyed it to Mr Pratt as she said she would.42 Ms Wilson recalled the nature of that conversation as follows:

Because the nature of the conversation was at a very general level, it didn’t focus on the detail, because I, clearly foolishly, didn’t at that point in time have concerns about how it would go forward. So I let him know that we were doing this work, we had had this – that this work was proceeding by DHS, that we had had this conversation, that DHS was intending to proceed. We had had this conversation, that they were seeking to scale up PAYG data-matching in a way that didn’t require legislation. And I have no record for this, so I can’t say what his response was.43

[emphasis added]

Mr Pratt did not recall receiving Mr Whitecross’s advice at the time, but after having the opportunity to peruse it briefly in oral evidence, remarked that “frankly, the advice is excellent advice.”44 Mr Pratt had no doubt that Ms Wilson would have talked to him, although he could not specifically recall the conversation.45

The Commission accepts that the conversation occurred as Ms Wilson described, probably at a high level of generality.46 However, it is more likely than not that it involved Ms Wilson conveying to Mr Pratt the fact of the proposal and DSS’s concerns with it, which would logically have included the information that DHS was seeking to advance the proposal in a way that did not require legislation.
7 Social Services communicates its concerns to Human Services

On 20 January 2015 Ms Halbert sent a draft of the Executive Minute (which had been received from DHS) to Ian Joyce, Mr Kimber and Mr Whitecross, copying Ms Wilson. Ms Wilson replied to everyone that afternoon, saying:

I am concerned about the smoothing proposal on assessing debts rather than looking fortnight by fortnight. I expressed my reservations to Malisa as I am not sure it can be done without fundamentally changing basis of eligibility away from current income which is also where we want to get to in family payments. Happy to be convinced otherwise if possible but would need very strong advice. Apparently [sic] they are going to split [sic] into two docs and Morrison most interested in hard edged fraud stuff and participation compliance each of which would [sic] be a separate brief.

Ms Wilson’s reference to the brief being split into two documents reflecting “hard edged fraud stuff and participation compliance” is consistent with a brief, B15/65, signed by Ms Golightly on 23 January 2015 (addressed below). It stated that following the meeting with Ms Payne the brief to Mr Morrison had been divided into two separate briefs. The brief to Ms Payne referred to a further brief to be prepared for Mr Morrison “in relation to the current arrangements re eligibility and participation requirements for job seeker and opportunities to strengthen these arrangements” which was to be provided to Ms Payne “shortly.”

At 4:43 pm Mr Kimber replied to Ms Wilson, Ms Halbert, Mr Joyce, Mr Whitecross and others. He attached a document he described as “our input to any responses back to DHS,” and made the following points:

In particular

\~ We are highlighting that the smoothing income proposal fundamentally changes the way SSL is constructed. It also potentially deals in the matter of retrospectivity (think Keating) if it was used for past year income etc.

\~ The rest are potentially less problematic, however, the details and impacts are scant. As a general comment the deal of increased regulatory burden for customers is evident – how the measure stacks up in terms of net savings when DHS costs and increased reg burden are factored in is not clear at this stage.

The attached document was part of the draft brief to Mr Morrison, comprising the introductory section and the “Potential Priority New Policy Proposals” section, with comments by DSS on each of the proposals in text boxes throughout the document.

Ms Wilson subsequently amended the document, and at 5:08 pm Ms Halbert sent the amended document (the DSS Dot Points) to Ms Ryan and Mr Withnell at DHS, copying in Ms Wilson, Mr Kimber, Mr Joyce, Ms Foster and others at DSS. Ms Halbert said:

As discussed, here are our comments on the compliance part of the brief. We feel particularly strongly about the clean up PAYG measure – you will see the comments.
The DSS Dot Points in respect of the PAYG measure stated:\textsuperscript{56}

- Whilst potentially attractive in terms of the level of savings and capacity to clean up a significant under of cases, the proposal fundamentally changes the assessment of income within the social security system and is not supported by current policy or legislation.
- DSS Public Law Branch confirms that the suggested calculation method does not accord with social security legislation, which specifies that employment income is assessed fortnightly.
- The legislation is framed to support the policy rationale for assessing employment income on a fortnightly basis, which ensures that income support payments are made when the recipient is most in need. This proposal would introduce an arrangement that runs counter to that rationale.
- The proposal would introduce dual mechanisms for the calculation of debt i.e. in some instance on a fortnightly basis and others on an annual basis.
- Smoothing income on an annual basis is not consistent with the policy directions DSS wishes to pursue for all payments, including family assistance, under welfare reform, taking the opportunity provided by the ATO single touch payroll development to implement this should government agree.
- The Keating High Court decision, limiting the application of legislative changes retrospectively, may impact on this proposal. For example the first year that annual smoothing could take place would be in financial 2016-17. As a result, the saving may be overstated over the forward estimates as there may be issues in applying the smoothing retrospectively to past financial years.
- It also raises issues concerning the potential for recipients not being able to effectively exercise their review rights to ensure they are not being disadvantaged.
- For example constraining review rights by suggesting that debts could only be challenged if the income support recipient provides fortnightly earnings data, shifts the responsibility entirely to the recipient to ensure their debt was correctly calculated, and does not take into account administrative error.
- Annual data matching will by its nature lead to the raising of large debts rather than identifying non-compliance earlier. Larger debts are more difficult to recover and would result in a significant increase in the debt base.
- The introduction of the ATO Single Touch Payroll initiative will ultimately provide DHS with access to accurate, real time employment income details on a fortnightly basis. This would provide:
  
  a) a ready basis to calculate debts on a fortnightly basis, in accordance with current legislation and policy intent and without the issues involved in changing to a smoothed approach.
  
  b) assist in more accurately assessing entitlements in the first instance, reducing the risk of debts occurring.

On 20 January 2015 Ms Ryan forwarded the DSS Dot Points to Mr Withnell and Ms Golightly.\textsuperscript{57}
8 Human Services responds to Social Services’ concerns

While it is not clear whether DSS had, up to this point, communicated its 2014 legal or policy advice about income averaging to DHS, or simply identified that the proposal raised the question of legislative change, the fact that the DSS Public Law Branch had given advice, and the substance of that advice, was communicated to DHS by Ms Halbert’s email of 20 January 2015 and the attached DSS Dot Points, which also conveyed the policy problems DSS had identified.

It appears that Mr Withnell sought assistance from DHS officers in responding to the DSS Dot Points, and sent Ms Halbert’s email with the DSS Dot Points to Mr Britton and Mark Brown “for [their] consideration.” His email said, “DO NOT FORWARD.”

Despite that firm direction, it appears that Mr Britton provided it to Jason Ryman (director, Customer Compliance Branch, DHS) in some form because later that day Mr Ryman sent Mr Britton an email with the subject line “DSS Response Dot Points” which contained a response in respect of “PAYG Clean-Up.”

Before sending his email to Mr Britton, Mr Ryman had consulted with members of his team, including Ms Collins, asking, “Hand on heart time – any exposure?” Ms Collins answered in the negative.

Her evidence was that Mr Ryman’s dot points response email was prepared for Mr Withnell “to use in discussions with DSS and the Department of Finance as part of the costing process;” she recalled Mr Ryman informing her and a colleague of that.

Mr Ryman’s email to Mr Britton opened with the words “as requested,” and gave the following response to the DSS Dot Points:

- The information received by DHS for PAYG matches include the period the individual was employed as well as the total gross amount paid during the period. The proposal will provide this information to the recipient and advise them of what action they need to undertake.
- The recipient will have an opportunity to provide the fortnightly breakdown of this income so DHS can assess any possible debts on a fortnightly basis. This will be clear in both the initial notice to the recipient as well as when they commence a digital process.
- If the recipient does not respond to a legal notice or chooses not to provide a fortnightly breakdown of income, it is proposed that the income would be ‘smoothed’ over the period of employment reported by the employer to the Australian Taxation Office. This would involve equal attribution of the income to each fortnight within the employment period.
- This approach is consistent with current Debt Policy (no legislation existing which states how a debt is to be calculated).
- DHS currently applies a similar process for Data Matching Program (DMP) and PAYG compliance interventions where it is unable to obtain the required information from the employer. This can occur when the employer can’t be identified (for example ceased operations), or the employer does not respond or provide a suitable response.
- The proposed process does not change a recipients [sic] right of review and is consistent with Guideline 6 of the Guidelines on Data Matching in Australian Government Administration as it provides the recipient an opportunity to respond before administrative action is undertaken.
The introduction of Single Touch Payroll will provide DHS with more timely employment income details. The full benefits of this are not likely to be realised until 2018 or 2019 and will not address historical non-compliance. As this [sic] estimated savings from this proposal are largely debt, Single Touch Payroll would not impact estimated savings.

The proposal provides for an automated assessment of debt. This will reduce administrative error.

The introduction of Single Touch Payroll will provide DHS with more timely employment income details. The full benefits of this are not likely to be realised until 2018 or 2019 and will not address historical non-compliance. As this [sic] estimated savings from this proposal are largely debt, Single Touch Payroll would not impact estimated savings.

Excerpt [sic] from Debt Policy Advice a couple of years ago - we are not aware of any changes but will follow up to be sure.

Generally when calculating a debt due to employment income we would attempt to gain fortnightly employment information to allow direct alignment with the applicable Centrelink fortnight however, no legislation exists which states how a debt is to be calculated. A debt is purely the difference between what the customer was paid and what they were entitled to.

By the time he prepared that response, Mr Ryman had received the DHS legal advice about aspects of the PAYG process, but it was not concerned with income averaging.

Mr Britton emailed Mr Ryman’s dot points to Mr Withnell, noting the email was “in response to the points raised by DSS,” and adding a further dot point which stated:

There would be no requirement to seek and/or apply retrospective legislative change based on the above.

The email also set out sections 72 and 196 of the Social Security (Administration) Act 1999 (Cth)(the Administration Act).

As Mr Ryman, Mr Britton and Mr Withnell all accepted in oral evidence, Mr Ryman and Mr Britton’s response to the DSS Dot Points did not provide any sensible response to the legal advice in the DSS Dot Points. Neither Mr Britton nor Mr Ryman is a lawyer and they were in no position to advise on the legal issues the DSS Dot Points raised. Nor did Mr Britton’s or Mr Ryman’s emails address the fundamental policy issue of the incompatibility between income averaging and the policy rationale of social security legislation identified in the DSS Dot Points.

Mr Withnell does not appear to have further communicated Mr Britton’s (and Mr Ryman’s) response to the DSS Dot Points. Instead, on 21 January 2015 he sent an email to Ms Golightly which attached a “Revised new draft brief to Minister Morrison” and said:

I have attached the new draft brief. ... I have done very little to Att A but substantial revision of the covering brief and Att B. The proposals are essentially the same but I have repackaged them ... . I have also in places tried to address or raise some of the issues raised by DSS - but not exhaustively.

Mr Withnell’s revisions did not change the sentence in the PAYG proposal which included an express reference to “income smoothing”:

“[t]he assessment will use an income smoothing methodology to apportion the customer’s income over the time of employment (rather than the current cumbersome process whereby the department has to determine and apply income on a fortnightly basis).”

On 22 January 2015, one of Mr Ryman’s team emailed him regarding a proposed request for legal advice on the PAYG proposal, “as per our discussions yesterday.” The proposed request for advice, which effectively sought legal advice on the legality of the use of income averaging in the PAYG proposal, described the process, emphasised that DHS was “already using income smoothing as a last resort in current processes,” and said that the proposed process would use “verification of income documents” outlined in the Guide to Social Security Law. It asked:

Are you aware of any impediments to applying income smoothed information to a customer record in the process proposed above?
However, the request for advice was not sent at this time. Mr Ryman replied to the email later that afternoon:

Just hold on to this at the moment. I think we are very safe based on the policy advice we have to date.

The assumption that income averaging was a policy, not a legal issue, persisted.

On 23 January 2015 Mr Britton sent a further email to Mr Withnell quoting section 1068-G8 of the Administration Act, the same provision that Mr Ryman had relied on in the June 2014 Minute, and stating his (misconceived) view that “it supports our proposition of averaging earning over the period of employment.”

8.1 Mr Withnell’s understanding

Mr Withnell’s oral evidence to the Commission was that he understood the message that had been communicated to him by Ms Halbert and the DSS advice at all times (including at the time of the ERC meeting on 25 March 2015). He accepted that in the DSS Dot Points, DSS was emphatically expressing a position that “the use of income smoothing to assess a customer’s social security entitlements was both unlawful and contrary to policy.”

8.2 Mr Britton’s and Mr Ryman’s understanding

Both Mr Britton and Mr Ryman gave evidence they had been unaware of the DSS legal and policy advice prior to giving evidence to the Commission.

Mr Ryman said he did not see the DSS Dot Points in January 2015; and he first saw them when he was given the document to prepare for his evidence before the Commission. According to Mr Ryman, his “DSS Response Dot Points” email, which he sent to Mr Britton, was not an attempt to respond to DSS’s criticisms in the DSS Dot Points, or any other document. He had prepared the DSS Response Dot Points email because he was requested by Mr Britton to “provide some dot points for DSS.”

Mr Ryman said the subject line of the email, “DSS Response Dot Points,” was a reference to his having prepared them for Mr Britton to respond to DSS about something. He could not recall, exactly, the purpose, but thought that Mr Britton may have asked him something along the lines of “Can you prepare some dot points of why we think we can do this.” His dot points were fairly general and went to “why we think we can do this, why we think this is a doable thing.” He acknowledged that both the DSS Dot Points document and the DSS Response Dot Points email used the words “PAYG Clean-up,” but maintained that he did not know where he got those words from when drafting the email.

There is no direct evidence that Mr Ryman saw the DSS Dot Points, but the evidence supports an inference that Mr Britton communicated them to him in some manner and sought Mr Ryman’s assistance in preparing a response to them.

The subject line of Mr Ryman’s email to Mr Britton, on the same day that Mr Withnell forwarded the DSS Dot Points to Mr Britton is one factor supporting that inference. The email said that because income information reported to the ATO would be “smoothed,” the process “would involve equal attribution of the income to each fortnight within the employment period;” which looks very much like an attempt to address the legal advice in the DSS Dot Points that income “smoothing” was inconsistent with the requirement that social security entitlement be calculated on the basis of fortnightly income. The assertions in the email about the consistency of the proposal with social security policy also support an inference that Mr Ryman understood and was trying to respond to the policy advice conveyed in the DSS Dot Points.
The inference that Mr Ryman was responding to the DSS Dot Points is not inconsistent with Ms Collins’s evidence about what he told her: that the response was for the purpose of assisting Mr Withnell with discussions with the Department of Finance, but also for the purpose of communications with DSS. The fact that Mr Ryman sent his email after consulting his team members and asking them in relation to “MP/TC – review my comments. Hand on heart time – any exposure?” suggests that he was conscious that he was dealing with a serious subject.

The Commission concludes Mr Ryman was aware of the DSS Dot Points, so it follows that he was aware that DSS had advised that the proposal was inconsistent with social security legislation and policy.

There is no doubt that Mr Britton received and read the DSS Dot Points which Mr Withnell emailed to him; he sought Mr Ryman’s assistance with a response to them, and provided that response to Mr Withnell. In evidence, he accepted that the response did not address the DSS point that:

the suggested calculation method does not accord with social security legislation, which specifies that employment income is assessed fortnightly.

Mr Britton was asked by Senior Counsel Assisting about that statement, but he could not recall what he had made of it at the time. However, he said, he had not actually seen any legal advice from DSS, and the advice he was consistently given was that there was no legal issue with what they were proposing. That may have had some connection with the fact that, by the time the DSS Dot Points arrived, Mr Ryman had received the DHS legal advice already described, but it did not include advice on the lawfulness of income averaging.

Also, in response to questions about this DSS dot point, Mr Britton explained that the results of averaging were “applied on a fortnightly basis” which he seems to have regarded as meeting the requirement that income be assessed fortnightly. Also, he said, he perceived that averaging in the proposed process would be used in “exceptional circumstances,” and would be “applied as we had historically applied it.” That gave him the confidence to add the final dot point in his email to Mr Withnell which stated “There would be no requirement to seek and/or apply retrospective legislative change based on the above.” At the time, his perception was that the internal advice was that the proposal was lawful; DHS already applied averaging in particular circumstances; and he had not seen an “alternate” piece of advice to displace his general view that “we were on solid ground.”
Mr Morrison’s “welfare cop” approach to the Social Services portfolio has been discussed previously. In an interview on 21 January 2015, Mr Morrison highlighted the relationship between the Social Services portfolio and the government’s objective to provide a balanced budget.\(^77\)

That interview caught the attention of Ms Golightly, who sent Ms Campbell a link to it.\(^69\) Ms Campbell gave evidence that she recalled the interview and the language used by Mr Morrison.\(^69\) She agreed that the language was significant to her, and to Ms Golightly, because it indicated the direction Mr Morrison wanted to take in his leadership of the portfolio.\(^100\) It is unremarkable that the senior executives of both DHS and DSS would keep abreast of such knowledge.

On Wednesday 21 and Thursday 22 January 2015, Mr Pratt and Ms Wilson met with Mr Morrison. In the Wednesday meeting, Mr Morrison asked for information on DHS compliance activity, including data matching.\(^101\) Mr Pratt’s notes of the Thursday meeting include the phrases, “Welfare cop” and “Integrity package by Budget.”\(^110\)

Neither Mr Pratt nor Ms Wilson raised problems DSS had identified with the PAYG proposal, but that was not unreasonable. The PAYG proposal was still in fairly early stages of development, DSS had communicated their views on the problems with it, and DHS had not yet responded to those concerns. The precise substance and content of the meeting with Mr Morrison is unclear, but it can be accepted that it was a high-level meeting at which the “integrity package” may have been discussed, but not necessarily the PAYG proposal.

By 22 January 2015 Mr Morrison had clearly communicated to the public, the secretaries of DSS and DHS, and deputy secretaries Wilson and Golightly his intention to achieve budget savings through his portfolio. He had also conveyed the approach he intended to take to the portfolio generally, including through the language of a “crackdown” on welfare cheats, “rorting” the system, and the concept of himself as a “welfare cop.”

In doing so, Mr Morrison contributed to a certain atmosphere in which any proposals responsive to his request would be developed. The context was apt to encourage the development of proposals which reflected the approach and tone of his powerful language.
10 The 22 January meeting

Also on 22 January 2015 Ms Halbert and Mr Whitecross held a teleconference with Ms Rule and Mr Withnell of DHS. Mr Whitecross recalled the purpose of the meeting was to discuss the DSS Dot Points that Ms Halbert had sent to Ms Ryan and Mr Withnell late on Tuesday, 20 January 2015, after Mr Withnell had met with Ms Payne.

During their meeting, Mr Whitecross advised Ms Rule and Mr Withnell that:

a) income averaging could be used to identify potential discrepancies where an individual received social security payments for the entire period to which the PAYG data related;

b) however, income averaging could not be used to determine an overpayment in a given fortnight; and

c) small discrepancies identified using income averaging were unlikely to reflect misreporting of income and were not cost effective to investigate; they could not, therefore, be included in estimates of savings.

Mr Whitecross recalled that Mr Withnell appeared to find DSS’s feedback “frustrating.” Mr Withnell and Ms Rule indicated that “DHS did not have sufficient resources to collect and evaluate information as advised, and that the estimated savings of $1.2 billion would not be achieved if individuals with smaller discrepancies or who were not receiving social security payments for the entire PAYG data period were excluded.” Mr Withnell seemed to be particularly displeased at the suggestion that the estimated savings would not be realised; Mr Whitecross formed the impression that “there was quite an attachment at more senior levels to that level of savings.” It seemed to Mr Whitecross that the $1.2 billion estimate was not a figure “that had come out of a methodology, but that the number itself was a goal of the process.”

Mr Whitecross discussed the proposal with Mr Kimber after the meeting. They identified a possible difficulty involved in making the required legislative change retrospective, so Mr Whitecross drafted an email to Ms Halbert (copied to Mr Kimber) who contacted the DSS Public Law Branch to obtain a tentative opinion.
11 Updates to the brief to Mr Morrison

On 23 January 2015 Ms Wilson took leave until 9 February 2015. Ms Halbert acted in her role as deputy secretary. Ms Golightly sought a further response from DSS on the PAYG proposal that day. She sent an email to Ms Halbert, copied to Ms Rule and Mr Withnell, thanking her for the time spent the previous day with Ms Rule and Mr Withnell on the “fraud and compliance options” for Mr Morrison’s draft brief, and explaining that some revisions had been made to it:

… to try and explain more clearly what the proposals involve and also to address the comments you had provided the other day.

Further feedback would be appreciated, Ms Golightly said, and Ms Rule and Mr Withnell would be happy to “talk through” the changes. Ms Halbert was welcome to telephone her.112

The attachment to that email was a “Revised new draft brief to Minister Morrison”113 in which Mr Withnell had changed the wording of the PAYG proposal114 to remove any reference to “smoothing,” “averaging,” “apportioning” or the need for legislative change. It did, however, describe the PAYG proposal as introducing:

a new approach to reconciling information declared to us by the customer with information from the ATO that indicates the customer may have incorrectly declared income from employment.

It seems that, DSS having raised legal and policy issues with income averaging, DHS’s solution was simply to remove reference to income averaging in the brief. After participating in the meeting with Mr Whitecross about the issues raised by the DSS Dot Points, including the problem with income averaging, Mr Withnell sent an email to Ms Golightly that afternoon (22 January 2015).115 The email said “I have made some amendments to try and tighten up and make clearer.” It attached a version of the draft brief, with references to averaging (or smoothing) removed, and no reference to the need for legislative change.116 It was this brief that was subsequently amended by Ms Golightly, and sent to Ms Halbert on 23 January.

The draft brief also made the points that the proposed process “treats the ATO data as a trusted source and removes the need for the department to be dependent on customer and business information,” and still provided the recipient “the opportunity to provide evidence to correct the calculation of entitlement should they choose to.” The use of a digital process, and the reliance on the ATO data “as the primary evidence rather than just a trigger” would enable DHS to undertake a much greater number of compliance reviews than was currently the case.

Ms Halbert sent Ms Golightly’s email and the attached brief to Mr Morrison, Mr Whitecross, Mr Kimber, and others at DSS, effectively requesting their advice and input.117

Mr Whitecross gave evidence that neither he nor Mr Kimber thought that removing the reference to “smoothing” was a substantive change to the proposal; rather, it was merely a change to the way the proposal was presented.118 The following exchange occurred in his oral evidence:

COMMISSIONER: So you were not fooled by the changed language and presumably were placed on alert by the reference to the ATO data being primary?

MR WHITECROSS: Well, the ATO data was intrinsically annual - was annual data. So the use of the language “smoothing” - there was no real smoothing. It was just data collected over an annual period and then applied fortnightly. So - I mean, so it wasn’t like - yes, anyway, I never thought “smoothing” was a very good description of what was actually being proposed. But we didn’t think that the change in language was a change in the proposal.119

Later on 23 January 2015, Mr Kimber replied with a draft covering email for Ms Halbert to send to Ms Golightly,120 and an amended version of the draft brief to Mr Morrison.121 His suggested email to Ms Golightly said:
Hi Malisa

Thank you for the opportunity to provide comments on the briefing. We have made some suggestions in the attached. These are highlighted. They are at a high level and reflect the cautionary note re some of the proposals in particular that we feel needs to be added.

Some of the issues that we would expect that will need to be explored if the PAYG proposal is further developed are:

- Leaving aside the potential fundamental shift that this proposal has in assess income for social security purposes, it may not potentially might not be possible to amend the legislation that has a retrospective nature and application to authorise a different methodology for calculating overpayments and debts.

- Even if it were possible, we think that the numbers may be overstated because any strategy would need to be refined to avoid ‘false positives. This refinement would be necessary because the methodology is inherently not precise. There is a significant risk in initiating a reassessment process if the reporting has been done correctly and the apparent overpayment is the result of weaknesses in the shortcut methodology for calculating the overpayment.

In the attached draft brief, Mr Kimber added general observations with respect to all of the proposals that they would need to be assessed as to their consistency with policy. In respect of the PAYG proposal, Mr Kimber said (and highlighted):

It is important to note that this proposal fundamentally changes the assessment of income within the social security system and is not supported by current policy or legislation. Any change to legislation to give effect to such arrangements may not stand scrutiny including any provisions that are introduced that have a retrospective nature and application.

Later that afternoon, Mr Whitecross forwarded Mr Kimber’s email to Ms Halbert with further amendments to the attachment. He informed her that he had “pared back the edits in the brief and the covering words [of Mr Kimber’s draft email for Ms Halbert to Ms Golightly] to cover the main points.”

In respect of the PAYG proposal, Mr Whitecross replaced Mr Kimber’s draft with something much less strongly worded:

This approach would involve legislative change and questions may arise about whether such changes can be made retrospectively.

His evidence was that he made the changes at Ms Halbert’s direction. She had telephoned him to say that Ms Golightly had “expressed to her concerns about the strength of DSS’s comments in relation to the PAYG Data Clean Up proposal,” and “in particular the criticisms of the proposed method of calculating overpayments.” As a result, Ms Halbert wanted to “tone down” Mr Kimber’s comments to DHS, and considered it sufficient to note that legislative change was required, because this would require DHS to work with DSS if the proposal were to be pursued.

Mr Whitecross said Ms Halbert indicated that Ms Golightly wanted the language to convey that DHS would still work with DSS on the proposal. That point caused a disagreement between them because he considered a firmer response was merited. He explained the point of difference:

It’s poor form to create the impression that there is more latitude in relation to an option than there really is. I think she felt that we needed to have more regard to the relationship. I took it as an instruction to make changes, that then I had to consider what - what those changes would need to look like.

Mr Whitecross still recalled this conversation with Ms Halbert years later. In an email he sent on 24 February 2020, he again referred to his being told (by Ms Halbert) that Ms Golightly had particular concerns about the “specific language criticising the method of calculation,” and that she “wanted only a reference to the requirement for policy and legislative consideration.” Ms Halbert said she did not
recall the conversation with Mr Whitecross, or asking him to soften the language, but did say that they frequently had “different styles of writing.”

The Commission agrees with Mr Whitecross’s observation that changing the language of DSS’s comments in this way would have created the impression that there was more “latitude” than there really was. DSS’s position was that the proposed use of income averaging under the PAYG proposal was unlawful. Not only would legislative change be required to implement the proposal, such change would involve a fundamental shift in the assessment of income within the social security system. It was important to emphasise that, in clear language, so that there could be no doubt about such an important concern.

Ms Golightly’s concerns, expressed to Ms Halbert and conveyed to Mr Whitecross, about the criticisms of the proposed method of calculating overpayments are particularly noteworthy. This sensitivity would prove highly significant to the eventual amendment to the wording of the PAYG proposal in the NPP, and to DHS’s response to scrutiny and criticism of the compliance review process over the years to come.

At 2:59 pm on 23 January 2015, Catherine Dalton (acting director, Payment Integrity and Debt Strategy, Social Security Performance Analysis, DSS), sent the draft brief to Anne Pulford (principal legal officer, DSS) and another government lawyer in the DSS Public Law Branch, requesting “advice on any legal implications/impediments, what action would need to be undertaken to resolve legal issues as well as some indication of the lead time required to obtain legislative change.” The version of the draft brief that was attached to that email was the one that had Mr Kimber’s stronger comments (on the PAYG proposal) about the “[fundamental] changes [to] the assessment of income.”

In the days that followed, the DSS Public Law Branch worked on Ms Dalton’s request for advice. Ms Pulford forwarded Ms Dalton’s request to Ms Wong, a lawyer in the Branch, on 28 January 2015. Ms Wong gave advice in respect of all of the proposals in the brief on 4 February 2015. In respect of the PAYG proposal, she advised:

7. PAYG clean up Comment: Please refer to the advice by Simon Jordan dated 18 December 2014 in relation to this issue.

That was a reference to the 2014 DSS legal advice.

By late afternoon on Friday, 23 January 2015, Ms Halbert had collated the DSS advice. She further softened the language in the introduction to the brief:

“Some of the options listed in Attachment A would need legislative and/or policy changes. The department has consulted DSS on the proposals. DSS has advised that some of the proposals may have significant implications for fundamental impacts on social security policy and legislation. It could be expected that some proposals will come under significant scrutiny as not being consistent with the overall beneficial nature of Social Security law. The proposals will also need to be assessed as to their consistency with the policy directions being pursued for all payments under welfare reform, and the Government’s commitment to reduce regulatory burden.

[Formatting in the original].

Ms Halbert replied to Ms Golightly, advising her that DSS had “made some suggestions” in the attachment and that those suggestions were “at a high level and reflect the cautionary note re some of the proposals in particular that we feel needs to be added.” She also said:

Some of the issues that we would expect that will need to be explored if the PAYG proposal is further developed are:

- As noted in the edits, it may not be possible to amend the legislation with a retrospective application to authorise a different methodology for calculating overpayments and debts under the PAYG clean-up. This will need to be further explored, if the Minister wants to pursue this option.
Significantly, one of the tracked amendments that DSS had made to the draft brief was the insertion of the following sentence in the description of the PAYG proposal:

This approach would involve legislative change and questions may arise about whether such changes can be made retrospectively. 140

Ms Golightly replied to Ms Halbert: “Many thanks Cath for getting back so quickly. Will make the changes you suggest. Certainly happy to keep working on any leg issues and costings etc.” 141

Ms Golightly forwarded Ms Halbert’s email to Mr Withnell for comment, describing some of the changes to the brief as “a little frustrating.” 142 Mr Withnell replied, stating: 143

In relation to the legislative change – I got hold of Murray but he had left for the day so couldn’t give me specifics on which provision in the legislation – his only comment is that it relates to attribution of income. This suggests maybe Section 1073 but he had no idea really. I left a message for Andrew Whitecross which he didn’t return but I have just tried him again and he has just got back to me – his advice is that they believe that several provisions in Chapter 3, General Provisions Relating to Payability and Rates would need to be changed and possibly others. I think if just change their ‘would’ to ‘may’ and go with that? Or we indicate that DSS have advised that they believe that legislative change would be required. We will be unable to get a clear resolution tonight and we have flagged potential legislative or policy impacts elsewhere. The other key thing is that the measure could still be done using the existing arrangements – just at a higher cost...

Ms Golightly replied to Mr Withnell’s email and agreed with his suggestions. 144 With respect to his statement that the process could be done under existing arrangements, but at a higher cost, Ms Golightly wrote that “…we might keep that up our sleeve for the moment in case we need it as a contingency later on.”

Mr Withnell’s evidence was that he knew, at the time of receiving the DSS Dot Points, that DSS was emphatically expressing a position that “the use of income smoothing to assess a customer’s social security entitlements was both unlawful and contrary to policy.” 145 What the email exchange between him and Ms Golightly seems to indicate is that although they were both aware of the substance of DSS’s legal advice, they did not know which particular legislative provisions would require amendment.

It was later that evening that Mr Britton sent the email to Mr Withnell quoting section 1068-G8 of the Administration Act and stating his view that “it supports our proposition of averaging earning over the period of employment.” 146
12 Ms Golightly signs the brief

On 22 January 2015, Ms Golightly had sent Ms Campbell two emails, each attaching a version of the revised brief to Ms Payne. Ms Campbell replied to the second email, providing feedback on the brief and correcting a typographical error.

On 23 January, Ms Golightly signed a revised brief to Ms Payne, version B15/65, which attached the draft Executive Minute to Mr Morrison. The “key points” noted that following the meeting with Ms Payne in Sydney earlier in the week, the brief to Mr Morrison was to be revised and divided into two parts. The description of the DHS proposal noted the need for policy change but Ms Golightly had not added any reference to legislative change. It is possible, however, that she signed it before receiving the suggested amendments from Ms Halbert, which, she had indicated to Ms Halbert, DHS would “add to the brief.”

Ms Payne signed the brief on 30 January 2015, making notations and corrections. A further meeting was planned with Ms Campbell and Ms Golightly for 2 February 2015.
13 The 2 February discussion

Prior to the meeting with Ms Payne on 2 February 2015, on 28 January Ms Golightly again amended the draft brief to Mr Morrison and emailed a copy to Mr Withnell. Ms Golightly reinstated the reference to the need for legislative change in respect of the PAYG proposal, but did not include any express reference to income averaging.

On 2 February 2015 a telephone conference took place between Ms Payne and Ms Golightly, and probably Ms Campbell; it was her first day back from leave and she did not recall attending but Ms Payne’s notes of the meeting include the word “Secretary.” Ms Payne’s notes also contain an entry, “cracking down’ – what can we do [without] having to legislate.”

It is inferred that Ms Payne’s reference to “cracking down” was a general reference to the approach to be taken to the social services portfolio. That approach had most recently been publicly expressed by Mr Morrison during the radio interview on 21 January 2015. It is also inferred that Ms Payne’s question “what can we do [without] having to legislate” referred to difficulties in passing legislation through the Senate (discussed above).

The results of the discussion on 2 February 2015 appear in a revised brief which Ms Golightly drafted and sent to Ms Campbell, noting that she had “[taken] up Minister Payne’s feedback as much as possible.” Ms Campbell instructed an assistant to print the draft brief for her.

There were no material changes to the wording of the PAYG proposal in this version of the brief, as compared to the version Ms Golightly had created on 28 January. It too noted, with respect to the PAYG proposal:

DSS has also advised that legislative change would be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so.

Given that Ms Golightly had already re-inserted that statement into the draft brief prior to the meeting with Ms Payne, the logical inference is that she did so pursuant to the express request of DSS given on 23 January 2015 to insert the statement, which she had indicated to both Ms Halbert and Mr Withnell she intended to do.
14 The finalisation of the brief to Mr Morrison

Paul McBride (group manager, Social Policy Group, DSS) returned from leave on 2 February 2015 and Mr Whitecross returned to his substantive position.160

Mr McBride was “brought up to speed”161 on the events in his absence: the DSS legal advice and the interactions between DSS and DHS in respect of the DHS proposal, including the legal and policy concerns expressed by DSS about the use of income averaging. Mr McBride gave evidence that he understood that if DHS were to use income averaging in the calculation of a debt it would require legislative change.162 He also understood that DHS was required to calculate income on a fortnightly basis and believed that DHS did not use income averaging for that purpose.163

Ms Wilson returned from leave on 9 February 2015.

Ms Payne reviewed and amended further drafts of the Executive Minute up to 11 February 2015.164 The Executive Minute was finalised as version “B15/125” on 12 February 2015, when it was signed by Ms Golightly and sent to Ms Lees, to be sent from Ms Payne’s office to Mr Morrison’s office.165 Ms Campbell had reviewed drafts of the brief and received the final version.166 The Executive Minute was addressed to Mr Morrison for action and Ms Payne for information.

The Executive Minute described the DHS proposal in a series of dot points. Those dot points:167

- retained the original features of the DHS proposal:

  - the application of PAYG data from 2010-13 to 866,857 customers via an online process
  - the transfer of the obligation on the recipient to ensure the record is correct by providing evidence to support their claim
  - the use of the ATO data as the trusted source/primary evidence not just the trigger for a compliance review
  - the estimated gross savings of $1.2 billion (to be agreed with DSS)

- recognised that the application of the PAYG data to calculate fortnightly income and hence entitlement could not be relied on to produce accurate results by observing that:

  It [the use of the PAYG data] still provides a customer the opportunity to provide evidence to correct the calculation of entitlement should they choose to…168

  conveyed the effect of the 2014 DSS legal advice with the words “DSS has also advised that legislative change would also be needed to implement this initiative”

- concluded with the statement, “As a result, we have been working with DSS on developing this proposal and will continue to do so.”

Irrespective of some variations to the language used in the drafts of the Executive Minute, from the version of the Executive Minute that Mr Withnell provided his colleagues on 9 January 2015,169 every iteration of the Executive Minute (that is, all draft versions and the final version provided to Mr Morrison) described the following as being features of the proposed measure:

- that the recipient would be presented with “information obtained from the ATO” and “an assessment of their correct welfare entitlement based on this information” and

- that the recipient would “have an opportunity to update the information prior to it being applied to their Centrelink record.”

Though some iterations of the Executive Minute (including the final version provided to Mr Morrison) did not make express reference to the practice of income averaging (or any synonym of the term), the
Commission’s view is that these common features, in and of themselves, contemplated the use of income averaging based on ATO-supplied information to determine overpayment of social security entitlement.

In this respect, the Commission notes the following:

- The “information obtained from the ATO” upon which the assessment was based was PAYG data, which was almost invariably provided for periods considerably longer than a fortnight and commonly was annualised. Recipients’ welfare entitlements were determined on a fortnightly basis. Consequently, to conduct an assessment of a recipient’s “welfare entitlement” based only upon PAYG data amounts necessarily required averaging of those amounts.

- The assertion that, “The customer will have an opportunity to update the information prior to it being applied to their Centrelink record” [emphasis added] clearly contemplated that, if customers did not take that “opportunity to update the information” the averaged ATO information would be applied to their record and

- The reference to ATO information being “applied to [a customer’s] Centrelink record” is a reference to the ATO information being used to determine overpayment of social security benefits. It is difficult to conceive of any other meaning that could be attached to those words, particularly in circumstances where the whole purpose of the measure was to assess the entitlements of welfare recipients with a view to determining overpayments.

In addition to the language used in the Executive Minute, other language included in descriptions of the Scheme evinces DHS’s intention (through the senior officers responsible for the proposal) to use averaging to determine an overpayment of social security entitlement. In particular:

- following the draft version of the Executive Minute distributed in mid-January 2015, every version of the Executive Minute (including the final version) referred to ATO data as either being “the default,” “the trusted source” or “the primary evidence rather than just a trigger”

- between 9 January 2015 and 23 January 2015, draft iterations of the Executive Minute explained that the assessment would “use an income smoothing methodology to apportion the customer’s income over the time of employment.”

There is another reason why the language of the Executive Minute suggested that income averaging continued to be integral to the proposal. As Ms Campbell accepted in evidence, the number of interventions that could be achieved, and consequently, the amount of savings that could be realised under the measure, could only occur with the level of automation that averaging allowed.

The Executive Minute specifically noted that without this level of automation, the cost of the proposal would be much greater as it would rely on significant additional staff numbers to conduct compliance reviews:

[The DHS proposal] can be undertaken under current policy settings and would require over 1000 staff for three years to achieve the savings. However if the proposed policy changes outlined in this brief were available, the reduction in required staff is considerable. The required staff would reduce to approximately 600 staff for the first two years and 60 in the third year. Savings in Operation XXXX2 could be used to offset the costs of both initiatives as well as other potential initiatives being developed to strengthen customer compliance...

The proposal would not have been the same without averaging.

The Commission concludes that the proposal in the Executive Minute contemplated the use of income averaging of PAYG data as the sole basis for determining social security entitlement, and it was for this reason that legislative change was required.

However, on the face of the document itself, the use of income averaging in the proposed process, and the fact of its being the reason for the need for legislative change, was not immediately obvious. Whether any given individual reading the Executive Minute understood that the proposed process contemplated the use of income averaging, or that this was the reason for the need for legislative change, depended on what else they knew. Those officers who had been involved in its drafting – Ms Campbell, Ms Golightly and Mr Withnell – knew that income averaging was intended.
Mr Morrison signed the Executive Minute on Friday 20 February 2015. He retained pages 12 to 17 inclusive, being “Attachment B” to the document, which set out the current arrangements with respect to DHS’s management of the “integrity” of the welfare system. In evidence, Mr Morrison said this was to “refer and to read more carefully after an initial read. And the normal practice is that that would then be usually destroyed.”

Two passages of the signed Executive Minute were highlighted; both referred to the need for legislative change. One highlighted passage was contained in the general section referring to all the proposals, and the other was the reference specifically pertaining to the PAYG proposal, which stated “DSS has also advised that legislative change would also be needed to implement this initiative.” However, it is unclear whether it was Mr Morrison who applied the highlighting to those passages.

Mr Morrison had marked the Executive Minute to instruct DHS to pursue the PAYG proposal (which was by now called “Increased use of Employment Income matching”) and to indicate that:

- he agreed to the development of a package of NPPs (including the PAYG proposal).
- he agreed to DHS continuing to work with DSS to progress “consideration of additional policy and legislative changes in relation to payment integrity.”
- he noted the current arrangements.

Mr Morrison gave the following evidence about the significance of the information contained in the Executive Minute:

MR GREGGERY: Now, in your statement - and correct me if I’m wrong - I understand what you say is that this document was the first principal source of information about the proposal that ultimately became the Budget Measure, strengthening the - that’s right?

THE HON. SCOTT MORRISON MP: Yes.

MR GREGGERY: And so what’s contained within it reflects -

THE HON. SCOTT MORRISON MP: Where it was at that time.

MR GREGGERY: The high-water mark of your knowledge at this particular point.

THE HON. SCOTT MORRISON MP: The only knowledge.

Mr Morrison said that at the time he signed the Executive Minute, he understood that legislative change would be needed to implement the PAYG proposal.

In evidence, Mr Morrison was taken to the description of DHS’s current arrangements, and in particular the following sentence:

The ability to change the [compliance review] process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments, even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the ATO so is therefore only available on an annual basis).

Mr Morrison said that he understood that sentence had flagged the legislative need to calculate fortnightly income in contrast to the annual nature of PAYG data. He knew that entitlement for income support payments according to the legislation was worked out on the basis of actual fortnightly income.
Mr Morrison accepted it was obvious to him as Minister for Social Services that:

...many social security recipients do not earn a stable or constant income and any employment they obtain may be casual, part time, seasonal or intermittent and may not continue throughout the year.\textsuperscript{185}

He understood there would sometimes be very good reasons for discrepancies between PAYG data and the total amount a recipient had declared in relation to their fortnightly income, and that the existence of a discrepancy did not necessarily equate to a debt.\textsuperscript{186} Mr Morrison said he understood that might be the case for persons who did not have stable or consistent income.\textsuperscript{187} He also gave evidence that he understood the concept of income averaging was involved in the DHS proposal.\textsuperscript{188}

15.1 The signed Executive Minute is given to Human Services

The copy of the Executive Minute signed by Mr Morrison, but not including pages 12 to 17, was returned to DHS on Monday, 23 February 2015.

On 24 February 2015 at 9:42 am, Mr Withnell emailed Mr Britton, Mr Brown, Rhonda Morris and Jan Bailey,\textsuperscript{189} and attached a copy of pages 1 to 11 of the Executive Minute.\textsuperscript{190}

What was \textit{not} contained in the first eleven pages of the Executive Minute was a paragraph contained on page 14, one of the pages that Mr Morrison retained, which stated:

The traditional compliance reviews are a manual staff intensive verification process involving obtaining information from customers and third parties often going back over a number of years. The \textbf{ability to change the process is limited due to legislative and policy constraints on the need to apply income fortnightly to determine overpayments even if they occurred over several months or years and even if income data is only available on an annual basis (for example, income is determined annually by the ATO so is therefore only available on an annual basis).} \textsuperscript{191}

The version of the Executive Minute which was circulated at this time, comprising only the first eleven pages of the document, did not contain this information.

However, this information was contained in earlier versions of the Executive Minute, including the version entitled “Revised draft brief to Minister Morrison 3 Feb,”\textsuperscript{191} which was provided, along with the signed Executive Minute, to various DHS officers.

By 26 February 2015 each of Mr Withnell, Mr Britton and Mr Ryman had been provided by email with a copy of the first 11 pages of the signed Executive Minute, and the 3 February version of the Executive Minute.\textsuperscript{192}

15.2 Mr Britton and Mr Ryman’s understanding of the Executive Minute

On 26 February 2015, at 8:37 am, Mr Britton sent an email to “Directors” stating:

We have now received authority to submit an NPP to include the measures we have been discussing.

It needs to be fully costed and supported by stakeholders by COB Monday which is unprecedented so I may need you to do work at short notice. I will clear my diary for the next few days and Leanne will re-arrange meetings...\textsuperscript{193}
At 9:24 am on the same day, Mr Withnell forwarded Mr Britton a copy of the version of the draft brief to Mr Morrison which was current as at 3 February 2015. Shortly after that, Mr Britton emailed both the 3 February 2015 version of the draft brief and a copy of the first eleven pages of the Executive Minute signed by Mr Morrison on to Mr Ryman.

Mr Ryman could not recall reading the Executive Minute. However, in circumstances where: he was asked to draft an NPP, which would necessarily be based on the description of the proposal that had been approved by the minister; the email providing the Executive Minute which contained that description was addressed to him alone; and he accepted in evidence that, despite being unable to recall, he would, “in the normal course,” have read it; the Commission is satisfied that Mr Ryman read the Executive Minute.

When asked about the PAYG proposal (contained in the “Increased use of Employment Income Matching” part of the Executive Minute), Mr Ryman said he could not see “where it talks about income averaging specifically.” He accepted that the use of income averaging in the proposed process could be implied.

Mr Ryman was taken to the part of the PAYG proposal section that stated:

There may need to be a change of policy to enable the use of the ATO data in this way. DSS has also advised that legislative change would also be needed to implement this initiative. As a result, we have been working with DSS on developing this proposal and will continue to do so.

The following exchange occurred:

MR SCOTT: Do you agree with me that aligns with the position that had been communicated by DSS in January 2015 that the proposal to use income averaging to calculate and raise debts would not be consistent with legislation?

MR RYMAN: Yes. It provides a very brief summary of that, yes.

It is apparent that the words of the Executive Minute stating “DSS has also advised that legislative change would also be needed to implement this initiative” is a reference to the legal issue with the proposal that the DSS Dot Points had conveyed to him. This is because there were no other issues, of which Mr Britton or Mr Ryman would have been aware at that time, which would give rise to a need for legislative change, other than those outlined in the DSS Dot Points. It may be inferred that Mr Ryman understood this when he read the Executive Minute and understood that DSS had identified a legal impediment to what was proposed in it.

Mr Britton was taken to the same part of the document. His evidence was that he did not have a recollection of making a connection, at the time, between the words “DSS has also advised that legislative change would also be needed to implement this initiative” reference, and the effect of the DSS legal advice communicated in the DSS Dot Points. He accepted in evidence that it was reasonable to make the link.
16 The meeting between Ms Golightly and Ms Wilson

On 25 February 2015 Ms Golightly telephoned Ms Wilson. They discussed the fact that Mr Morrison had signed the Executive Minute.206

Ms Golightly sent Ms Wilson an email on 26 February 2015 in which she noted their discussion about the Executive Minute the previous day.207 Ms Golightly also referred to a meeting between Mr McBride and Mr Withnell which was scheduled for Friday, 27 February 2015. Mr McBride gave evidence that the purpose of that meeting was, in part, to resolve the question of how the proposal would be implemented in view of Mr Morrison’s support and the need for legislative change.208

In her email to Ms Wilson, Ms Golightly said:

Minister Morrison has supported all three overarching recommendations (basically, that he agrees to the development of a package of measures, that we continue to work with you on the policy and legislation aspects of the package and that he notes the current arrangements in place to protect the integrity of welfare payments).

...

We will need to progress the relevant NPP(s) quickly to fit in with the Portfolio Budget Submission timetable. Once Mark [Withnell] and Paul [McBride] and the others have met and worked up a substantive draft, maybe it would be a good idea for us to get together to discuss the NPP to make sure we have covered off any issues?

Ms Wilson recalled meeting Ms Golightly in her office in “about late February 2015 or very early March” with “at least one other DHS officer” whom she could not identify.209 Ms Wilson believed that the meeting occurred after Mr Kimber sent an email on 26 February 2015 copied to Ms Wilson, Mr McBride and Ms Halbert which informed the recipients that:

we have just received advice from DHS that Minister Morrison has indicated that he wants a number of potential proposal in the attached briefing re compliance to be brought fwd in his portfolio PBS.210

Ms Wilson’s recollection of the meeting is set out in her supplementary statement:

• Ms Golightly advised her that Mr Morrison had “expressed an interest” in developing the “PAYG proposal” as part of the 2015-16 Budget but that it was “difficult to pass legislation through the Senate at the time” as the Government required the support of at least six non-coalition Senators. Ms Golightly said that Mr Morrison “wanted to implement the measure in a way that did not require legislative change.”

• Ms Wilson “reiterated [her] earlier reservations with respect to income smoothing” and that it was important that there be opportunities for customers to engage and clarify what their earnings might have been.

• Towards the end of the discussion Ms Wilson “…agreed to consider what might be possible.”211

In evidence, Ms Wilson said the meeting with Ms Golightly and the person from DHS took “around 30 to 40 minutes” and Ms Golightly told her that “[Mr] Morrison wished to pursue a number of options but in particular the PAYG proposal.” Ms Wilson gave evidence as follows:

MS WILSON: Well, according to this of [sic] conversation, as I recall, it was about can we find a way to do more [sic] this in a way that doesn’t transgress or undermine the DSS concerns, that increases the activity in terms of PAYG income-matching as the basis for exploring whether there’s an overpayment or a debt. Is there something possible here? And so what I undertook to do was, having pressed back that income smoothing or income averaging could not be part of a design and that there ought to be sufficient opportunities for the record to be corrected.
MR GREGGERY: What record?

MS WILSON: The PAYG data to be explained.

MR GREGGERY: By whom?

MS WILSON: Between the customer and Human Services, potentially with the assistance of other information that might be available at that time.

MR GREGGERY: It assumes that there has been some suggestion that the PAYG data has been applied to income fortnights, which requires explanation.

MS WILSON: That’s not how I read it at the time.212

Ms Wilson said that after the meeting she called Mr Kimber and discussed “the ways in which the employment income needs to be assessed” and the 2014 DSS policy advice and the 2014 DSS legal advice.213

In Ms Wilson’s supplementary statement she said that she then called Ms Golightly and told her:

...that the ‘bottom line’ was that there could be no income smoothing and that I was concerned about the design of the proposal as customers needed to have an opportunity to comment on employment income. I requested that the New Policy Proposal include the words that there would be no change in the way PAYG income and debt was calculated for social security purposes or words to that effect.214

[emphasis added]

In evidence, Ms Wilson said she believed that Ms Golightly “…understood the concerns” that she had expressed and accepted her position.215
17 The 27 February meeting and amendments to the New Policy Proposal

Mr Kimber, much later, gave an account of a meeting he attended with Mr McBride, Mr Withnell and Mr Britton the following day, 27 February 2015. Mr Ryman was also included in the meeting invitation; however, it is unclear whether or not he actually attended. He had no recollection of doing so.216 The day prior, Mr Ryman had emailed Mr Britton the most recent draft of the NPP to be submitted to Cabinet for the measure;217 it explicitly acknowledged that income averaging was to be used in the proposed process.

None of the attendees had any recollection of the meeting. The only evidence of the discussion that took place is a January 2017 email sent by Mr Kimber to Emma-Kate McGuirk, Ms Halbert, Ms Wilson and Mr McBride setting out his recollection of what occurred.218 He said:

From memory Mark Withnell, Scott Britton, Murray Kimber and Paul McBride attended.

At the 27 February meeting DHS outlined a revised proposals [sic] that would use newly available data sources and analytical tools; such that the new approach will not change how income is assessed or overpayments calculated.

It had the following key components:

- DHS would target identified discrepancies based on analysis of the Pay as You Go (PAYG) file obtained from the Australian Taxation Office compared with the reported earnings data that DHS holds.
- Where a significant discrepancy is detected this information will be presented to the recipient. This would not be a debt notice but rather the recipient would be afforded the opportunity to explain, correct, update or challenge that information.
- Any subsequent debt raised would take into account the information provided by the recipient.
- DHS also advised that there would be no change to how income is assessed or overpayments calculated as part of this proposal.

The period of time between the meeting and Mr Kimber’s email raises a question about the extent to which his memory is accurate, and there is also the question of whether his recollection was affected by the wording of the NPP which was developed following the meeting on 27 February 2015, from which he refreshed his memory in January 2017.

The Commission takes the view, however, that Mr Kimber’s email account is likely to be reliable. He had been closely involved in the development of the DSS position up to that point in time and had a strong working knowledge of the issues with the DHS proposal. The statement attributed to “DHS” that “there would be no change to how income is assessed or overpayments calculated as part of this proposal” corresponded with what Ms Wilson had, the previous day, asked Ms Golightly to include in the NPP. And, following the meeting, on the same day, Mr Ryman emailed Mr Britton,219 attaching a copy of a further draft of the NPP which added words to the effect of what Ms Wilson had requested.220

Mr Ryman’s email stated “Here is the latest version. I would like to ensure it is going in the right direction so we don’t get to the end of the day and have to start again.” In contrast to the draft of the NPP that Mr Ryman had emailed to Mr Britton just the day prior,221 the updated draft removed the reference to the use of income averaging. The amendment appeared as follows:222
Mr Ryman’s evidence was that he made the amendments at the direction of either Mr Withnell or Mr Britton. He could not specifically recall why he was directed to make those updates. Mr Britton could not recall the circumstances that led to this amendment.

The same day, Mr Britton emailed Mr Withnell, attaching the draft NPP that had been sent to him by Mr Ryman, with minor amendments.

There was, plainly, a connection between Ms Wilson’s instruction to Ms Golightly to include in the NPP words to the effect that there would be no change in the way PAYG income and debt was calculated, and the events of 27 February 2015; the representations of no change made by Mr Withnell and Mr Britton to DSS at the 27 February 2015 meeting and the amendments to the NPP made by Mr Ryman.

Despite the wording change, the senior officers in DHS responsible for the proposal (Ms Campbell, Ms Golightly and Mr Withnell) understood that income averaging would form part of the NPP if it were approved by the ERC. That view is consistent with the following:

- that at all times from 1 July 2015 the scheme did in fact involve the “fortnightly attribution of the income advised by the ATO” to determine social security entitlement
- that the projected number of interventions or customers remained unchanged (886,857)
- that the financial years to which the proposal related remained unchanged (2010 to 2013)
- that the projected savings as between the Executive Minute and the NPP were similar
- that the concept of presenting PAYG data to a recipient in an online account and requiring them to confirm or update the information remained unchanged
- that the transfer of the obligation to the customer to ensure the record was correct remained unchanged
- that there is no evidence that DHS and DSS worked together to “progress consideration of additional policy and legislative changes in relation to payment integrity” as outlined in the Executive Minute
- that there is no evidence that Ms Campbell, Ms Golightly or Mr Withnell proposed or required any change in substance to the DHS proposal after Mr Morrison signed the Executive Minute, and that there is no record of either Mr Morrison or Ms Payne being provided with any confirmation that the DHS and DSS worked together to “progress consideration of additional policy and legislative changes in relation to payment integrity” as outlined in the Executive Minute.

The evidence before the Commission clearly showed that DHS did not abandon its intended use of income averaging in the PAYG proposal after the conversation between Ms Wilson and Ms Golightly. The changes made were to the wording of the NPP document, not to the substance of the proposal itself.
Mr Ryman’s evidence was that at the time he made the change to the NPP he did not believe that the new PAYG process represented a fundamental change to how income was assessed or overpayments calculated. That was because, he said:

At the time, obviously income was still being assessed on a fortnightly basis. Debts were calculated on the difference between the fortnightly amount and the amount declared to the Agency. The - the way by which the Agency determined that fortnightly amount using averaging was still the same, but on a lot higher scale.

... So I'm saying that, you know, the way by which we determine the fortnightly amount is to use the period of employment and to calculate it to a fortnightly amount. And so that was - that was happening at that point. 229

Mr Britton subscribed to a similar view:

But, again, the thinking throughout this - and until - until things started to unravel, the genuine thinking was, as I very simply explained earlier, around, well, it was being applied on a fortnightly basis. Our understanding was now we obviously recognise and accept that it was wrong, but it was - and certainly my - my genuine reflection and recollection was it was being applied fortnightly. So even though this was a fair way in, and this is moving towards the development and introduction of the OCI as the system, I do genuinely believe that there was a view formed, now we know wrongly, but at the time around averaging being acceptable in the circumstances. 230
The misleading effect of the New Policy Proposal

The description of the PAYG proposal in the NPP that was submitted to the Expenditure Review Committee (ERC) on 25 March 2015 contained no material change from the draft NPP amended on 27 February 2015. The version that was submitted to the ERC omitted any explicit reference to the use of income averaging and contained the representation that “there would be no change to how income is assessed or overpayments calculated as part of this proposal.”

The use of income averaging to determine social security entitlement remained, in substance, a feature of the proposal. It was therefore necessary that any NPP considered by Cabinet disclose:

- the nature of the averaging component and
- the legal impediments to the implementation of that component (being the need for legislative change).

For the reasons articulated below, the Commission finds that the language used in the NPP that was submitted to the ERC on 25 March 2015 had the effect of obscuring the fact that, in substance, the PAYG proposal contemplated a process involving the use of income averaging.

While the NPP referred to the involvement of ATO information, the language used in the NPP did not explain how that information would be used, nor did it disclose the intended use of income averaging to determine social security entitlement.

Additionally, the NPP did not make any reference to any legal impediments associated with the use of income averaging. References to the need for legislative change of the kind that had appeared in the Executive Minute were not included in any iteration of the NPP.

The representation that “there would be no change to how income is assessed or overpayments calculated as part of this proposal” was liable to mislead Cabinet because it disguised a significant aspect of the nature of the proposed measure, and its associated legal and policy impediments. As Ms Campbell accepted in her evidence, the no change representation was untrue. Income averaging, in the absence of further information to confirm that the income was earned regularly, could not be relied on to indicate what a recipient had earned in any given fortnight. Nonetheless, where the recipient had not responded or had not provided acceptable information, the calculation of social security entitlement would be based on an average of their income, not on their actual fortnightly income. This was undoubtedly a departure from how “income [was] assessed or overpayments calculated.”

Absent from the NPP was any identification of the method for which, it was claimed, there had been no change. The assertion that there would be no change to the method of assessing income and calculating overpayments was meaningless and would not have disclosed to a reader, even one who was aware that averaging had previously been used in some limited circumstances to calculate social security entitlement, that the proposal contemplated the use of averaging on a regular basis.

The misleading nature of the statement was not confined to what it failed to disclose. It had the effect of positively insinuating to the reader that, because there was to be no change to the way income was assessed or overpayments calculated, the implementation of the proposal would be unlikely to encounter legal or policy barriers.

The NPP considered by the ERC on 25 March 2015 did not disclose to Cabinet the averaging component of the proposal, or the legal and policy impediments to its implementation, or that DSS advice had indicated that the implementation of the measure in the way intended could not lawfully occur without legislative change. At the time of the ERC, the use of income averaging was contemplated as part of the proposal, and DSS had advised that the proposed use of averaging to determine social security entitlement was
unlawful. Consequently, those members of Cabinet who had no knowledge of the proposal’s development were likely to be misled as to the true nature of the proposed measure and the legal and policy impediments associated with it.

18.1 Mr Ryman’s and Mr Britton’s knowledge

When asked about removing any reference to averaging in the draft NPP, Mr Ryman stated:

I certainly haven’t done that to mislead anyone. I have been operating under instructions, is my belief, because every other version I had had been part of – back from 2014 through, had included it.233

Mr Britton also denied suggestions of any collusion with DSS, or deception of DSS, with respect to the removal of the reference to averaging.234 Any suggestion of such “intent” was not what he observed or felt at the time.235 It was:

Certainly not part of any conversation I had was, okay, we are going to exclude this so that it doesn’t go forward. Like, that – that wasn’t part of anything I was having a conversation about.236

The Commission is unable to conclude that either Mr Ryman or Mr Britton intended to mislead Cabinet when they were involved in the removal of the reference to income averaging from the NPP and the insertion of the “no change” statement. There seems a strong possibility that they actually believed their own rhetoric: that they thought DSS had not understood what was obvious to them - that if the results of income averaging were applied in each fortnight, that was the assessment of income on a fortnightly basis; that the Social Security Act recognised averaging, so it must be all right; and that it had happened in the past (although, Mr Britton said, as an “exceptions process” where the recipient agreed237), so this was not a change; and the hope was (despite the analysis to date) that everyone would go online, so it would hardly happen at all. From their perspective, more senior officers of DHS were pressing ahead with this proposal, which might have given them the idea that those senior officers agreed with their view and disagreed with the view of DSS.

There is no doubt that Cabinet should have been given the details of what the proposal involved and what DSS’s advice about it had been; but Mr Ryman and Mr Britton were not at the top of this chain. There were a deputy secretary, Ms Golightly, and their immediate superior, Mr Withnell, making decisions on the NPP, and Mr Ryman and Mr Britton were not party to all the interactions and communications that were occurring. They tended to attend to what they were told needed doing, and were not given to deep reflection; to be fair, they were not given much time for it. The Commission cannot be satisfied that they were alive to the implications of the omissions from the NPP.

18.2 Mr Withnell’s knowledge

Mr Withnell is in a different position. He knew of and understood the 2014 DSS legal advice to the effect that the use of averaging to determine social security entitlement in the way proposed was unlawful, including at the time of the ERC meeting on 25 March 2015.238 He had an intimate understanding of the language used to describe the measure in the NPP and he was heavily involved in the document’s development. Occasions where Mr Withnell either provided, or was provided with, draft versions of the NPP included 27 February 2015,239 3 March 2015,240 4 March 2015,241 7 March 2015,242 11 March 2015243 and 18 March 2015.244 All of these draft versions omitted any reference to the averaging component to the proposal and any mention of the legal impediments to that component’s implementation.

In evidence Mr Withnell admitted that “... if there was still contemplation of using the ATO data as a basis for calculating overpayments, [versions of the NPP after 27 February 2015] would in large part be misleading.”245 However, he did not accept that the NPP that had been put to Cabinet was “apt to mislead.”246 He maintained that, to his knowledge, the use of averaging to determine social security benefits was not a component of the measure at the time of the ERC meeting. Indeed, he had never
become aware that it was a feature of the Scheme.\textsuperscript{247} Although averaging had been contemplated by DHS early in the development of the proposal, on his version, it had been abandoned before the Scheme’s implementation.

Mr Withnell gave conflicting evidence about when this supposed abandonment occurred. Initially, his evidence was to the effect that, by the time of the Executive Minute being sent to Mr Morrison, any notion that averaging would be involved in the Scheme had been abandoned.\textsuperscript{248} However, in later evidence, Mr Withnell said that Mr Ryman’s 27 February 2015 draft of the NPP represented “…the point at which [DHS] moved away from the use of income averaging… to a different approach.”

The Commission does not accept either that income averaging was abandoned (it so clearly was not) or that Mr Withnell thought it was. He could not have been under such a fundamental misunderstanding as to the true nature of the Scheme. He held a senior position within DHS and had heavy involvement in the development of the proposal to Cabinet. His contribution included drafting and amending parts of the Executive Minute and NPP. He received regular instruction from Ms Golightly, gave instruction to Mr Britton and Mr Ryman and was a central figure in negotiations between DHS and DSS. In his evidence, Mr Britton said that throughout the development of the proposal, he had engaged in numerous discussions with Mr Withnell regarding the averaging component of the measure and how it would be applied.\textsuperscript{249} At no point had Mr Withnell done “anything to indicate that he did not understand that [averaging to calculate and raise debts] was part of the process.”\textsuperscript{250}

Throughout the Scheme’s development, Mr Withnell understood that the use of income averaging was a feature of the proposal.\textsuperscript{251} He did a variety of things after the ERC meeting which are only consistent with his knowing of the Scheme’s averaging component, including the following:

- On 27 April 2015, Mr Withnell settled a template letter to recipients under the Scheme’s pilot program.\textsuperscript{252} The material that Mr Withnell reviewed described an “apportionment methodology” where, upon being presented with “PAYG match data,” recipients had the option to either “provide updated information” or to “allow the data to be applied as received from the Australian Taxation Office”

- In early July 2015, Mr Withnell settled a draft brief to Ms Campbell in relation to the Pilot program and its progress.\textsuperscript{253} That draft clearly described how, as part of the Pilot, customers were having debts raised against them on the basis of “matched PAYG data”

- In March 2016, Mr Withnell was involved in briefings to Ms Harfield in relation to the 2015/16 budget measures.\textsuperscript{254} Mr Withnell (together with Mr Britton and Mr Ryman) told Ms Harfield that the Scheme involved “a customer being presented with the ATO data and invited to correct it, and if they didn’t, the data would be applied” in “an averaged form”\textsuperscript{255}

- In January 2017, Mr Withnell was involved in preparing a summary of historical budget measures relating to “employment income matching” for the then Social Services Minister, Mr Porter. Mr Withnell provided a draft of that summary to Ms Golightly on 5 January 2017.\textsuperscript{256} Part of the summary clearly described a “method of averaging” used under the Scheme to raise debts,\textsuperscript{257} and

- On 12 January 2017, Mr Withnell sent an email to Ms Golightly (and others) where he described the EIM (Employment Income Matching) process under the Scheme.\textsuperscript{258} Mr Withnell stated, “The averaging of employment income over the period worked (or advised by the ATO) is only used by Compliance and as a last resort if other information is unavailable eg customer fails to engage.”

It is clear from the documents and emails he wrote or sent that Mr Withnell had a clear understanding of the averaging component of the Scheme.

Given his role, Mr Withnell could not have been under some illusion that the averaging aspect had been abandoned in the NPP proposal development stage, when it so plainly was not; and it is obvious that he knew the Scheme was implemented with averaging as a key component. It can be inferred that he knew the use of averaging to determine social security entitlement was intended to be a feature of the proposal at the time of the Cabinet’s consideration of the NPP on 25 March 2015.
Mr Withnell did not misunderstand the true nature of the proposal and was not under some misapprehension that DHS had abandoned the concept of averaging. He knew that the NPP did not describe the averaging component to the proposal, or the legal impediments to it and he knew that it was likely to mislead Cabinet by those omissions. He was a party to that process.

Ultimately, in the Commission’s view, based upon (a) Mr Withnell’s knowledge that averaging was intended to be a feature of the proposal, (b) his awareness of the DSS advice and (c) his awareness of the language used in the NPP, Mr Withnell knew that the description of the measure in the NPP would be apt to mislead Cabinet as to the true nature of the Scheme. There is no evidence of Mr Withnell taking any steps to ensure that Cabinet was properly informed of the averaging component of the measure. To the contrary, Mr Withnell was a central figure in formulating the language used in the NPP ultimately considered by the ERC on 25 March 2015. The Commission’s view is that Mr Withnell engaged in deliberate conduct designed to mislead Cabinet.

18.3 Ms Golightly’s knowledge

The Commission is reliant on oral and documentary evidence in making findings with respect to Ms Golightly, and recognises the problems inherent in making findings against someone who cannot challenge the evidence.

Ms Golightly was the deputy secretary with responsibility for the PAYG proposal. She was engaged in the process of drafting, settling and signing the Executive Minute, and the development of the NPP. She was involved in meetings and conversations with Ms Payne, Ms Campbell, and Mr Withnell, and DSS officers including Ms Wilson and Ms Halbert.

Ms Golightly was aware from an early stage that the use of income averaging in the manner described in the proposal would require legislative and policy change. She was also aware that the final NPP that went to Cabinet contained no mention of averaging.

Ms Golightly had been asked by Ms Campbell to prepare the brief for Mr Morrison.259 Ms Golightly was subsequently heavily involved in the settling, signing, and distribution of the numerous versions of the Executive Minute,260 some, but not all, of which contained references to the use of income averaging (or “smoothing”) in the PAYG proposal, and the indication that the proposal would require policy change, and may require legislative change.

Ms Golightly was informed of DSS’s concerns about the proposal through conversations with Ms Wilson and Ms Halbert, and through the DSS Dot Points.261 She knew that DSS’s advice was that the use of income smoothing to assess a customer’s social security entitlements was both unlawful and contrary to policy. She was heavily involved in the drafting, settling and distribution of the NPP, which did not indicate that legislative change would be required for the measure.262

Ms Wilson had told Ms Golightly on 26 February 2015 that the “bottom line” was that the proposal could not involve income smoothing, and that was clearly supported by the DSS legal and policy advice, of which Ms Golightly was aware. But there is no evidence that Ms Golightly did anything to remove averaging from the proposal, which of course would have had significant consequences for the ability to automate the process, and achieve the same number of reviews.

The Commission inferences that the statement that the proposal did not change how “income was assessed or overpayments calculated” was made at the 27 February 2015 meeting in consequence of a direction from Ms Golightly. Corresponding amendments were made to the then draft of the NPP, on 27 February 2015, shortly after the meeting between DHS and DSS, which added those words and removed any reference to the use of averaging. Ms Golightly was responsible for the development of the NPP, and was a senior public servant. She was heavily involved in clearing the draft NPP, and engaging with Mr Withnell in developing the NPP. The Commission concludes that she was aware that, as presented to Cabinet, it was misleading.
19 The New Policy Proposal arrives at Social Services

By late on Monday 2 March 2015, DSS officers had obtained a copy of the draft NPP. The evidence produced to the Commission does not identify how or when the NPP was provided to DSS. An email from Anthony Barford (policy manager, DSS) to Ms Dalton at 4:17 pm referred to the NPP and (presumably) a telephone conversation with a lawyer from the DSS Public Law Branch, which referred to the NPP.263

While the draft NPP did not contain any explicit mention of averaging, it was clear to those with an understanding of the proposal that averaging would be involved in the measure. The NPP referred to the same number of interventions that would be conducted as did the Executive Minute, and also asserted that the same amount of savings would be achieved. The vast scale of those interventions was only achievable with the level of automation that averaging permitted.264

Mr Barford confirmed that irrespective of the language used in the NPP, he understood that income averaging was intended to be used to raise debts265 and that those around him had the same understanding.266 His emails to his colleagues confirm his contemporaneous understanding that averaging was being used.267 Mr Barford could not identify any basis on which anyone in DSS would not have understood the NPP involved income averaging. He explained that the NPP progressed to the ERC without reference to the need for legislative change by reference to the dynamics of DSS:

So, at some point, given all the information that has been provided and is visible in these documents, a decision would have been made by the senior executive to progress this. A decision clearly - in the signed document that we have seen by the Minister to support a particular proposal, you go away and find a way to make it work.268

He added that he understood no NPP could proceed without approval from either the secretary or deputy secretary.269

Mr Barford’s understanding of the position is reflected in an email request he made for legal advice, and actions taken as a result of that advice. In the email, which he drafted for Ms Dalton to send to the DSS Public Law Branch, he said in relation to the SIWP NPP:

…[W]e anticipate significant legislative change to ring it into effect, DSS however has concerns about potentially reversing the onus of prof [sic] and responsibility onto customers and any implications that may have for the purpose and intent of social security law.270

Ms Dalton duly sent an email to the DSS Public Law Branch saying:

Urgent advice is required as the following strategies have been cleared by Minister Morrison for DHS to take forward as an NPP. The checklist in DHS’s draft NPP states that no legislation is required. However, we are concerned that the strategies may require legislative change (perhaps significant) and are seeking your advice as to the possible extent.271

Mr Barford then sent an email to Ms Dalton in which he set out his comments on the draft NPP.272 In his email, Mr Barford identified what he considered to be a number of flaws in the NPP, which included the reversal of legal obligation and the Due Diligence Checklist which said no legislation was required, in circumstances where DSS was waiting for legal advice.

Mr Hertzberg of the DSS Legal Branch provided his legal advice in response to Ms Dalton’s request on 4 March 2015,273 sending it to her, Mr Kimber, other Public Law Branch lawyers and Mr Barford. He referred to the earlier legal advice of Ms Wong of 4 February 2015 which in turn referred to the legal advice of Simon Jordan dated 18 December 2014 (the 2014 DSS legal advice). Mr Hertzberg advised:
I have also discussed some of the other issues with [Ms] Wong and note her earlier advice, from 4 February, on some of the issues is still applicable. In general, I think it is clear that at least some legislative amendments will be required for the NPP and that there should be a Bill for this. The extent of the amendments will depend upon the detail of what is proposed.

In addition to his reference to Ms Wong’s advice, Mr Hertzberg identified a number of legal issues with the proposal: whether PAYG data would be obtained from the ATO as part of the current cycle under the Data-matching Program (Assistance and Tax) Act 1990; the need to consider the secrecy provisions in the taxation legislation and particularly s. 355B in the Schedule to Taxation Administration Act 1953; whether social security law accommodated the role of PAYG data as “primary evidence” of income; and, in that regard, whether new rules needed to be inserted in respect of the employment income and ordinary income tests in Par 3.10 of the Social Security Act.

On Wednesday 4 March 2015 Ms Wilson, Ms Halbert, Mr McBride and others at DSS received a copy of the NPPs developed by DHS for the DSS portfolio budget submission. The NPPs included a draft of the Strengthening the Integrity of Welfare Payments measure.
20 Social Services’ knowledge of the continued proposal for the use of averaging

Later that day Mr Kimber sent an email to Mr McBride and others which attached DSS costing information for the NPP and a legal advice prepared earlier that afternoon by a DSS lawyer. Mr Kimber said in his email:

Hi Paul – for info – the following has been provided to DHS thru our Budget area.

Details of our costing for DHS Compliance NPP (PAYG component) and also based on preliminary legal advice we believe that there may be some lego changes required – this will depend on the specific of implementation. We are suggesting that this be noted in the NPP so that govt is then not surprised if that it becomes a requirement.

[errors in original]

Mr McBride replied to Mr Kimber’s email and agreed that Mr Kimber’s suggestion to note the prospect of legislative change in the NPP made sense.

That sequence reflects a recognition that, notwithstanding the representations made by DHS at the 27 February 2015 meeting and the consequent changes in the wording to the NPP, legislative change might still be required in relation to the proposed measure, including the PAYG element.

However, Mr Kimber’s suggestion to note the prospect of legislative change in the NPP went no further. While Mr McBride told Mr Kimber that his suggestion made sense, there is no evidence that he, Mr McBride, conveyed that suggestion to Ms Wilson.

20.1 Mr McBride’s knowledge

Mr McBride’s evidence was that he believed that the proposal to use of averaging had been abandoned. He relied on the fact that the drafts of the NPP which he saw did not state that averaging would be involved in the proposed measure, which in his view meant that DHS could not use averaging in implementing the measure because it had not been authorised by Cabinet. Mr McBride did not ask how the projected savings, which mirrored those in the Executive Minute, could be achieved without resort to income averaging.

He also did not ask how the measure would be implemented despite his evidence that it was the responsibility of DSS to ensure that DHS delivered the savings which were to be specified in the NPP.

Mr McBride said that DHS had explained that the predicted number of interventions would be achieved through the use of new technology and analytics tools. He was, however, unable to give anything but the most general description of what he says he was told about these things. There is, however, no basis to conclude that he knew at the time the NPP went to Cabinet that, in fact, there had been no change to the substance of the proposed measure, and that it still contemplated income averaging.

20.2 Ms Wilson’s knowledge

Ms Wilson’s experience of Ms Golightly was that “She was a very forceful character. She didn’t enjoy being questioned and made that pretty clear.” Ms Wilson had a “very unhappy relationship with her” when Ms Golightly was her direct manager, but did not make a formal complaint because that was “a very fraught area in the Australian Public Service.” However, Ms Wilson said she did not perceive Ms Golightly as
a “deliberately untruthful person,” and had no reason not to believe that Ms Golightly would act in accordance with the advice that DSS, including Ms Wilson, had given to DHS and to Ms Golightly herself. Ms Wilson’s evidence was that she believed that DHS had agreed to change the proposal so that income averaging would no longer form part of it.

Ms Wilson said that she recalled checking the NPP before it was lodged with the Portfolio Budget Submission and saw that it said words to the effect that there would be no change to the way in which income was assessed or overpayments calculated. She said in her evidence that, in hindsight, she wished she “had asked more questions.”

The Commission accepts that Ms Wilson’s conversation with Ms Golightly took place as she said: that she did not know that DHS would proceed using income averaging, and that she was not involved in any misleading of Cabinet. But the Commission also concludes that Ms Wilson refrained from enquiring too closely into how the measure was to be implemented without the use of income averaging, or returning to the question later, because DHS was resistant to DSS advice and the minister wanted the proposal to proceed. Her later conduct points to that conclusion.

Although she may have hoped for the best when she negotiated with Ms Golightly in 2015, it must have been obvious to Ms Wilson from information she received about the Scheme’s development in 2016 (detailed later) that income averaging was involved, but she did not react. Her response, when the fact of averaging’s use became public knowledge in early 2017 (also detailed later), was simply not consistent with that of someone taken by surprise and feeling betrayed. It was the reaction of someone who felt she had some degree of responsibility for what occurred and was anxious to obscure what had really happened.
21  The Expenditure Review Committee meeting

The ERC consideration of the NPP occurred in the afternoon and evening of 25 March 2015. It was attended by Ms Payne, Ms Lees, Ms Campbell, Mr Morrison and Mr Pratt. The final content of the NPP considered by the ERC did not materially differ from the draft first received and approved by Ms Payne on 3 March 2015.

Mr Morrison accepted that there was very little change between the description of the DHS proposal in the Executive Minute and the PAYG measure in the NPP. Mr Morrison identified two points which distinguished the Executive Minute from the NPP; firstly the addition of the sentence, “The new approach will not change how income is assessed or overpayments calculated” and secondly, the assertion that legislative change was not required. Mr Morrison accepted that the process described in the Executive Minute and the NPP was the same in relation to the use of income averaging and the way overpayments were calculated.

21.1 Knowledge of Ms Campbell

Ms Campbell was copied to emails to Ms Payne’s office attaching drafts of the NPP on 3 March 2015. It is more likely than not that Ms Campbell reviewed at least one of those drafts because she both had access to the Secretary’s Office email address to which they were sent and was routinely provided print outs of documents emailed to her or her office. She kept a close eye on the development of matters relevant to the upcoming Budget consideration of DHS. The drafts of the NPP contained the words, “The new approach will not change how income is assessed or overpayments calculated” and did not refer explicitly to smoothing or averaging, or refer to the need for legislative change.

On 11 March 2015 at 12:35 pm, Emily Canning emailed Ms Campbell and Ms Golightly with an update on the Portfolio Budget Submission and DHS NPPs indicating that comments had been provided on the Strengthening the Integrity of Welfare Payments NPP. Ms Campbell responded at 3:35 pm thanking Ms Canning.

At 8:06 pm, Ms Canning emailed Ms Campbell to confirm that the DHS NPPs had been signed off by Ms Payne and were now with DSS and advised that a hard copy of them had been delivered. Ms Campbell responded at 8:12 pm thanking Ms Canning. Given her “close eye” on “matters relevant to the upcoming Budget consideration of DHS,” it is more likely than not that she reviewed the hard copy of the NPP that she was provided.

It is impossible to reconstruct the precise wording of the draft that was printed for Ms Campbell from the documents produced to the Commission. However, given that the following facts are true of the prior drafts of the NPP that Ms Campbell received on 3 March 2015, as well as the final NPP, it can be inferred that the hard copy provided to Ms Campbell also asserted that the new approach would not change how income was assessed or overpayments calculated and made no reference to averaging or the need for legislative change.

On 12 March 2015 Ms Ahmer emailed Ms Campbell a wording change for the Portfolio Budget Submission for her approval which Ms Campbell approved by saying “Ok with me.” The subject line of that email was “For clearance: Recommendation in relation to increasing the SES cap for Strengthening Integrity proposal in the PBS.” Ms Golightly responded stating:

Hi Kathryn – following our brief conversation on Monday we left the NPP wording non-committal re level as we were not sure what level the AFP would be able to provide...
While this particular exchange apparently referred to a different element of the measure from the PAYG element, it is apparent that Ms Golightly was working closely with Ms Campbell on the content of the NPP.

A meeting was scheduled on 18 March 2015 for an ERC briefing including Ms Campbell, Ms Lees and Ms Golightly. On 24 March 2015 at 11:14 am, Ms Golightly emailed Ms Canning and Ms Ahmer to indicate that Ms Campbell had called with questions on some of the ERC briefs and to indicate that some of the ERC briefs and NPPs would be updated.

Ms Canning emailed Ms Campbell at 2:00 pm on 24 March 2015 saying that work had been done to polish the talking points (for the ERC) based on the comments that had been received, and asking whether Ms Campbell was content with them. It was proposed to give them to Ms Payne’s office and to Mr Morrison. The talking points attached to that email did not refer to the methodology for the proposal (which was to use averaging of ATO data) or to the need for legislative change.

On 25 March 2015 Ms Payne received a briefing from Ms Campbell, Ms Golightly and Mr Withnell in preparation for attendance at the ERC. Ms Lees gave evidence that the usual practice for the preparation of Ms Payne for attendance at the ERC involved giving her a briefing folder for the DHS NPPs (but not DSS NPPs) and relevant Cabinet documentation, the Finance green brief, talking points and any other relevant documents. That evidence is consistent with an email sent within DHS from Ms Golightly the previous day.

The ERC meeting was held on 25 March 2015 at 4:00 pm. The Business List records that in respect of the 2015-16 Budget for Social Services the Portfolio Budget Submission (TA15/0154 and Finance Green Brief) was item 5(a).

Ms Campbell does not recall if she was present at the ERC at the relevant time, but the Attendance Record has here there for item 5(a) only. Regardless, Ms Campbell accepted that “if [she] were present, it would be because [she] could speak to the new policy proposal under consideration” and “that would require [her] to have technical knowledge of what was involved in the proposal so she could answer questions about it.” The documentary record supports a finding that Ms Campbell was present at the consideration of the NPP or was at least intended to be present and accordingly that she would have been prepared to defend it if she were.

The preceding paragraphs demonstrate that Ms Campbell was provided with drafts of the NPP and had knowledge of the contents of those drafts. By virtue of her position and her involvement in and oversight of the preparation of material for the ERC, including the NPP, Ms Campbell was in a position to require that the drafts be amended if she considered it necessary.

Ms Campbell knew that the PAYG proposal involved averaging and also had knowledge of the DSS advice conveyed in the Executive Minute that legislative change was required in order to implement the proposal. She did not receive any legal advice which contradicted the effect of the DSS advice referred to in the Executive Minute. She knew that neither the fact of averaging nor the advice that legislative change was required appeared in the NPP. There is no evidence that she asked that the description of the NPP be changed to accord with the Executive Minute.

On the contrary, Ms Campbell gave evidence that she reviewed emails, asked for and reviewed documents but “found no evidence” that DHS worked with DSS in respect of the DHS proposal, despite the statement in the Executive Minute that DHS would do so. Ms Campbell said she did not consult with any person about the need for legislative change after the Executive Minute was sent to Mr Morrison. DHS had left the issue of legislative change to DSS as the department with the responsibility for the legislation and she could not recall whether she had asked in 2015 whether legislative change had occurred.

Irrespective of whether Ms Campbell attended the ERC, the NPP, in which she had involvement, and of which she had oversight, was likely to mislead Cabinet because it contained no reference to income averaging or the need for legislative change. Ms Campbell did not request any relevant amendment to the
NPP which would have averted that possibility. Nor is there any evidence which would indicate that she otherwise corrected the position. (For example, the ERC Talking Points also make no reference to income smoothing or averaging or the need for legislative change, and there is no evidence that Ms Campbell sought that they be amended to present the true position).

In oral evidence, Ms Campbell accepted that the NPP was apt to mislead Cabinet. She contended that her failure to eliminate its misleading effect was an “oversight.” That would be an extraordinary oversight for someone of Ms Campbell’s seniority and experience. The weight of the evidence instead leads to the conclusion that Ms Campbell knew of the misleading effect of the NPP but chose to stay silent, knowing that Mr Morrison wanted to pursue the proposal and that the Government could not achieve the savings which the NPP promised without income averaging.

21.2 Knowledge of Ms Payne

Ms Payne was provided with, and read, four drafts of the Executive Minute. She was also provided, for her information, with the final version which was eventually signed by Mr Morrison. The evidence before the Commission reveals Ms Payne closely read material DHS provided to her. The evidence also confirms that Ms Payne involved herself in the structure and drafting of the Executive Minute by DHS from her meeting with Ms Campbell and others on 20 January 2015 onwards.

The first draft prepared by DHS was B15/39. It was provided to Ms Payne electronically and in hard copy in advance of her meeting with Ms Campbell, Ms Golightly and Mr Withnell on 20 January 2015. This draft is the only draft that contained a reference to an “income smoothing” methodology. Although Ms Payne did not sign B15/39, it seems evident from Ms Golightly’s subsequent briefing to her that it had been divided into two parts (the first part being redrafted in the form of B15/65 on 23 January 2015) “following the meeting,” that it was discussed at that meeting. The Commission finds that Ms Payne was informed about the existing compliance process and the nature of the proposed changes to that process by the contents of B15/39 and the subsequent briefs and draft briefs in which the Executive Minute was developed.

The information about the existing compliance process remained almost unchanged from B15/39 to the final version of the Executive Minute. The proposed new approach could not be understood without an understanding of the existing process. Although the language of the proposed new approach changed over the course of these briefs, the reference to the need for legislative change was introduced after the meeting on 20 January 2015. The question of what could be done without legislative change was discussed in the 3 February meeting.

The final version of the Executive Minute to Mr Morrison stated, with respect to all of the proposals (except the creation of a Taskforce, which is not relevant for present purposes), that they “could be undertaken under existing arrangements but would be significantly strengthened if the suggested policy and legislative changes were adopted.” It also stated “It is recommended that the department continues working with the DSS to undertake the above analysis and develop a package of policy and legislative changes for you to take forward.”

The evidence of Ms Lees, Ms Payne’s chief of staff, was that any engagement between DHS and DSS in pursuit of working together on the potential policy and legislative changes would not typically be reported to the Minister’s office, unless there was a problem. That was consistent with Ms Payne’s evidence to similar effect.

Ms Payne was first provided with the draft NPP on 3 March 2015. This was after the explicit reference to income averaging had been removed, and the NPP instead stated “The new approach will not change how income is assessed or overpayments calculated.” The answer to the question in the NPP “Due Diligence Checklist” of “Is legislation required?” was “NO.”

Those two features of the draft NPP, namely, the reference to no change to “how income is assessed or overpayments calculated,” and the indication in the due diligence checklist that legislation was not
required, remained unchanged for each version of the NPP received and or revised by Ms Payne. They also remained unchanged in the final material that went to Cabinet.

In considering whether Ms Payne knew that it was intended that DHS would use income averaging in the proposed “new approach” described in the NPP, and that the NPP for that reason would be likely to mislead the ERC and Cabinet, there are a number of matters to be considered.

Ms Payne knew that the use of income averaging was the primary basis of the “new approach” described in the Executive Minute and that DSS had advised DHS that legislative change was required to implement the DHS proposal in that way, and no individual or brief informed her that DSS had changed its position on the need for legislative change. On the face of the documents, there had been a change with respect to the documented need for legislative and policy change between the final version of the Executive Minute, and the first version of the NPP that was received by Ms Payne. Ms Payne could not recall whether or not, at the time, she had recognised that there had been such a change, or whether or not she had contemplated how the proposal would be implemented as a result of that change.

There is an obvious consistency in the projected number of interventions and savings as between the Executive Minute and the NPP from which it can be inferred that the intended process by which those interventions and savings were achieved had not changed.

Against that, Ms Payne was entitled to rely on her senior departmental officers, in this case, Ms Campbell and Ms Golightly, to bring matters requiring her personal consideration to her attention. She was also entitled to assume they would perform their functions according to the obligations and responsibilities imposed on them by the Public Service Act 1986 (Cth) (Public Service Act).

The Executive Minute had contemplated further engagement between the two departments, and the evidence was that the results of that engagement would not ordinarily be raised with the Minister’s office, so it was possible something might have happened in that regard without Ms Payne’s knowledge. The language of the NPP drafted in response to Mr Morrison’s direction stated “The new approach will not change how income is assessed or overpayments calculated” in direct contrast to the language in the Executive Minute. Ms Payne could conceivably have understood that sentence to mean that DHS was not proposing to use income averaging in the proposal.

Mr Morrison, not Ms Payne, was the Cabinet minister in the portfolio and it was his direction to DHS to develop the NPP. The Cabinet Handbook imposed a positive obligation upon Mr Morrison as the “sponsoring” minister of the NPP to the ERC to ensure that the NPP provided sufficient detail on risk and implementation challenges to ensure that Cabinet could make an informed decision on the efficacy of the NPP. It also imposed responsibility on Mr Morrison for the content, quality and accuracy of the advice contained in the NPP.

Weighing all of those matters, the Commission cannot find that Ms Payne knew that the intention was for DHS to use income averaging in the proposed “new approach” described in the NPP, or, accordingly, that the NPP was apt to mislead the ERC and Cabinet. The question then is whether she ought to have inquired how DHS did intend to proceed. There is no record or other of Ms Payne seeking information from Ms Campbell or Ms Golightly between 23 February 2015 and 25 March 2015 about how the NPP was to be implemented if it did not involve the use of income averaging. Ms Payne was unable to recall whether she did inquire or not due to the long passage of time. The Commission infers that Ms Payne did not make any such inquiry.

In considering whether Mr Payne ought to have asked how DHS intended to implement the NPP, the same considerations which are relevant to her actual knowledge apply. There are two additional considerations which are relevant and point in different directions. How the NPP was to be implemented was directly relevant to the matter of service delivery by DHS and was therefore relevant to Ms Payne’s administration of DHS. It was significant because it involved the question of potential lawfulness (raised by the DSS advice) and because of the proposal’s large scale, which affected hundreds of thousands of current and former social security recipients. On the other hand, to suspect that averaging might still be involved, Ms Payne would have had to entertain the possibility that the department’s senior executive officers had
deliberately concealed the fact by language to the opposite effect in the NPP. That is not something one would expect a minister readily to contemplate.

Weighing up all the considerations, the Commission concludes that Ms Payne was entitled to regard the assurance she received in the NPP as sufficient. There was no reason for her to anticipate that DHS officers intended to implement the NPP by the use of income averaging contrary to the language of the NPP.

There is, of course, the broader question of ministerial responsibility. Ms Payne was responsible for a department which instituted the flawed Scheme and officers of which misled Cabinet as to what it involved. Those are matters for Parliament and the electorate, not this Commission.

### 21.3 Knowledge of Mr Morrison

Mr Morrison gave evidence of his usual practice that if he wished to convey something to the department beyond the available options on a brief, he would write his request or direction underneath his signature on the front page of the brief. His markings on the Executive Minute conveyed simply that he agreed to DHS developing a package of New Policy Proposals which included the PAYG measure, and that he agreed to DHS continuing to work with DSS to progress consideration of the additional policy and legislative changes related to those proposals. He did not seek an advice on the DSS advice in respect of the legislative change referred to in the Executive Minute. Mr Morrison described the effect of his markings on the Executive Minute to be:

... as it says on the final bullet point that: “As a result, we have been working with DSS on developing this proposal and will continue to do so.” And so I said, “Yes. Pursue that. Keep having those discussions.” There was no response here by me which said that, you know, I don’t agree to legislation.

Mr Morrison gave evidence that after he signed the Executive Minute, which contained his instructions, the “package of policy or legislative changes” he expected DHS to develop with DSS was not produced. He did not see any advice from DSS after he signed the Executive Minute which addressed why DSS appeared to reverse its position on the need for legislative change, nor did he ask for any advice or clarification.

Having received the NPP, Mr Morrison said, he understood that the use of income averaging remained part of the method by which the NPP would be implemented despite the change in characterisation of that process between the Executive Minute and the NPP. He said:

[T]hat there was a fundamental change between the [Executive Minute] and the [NPP]. And those two changes were (1) the inclusion of a statement which said the approach on how income is assessed, and overpayments calculated has not changed, ie, that means what we’ve been doing as a government for more than 20 years is unaltered; and, secondly, that legislation previously thought to be required is no longer required.

Mr Morrison said, in effect, that his understanding was that the NPP “countermanded” the position communicated in the Executive Minute. For these reasons, after he received the NPP, Mr Morrison said, he had no need for clear legal advice on the question of legality raised in the Executive Minute, and did not question why the package of policy and legislative changes he expected DHS and DSS to pursue work on was not produced. He expanded on his position, saying that:

- using income averaging as the sole basis for raising a debt where a recipient did not respond to a request for income information was a practice undertaken by DHS for at least 20 years. He was informed of the practice in 2015 as “just a foundational way of the way DHS worked.” For this reason he did not accept that the use of income averaging in the DHS proposal was a “new approach to reconciling information;” it was the technologies and the scale of the interventions which were new,
the resolution of the issue of the need for legislative change was communicated to him (and Cabinet) by the NPP Due Diligence Checklist on the draft NPP dated 3 March 2015 received by Mr Wann from Ms Payne’s office which advised no legislative change was required (although Mr Morrison did not recall seeing that version but did see later versions of the NPP to the same effect); and

“[He] had instructed in [the Executive Minute], that any of these issues were to be resolved, and it followed, from the NPP Due Diligence Checklist that ‘...they were’.”

Mr Morrison not told that averaging was an established practice prior to 25 March 2015

Mr Morrison accepted that he did not receive a written briefing about the DHS practice of income averaging, and could not recall who told him or when he was told about the DHS practice of averaging. He said that he was not provided with any document which supported the information. He said “It would have come up in verbal briefings.”

Mr Morrison’s oral evidence that he was informed of the practice of income averaging is not contained anywhere in his statement. His statement confirms that he did not receive any specific advice or further briefing from DSS or DHS in respect of the proposals, design or lawfulness of the Scheme following the Executive Minute and prior to the ERC. Mr Morrison did not mention the longstanding practice in his explanations for why the Scheme was introduced as part of the 2015/16 DSS Portfolio Budget Submission.

It is very unlikely that his own department would have given Mr Morrison such information. Ms Wilson, Mr Whitecross, Mr McBride and Mr Kimber, all of whom were involved with advising on the Executive Minute and the development of the NPP, gave evidence to the effect that they had no knowledge of a practice, longstanding or otherwise, of income averaging by DHS. They had advised against its adoption on policy and legal grounds, as was documented in the 2014 DSS policy advice and the 2014 DSS legal advice, and in emails sent by them in January 2015. Mr Pratt had been chief executive officer of Centrelink in 2008 and DHS secretary from 2009 until he became DSS secretary in 2013; he was unaware of income averaging ever being used by DHS to determine and raise debt.

Mr Withnell and Mr Britton, the DHS officers who developed the proposal, were aware, respectively, that DHS had in fact used income averaging in the past, in “exceptional cases” where the recipient might agree that it was appropriate, and as an “exceptions process” where the recipient was agreeable. They were unlikely to have described it to Mr Morrison as a “foundational way” that DHS worked.

If Mr Morrison were told of a practice of using income averaging of ATO data as the sole basis for debt raising where a recipient did not respond to a request for information, it would have directly contradicted the information about existing compliance processes contained in the Executive Minute, at pages 12 to 17, which he retained. There the points were made that traditional compliance reviews were “a manual staff intensive verification process involving obtaining information from customers and third parties” and that the ability to change that process was limited because of “legislative and policy constraints on the need to apply income fortnightly to determine overpayments,” even if income data were only available on an annual basis, as the ATO data was.

Similarly, the information about the PAYG proposal in the Executive Minute prepared by DHS is inconsistent with an established DHS practice of income averaging. The references to the need for policy and legislative changes are only explained by the use to which the PAYG data was put, and the proposal to use income averaging as the sole basis for debt raising where a response was not received, requiring no human intervention and enabling the automation of debt recovery.

As set out in detail above, the Executive Minute was developed at group manager and deputy secretary level within DHS, reviewed by the secretary and with consultation of the Minister for Human Services. Advice was sought from DSS which resulted in the provision of the DSS Dot Points. At no stage during that
process did anyone assert to DSS that income averaging as contemplated by the Executive Minute was a longstanding practice.

The assertions made by Ms Harfield and others in DHS in January 2017 to Mr Tudge, Mr Porter and Ms Wilson to the effect that income averaging was a longstanding practice are addressed elsewhere in this Report. They do not provide any basis for inferring that that those statements would have been made to Mr Morrison in 2015. Finally, Mr Morrison’s evidence that he was told of the longstanding practice of income averaging in 2015 is inconsistent with his oral evidence that the Executive Minute was the sole source of his information at that point in time.

The Commission rejects as untrue Mr Morrison’s evidence that he was told that income averaging as contemplated in the Executive Minute was an established practice and a “foundational way” in which DHS worked.

No established practice of PAYG income averaging where a recipient did not respond

In addition to his evidence that he was told of the established practice of raising debts by using income averaging, without more, where a recipient did not respond to a request for information, Mr Morrison sought to prove that DHS in fact had such a practice. He relied on different sources of information for that assertion: two ministerial media releases, two DSS letters, and some sampling done in 2020. All of them are the subject of more detailed consideration in chapter 1 - Legal and Historical Context of the Scheme, in the section “The history of data matching in the social security context” and “The history of income averaging in the social security context.”

Briefly, however: The first of the media releases, Computer matching press release, on 21 August 1990 was issued on behalf of then Minister for Social Security, Senator Richardson. It announced the automation of tax file numbers to verify income information supplied by clients seeking income support payments and the computerised provision of income taxation information from the ATO to DSS. The second media release, New data matching to recover millions in welfare dollars on 29 June 2011 was jointly issued by then Minister for Human Services, Tanya Plibersek, and then Assistant Treasurer, Bill Shorten. It announced daily computerised data matching between Centrelink and the ATO in respect of former income support recipients who had a social security debt and an anticipated increase in the recovery of social security debts by tax garnishee notice. Neither media release dealt with income averaging or automated debt recovery.

The DSS letters both dated from 1994. One appears to be a template and the other a copy of a letter actually sent, but they are in identical terms. Each states that it is a request for information under the Social Security Act in relation to Newstart Allowance; alludes to a difference between DSS records and taxable income information which the ATO has provided under the Data Matching Program (Assistance and Tax) Act 1990; warns that a failure to provide information in response can lead to a cancellation or suspension of payment; warns that any response may be checked against third party information, such as from employers and banks; and advises that if no response is given, the ATO taxable income information will be used and DSS will write to the recipient about how much money they need to pay back.

Those letters were different in a number of respects from those sent in the course of the Scheme. They were sent only to current income support recipients; they were notices under the Social Security Act which imposed an obligation to respond; they related to income tax return information, not PAYG data; they contemplated verification of information from third parties using DSS’s evidence gathering powers; and it was not suggested that the data would be applied through automation or without human assessment.

There was no evidence about when or how often DSS sent such letters but, in any event, there is no evidence that they were used by Centrelink when it assumed responsibility for service delivery. Nor does it appear that they were used in relation to PAYG income information. Centrelink’s letters to recipients when it began its PAYG data-matching program made no similar suggestion of applying ATO data, as the template
customer contact letter\textsuperscript{369} attached to the 2004 PAYG data matching protocol makes clear. Services Australia outlined the content of the initial letters sent to recipients during the 2004 to 2011 period, which remained in similar terms and made no reference to use of ATO PAYG data to assess income.\textsuperscript{370} Copies of letters provided by Services Australia for the period September 2011 to July 2015,\textsuperscript{371} after DHS became the responsible department, similarly make no reference to use of ATO PAYG data to calculate entitlement.

Finally, Mr Morrison relied on an email\textsuperscript{372} in relation to sampling done in 2020 of 500 files for each of the years 2009 and 2011. According to it, over the two years, 9.1\% of the debts in the thousand files sampled in total were raised based on the sole use of averaging, while 11.5\% were based on its partial use; which, Mr Morrison said, demonstrated that one in five debts was raised using income averaging and automation. However, there is no evidence about how the sampling took place; what constituted “partial” as opposed to “sole” use of averaging; whether the averaging was done in circumstances where it was actually provided for by the Social Security Act; and whether it was done in circumstances like those explained by DHS officers where, for example, the recipient was able to confirm that their income was of a regularity which made averaging reliable. Given those limitations, the Commission does not regard the email as informative, whether or not the figures are correct.

For those reasons the Commission did not find the documentary evidence to which Mr Morrison pointed compelling. In any event, Mr Morrison was not provided with any documents in 2015 which provided any support for his assertion of a longstanding practice, let alone its legality. If Mr Morrison wanted to question the advice in the Executive Minute that legislative change was required for income averaging, given his asserted belief that it was a long-standing practice, he could have followed his usual practice of writing beneath his signature.\textsuperscript{373} The more likely explanation is that he did not question the advice because he knew that entitlement for income support payments according to the legislation was worked out on the basis of actual fortnightly income.\textsuperscript{374}

The effect of the oral and documentary evidence is that DHS did not have any “foundational way” of working which involved income averaging as the sole basis for debt raising where the recipient did not respond, and Mr Morrison could not have supposed that it did. The Executive Minute informed Mr Morrison that the use of income averaging in the DHS proposal required legislative change.

The meaning of the New Policy Proposal due diligence checklist

Mr Morrison’s evidence was that he relied on the checklist in the NPP as showing that DSS did not, after all, consider that legislative change was needed for the proposal to use income averaging:

Because no legislation was required. That was the clear advice from the Department, included in a Cabinet checklist titled NPP Due Diligence Checklist, for which Secretaries hold very significant responsibilities. And their advice was that no legislation was required.\textsuperscript{375}

The content of the NPP follows the subheadings: Minister, Authority for NPP, Affected Agencies, Appropriation Source, Constitutional risk, Financial implications, Proposal Description, Policy Case, Implementation and Delivery, Regulatory Impact and NPP Due Diligence Checklist (Checklist). The Checklist for the final NPP contained three categories: General Implications, Legislation and [Regulatory] Impact Statements.\textsuperscript{376} Under the ‘Legislation’ heading, three questions were asked:

- Has the Australian Government Solicitor assessed the constitutional and legislative authority risk?
- If yes, has the advice been provided to Finance?
- Is legislation required?

The first two were answered in the affirmative, the third in the negative.
Mr Morrison’s evidence led to consideration of the meaning of the three questions, particularly the third. Rules 26 and 27 of the Budget Process Operational Rules (BPORs) provided for how the question of Constitutional Support and Legislative Authority was to be addressed in an NPP. They required:

26.1 the Constitutional risk rating (i.e. ‘high’, ‘medium’ or ‘low’) as assessed by the Australian Government Solicitor; and

26.2 the proposed source of legislative authority for the expenditure (if required), as informed by legal advice by the Australian Government Solicitor as to whether primary legislation or an item in the Schedules to the Financial Framework (Supplementary Powers) Regulations 1997 (FF(SP) Regulations) may be appropriate, noting that new or significantly changed spending activities proposed to rely on the FF(SP) Regulations must be authorised through new or amended legislative authority.

[emphasis added]

That suggested that the third question related to the source of the authority for the expenditure. Mr Morrison, however, said that in his view, the question “Is legislation required” was directed to whether legislation was required to implement the NPP, not the question of legislative authority for expenditure addressed in the BPORs. He based his evidence upon his experience as a member of the ERC, not the words of rule 26 of the BPORs, and asserted the suggestion to the contrary involved a narrow reading of the BPORs.

There was some support for Mr Morrison’s understanding of what the question related to, but not where the answer would come from, in the evidence of Mr Turnbull. Mr Turnbull understood the effect of the Checklist was that AGS had advised whether or not legislation was required to implement the proposal; “you couldn’t read it any other way.” He agreed that if that had not in fact occurred, members of the ERC would be misled by the NPP to think that AGS had so advised.

The role of the Australian Government Solicitor in the checklist

It is worth exploring what part AGS played in responding to the Checklist, because Mr Turnbull was not the only minister who gave evidence to think that the third answer represented the advice, not of the department advancing the proposal, but of AGS or the Attorney-General’s Department. Kathryn Graham (national leader, Office of General Counsel, AGS) was the author of the AGS Constitutional risk advice in respect of the NPP.

In her statement, Ms Graham explained that the primary role of the AGS advice in the Budget process did not extend to the legality of the measure itself but was confined to the question of expenditure of Commonwealth funds (appropriation):

[The] assessment is a narrow and specific one relating to constitutional risk; it is not directed to broader questions of lawfulness and legal risk.

... Our instructions do not extend to considering whether there are any other legal issues raised by a NPP beyond the question of constitutional risk and legislative authority for expenditure. In the event that a very obvious legal issue is apparent on the face of the NPP, we may include a comment to that effect in our assessment, however, this is rare in practice given the volume of NPPs, the tight timeframes, the narrow focus of the assessment and the broader complexity of many of the proposals.

Ms Graham provided her advice on 5 March 2015 after DHS provided her with the draft NPP on 4 March 2014. Her advice was confined to the question of whether legislation was necessary to authorise the spending (Budget appropriations) sought by the NPP. This approach was consistent with the requirement of the BPORs for the Checklist and her lengthy experience in providing such advice. Ms Graham advised:
No legislation is required to authorise any of the spending contemplated by the NPPs (although it may be necessary to amend legislation to implement them).

... 

For the purposes of this assessment we have not considered other legal issues associated with the NPP (e.g., compliance with the Privacy Act 1988). It is clear that Ms Graham’s advice dealt with whether legislation was required to authorise the spending for the proposal in the NPP, not whether legislation was required to implement it. In any case, the lack of detail in the NPP would have made it impossible for AGS to advise on the lawfulness of the proposed use of averaging in the proposal in any event.

What did the third question and answer really relate to?

Having made that short digression, the Commission accepts Mr Morrison’s evidence that the third answer in the checklist could extend beyond the issue of whether authorisation was needed for expenditure, and could involve the advice of the relevant department. After Mr Morrison gave evidence he sought, and was granted, access to a number of other NPPs contained in the 2015-16 DSS Portfolio Budget Submission. They demonstrate, at least in some instances, when the question “Is legislation required?” was answered in the affirmative, it related to the need for legislation to implement the proposal, not to authorise expenditure.

Mr Morrison’s understanding that DSS was involved in answering the question was consistent with the conduct of those at DSS below SES level after Mr Barford received the first draft of the NPP on 2 March 2015. Mr Barford, Ms Dalton and Mr Kimber were each involved in seeking advice from the DSS Public Law Branch as a matter of urgency by 4 March 2015 on the proposals.

Was Mr Morrison entitled to rely on the third question and answer?

The PAYG proposal in respect of which the third question was answered “No” contained no reference to income averaging and, in fact, suggested the contrary position by the “no change” representation. Answering it did not require DSS to reverse its position that legislative change would be required if that were part of the proposal. (DSS had not in fact changed its position on the use of income averaging as contemplated by the Executive Minute.)

Mr Morrison had, in signing the Executive Minute, directed DHS to “work with [DSS] to progress consideration of additional policy and legislative changes” and he was entitled to assume they had done so. A Minister can expect senior executive staff of a Department to follow his or her directions perform their functions in accordance with their obligations and responsibilities under the Public Service Act. Mr Morrison would not ordinarily suspect that DHS officers would conceal the intended use of income averaging from DSS so as to prevent DSS from providing legal advice that it was unlawful.

However, Mr Morrison was responsible for administering the Social Security Act according to law and it was his department which provided the advice referred to in the Executive Minute that legislative change was required. He had directed DHS to develop the NPP, and as the Cabinet minister for the Social Services Portfolio, he was its sponsor. The Cabinet Handbook, 8th Edition provided:

23. In upholding the principles of collective responsibility and Cabinet solidarity, Ministers must:

... 

(f) ensure that Cabinet submissions provide enough detail on risk and implementation challenges to ensure the Cabinet can make an informed decision on the efficacy of the proposal

...
Ministers are expected to take full responsibility for the content, quality and accuracy of advice provided to the Cabinet under their name. Ministers bringing forward submissions are also responsible for ensuring that the consultation necessary to enable a fully informed decision to be taken occurs at both ministerial and officials [sic] levels. It is particularly important that there is agreement on factual matters, including costs. 388

The language of the NPP drafted in response to Mr Morrison’s direction stated “The new approach will not change how income is assessed or overpayments calculated” in direct contrast to the language in the Executive Minute. Although Mr Morrison understood the NPP to involve the use of income averaging, it was objectively impossible for any reader without further knowledge to appreciate that. To a reader with knowledge of DHS’s past averaging practices, the “no change” sentence would convey the contrary: that DSS was not proposing to use income averaging as contemplated in the proposal, because it had never previously been used in that way.

The NPP was directly relevant to the DSS responsibility for income support policy and was therefore relevant to Mr Morrison’s administration of the department. He knew from the Executive Minute that the use of income averaging might require a change of that policy. It was significant because it involved the question of potential unlawfulness (raised by the DSS advice that the proposal needed legislative change) and because of the large scale of the DHS proposal which affected hundreds of thousands of current or former social security recipients.

Mr Morrison knew that the use of income averaging was the primary basis of the “new approach” described in the Executive Minute and that DSS had advised DHS that legislative change was required to implement the DHS proposal in that way. The NPP represented a complete reversal of the legal position without explanation. Mr Morrison was not entitled without further question to rely upon the contradictory content of the NPP on the question of the DSS legal position when he proposed the NPP to the ERC. The proper administration of his department required him to make inquiries about why, in the absence of any explanation, DSS appeared to have reversed its position on the need for legislative change. If he had asked Ms Wilson, she would have told him that it was because DHS had (ostensibly) reversed its position on using income averaging. He chose not to inquire.

Mr Morrison allowed Cabinet to be misled because he did not make that obvious inquiry. He took the proposal to Cabinet without necessary information as to what it actually entailed and without the caveat that it required legislative and policy change to permit the use of the ATO PAYG data in the way proposed in circumstances where: he knew that the proposal still involved income averaging; only a few weeks previously he had been told of that caveat; nothing had changed in the proposal; and he had done nothing to ascertain why the caveat no longer no longer applied. He failed to meet his ministerial responsibility to ensure that Cabinet was properly informed about what the proposal actually entailed and to ensure that it was lawful.

The Budget process, which was “built to ensure that Ministers can have confidence that when submissions come before it that those checks and balances have been applied through the workings of the Public Service,” 389 failed to expose the fundamental flaws in the savings assumptions and the assumption of legality underlying the proposal.

**Why was Mr Morrison not given the legal and policy advices?**

Mr Morrison’s evidence that senior public servants, at both DSS and DHS, should, before the measure became part of the Budget, have given him the 2014 DSS legal advice, and the legal advice DSS had provided to DHS in January 2015 (in the DSS Dot Points), is accepted. Mr Morrison was invited to consider possible contributing factors for the failure to clearly advise him of the legal position during the development of the NPP. He did not accept those possible contributing factors. The following exchange then occurred:
MR GREGGERY: Given that you don’t consider any of those reasons to justify the withholding of the advice, and you consider the withholding to be inconceivable and inexplicable broadly, are you able to identify what it was that led to the withholding of the advice, given the duty of the public servants to bring it to your attention and [to the attention of] subsequent Ministers?

THE HON. SCOTT MORRISON MP: No, I’m not. And that is distressing. 390

It may be observed that the advice provided by DSS to DHS in the development of the Executive Minute did comply with the duty to give full and frank advice about the need for legislative change. The candour of that advice stopped, at least on the part of DHS, after Mr Morrison instructed DHS to develop the NPP by signing the Executive Minute which specifically advised of the need for legislative change.

Mr Morrison made clear to DSS that he wanted the DHS proposal progressed by way of NPP for the upcoming DSS Portfolio Budget Submission without legislative change. Ms Wilson’s evidence is consistent with the body of evidence which confirmed the substantial difficulty in progressing the DHS proposal if it required legislative change due to:

• the number of Senate crossbench members
• the related need for the savings proposal to be a genuine offset under the BPORs.

There are additional indicators which provide some explanation for the failure by the public servants to be active in communicating to Mr Morrison during the development of the NPP that DSS had not changed its advice that income averaging required legislative change.

Mr Morrison recalled that, during his meeting with Ms Campbell on 30 December 2014, he expressed an interest about DHS’s management of integrity of the welfare system. 391 The Executive Minute, provided to Mr Morrison by DHS on 12 February 2015, was responsive to the conversation that he had with Ms Campbell. 392

Mr Morrison accepted that his approach as a minister, including as the Minister for Social Services was “… having set the policy direction, expect them to get on and deliver it.” 393 That policy direction, as Mr Morrison made public, was one of “ensuring welfare integrity” 394 from his position as a “welfare cop on the beat.” 395 Coupled with this was an ongoing need to identify savings in the social security sector, as part of the Government’s agenda to reduce debt and balance the Budget. 396 It was a requirement that proposals be fully offset. 397

Members of the senior executive of both DSS and DHS were acutely aware of Mr Morrison’s policy direction, and the drive for savings. 398 As previously described, there was a resulting sense of pressure which filtered through the management of both departments. 399 There were concerns within DHS that the proposal was not ready to be put forward as a Budget measure; however, its progress to being included in the NPP was rapid and unchecked. As Mr Britton said, there was pressure to “…get on with it. Just get on with it… And we collectively got on with it.” 400

The SIWP NPP met both Mr Morrison’s declared policy direction and the drive for savings. The PAYG proposal was critical to the success of the NPP as a whole. It provided the majority of the proposed savings for the measure, and offset not only its own costs but also those of the other elements and other potential initiatives. 401 If it could not be pursued, the viability of the entire proposal would be threatened.

The failure of DSS and DHS to give Mr Morrison frank and full advice before and after the development of the NPP is explained by the pressure to deliver the budget expectations of the government and by Mr Morrison, as the Minister for Social Services, communicating the direction to develop the NPP through the Executive Minute.
108 Royal Commission into the Robodebt Scheme

1 Exhibit 2-1745 - KCA.9999.0001.0008_R - 20221025 NTG-0057 Statement of K Campbell with Annexure(46203361.1) [p 1: para 9].

2 Although the exact mechanism of transmission to Mr Withnell is unclear, the wording was almost identical to significant parts of the NPP sent by Ms Collins to Mr Ryman on 12 December 2014, including the typographical error contained in the reference to the “Australia [sic] Taxation Office.”

3 Exhibit 2-2158 - CTH.2004.0001.9608_R - For your reading pleasure - DO NOT FORWARD [DLM=Sensitive].

4 Exhibit 2-2159 - CTH.2004.0001.9609 - Min Morrison brief.

5 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2].

6 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2]. Mr Whitecross was invited by Ms Alanna Foster, DSS.

7 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive] [p 2].

8 Exhibit 2-2032 - DSS.5018.0002.4231_R - RE- Options to strengthen eligibility and participation requirements [DLM=Sensitive].

9 Transcript, Marise Payne, 13 December 2022 [p 1666: lines 23-31].

10 Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 14-22]; Transcript, Finn Pratt, 10 November 2022 [p 853: lines 18-19].

11 Exhibit 2-2497 - CTH.3732.0001.0008_R - B14-1288 SF 3 393527-1.pdf, [p 2]; Transcript, Finn Pratt, 10 November 2022 [p 852: lines 11-13].


13 Transcript, Finn Pratt, 10 November 2022 [p 877: line 39 – p 879: line 20].

14 Transcript, Finn Pratt, 10 November 2022 [p 877: line 39 – p 879: line 20]. The Commission notes the evidence of Ms Campbell at P-4636 line 1- P-4637 line 45 about the legislation that increased the asset test free areas and the taper rate by which a pension is reduced in the Social Services Legislation (Fair and Sustainable Pensions) Bill 2015. However, that legislation did not involve the controversial legislative change that would be required to make lawful the use of averaging in the Robodebt Scheme.

15 Exhibit 4-5206 - CWA.9999.0001.0005_R, Supplementary Statement of Mr Charles Wann together with Amended Statement of Mr Charles Wann (61304596.1), [p 5]; Transcript, Charles Wann, 20 February 2023 [p 3333: line 41].

16 Transcript, Scott Morrison, 14 December 2022 [p 1874: lines 5-7; p 1880: lines 21-31].

17 Exhibit 2-2498 - MPA.0001.0001.0052 - Catchup with Kathryn - Megan.

18 Exhibit 2-2499 - MPA.0001.0002.0082 – 20150113, 13 January 2015 [p 2]; Transcript, Marise Payne, 13 December 2022 [p 1651: lines 5-8].

19 Exhibit 4-5207 - CTH.4000.0308.1766_R - Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1; Exhibit 4-5209 - CTH.4000.0399.0148_R - B15 39 Cover brief for Minister Payne.

20 Exhibit 2-1938 - CTH.3008.0007.7938_R - Fw- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 2-1942 - CTH.3008.0007.7939 - Appendix 1; Exhibit 2-1943 - CTH.3008.0007.7969_R - B15 39 Cover brief for Minister Payne.

21 Exhibit 4-5207 - CTH.4000.0308.1766_R - Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1; Exhibit 4-5209 - CTH.4000.0399.0148_R - B15 39 Cover brief for Minister Payne.


23 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1.

24 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 7-8].

25 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 11].

26 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 7-8].

27 Exhibit 4-5208 - CTH.4000.0399.0151 - Appendix 1 [p 11].

28 Exhibit 2-2502 - MPA.0001.0001.0086 - Meeting Kathryn Campbell - Malisa GoLightly - Mark Withnell - Megan; Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1) [para 36-37].

29 This was the B15/39 version of the brief.

30 Exhibit 10018 - MPA.0001.0002.0085 - 20150120.pdf.

31 Transcript, Serena Wilson, 9 November 2022 [p 776: lines 11-14].

32 Transcript, Andrew Whitecross, 8 December 2022 [p 1348: line 36 - p 1349: line 2].
33 Exhibit 2-2033 - DSS.5006.0001.2529_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
34 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only]; Transcript, Andrew Whitecross, 8 December 2022 [p 1350].
35 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only].
36 Transcript, Serena Wilson, 9 November 2022 [p 780: lines 5-19].
37 Transcript, Serena Wilson, 9 November 2022 [p 780-782].
38 Transcript, Serena Wilson, 9 November 2022 [p 784, lines 21-22].
39 Exhibit 1-0065 - DSS.5031.0001.0108_R - RE- Information about the DHS proposal to change the approach to identifying and raising debts [DLM=For-Official-Use-Only].
40 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive].
41 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive].
42 Exhibit 1-1214 - DSS.5022.0001.0488 - DSS comments on DHS Welfare integrity options.
43 Presumably an abbreviation for “Social Security Law.”
44 Exhibit 1-1214 - DSS.5022.0001.0488 - DSS comments on DHS Welfare integrity options.
45 Exhibit 2-2090 - DSS.5064.0001.0071_R - DSS comments on DHS Welfare integrity options (2) [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 2-2091 - DSS.5064.0001.0072 - DSS comments on DHS Welfare integrity options (2) [p 2-3].
46 Exhibit 2-2094 - DSS.5024.0001.0191_R - DSS comments on DHS Welfare integrity options (2) [SEC=UNCLASSIFIED]; Exhibit 2-2095 - DSS.5024.0001.0192 - DSS comments on DHS Welfare integrity options (2).
47 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive]; Exhibit 2-2040, DSS.5061.0001.0013 - Appendix 1 (20 Jan).
48 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive].
49 Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute.
50 Exhibit 1-1210 - DSS.5022.0001.0486_R - RE- Appendix 1 (20 Jan) [DLM=Sensitive]; the email copied Ms Dalton, Mr Jones and Mr Barford.
51 Exhibit 1-1214 - DSS.5022.0001.0488 - DSS comments on DHS Welfare integrity options.
52 In an email to Mr Ryman later that afternoon, following discussions with Debt Policy and Means Test, a DHS officer suggested removing this sentence. However, this does not seem to have occurred.
54 Exhibit 2-2216 - CTH.2004.0002.0342_R - RE- DSS comments on DHS Welfare integrity options (2) [DLM=Sensitive].
55 Sections 72 and 196 referred to the requirements for particular notices given to require recipients to provide information about certain changes in circumstances, or more generally.
This was a “set of online resources that [DSS]... maintained to assist decision-makers in [DHS]” and “the overarching authority... of translating both the Social Security Act and the Social Security Administration Act into a somewhat more accessible form” – See: Transcript, Serena Wilson, 9 November 2022 [p 760: lines 12-19].


117 Exhibit 2-2064 - DSS.5024.0001.0002_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2065 - DSS.5024.0001.0003_R - Revised new draft brief to Minister Morrison.

118 Transcript, Andrew Whitecross, 8 December 2022 [p 1382: lines 32-39].

119 Transcript, Andrew Whitecross, 8 December 2022 [p 1382: line 41 – p 1383: line 2].

120 Exhibit 2-2058 - DSS.5024.0001.0017_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

121 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3).

122 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3).

123 Exhibit 2-2059 - DSS.5024.0001.0019_R - Revised new draft brief to Minister Morrison (2) (3).[p 2].

124 Exhibit 2-2060 - DSS.5024.0001.0460_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-2061, DSS.5022.0001.0462_R - Revised new draft brief to Minister Morrison (2) (3).

125 Exhibit 2-2061 - DSS.5022.0001.0462_R - Revised new draft brief to Minister Morrison (2) (3) [p 10].

126 Transcript, Andrew Whitecross, 8 December 2022 [p 1384: line 30 - p 1385: line 10]; Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 65].

127 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: lines 6-10].

128 Exhibit 2-2031 - AWI.9999.0001.0005_R - 20221121 Whitecross A Statement - NTG-0069(46505876.1) [para 65].

129 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: lines 31-39].

130 Transcript, Andrew Whitecross, 8 December 2022 [p 1385: line 45 – p 1386: line 8].

131 Exhibit 2-2109 - DSS.5024.0001.0001_R - Fraud and compliance measures [SEC=OFFICIAL-Sensitive].

132 Transcript, Cath Halbert, 8 December 2022 [p 1428: lines 25-39].

133 Exhibit 2-3214 - DSS.5091.0001.0865_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 2-3215 - DSS.5091.0001.0866_R - Revised new draft brief to Minister Morrison (2) (3).

134 Exhibit 2-3215 - DSS.5091.0001.0866_R - Revised new draft brief to Minister Morrison (2) (3) [p 11].

135 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

136 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

137 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

138 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

139 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

140 Exhibit 2-3219 - DSS.5091.0001.0840_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive].

141 Exhibit 2-2062 - DSS.5024.0001.0054_R - Revised new draft brief to Minister Morrison (2) (3) (2).

142 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

143 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

144 Exhibit 4-5650 - CTH.3095.0001.4993_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

145 Transcript, Mark Withnell, 9 December 2022, [p 1511: lines 13-22].

146 Exhibit 4-5581; Exhibit 2-1310 - CTH.3034.0032.7254_R - Some reading. ............... [SEC=UNCLASSIFIED].


149 This was version B15/65 of the brief. See: Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute; Exhibit 4-5204 - MLE.9999.0001.0001_2_R - 20230124 NTG-0161 (M Lees) Signed Statement(46952747.1) [para 45].

150 Exhibit 1-1269; Exhibit 1-1273; Exhibit 2-2171 - CTH.4700.0001.2356_R - Executive Minute.

151 Exhibit 9061 - CTH.4000.0399.0018_R - Re: Compliance brief [SEC=UNOFFICIAL], Exhibit 9978 - CTH.3008.0008.0217_R - [DLM=For-Official-Use-Only]; Exhibit 9979- CTH.3008.0008.0218_R - Revised new draft brief to Minister Morrison.docx.
It appears that process was followed, because the copy signed by Mr Morrison on 20 February 2015 was first stamped by a DLO in Ms Payne’s office on 12 February 2015. See: Exhibit 4-5218 - CTH.4000.0399.0024_R - B15-125 - Signed brief for Minister Morrison and B15-126 - Cover brief to B15-125 [DLM=Sensitive]; Exhibit 4-5219 - CTH.3008.0008.4360_R - B15-126 - Cover brief for B15-125 - Signed brief for Minister Morrison; Exhibit 4-5220 - CTH.3078.0001.0284_R - For advice re B15-125 - Signed brief for Minister Morrison and B15-126 - Cover brief to B15-125 for urgent progressing to the Minister [DLM=Sensitive].

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The Expenditure Review Committee (ERC) is a committee of Cabinet which advises on Budget matters. The ERC considers most NPPs with actual or potential financial implications before they are considered by Cabinet. For more detailed information, see the chapter – Failures in the Budget Process.
260 Exhibit 2-2500 - CTH.3784.0001.0002_R - B15-39 Current Compliance Processes and Options for Improvement (Agency Signed); Exhibit 2-2501 - CTH.3784.0001.0004 - B15-39 Current Compliance Processes and Options for Improvement (Attachment); Exhibit 4-5207 - CTH.4000.0308.1766_R, Fwd- B15-39 - Cover brief - Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 2-1938 – CTH.3008.0007.7938_R, FW: B15/39 – Cover brief – Compliance processes and options for improvement [DLM=For-Official-Use-Only]; Exhibit 1-1269; Exhibit 2-1939 - CTH.3008.0008.1654_R; Exhibit 2-2501 - CTH.3008.0008.1656_R – Revised draft brief to Minister Morrison.docx; Exhibit 4-5218 - CTH.4000.0399.0024_R - B15/125 - Signed brief for Minister Morrison and B15/126 - Cover brief to B15/125 [DLM=Sensitive]; Exhibit 2-2334 - DSS.5091.0001.0206_R - FW- 11779 - Strengthening the Integrity of Welfare Payments - PAYG component [SEC=PROTECTED, DLM=Sensitive-Cabinet].


262 Exhibit 4-5227 - CTH.3004.0001.4260_R - proposed words [DLM=Sensitive]; Exhibit 4-5230 - CTH.3006.0001.6036_R - Compliance NPP [DLM=Sensitive]; Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8), p 2; Exhibit 4-5629; Exhibit 2-2018 - CTH.3006.0001.6065_R - NPP final version [DLM=Sensitive]; Exhibit 4-5628 - CTH.3006.0001.6066_R - Strengthening the Integrity of Welfare Payments NPP (10).

263 Exhibit 2-2556 – DSS.5091.0001.0900_R - Possible legislative amends to enable DHS measures [SEC=PROTECTED, DLM=Sensitive-Cabinet].


265 Transcript, Anthony Barford, 24 January 2023 [p 2323: lines 25-29].

266 Transcript, Anthony Barford, 24 January 2023 [p 2323: line 46 – p 2324: line 1].

267 Exhibit 2-2555; DSS.5060.0001.0551_R - FW- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 3-3520 - DSS.5091.0001.0118_R - Docs for Thursday meeting - Potential legislative amends - DHS Strengthening Welfare NPP package [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 3-3524 - DSS.5091.0001.0136_R - Costing Agreement 11779 Strengthening the Integrity of Welfare Payments (Department).

268 Transcript, Anthony Barford, 24 January 2023 [p 2322: lines 44-47].

269 Transcript, Anthony Barford, 24 January 2023 [p 2323: lines 37-42].

270 Exhibit 2-2556 – DSS.5091.0001.0900_R - Possible legislative amends to enable DHS measures [SEC=PROTECTED, DLM=Sensitive-Cabinet].

271 Exhibit 3-3517 - DSS.5067.0001.0311_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive].

272 Exhibit 9874 - DSS.5105.0001.8847_R - Tony - Comments on DHS NPP [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 9875 - DSS.5105.0001.8848_R - Tony - Comments on DHS NPP [SEC=PROTECTED, DLM=Sensitive-Cabinet].

273 Exhibit 4-7911 - DSS.8500.0001.1145_R - RE- New version of draft brief on fraud and compliance [DLM=Sensitive]; Exhibit 4-7907 - RBD.9999.0001.0476 - 1A. Population Identification Process Map - Pre Robodebt to OCI_20230303 [para 58-62].

274 Exhibit 4-7907 - PMB.9999.0001.0003_R - NTG-0215 Paul McBride Statement - Amended Doc IDs 47354008.1, [para 56]; Exhibit 4-7908 - DSS.8500.0001.1928_R2 - DHS NPPs for inclusion in the 2015-16 PB Sub [SEC=PROTECTED, DLM=Sensitive-Cabinet].

275 Exhibit 4-7909 - DSS.8500.0001.1936_R - [NPP B.35] - 204 Strengthening the integrity of Welfare payments (v.8).

276 Exhibit 2-3234 - DSS.5091.0001.0206_R - FW- 11779 - Strengthening the Integrity of Welfare Payments - PAYG component [SEC=PROTECTED, DLM=Sensitive-Cabinet].

277 Exhibit 2-3235 - DSS.5081.0001.9189_R - RE- 11779 - Strengthening the Integrity of Welfare Payments - PAYG component [SEC=PROTECTED, DLM=Sensitive-Cabinet].


279 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 31-41, p 4803: lines 1-12].

280 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 31-41, p 4803: lines 1-12].

281 Transcript, Paul McBride, 9 March 2023 [p 4828: lines 16-26].

323 Transcript, Kathryn Campbell, 7 March 2023 [p 4575: line 44 – p 4577: line 1].
324 Transcript, Kathryn Campbell, 7 March 2023 [p 4577: line 3 – p 4578: line 29].
326 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 2].
327 Exhibit 2-2669 - DSS.5077.0001.0037_R - AHL6MFD2_2022-10-27_12-14-35-258 [p 2].
328 Transcript, Megan Lees, 20 February 2023 [p 3327: lines 1-19].
329 Transcript, Marise Payne, 2 March 2023 [p 4292: lines 5-10].
330 Exhibit 4-5230 - CTH.3006.0001.6036_R - Compliance NPP [DLM=Sensitive]; Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8); Exhibit 4-5237 - CTH.4000.0399.0030_R - RE- Final Version of Compliance NPP [DLM=Sensitive]; Transcript, Megan Lees, 20 February 2023 [p 3314: lines 5-18].
331 Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8) [p 3].
332 Exhibit 4-5231 - CTH.4000.0399.0127_R - Strengthening the Integrity of Welfare Payments NPP (8) [p 6].
333 Exhibit 4-5249 - CTH.3023.0001.5966_R - Strengthening the Integrity of Welfare Payments NPP [DLM=Sensitive]; Exhibit 4-5250 - CTH.3023.0001.5967_R - Strengthening the Integrity of Welfare Payments 040315; Exhibit 4-5258 - CTH.4000.0308.2411_R - ACION more NPPS for clearance [DLM=Sensitive]; Exhibit 4-5259 - CTH.4000.0399.0192_R - NPP integrity; Exhibit 4-5263 - CTH.4000.0308.2441_R - FW- Updated NPP - Strengthening the Integrity of Welfare Payments [DLM=Sensitive]; Exhibit 4-5264, CTH.4000.0308.2442_R - NPP Strengthening the Integrity of Welfare Payments 110315.
334 Exhibit 2-2022 - PMC.001.0002.017_R - PMC-001-0002-017_Redacted.
335 Transcript, Marise Payne, 2 March 2023 [p 4291: line 15 – p 4293: line 45].
336 Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10, [24-26], in the context of the contemplation by Parliament of the conferment of statutory power on Ministers, also citing Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 65-66.
337 Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; DCM20 v Secretary of Department of Home Affairs [2023] HCA 10, [24-26], in the context of the contemplation by Parliament of the conferment of statutory power upon Ministers.
340 Transcript, Scott Morrison, 14 December 2022 [p 1795: lines 35 to 41].
341 Transcript, Scott Morrison, 14 December 2022 [p 1796: lines 1 to 5].
342 Transcript, Scott Morrison, 14 December 2022 [p 1821: lines 19 to 25].
343 Transcript, Scott Morrison, 14 December 2022 [p 1801: lines 11-15].
344 Transcript, Scott Morrison, 14 December 2022 [p 1841: lines 41-42].
345 Transcript, Scott Morrison, 14 December 2022 [p 1838: lines 21-34].
346 Transcript, Scott Morrison, 14 December 2022 [p 1837: lines 36-41].
348 Transcript, Scott Morrison, 14 December 2022 [p 1856: lines 31-36].
349 Transcript, Scott Morrison, 14 December 2022 [p 1801: line 17; p 1802: lines 22-27].
351 Transcript, Scott Morrison, 14 December 2022 [p 1808: lines 4-41; p 1814: lines 7-13 and lines 20-24].
352 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 43-46; p 1803: lines 5-29].
353 Transcript, Scott Morrison, 14 December 2022 [p 1796: lines 9-44].
354 Transcript, Scott Morrison, 14 December 2022 [p 1802: lines 28-29; p 1785: lines 5-8].
355 Transcript, Scott Morrison, 14 December 2022 [p 1863: lines 27-34].
356 Transcript, Scott Morrison, 14 December 2022 [p 1863: lines 36-46].
357 Transcript, Scott Morrison, 14 December 2022 [p 1864: lines 1-4].
358 Transcript, Scott Morrison, 14 December 2022 [p1860: line 1-3].
359 Exhibit 2-2559 - SMO.9999.0001.0009_R2 – 20221125 Statement of Mr Scott Morrison – PII redactions.pdf [paras 22-29].
360 Exhibit 2-2559 - SMO.9999.0001.0009_R2 – 20221125 Statement of Mr Scott Morrison – PII redactions.pdf [para 72].
361 Transcript, Finn Pratt, 10 November 2022 [p 847: lines 14-18].
362 Transcript, Mark Withnell, 9 December 2022, [p 1496: line 47 – p 1497: line 20].
363 Transcript, Scott Britton, 8 November 2022 [p 669: lines 25-31; p 670: lines 25-29].
364 Transcript, Scott Morrison, 14 December 2022 [p 1808: line 26 – p 1812 line 41].
See, for example: Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].

See, for example: Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].
Chapter 5:  
2015 to 2016 - Implementation of the Scheme
1 The lead up to the pilot

The New Policy Proposal (NPP) presented to the Expenditure Review Committee (ERC) on 25 March 2015 proposed 1 July 2015 as the commencement date for the process which would become the Robodebt scheme (the Scheme). The estimated savings for the measure were based on an assumption that it would commence at that time. However, at the time of the ERC meeting, Department of Human Services (DHS) officers had not completed the design of the proposed process, or tested or modelled it, and the Department of Finance continued to hold concerns about the costings that underpinned it.

So it is perhaps not surprising that the focus of DHS officers after the ERC meeting on 25 March 2015 was fixed on overcoming any remaining barriers to the launch of the Scheme on 1 July 2015, rather than on undertaking any critical analysis of its underpinnings that might reveal its fundamental flaws. This focus is reflected in an email that Jason Ryman (director, Customer Compliance Branch, DHS) sent to other DHS officers on the day of the ERC meeting:

I have until the 27th of April to have process [sic] designed, agreed and ready for testing for early May. The process will essentially mirror what we will be looking to develop as an online solution, recognising there will be manual processes (such as initiation)...¹

The design of the process in the intervening three-month period involved various requests for legal and policy advice about aspects of the process while DHS deliberated about its details. These requests came, at times, frustratingly close to identifying the fundamental flaws in the scheme.

In one email, sent on 27 March 2015, a DHS officer queried whether legal advice should be obtained about any issue arising in the application of match data once an income support recipient failed to provide additional information after having been requested by DHS to do so.² On 9 April 2015, Mr Ryman sent an email to a lawyer in the Legal Services Division, DHS, requesting further advice with respect to the proposed PAYG process.³

Mr Ryman asked a number of questions relating to the design of the process. The first related to whether there were any legal issues associated with the detail proposed to be contained in the initial letter to recipients at the commencement of the process. The second and third related to whether, in certain circumstances, a statutory provision had to be cited in that letter. The final question described, in general terms, the process of income averaging under the Scheme, and asked if there were “any impediments to this approach.” The final question was:

Applying the matched information to the customer record means that the total gross income (advised on the PAYG) will be evenly distributed across all fortnights in the employment period (advised on the PAYG), and then standard fortnightly attribution of income will be applied. It is important to note that the matched information will only be used for retrospective earnings related to debt calculations and not for the assessment of income in relation to ongoing rates of payment. We already apply this method as a last resort in current processes where we are unable to identify the employer or unable to contact [sic] the employers (e.g. out of business) or where the customer and/or employer have not complied with the request for information. Using this method upfront reduces the red tape burden on third parties, and we are using acceptable ‘verification of income documents’ for the purposes of coding income in relation to a debt being raised (guide to SSLaw 2.2.3). Are you aware of any impediments to this approach noting it is consistent with current policy and it does not change how debts are calculated or the policy associated with the fortnightly attribution of income?

The advice provided in response to the question did not address the question of whether income averaging, as it was used in the Scheme, was lawful.

Instead, it contained observations that it was “best practice” to give income support recipients the opportunity to respond to DHS information; that the decision-maker had a discretion to accept information from the ATO and act on it if it was reliable, verifiable and credible to raise a debt, but “best practice” principles should be in place to mitigate the risk of doing so; and that where a recipient did not receive the notice, they could appeal, which was a matter of “risk assessment from an operational viewpoint.”⁴
John Barnett, the DHS lawyer who settled the advice in response to Mr Ryman’s request, gave evidence before the Commission. He had not understood that question to be asking whether it was lawful to use income averaging to calculate debts in the absence of other evidence to support the calculation. He thought that what was being proposed was that calculations reached with income averaging would be considered “in light of all of the other circumstances and not in isolation.”

In April 2015, a PAYG Pilot Stakeholder group was formed. The group met on a regular basis (usually weekly) in the months of April to June 2015. At its meeting on 20 April 2015, the Board considered an agenda item which plainly concerned Mr Barnett’s advice. The minutes record, “Legal advice on the initiation letter received,” and note that “Advise [sic] supports the inclusion of data in the letter, that no coercive reference is required and the application of ATO data.”

On 24 April 2015, policy advice was sought from Emma Kate McGuirk, who then held the position of director of DHS’s Income Support Means Test Section, in relation to the income test for the program. She had participated in a walk-through of the proposed business processes for it. The email seeking her advice said that matched PAYG income information would be applied to income support recipients’ records using income averaging if those recipients did not respond after an initial letter notifying them. It asserted that the method was already used “as a last resort” in current processes where attempts to get the information from the recipient or employer had failed; now the method would be used “upfront,” reducing the red tape burden on third parties. Notwithstanding that the email clearly indicated a proposed departure from “last resort” use of income averaging, Ms McGuirk gave her advice in response by email dated 1 May 2015, indicating policy support for the process:

...as long as the customer is given the opportunity to correctly declare against each fortnight and apportionment is the last resort, we support what you are doing. Good luck!

The apparent inconsistency between Ms McGuirk’s qualified “last resort only” support for the proposed process and the description of that process in the earlier 24 April 2015 email does not seem to have caused any reflection within DHS. The departure from the use of income averaging “as a last resort,” making it instead the default position where the recipient did not, or could not, correct the ATO data, remained an integral feature of the Scheme throughout its implementation.
2  The initial pilot program

Between May and June 2015, a pilot program was conducted to test the effectiveness of the manual process that was being used while the online platform used for the Scheme was under development.\(^\text{12}\) While the pilot involved a manual process, it incorporated key principles of the Scheme. This included an initial contact letter “inviting” income support recipients to contact DHS and discuss the ATO data provided in relation to them.\(^\text{13}\) The pilot was undertaken in two phases, the first involving 1000 recipients, and the second involving 1600.\(^\text{14}\)

In an email to Mr Ryman dated 6 May 2015, copied to Scott Britton (national manager, Customer Compliance Branch, DHS) and Owen Lange (director, Business Integrity Support Centre, DHS), pointed out:

> We are going to have a percentage of customers that do not contact despite our invitation, and these customers will have their debts raised regardless of the 21 day mark.\(^\text{15}\)

Mr Ryman responded the same day:

> Hey Owen, you are right in your assessment. One of the unknowns is how many will not contact and then how many will contact after being advised of the debt via letter. What we are thinking is those who choose not to contact are satisfied with the information in the letter and the process we will apply in calculating the debt.\(^\text{16}\)

It is clear that those involved in the pilot, including Mr Ryman, expected that there would be a number of recipients who would not respond to the initial letters to them from DHS. Some of the documents prepared during the development of the NPP used historical data to predict that 35 per cent of income support recipients who were sent letters under the Scheme would not respond to those letters.\(^\text{17}\)

In the event, about 60 per cent of income support recipients involved in the pilot did not respond to DHS's attempts to contact them,\(^\text{18}\) a much higher proportion than had been assumed for the measure during the budget process.

Following the pilot, a draft brief to the secretary of DHS was prepared, reporting on this development. The draft was provided to Mark Withnell (general manager, Business Integrity, DHS) through Mr Britton’s Branch Coordination Team by email on 30 June 2015.\(^\text{19}\) Mr Withnell returned the draft on 2 July 2015, with notations indicating that he wanted amendments to it.\(^\text{20}\) Mr Ryman later the same day made changes to the draft in accordance with Mr Withnell’s feedback, and sought Mr Britton’s clearance for them.\(^\text{21}\) Later again that same day, the amended brief was emailed back to Mr Withnell through Mr Britton’s Branch Coordination Team.\(^\text{22}\) The brief was ultimately not delivered to the secretary.\(^\text{23}\)

It is a reasonable inference that both Mr Britton and Mr Ryman were familiar with, and accepted as correct, the contents of the draft brief. It contained this information:

> An unexpected outcome is the percentage of customers who are not contacting the Department within the prescribed 21 days. At this stage, approximately 60 per cent are not contacting. These customers have debts raised on the match / matched PAYG data and are sent a debt notice. By providing details of their employment (including period and amount earned) in the original letter to customers, it is possible that the customer is able to make an informed decision to not respond. This possibility is supported by:
  - when customers contact, over 50 per cent agree with the data and request any debt be calculated on this information. This indicates a high level of acceptance of the matched / match data.
  - for customers who did not contact, only 1 per cent of customers have contacted to provide information after receiving a debt notice. This indicates a level of acceptance of the debt.

The assertion\(^\text{24}\) that income support recipients were able to make informed decisions about whether to respond to letters sent to them was speculative, untested and unsupported by any evidence. Those statistics cited in support were an entirely unconvincing basis for the assertion, which was also contrary to the facts known to both Britton and Mr Ryman. Both knew that income support recipients might
not receive letters sent to them by DHS, so the fact they had not responded to them did not amount to acceptance of what the letters asserted.\textsuperscript{25}

In any case, the initial letters sent to recipients, supposedly the basis for “informed decisions,” did not reveal that income averaging was going to be used to calculate their entitlements.\textsuperscript{26} That remained the case for the letters sent out when the Online Compliance Intervention was implemented in 2016.\textsuperscript{27} All that the letters told their recipients was that DHS possessed ATO information in the form of total amounts of income they had earned from particular employers over particular periods, and that there was a discrepancy between that information and what the recipients had told DHS about their income.

It was entirely possible in any given case that the amounts reported to the ATO and the information that a recipient had reported to DHS were both correct, and there were a range of circumstances in which the discrepancy between the two amounts could be explained. One pertinent example was that an employer might have inaccurately reported the dates of a recipient’s employment to the ATO, so that it gave the impression the recipient was working and receiving a full benefit at the same time, when in fact, a more accurate date range would confirm that there had been no overlap, or a more limited overlap, between the period in which the person was employed and the period in which they were paid a benefit.

A recipient could receive a letter and see no need to respond because they accepted the ATO figure as correct, without appreciating that it would be averaged to calculate fortnightly income, determine entitlement and raise a debt.\textsuperscript{28} In circumstances where the letters did not disclose that DHS was proposing to use income averaging, a failure to respond to those letters could not be understood to amount to an acceptance of the resulting debt calculations as accurate.

In fact, what the pilot revealed was alarming. If the results of the pilot were replicated once the Scheme was implemented at full scale, it could be expected that 60 per cent of the interventions that were planned for the Scheme would involve debts being raised against recipients which were probably inaccurate, because they were based on averaging.\textsuperscript{29} This evidence invalidated Mr Britton’s expectation that income averaging would be used to calculate and raise debts under the scheme on an exceptional basis, and would only involve low numbers of people.\textsuperscript{30}

The draft brief to the Secretary represented an attempt to put a positive spin on the alarming results of the pilot. It ought to have contained a candid assessment of the results of the pilot, including the prospect that inaccurate debts would be raised on a massive scale because recipients did not respond or unwittingly accepted the ATO data. The brief failed to give a realistic picture of the results of the pilot.

In a submission to the Commission, Mr Britton said that he “verbally raised concerns about the Pilot with Karen Harfield and Mr Withnell and suggested that bulk initiations be delayed.” However, that submission is directed to events during the manual iteration of the Scheme, which is discussed further below, and was often also referred to as a “pilot” within DHS, in the lead up to the full operation of the online platform.

Ms Harfield had not commenced employment with DHS at the time of the initial pilot program.

The failure to confront fundamental flaws in the operation of the Scheme appears to have been a product of the culture within DHS at the time. In evidence before the Commission, Mr Britton said:

\begin{quote}
…my own experience was there was difficulty in giving bad news or alternate [sic] views to the Deputy [Secretary], Golightly. I had had a number of personal experiences with project reports that were red, didn’t like red, had to change it, update it. It may be that. I don’t know. I’m - I’m basing it purely on my personal experience. I think there was a general cultural view around no one gives bad news. So fix it - get on with it and fix it.\textsuperscript{32}
\end{quote}

The brief was not given to the Secretary.\textsuperscript{104} An email dated 25 November 2015 advised “GM [Mr Withnell] advised this brief is not progressing to the Secretary….”\textsuperscript{105} One possible explanation for this is that Ms Campbell was informed of the results orally, preferring not to receive them in writing. She said when asked about this that she had no recollection of such a thing occurring, and her solicitors submitted that no such finding could, therefore, be made. The other possibility is that the results were not given to her because of the same fear of delivering “bad news” that Mr Britton described in his evidence. It is difficult to conceive of any explanations other than those. Neither reflects well on Ms Campbell’s management of the department.
3 The PAYG Manual Compliance Program

The PAYG Manual Compliance Intervention program commenced operation on 1 July 2015 (the Manual Program).[^33] Although under the Manual Program reviews were undertaken by compliance officers, the program was designed to “mirror” the process that was to be implemented online the following year.[^34]

The matches that were to be dealt with in the Manual Program were taken from what DHS considered to be the highest risk categories of matches. Structuring the measure in this way was intended to ensure that matches associated with a higher likelihood of the existence of a debt, or a higher debt amount, or both, were dealt with in the first year. This was considered necessary for the proposed measure to produce a saving in each year, because in its first year any such savings would be diminished by expenditure on ICT costs associated with the development of the new online platform, and by the limits on the number of matches that compliance staff could process manually while the online platform was being developed.[^35]

The NPP had referred to the first year of the PAYG process being “undertaken using existing business processes.”[^36] The imprecision with which this is expressed makes it difficult to assert that it is wholly incorrect. However, there was a number of features contemplated in the proposed manual process which were not part of the business processes that existed pre-Robodebt, including the following:

- the ATO PAYG data was to be regarded as the primary source of earned income information, and could be acted upon to raise debts even in the absence of confirmation by a recipient or employer
- if a recipient did not engage with the department upon receiving the initial correspondence, there would be little to no investigation or information-gathering by compliance officers with, for example, the recipient or an employer
- where alternative information had not been provided, the ATO PAYG data would be averaged across an employment period in order to determine a recipient’s entitlement during the period benefit was received and calculate any overpayment and resulting debt. Although this had previously occurred on a limited basis, it was now contemplated that it would occur in all instances where the recipient had not provided further information.

The process for the Manual Program was known as the “Rapid Response” model. Under that process, the letter sent to recipients contained a telephone number for the Department. If a recipient contacted the Department in response to the letter, a compliance officer would determine how to proceed with the review, using whichever of the following three options was applicable:

- Firstly, with a recipient’s agreement, the ATO PAYG data would be used for the review. In those circumstances, the data would be apportioned (averaged) evenly across the employment period specified in the ATO data. If the calculation could be performed while a recipient was on the phone, the outcome would be explained, and a compliance officer would make a decision about whether a penalty fee was to be applied. A debt would then be raised.[^37]
- Secondly, a recipient could provide a verbal update to their information, either on the initial phone call or by arranging to call back at a later time. Any further information would be assessed by a compliance officer, who would determine if the update was “reasonable,” before using the information to inform the calculation of whether a debt was owed. Depending on the type of information provided by a recipient, the assessment of any debt amount could still involve the use of income averaging.[^38]
-Thirdly, a recipient could provide documentation to update their information. The compliance officer would then assess the information to determine if it was “reasonable,” and proceed with the calculation of whether a debt was owed. If a debt was raised, the recipient was to be advised through a telephone call from the compliance officer.[^39] Where the documentation provided by a recipient was considered to require clarification, the compliance officer would make a further call to the recipient to obtain further information. If, after this process, sufficient documentation was not provided, the PAYG match data was averaged across the PAYG period for the purposes of determining entitlement and raising any debt.[^40]
If the recipient did not contact the Department in response to the initial letter, the PAYG match data was apportioned (averaged) across the PAYG employment period.\footnote{31}

Just under 105,000 compliance reviews were commenced during the 12-month period of the Manual Program’s operation.\footnote{41} That was a fivefold increase from an average 20,000 compliance reviews conducted annually before the Scheme began.

The operation of the Manual Program resulted in a dramatic increase in the scale of DHS’ use of income averaging. Although the precise extent of the use of income averaging prior to the Scheme is unclear, the limitations that departmental procedures imposed on its use,\footnote{43} coupled with evidence given before the Commission,\footnote{44} lead to a clear inference that it was used infrequently, and it was certainly not used in the majority of cases.\footnote{45} The proportion of debts raised using income averaging under the Manual Program was 90.1 per cent. Not only did that represent most of the recipients subject to review, but it was applied in circumstances where the underlying pool of recipients had increased fivefold in number.

3.1 Staff concerns

In 2015, Colleen Taylor was a compliance officer at DHS. At that time, Ms Taylor had been a public servant for over 30 years, with extensive experience including frontline customer service roles in Commonwealth social welfare entities including Centrelink and its predecessors.\footnote{46} Ms Taylor’s knowledge and experience were such that her work would, at times, involve quality checking of work done by other compliance officers.\footnote{47} She had detailed knowledge of the income support payment system, departmental practices for dealing with overpayments and debts, and reviewing customer records.\footnote{48}

In 2015, Ms Taylor was informed of the changes to compliance practices that had been introduced under the Manual Program’s Rapid Response model.\footnote{49} Under that process, from around September 2015, compliance officers would no longer contact employers to obtain information.\footnote{50} From January 2016, compliance officers would no longer perform checks on a recipient’s departmental record.\footnote{51}

Ms Taylor became concerned about the inability of the process to identify all of the information necessary to properly investigate a discrepancy and calculate any subsequent debt, including information from employers and the recipient’s own departmental record.\footnote{52} She considered that the changes “would result in a large number of debts being issued to people when they did not really owe a debt, or any debt they did have was lower,”\footnote{53} and that “relying on averaging would not produce a result which was even close to right in many cases.”\footnote{54}

Ms Taylor said:

It seemed to me at the time that the purpose of the changes was to massively increase the number of debts being issued, to churn out debts on an industrial scale, based on the assumption that there were huge levels of debt which could be recovered. It also seemed to me that it was going to proceed despite the fact that many of the claimed debts would not be correct.\footnote{55}

In early 2016, Ms Taylor raised some of her concerns with departmental officers including her supervisor and the “Compliance Help Desk.”\footnote{56} She pointed to an instruction given to compliance officers to the effect that they did not need to check a recipient’s record for documents that might have been supplied prior to the start date of the compliance intervention. She provided an example of where, if the instruction were followed, relevant documents on a recipient’s file (such as payslips or employment separation certificates) would be ignored. This could result in raising a debt where none existed, or raising a higher debt than was warranted. Ms Taylor expressed her earnest concern, “...as a Compliance unit, we should not be the ones stealing from our customers.” When asked about that comment in oral evidence, she responded:

Well, if we know there’s no debt, and yet we’re sending a debt notice out to someone, isn’t that stealing?\footnote{57}
3.2 Reaction to the PAYG Manual Program

Despite its similarities in process to the OCI iteration of the Scheme, the Manual Program did not attract the same levels of criticism and publicity during its operation. There is a number of possible reasons for that.

Firstly, the review process was still an interaction, or series of interactions, involving human contact and a manual application of a compliance officer’s skills and experience during the review process. Despite the limitations imposed on a compliance officer by the procedures they were required to follow, there was still potential in the manual process for the officer to exercise discretion and reason throughout the review. That would depend on individual officers: whether their approach to conducting the review was one of strict adherence to the procedure under which they were operating, or was more flexible and tailored. The interaction between a recipient and a compliance officer also carried with it the opportunity for explanations, assistance and collection of further information from a recipient. Although the manual interaction under the Manual Process did little to reduce the use of averaging (and consequent debt inaccuracy), the human element may have contributed to the Manual Program attracting less criticism and publicity than OCI.

Secondly, the cases that had been targeted for review under the Manual Program were those that had been assessed by DHS as involving the “highest risk” of non-compliance. Putting to one side the issue with the ultimate legitimacy of those debts, at the time they were raised many recipients may have accepted they had a debt, particularly given it had been raised manually by a compliance officer.

Thirdly, the Manual Program involved the initiation of fewer compliance reviews, over a much longer period of time, than OCI, and a collective awareness of the system DHS was using had yet to develop. The higher numbers of affected recipients, concentrated over a shorter period of time, under OCI, were bound to attract more attention and publicity.

On one view, staff like Ms Taylor may seem to have been prescient in identifying, very early in the Scheme’s operation, a range of problems so neatly aligned with what later emerged as the central criticisms of the Scheme (particularly its OCI iteration). The reality is, though, that the Scheme’s deficiencies were so
fundamental and obvious they were readily identifiable, even at an early stage, by those with knowledge of the social security system, especially DHS staff.

Had the senior officers responsible for the design of the concept and the implementation of the Scheme had the desire, or the time, to develop a system capable of accurately capturing and calculating actual debt amounts, one of the first ports of call should have been the experience and knowledge held by their own department’s staff. Not only did they not seek it, but when staff members like Ms Taylor raised concerns, they were ignored or dismissed.

At the level at which decisions about the Scheme were being made, attention was entirely centred on implementing it to ensure it achieved “success,” measured in terms of the numbers of reviews completed and the amount of savings achieved. The focus was on how to do this. There was no critical analysis or reflection on whether it should, or even could, be done. The alarm bells were ringing loud and clear for anyone who cared to listen, but they were falling on deaf ears.

In December 2015, the “Enhanced Welfare Payment Integrity – income data matching” measure (the EWPI measure) was introduced through the Mid-Year Economic and Fiscal Outlook 2015-16 (MYEFO). The original SIWP measure had applied to income discrepancies for the 2010-11, 2011-12 and 2012-13 financial years. The EWPI measure extended that measure to allow for the examination of discrepancy data and resulting compliance activity for the 2013-14 and 2014-15 financial years.
4 The Online Compliance Intervention system

While the Manual Process was in operation, the ICT platform that would become OCI was being developed. The development of the OCI platform was complex and it is unnecessary to traverse it in great detail. However, two significant points emerge. Firstly, problems arose during the design and testing phases that demonstrated that there were deficiencies in the system’s capacity to accurately calculate debts. Secondly, DHS management, particularly Ms Golightly, applied intense pressure to ensure that enough reviews were commenced to meet the requirements of the Budget measures, with the result that system issues were not resolved prior to the OCI system’s commencing full operation.

In March 2016, a new Division was created in DHS to deal with the area of customer compliance. Ms Harfield joined the department as the general manager of this newly created “Customer Compliance Division” and became general manager for the EWPI budget measure. Mr Withnell remained as the general manager of the Business Integrity Division, and continued to be the Senior Responsible Officer for the SIWP budget measure.

When Ms Harfield started in the role, Mr Ryman, Mr Britton and Mr Withnell briefed her on the Budget measures. From those briefings, Ms Harfield learned that the Budget measures involved a process by which a recipient would be presented with ATO data and invited to either accept it, or correct it by providing further information; that where a recipient did not respond, the data would be applied using a process of averaging; that it was anticipated that recipients would engage with the process of the compliance review, so that “the number of times averaging would need to be used would be less;” and that averaging was a last resort where other information could not be obtained.

By the time Ms Harfield began as general manager, the system build for the OCI platform was behind schedule, and was encountering technical issues. The underlying program functionality had been scheduled to be provided for a March 2016 release, to enable “robust verification testing to be undertaken prior to commencement of online compliance activity from 1 July 2016.” However, the deadline was not met, and the delivery was rescheduled for a June 2016 release.

4.1 Testing and development

The testing with respect to the development of the ICT platform was undertaken in various phases, some of which overlapped. Those phases were system integration testing, user acceptance testing and business verification testing.

On 8 June 2016, a contractor who was working as a test manager in the Enterprise Testing Branch produced a report summarising the outcome of the “System Integration Testing” (SIT) that had been undertaken for the systems underlying the OCI project. The testing team’s recommendation was negative for release to the next stage. The test manager’s view was that certain components within the system had been tested and worked well “completely in isolation,” and there was “a considerable level of confidence” in some of the components that had been tested. However, the report concluded, despite that level of confidence, “more in depth and complex customer scenarios have not been undertaken at this stage.” It was recommended that “further robust/vigorous testing and analysis of more complex customer scenarios be undertaken for this task, to provide a more reliable/dependable level of confidence.”

However, that same evening, staff in ICT advised Mr Britton that they had “obtained conditional sign off to release [the platform] to production in a dormant state as we discussed at today’s board meeting.”

On 9 June 2016, Mr Britton sent emails seeking clarification of the final position, querying how the differing positions in the reports could be reconciled, and seeking “further details so that I can understand how the test report went from recommending that EIM does not go into this weekend release to now being (conditionally) OK.”
On 10 June 2016, less than 48 hours after the first report had been provided, the Enterprise Testing Branch provided a further report. In stark contrast to the first report, this report recommended the conditional release of the OCI product to the next stage. The writer of the covering email stated that the “draft report” previously provided “was not accurate and did not reflect the state of testing;” “a negative recommendation should never have been the outcome.” The test manager who had written the first report was clearly not in favour. The email said of him:

For some context, we were having issues with [the contractor]’s approach to testing within this project, the accuracy and timeliness of his daily reporting...As a result his contract was ended with effect 8 June...

Mr Britton forwarded the further report to Mr Ryman and Gary Clarke, director of Capability Delivery Management, for their review. Mr Clarke replied that he could not “reconcile the significant differences between this report and the one produced by the Test Manager who was on the ground for the entire time of the SIT exercise.” He did not think the differences could not be explained away by the explanation testing staff had given in the email to Mr Britton. The original report, Mr Clarke said, “matches with the feedback being received ‘on the ground’ by our PM from the testers just hours before the original report was received,” who “advised that [the] end to end [process] was still not working, and only basic test scenarios had been completed.” The second report, he pointed out, was “almost devoid of useful information...to determine some level of confidence in the product being delivered.”

But the second report prevailed. Later that day, Mr Britton replied to Mr Clarke and Mr Ryman, saying “Mark [Mr Withnell] and I spoke with the A/g GM and he provided assurance that we can rely on the final test report received this morning.” The documents the Commission has been able to obtain do not shed any light on how the issues were resolved, but it appears that the “Core Online Compliance Solution was delivered as part of [the] 11 June release,” and that further systems integration testing was performed until it was considered “completed” as reported to the SIWP ICT Program Board on 15 July 2016.

A further phase of testing was “user acceptance testing.” The aim of this phase was to “validate [that] the products due to be released are fit-for-purpose and ready for operational use.” Part of this testing was to identify gaps between “how the completed system works” and “how the business operational processes are performed according to what the project expects.” Ultimately, the user acceptance testing was designed to occur at “the final phase of end-to-end testing to verify whether the system meets a customer’s requirements and ultimately whether it is ready for deployment into production.”

It was clearly important to ensure that the system was tested with staff, who represented a significant cohort of “users” of the system. But perhaps the most obvious cohort of “users” was that of recipients themselves. Testing could hardly “verify whether the system meets a customer’s requirements” without involving any recipients in the process.

However, that is exactly what occurred. The testing involved departmental staff “running through scenarios as ‘customers’ to identify any issues.” No testing involving recipients was undertaken outside the pilot, and the pilot did not provide any information as to potential difficulties with the process from the recipients’ point of view. There was apparently a “draft plan” to undertake user testing, with a view to seeking recipient feedback, in early 2017. That timeline, self-evidently, did not contemplate such testing as part of the design and implementation of the initial OCI system, which was planned to commence in mid-2016.

On 23 June 2016, members of the SIWP Board decided to delay the next phase of testing, which was “Business Verification Testing.” The Board held concerns about the lack of complex scenarios that had been completed in the user acceptance testing phase, and concerns about the customer interface “which could result in inaccurate data being pushed through to the debt calculation.” There was a need to “understand better the issue with debt calculations, and the variation seen across systems.” The commencement of business variation testing was delayed pending further user acceptance testing.
4.2 “Our future is here”

On 11 July 2016, the OCI system went live into a production environment. Approximately one week later, Mr Britton emailed Ms Harfield, Mr Ryman and others with the subject line “OCI – Our future is here.” He informed them that the first online intervention had successfully gone through the system.

The delay in Business Verification Testing (BVT) was not a long one; it commenced on 15 July 2016. The BVT Plan was based upon an assumption that the system integration and user acceptance testing phases were completed prior to the commencement of BVT.

During the initial BVT phase, 1000 recipient records were randomly selected to test the system functionality. Ten compliance officers, supported by technical staff, oversaw the process by which those 1000 recipients completed the review process through the OCI.

The BVT phase subsequently became known as the “Staged Implementation Phase” (usually referred to as SIP), following which it was anticipated that the OCI system would start initiating increased volumes of compliance interventions.

During the staged implementation phase, OCI interventions were subject to a system “switch,” which prevented an assessment from being displayed to a recipient until it was checked for accuracy. This check included a process by which any debts that had been automatically calculated by the OCI system were also manually calculated by a compliance officer to check the accuracy of the automatic calculation. The results of this analysis were presented in reports entitled “SIP Reporting Dashboard + Issues,” which reflected cumulative data presented on a daily and weekly basis.

There was an obvious problem, reflected in the figures provided in those reporting dashboards, with the accuracy of the automatically calculated debts. By the end of the staged implementation phase, on 30 September 2016, compliance officers had completed 919 manual “validations” to check the accuracy of the automatic calculation. That process revealed that 29 per cent of the debts automatically calculated by the OCI system were “incorrect.” The inaccuracy of debts calculated as part of a reassessment process was even higher, with 37 per cent out of a total of 63 reassessments being found to be incorrect.

Another concerning feature the SIP reports revealed was the recipient response rate to the online process. Seventy percent of customers had taken no action in response to the process. Of the 30 per cent who had engaged in the process, 83 per cent had “accepted” the ATO data. Ninety five percent of reviews had been completed without any action by a compliance officer, which necessarily meant that even where a recipient had accepted the ATO data, they had done so without any explanation or assistance from a compliance officer. Overwhelmingly, therefore, the default mechanism of calculation, for both those customers who had not responded, and those who had accepted the ATO data, was averaging of the ATO data to calculate their fortnightly income.

This information was extremely concerning, for at least three reasons.

Firstly, it revealed that, if the operation of the system at full capacity reflected the results of the staged implementation phase, the majority of recipients would not engage with the process. This was in circumstances where the system placed the onus on the recipient to update, correct, or provide further information to prevent it automatically using ATO data to calculate any debt.

Secondly, it demonstrated that income averaging would be used on a massive scale, far higher than had been anticipated at any point in the process thus far. It would be the default mechanism of calculation, used in the majority of reviews; certainly not a “last resort” or limited to exceptional cases.
Thirdly, the results of the staged implementation phase indicated that the automatic calculation of debts by the system had a high rate of inaccuracy (29 per cent). That rate was concerning in and of itself. However, it is even more so in view of the likelihood that it was actually an underestimation of the number of “incorrect” debts, for the following reason. Although it is unclear from the SIP reports by what methodology a compliance officer would manually calculate the debts under the “validation” process, it seems likely that it was the same or similar to that used by the Rapid Response Teams under the Manual Process. A manual validation that used income averaging to check an automatically calculated averaged debt would find that the automatic debt (also calculated using averaging) was “correct.” However, where a recipient’s income was variable fortnight to fortnight, which was the case for the vast majority of recipients, a calculation that used income averaging was most unlikely to produce an accurate debt amount.

From a more cynical perspective, the results of the SIP demonstrated that, despite the obvious shortcomings in the process, the OCI system was capable of completing reviews and calculating debts with very little human engagement or intervention, in a very short space of time. For anyone unconcerned with fairness, accuracy, or, indeed, lawfulness, the testing results suggested that the system could quickly and automatically generate the savings and the numbers required to fulfil the promises made under the Budget measures, on a scale limited only by the number of discrepancies revealed by the data matching process.

### 4.3 Pressures and priorities

During August and September 2016, Ms Harfield described Ms Golightly as being “very focused” on what she regarded as a lack of progress in achieving the number of reviews required to deliver the Budget measures. Ms Harfield perceived that “the heavy emphasis on my role, from Ms Golightly, was to push myself and my team to achieve the volume targets for reviews as required in the Budget measures.”

Mr Britton described Ms Golightly as having a “deliver at all costs approach;” she was “very uncompromising, directive and sometimes aggressive in her communication.” There was pressure to achieve savings at the early stages of the PAYG measure, and a suggestion that initiatives should be brought forward. He emailed Ms Golightly, outlining the risks of this strategy in circumstances where a number of IT issues remained outstanding.

In early September, Ms Harfield said, she told Ms Golightly that the IT delays with the OCI system meant that review numbers would increase later than expected. Ms Golightly asked for a brief on the subject (the Combined OCI Brief). Ms Harfield delegated that work to Mr Britton, who asked Tenille Collins to start work on that brief.

On 7 September 2016, Mr Britton emailed Ms Golightly regarding the OCI IT problems, saying that some of them were critical, and would need to be resolved before large scale initiations of compliance interventions were commenced. The following day, Mr Britton sent a further update to Ms Golightly expressing confidence that there would be sufficient volumes of work to commence large scale initiations from October 2016. However, some of the technical problems presented a risk to the project because of the unanticipated manual effort that might be required to finalise those reviews.

On 8 and 9 September 2016, Ms Golightly was making inquiries in tones of urgency about the Project Status Report for the EWPI measure, asking whether the number of planned interventions would “get us to where we need to be re target for the year?” (if it did not, Mr Britton was to “call [her] urgently”) and whether “we are still confident that we will meet the targeted completions.”

On 11 September 2016, Mr Britton emailed Ms Harfield, outlining the discussions he had had with Ms Golightly about the IT issues with the OCI project and the latter’s anxiety “about our ability to meet the volume of cases required for 16/17.” Mr Britton said that he had advised Ms Golightly that “we can step her through the initiation forecast that will ensure we meet the numbers. I am looking at options now where we could increase the numbers quickly over the coming weeks prior to 10 October when we are planning to increase the numbers dramatically.”
Soon after, Mr Britton emailed Ms Harfield to let her know that Ms Golightly no longer wanted the Combined OCI Brief that she had requested from Ms Harfield. Instead, Mr Britton said, he had “covered all issues and actions through other emails and discussions.” Mr Britton’s email attached the draft of the Combined OCI Brief that had been developed to date (which Ms Golightly no longer wanted), which set out a range of IT issues, and noted the risk of unexpected manual effort to finalise the reviews that had been initiated.

Ms Collins, who was involved in drafting the Combined OCI Brief, recalled a conversation with Mr Britton and Ms Harfield, in which Ms Harfield “indicated that she was still interested in pursuing the issues” that were outlined in the Combined OCI Brief. Essentially, Ms Golightly had indicated that she no longer wanted the Combined OCI Brief, but Ms Harfield was concerned enough about the issues addressed in the brief to arrange for work on it to continue. On 16 September 2016, Ms Collins updated the brief. The fate of the Combined OCI Brief is discussed further below.

According to Ms Harfield, Ms Golightly “made it very clear [to her] that the interventions were to increase in line with the Budget measure requirements and that this was to happen as soon as possible” and instructed her to produce a proposal to increase the number of compliance reviews initiated in the OCI system by the end of September 2016. Ms Collins agreed with the proposition that the “push” to escalate the scale of reviews came from Ms Golightly.

Mr Ryman recalled that, around this time, he was concerned about the risks of increasing the volume of reviews, because there were aspects of the OCI system that needed further refinement, and they had “not been afforded a sufficient opportunity to iron out any bumps.” He thought the decision to increase the number of reviews may have been a response to “significant performance expectations which had costs savings attached to it.”

On 20 September 2016, as instructed, Ms Harfield sent an email to Ms Golightly about “re-planning... to ensure that a significant increase in the volume of initiated interventions occurs by the end of September.” In order to reach the figure of 75,000 interventions for the July/September quarter of 2016-17, 63,000 additional interventions would be initiated over the course of the week commencing 26 September 2016. Those interventions would be a combination of those identified under the employment income matching element of the SIWP measure, and those under the EWPI measure.

Ms Harfield indicated that there would be manual work associated with the increased interventions, in order to overcome known system issues that would prevent a review from being automatically processed or finalised. She noted a number of ICT fixes scheduled for deployment on 30 September 2016, which were “required to ensure customer debts are calculated correctly, and manual effort was reduced.” Those fixes would be monitored, as would the results coming out of the staged implementation phase, which would continue as the number of initiated interventions was scaled up. After some clarification of detail, Ms Golightly responded that “on this basis I think we should proceed if you and Mark [Mr Withnell] (as acting for me) are comfortable.” Ms Harfield emailed Mr Withnell, asking him to call her about Ms Golightly’s “request.”

Ms Collins recalled a conversation between herself, Mr Withnell, Ms Harfield and Ms Golightly (Ms Golightly by telephone) in late September 2016, about “whether or not we should proceed to scale up this measure” and “the various issues that we were seeing.” The conversation was “unusual” in that Ms Golightly was on leave at the time, and Mr Withnell was the acting deputy secretary.

At the end of that meeting, Ms Collins said, she was instructed to “redo the forecasts...to scale up to 75,000 initiations by the end of September, which was about a week away at that point.” Ms Collins raised some of the associated risks; Ms Golightly was “very upset with me, was screaming at me.” Ms Collins proposed that she update the Combined OCI Brief, because she thought there were additional risks, but Ms Golightly replied, “under no circumstances are you to put this in writing.” The Combined OCI Brief was never finalised.

In the face of the sustained pressure from Ms Golightly, the plan set out in Ms Harfield’s email of 20 September 2016 was adopted. Increased initiation of reviews began from 26 September 2016.
4.4 Papering over the cracks

Following the commencement of large scale initiations of compliance reviews under OCI, there were attempts to manage the problems in the OCI system. Mr Britton signed a brief on 5 October 2016 which outlined a number of those problems, and the strategies to deal with them.\textsuperscript{148}

By early October, four “critical” ICT issues remained,\textsuperscript{149} which were considered to “represent a risk to the accuracy of the automated assessment provided through the OCI platform.”\textsuperscript{150}

There was a plan to deliver “fixes” to resolve those issues on 15 October 2016.\textsuperscript{151} A number of strategies was implemented to mitigate their impact until then, and until there was greater confidence in the accuracy of automated assessments and debt calculations.

One of those strategies was to pre-identify cases affected by those issues, and prevent their release into OCI for review until such time as the fixes had been released. However, this only applied to two out of the four critical issues. There remained “a risk associated with the accuracy of the automated assessment and debt calculation with two of the four issues.” The relevant brief on this issue stated “Analysis undertaken has identified the incorrect debt outcome relating to these issues are always to the customer’s advantage.” The brief indicated that the Debt Management Branch had been consulted about the debt accuracy risk and accepted it “until the fix has been released.”\textsuperscript{152}

Notwithstanding the problems, on 5 October 2016, Mr Britton approved the removal of the “switch” which had hitherto prevented the assessment from being displayed to the recipient before it had been checked for accuracy.\textsuperscript{153} He told Ms Harfield, “we have been able to put mitigation in place as described within the attached brief so we are confident that cases with potential errors can be identified and treated.”\textsuperscript{154}
Savings and targets

Ms Golightly’s anxiety about meeting targets continued. On 18 October 2016, having reviewed the September “Debt and compliance report” to be sent to the minister’s office, she asked for more commentary in the footnotes to explain why there was a “low achievement against the targets” although the measures were still described as “on track.” After Ms Harfield updated the document, Ms Golightly again queried the number of interventions, and whether it would result in the department’s reaching the target number of compliance reviews.

In November 2017, Ms Golightly again commented on the debt and compliance report, querying the number of reviews being undertaken in relation to the SIWP measure, and the measure extending its operation to later years. She addressed Mr Britton and Ms Harfield:

I know that Oct was the first few weeks of our increased numbers of interventions but these savings figures (on the surface of it) seem very low. Are we happy that the savings are commensurate with the interventions? In other words are the savings being achieved as expected for the number done?...

In response, Mr Britton maintained that, although the figures appeared relatively low in comparison to the target, the measures were on track, and they were confident of reaching the targets for savings and intervention numbers. He stated that activity for the Budget measures had been scheduled against various factors, and that “a linear delivery of interventions and associated savings should not be anticipated.”

Mr Britton also raised the fact that recipients were not taking any action in 70 per cent of interventions, which was higher than the “60 per cent built in to assumptions.” There were higher volumes of work than had been anticipated, mainly because of the recovery work necessary to deal with system errors.

The problems began to emerge almost immediately once large scale initiations of compliance reviews began:

• Between 21 and 24 October 2016, an issue with the OCI system resulted in a number of people being affected, with the details recorded as follows. Seventy-five Age Pension recipients had their payments cancelled. Eight of those recipients did not subsequently receive their payment on time, with at least one payment being received six days late. Twenty eight former recipients were also affected by the error, in an unspecified way. Approximately 600 recipients received an incorrect payment, which the department would have to either waive or seek to recover. Some 2,700 recipients had possibly had an incorrect debt amount raised, when they did not, in fact, have any debt at all. An “emergency change” to the system had been made, it was reported, and it was “now working correctly.”

• On 26 October 2016, Ms Harfield emailed Ms Golightly about an OCI issue relating to interventions having been finalised with “incorrect outcomes.” The system was not applying rules to ensure manual processing occurred in specific scenarios. One hundred and three recipients were affected, and the system code was updated to rectify the issue.

• On 7 December 2016, a problem with the system caused a recipient’s entitlement to be “rejected.” She had attempted to report earnings, but was unable to do so using the OCI system. When a compliance officer attempted to assist her, a system error had occurred, causing a rejection of the recipient’s payment and a false record of a $34,330.33 overpayment. The recipient was in hardship because her payment was rejected, and she had a medical condition which was exacerbated by the situation.

• On 16 December 2016, the Centrelink Online system was unavailable, and recipients (some 119 of them) were unable to access online compliance reviews.

• On 22 December 2016, it became apparent that debt reminder letters were not being issued for people who had not repaid their OCI debt. 71,332 cases were identified in this category.
5.1 A rushed release

Mr Britton’s view was that the decision to initiate reviews earlier than planned, in large volumes, when the core system was not fully functional and tested, may have been behind many of the early OCI problems. He considered it should have been staged over a longer period, but savings expectations meant that timeframes were truncated and, in his opinion, unrealistic. The focus, urgency, expectation of, and pressure to deliver unprecedented savings removed the opportunity to ensure design accuracy and customer experience were fully considered and effective before full implementation. The push from above to show early success and to deliver the forecast savings created pressure to initiate large volumes of reviews, despite the risk of additional manual effort costs or “inherent risk” due to residual ICT errors. The required volumes of reviews to achieve savings were high, and relied on the success of new ICT platforms. If more time had been available to fully test the systems and processes prior to implementation, the risk of error may have been reduced.

The consensus among the witnesses who worked with Ms Golightly was that it was difficult to tell her about problems or convince her that the implementation should proceed more slowly, if it meant falling behind targets. She was not an easy person to work for, and was not receptive to the views of others, apart from Mr Withnell. Mr Ryman described the culture within the Branch, during late 2016 and into early 2017, as “particularly intense.” From the time in 2016 that issues started to emerge with the system, he had increasing contact with Ms Golightly, whom he felt intimidated by; she was given to shouting at him.

Ms Collins said that, between September 2016 and May 2017, on occasions where she had attempted to raise problems or risks with Ms Golightly, Ms Golightly told her that she would lose her job, or that her career was over. Ms Golightly’s behaviour, Ms Collins considered, discouraged people from giving her information clearly and comprehensively setting out risks and problems, which “affected the quality of information and advice provided to the Secretary and to the government.”

Ms Harfield recalled that “when I offered any insight or advice about the issues identified with the Scheme, they were soundly rejected. Ms Golightly appeared to rely exclusively on Mr Withnell for strategic insight as the authority on the measures.” Ms Collins offered some confirmation for that perspective. She had noticed during the late September conversation about whether the large-scale OCI roll-out should proceed that Ms Golightly was “very dismissive of Ms Harfield... she kept talking over the top of her and deferring to Mark Withnell.” Ms Harfield thought Ms Golightly was just as dismissive of Mr Britton’s opinions.

Mr Britton said that at the end of November 2016 he was temporarily transferred to another role outside of the Department “at the direction of Deputy Secretary Golightly,” though he returned temporarily throughout December 2016 and January 2017 to assist with managing the issues arising as a result of the OCI system. He left feeling a mixture of relief and disappointment.

The workplace environment was an intense one, in which departmental staff were under a high level of pressure. Given the circumstances in which the system commenced full operation, it is not at all surprising that there were multiple system issues. Though some of the problems which emerged might be regarded as “teething problems” in a new system, some represented serious and fundamental flaws in its operation. They were one more warning sign in a sequence of many. But the continued focus on savings and numbers, and fulfilling the promises made under the measures, meant that it was never an option to stop.
6  The Minister for Human Services

Alan Tudge commenced as the Minister for Human Services on 18 February 2016. By that point in time, the SIWP and EWPI measures were in place.

The importance of these measures to Mr Tudge’s portfolio was emphasised early in his tenure as minister, both by DHS and his ministerial colleagues.

Mr Tudge was briefed by DHS on a number of aspects of his portfolio, including an overview of the administration of payments, compliance activities and debts.180 In the context of Mr Tudge’s understanding that the government was striving for a balanced Budget,181 that briefing served to emphasise that the measures underlying the Scheme were significant in that “almost all” of the savings in his portfolio resulted from the SIWP measure.182

Soon after his appointment as minister, Mr Tudge was asked by the Minister for Finance, Mathias Cormann, if there were further opportunities for savings measures in the area of welfare compliance.183 DHS developed a ministerial briefing,184 and subsequent NPPs,185 which Mr Tudge understood “built on existing measures,”186 and he informed Mr Cormann about those possible further measures.187 The proposed measures were designed to return “significant additional savings to government,” and included a proposed extension to the Employment Income Matching (PAYG) element of the SIWP measure.188

Consistent with this early emphasis on the importance of savings, Mr Tudge demonstrated a desire to monitor the progress of the announced measures, and to promote the government’s agenda through public announcements of the achievement of “milestones” under those measures.189

Media articles, and a media release by Mr Tudge, in early 2016 touted the government’s success in its efforts to “crack down” in the context of a “war on welfare rorting,” which had resulted in savings recovered ahead of schedule.190

On 2 March 2016, Mr Tudge, along with the Minister for Social Services, Christian Porter, issued a joint media release signalling the government’s intention to introduce a Budget Savings (Omnibus) Bill, in order to “ensure people pay back their welfare debts if they have received payments they are not entitled to.”191 Mr Porter was quoted in the media release as saying that, under the Bill, “the government will impose an interest charge on debts, remove the six year limit on debt recovery and prevent social security debtors from leaving the country.”

On 10 March 2016, Mr Tudge’s acting advisor communicated an “urgent” request to DHS, from the minister, about the savings figures from the SIWP measure.192 He stated:

> [the] Minister is keen to announce that SIWP has achieved the first year savings expectations already. He wants to announce on the day the amount is reached...

On 18 March 2016, Mr Tudge’s advisor requested a meeting with departmental officers to discuss debt and compliance.193 The request described setting up an ongoing reporting system on the debt and compliance measures, and “how they were tracking.” It suggested the creation of a document which would allow the department and the minister’s office to “track and report on progress against all measures, ensuring both accountability and milestones are achieved. It would also provide the MO with easy access to a single data source to enable public announcements to be made when appropriate.”

On 28 April 2016, DHS provided information to staff in Mr Tudge’s office, in response to a request for a “forecast of significant business or service delivery events from May 2016 to July 2016.”194 The briefing stated:

> From 1 July 2016, the Online Compliance Intervention (OCI) will be implemented, which will significantly increase the volume of compliance activity undertaken by the Department and will return significant savings to government.195
7 General approach to media

In an approach that was entirely consistent with the policy direction and messaging of recent years in the social security portfolio, Mr Tudge adopted an approach to media that focused on “cracking down” on non-compliance by income support recipients.

On 3 March 2016, an article was published in the Herald Sun, entitled “Cheats cop whack.” The article described overpayments “identified in a government crackdown,” and stated that the government had “declared war on welfare rorting after identifying $1.9 billion in fraud and overpayments.” Mr Tudge was quoted as saying that “the government had originally budgeted to claw back $329 million by July, but the program had been so successful they would hit that target next week.”

On 11 March 2016, Mr Tudge issued a media release entitled “Welfare compliance measures ahead of schedule.” The media release described the Government’s “crack down” on welfare fraud and overpayments, and outlined the achievement of savings under the 2015-16 Budget measures, ahead of the previously planned timeframes. Similar language was picked up in an article published in The Weekend Australian the next day.

The NPPs that had been developed by the department, and provided to the minister, formed the basis of part of the Coalition’s election commitments announced in June 2016. On 29 June 2016, the Daily Telegraph published an article entitled “$1B better off after curb on cheats,” which reported that planned welfare and compliance measures would result in savings of approximately $2 billion over forward estimates.

Following the announcement of the Federal Election in 2016, the Coalition released its policy for “Better Management of the Social Welfare System.” One of the key commitments described in that policy was the further strengthening of the integrity of Australia’s social welfare system by, relevantly, “enhancing the integrity and compliance of social welfare payments through improved employment income and non-employment income data-matching.” The policy indicated that the proposed improved employment income measures, in combination with other welfare integrity measures, would “increase the amount of fraud and quantum of overpayments detected and ensure social welfare payments are targeted at the people who need them most.” It contained the assurance:

No one who genuinely needs social welfare support and who is honestly disclosing their employment income and non-employment income will be worse-off under our commitment.

That sentiment was later echoed by Mr Tudge, who was quoted in the Weekend Australian as saying “A small number deliberately cheat the system and take more than they are entitled to...these measures will not adversely affect any welfare recipients who are honestly complying with their...requirements.”
In December 2016, the NPPs that had been developed earlier in the year, and had formed the basis of part of the Coalition’s election commitments, were approved by the government and announced in the 2016-17 MYEFO under the Better Management of the Social Welfare System measure.203

By the end of 2016, the importance of the measures underpinning the Scheme to the government was firmly established. The savings made a significant contribution to the Coalition’s plan for a balanced Budget. Welfare compliance was a popular policy, and formed part of the platform upon which the government had been re-elected. There had been repeated public emphasis, largely through the media, on the connection between the government’s commitments in respect of savings and management of the Budget and the integrity of the welfare system. By the end of the year, the government’s efforts to fulfil those commitments had been publicly and explicitly connected to specific measures underpinning the Scheme.

Mr Tudge knew about the importance of the measures in the context of each of those factors.204 He had been appointed as minister when the SIWP and EWPI measures were already in place, and was conscious of what he felt was an obligation to implement decisions that had already made by Cabinet with respect to his portfolio.205 He had proposed further measures to ministerial colleagues, which were relied upon by the government in its election platform, and were ultimately approved by Cabinet. He had relied upon the purported “success” of the measures to publicly promote the government’s achievement of “milestones” under the measures. He was aware that a failure to follow through on the measures, particularly those parts that had underpinned the government’s recent election commitments, would open up potential criticism of the government.206

Staff of DHS were also acutely aware of the importance of the measures. Throughout 2016, the intense pressure applied by senior management had resulted in reports to the minister of the resounding success of the measures, through the achievement of unprecedented numbers of compliance reviews and subsequent savings success. The staff concerns and system problems that had arisen throughout the period prior to December 2016 formed no part of the briefings to the minister, which instead provided information to support his public promotion of the success of the measures.

By December 2016, the effect of the position adopted by both Mr Tudge and his department was that the continued effective implementation of the measures was crucial in order to maintain the foundation for the public narrative of success. Any serious problems with the Scheme would now inevitably be an embarrassing backdown and would attract censure and criticism on a departmental and ministerial level.

8 No turning back
9 Conflating and inflating fraud

On 16 July 2016, shortly after the announcement of the Federal Election and the release of the Coalition’s social welfare policy platform, Mr Tudge was quoted in the Weekend Australian as saying “A small number deliberately cheat the system and take more than they are entitled to…these measures will not adversely affect any welfare recipients who are honestly complying with their…requirements.”

In November 2016, the minister’s office requested an update on the achievement of savings under the SIWP and EWPI measures, including the question “When will the department achieve $500 million in gross fiscal savings?”

On 23 November 2016, Mr Tudge issued a media release entitled “New technology helps raise $4.5 million in welfare debts a day.” The media release described the OCI system, which the minister asserted was “making a major contribution to the government’s fraud and non-compliance savings goals.” With respect to the new system, he stated:

This is a great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems.

The media release was closely followed, on 5 December 2016, by an article in The Australian newspaper about the OCI, entitled “Welfare debt squad hunts for $4bn.” Mr Tudge was reported as saying:

Our aim is to ensure that people get what they are entitled to – no more and no less. And to crack down hard when people deliberately defraud the system.

On the same day, 5 December 2016, Mr Tudge was interviewed on radio station 2GB by Chris Smith. Mr Smith observed that, from the media coverage he had seen, he had not been able to get an understanding of what percentage of overpayments were a result of deliberate fraud. Mr Tudge replied that “It’s very hard to assess.”

However, it did not appear that it was too difficult to assess, particularly if the question had been asked. The very next day, on 6 December 2016, Mr Tudge’s advisor was provided with a copy of a brief to the Minister for Social Services, Mr Porter, which contained data that was current as at 30 June 2016. The brief contained detailed information about social security debt, sourced from Mr Tudge’s own department’s systems. That information revealed that fraud accounted for 0.1 per cent of the debt raised in the 2015-16 financial year, and just 1.2 per cent of the outstanding debt base as at 30 June 2016. Mr Tudge’s advisor indicated to departmental officers that he was going to show the brief to Mr Tudge “over the next day or so.”

Mr Tudge did not have a specific recollection of the brief. However, in circumstances where the brief was copied to Mr Tudge “for his information,” the data was sourced from his own department, and where his advisor had indicated that he was going to show Mr Tudge the brief “over the next day or so,” it can be inferred that Mr Tudge had knowledge of the contents of that brief.

On the same date, Mr Tudge appeared on TV’s A Current Affair in a segment on welfare debt, dealing with some of the measures that had been implemented by the department, including the “new automated system” and the “welfare debt recovery squad.” The segment opened with Mr Tudge stating:

We will find you, we will track you down, and you will have to repay those debts, and you may end up in prison.

The comment drew immediate criticism, including from the Chief Executive Officer of the Australian Council of Social Service (ACOSS), Dr Cassandra Goldie AO, who described the comment as “appalling,” “false” and “highly irresponsible.”

Mr Tudge’s evidence before the Commission was that he made the statement in response to a question by the interviewer about his message for persons who intentionally defraud the Commonwealth, and that the program did not show the question that had been put to him to elicit that response.
The Commission accepts that this was what occurred. However, the circumstances in which Mr Tudge’s comment was made, and publicly portrayed, were symptomatic of the larger issues with the public rhetoric with respect to the welfare system, and welfare recipients, and the associated media reporting.

It was well known that there was often conflation of the concepts of welfare fraud and inadvertent overpayment in the media. At the very least, there was a tendency not to make an explicit distinction between the two. The Commission heard evidence including from ACOSs, a departmental media manager, and Mr Tudge himself that this conflation occurred. In Dr Goldie’s experience, many people who were dealing with the department did not know the difference between welfare fraud and overpayments, and were confused about whether or not they were being accused of something criminal. A failure to clearly distinguish between the two concepts in public messaging served to fuel that confusion.

Both DHS and Mr Tudge were aware that sufficient clarity of communication was required to draw the distinction between the concepts, and to overcome the conflation that commonly occurred.

Regardless of Mr Tudge’s intention with respect to his messaging, the segment on A Current Affair did not make the distinction between fraud and inadvertent overpayment with any degree of clarity, and the story had conflated the two concepts. So much so was accepted by Mr Tudge.

Over a month later, on 11 January 2017, Mr Tudge took part in an interview on the ABC’s Radio National in which he explained that his comment on A Current Affair was specifically directed towards circumstances of fraud, and not inadvertent overpayment.

Mr Tudge did not issue a media statement to clarify the distinction between fraud and inadvertent overpayment because it was not his practice to do so, and he did not think a press release would have the same impact as doing a segment on A Current Affair. He acknowledged that he “could have gone further” in media interviews to clarify that fraud represented a very small part of welfare compliance.

Mr Tudge knew that conflation of fraud and inadvertent overpayment occurred, most specifically from his experience with respect to the segment on A Current Affair. He knew that fraud represented a very small proportion of welfare compliance. Despite this, he took no action to issue a media release to clarify and emphasise the distinction between fraud and inadvertent overpayment, and he did nothing to draw attention to the fact that fraud represented a very small part of welfare compliance.

This was the media environment which existed when criticisms of the Scheme began to emerge and develop in late 2016 and into 2017. It was during this time that Mr Tudge and his office implemented a media strategy as detailed further below.
10 Increasing concern and criticism

Throughout December 2016, public expressions of discontent with the OCI system began to gather momentum.

A media release by independent MP Andrew Wilkie criticised Centrelink’s new IT system for “spitting out numerous incorrect debt notices,” some of which dated “back as far as 2010,” and that people were “given three weeks to provide documentation to Centrelink to prove they were not overpaid.”

This resulted in a request from the minister’s office for information about the circumstances of the recipients who had liaised with Mr Wilkie. The departmental briefing in response indicated that of the four people who had contacted Mr Wilkie, three involved debts resulting from a review under the OCI system. No definitive conclusions could reliably be drawn from a sample of cases that was limited in number, and represented people who had been dissatisfied enough to complain to Mr Wilkie. However, the briefing was, at least, unlikely to inspire confidence in the OCI system. With respect to the three cases:

- DHS determined that the first required further information, and arrangements had been made for a re-assessment at a later date
- The debt in the second case was unchanged after a manual assessment; however, during that process the recipient had advised they were computer illiterate, and that their employer was no longer available to obtain the details required
- Following contact with the third person, the department conducted a re-assessment, and reduced the debt from $6464.94 to $426.88. The debt was then waived entirely.

The briefing also indicated that a validation exercise undertaken by DHS during the design of the measure had demonstrated that there was a 13 per cent positive or negative variance between debts calculated manually, and debts calculated using income averaging. The variance occurred as a result of “a range of things including the weekly variability of customer earnings, and the correctness of start and end dates for employment.”

On 13 December 2016, DHS received a request from a journalist from The Guardian newspaper, asking “is the department aware of any issues that are causing the automated compliance system to issue higher rates of incorrect debt notices?”

By this point in time, Ms Golightly was aware that there had been issues with the system, including with respect to incorrect debt amounts advised to recipients. Despite this, Ms Golightly approved a response to the journalist, which was also provided to and cleared by the minister, which stated “The department is confident the online compliance system, and associated checking process with customers, is producing correct debt notices.”

At the time of providing that clearance, the minister was not advised of the system issues of which Ms Golightly was aware, or indeed any issues with the online compliance system.

On 20 December 2016, the Commonwealth Ombudsman’s office contacted DHS to request information about the OCI system. The Ombudsman’s office advised that it had been receiving a large number of calls from people concerned about the calculation of debts through the OCI platform, and the use of averaging had been particularly mentioned. There had also been complaints about a lack of telephone assistance from DHS, and recipients being advised that DHS officers were unable to assist them because certain actions could only be done via the online compliance platform.

The following day, on 21 December 2016, Ms Golightly sent an email to Ms Harfield and Craig Storen, which forwarded a newspaper article entitled “Ombudsman asked to investigate if Centrelink wrongly pursuing welfare debts.” Ms Golightly asked whether the department had had any contact from the Ombudsman. She indicated that “In any case, we should contact them ASAP...to get on the front foot with this. We just need to make sure what the process is and all the safeguards we have in place.” It is unclear what “safeguards” would be necessary with respect to any potential communications with the Ombudsman’s office.
On 21 December 2016, Dr Cassandra Goldie AO, CEO of ACOSS, wrote to Mr Tudge about the department’s debt recovery under the OCI system. Dr Goldie outlined a number of concerns that were consistent throughout the experiences of people who had raised issues with ACOSS. These included:

1. **Automated data matching leading to inaccurate assessments of overpayments**
   
   Reports are consistent that the system is detecting a debt by averaging out annual income over 26 fortnights and then correlating that to receipt of income support. As you are aware, people (generally) must report income fortnightly rather than annually. However, people appear to be receiving debt notices on the basis of their annual income as opposed to the fortnightly income they earned whilst receiving income support. The system therefore generates a false notice of overpayment. This is a serious problem that would likely be producing large numbers of inaccurate notices, wasting recipients and the Department’s time and resources as well as causing much unnecessary stress and anxiety amongst recipients.

2. **Routine imposition of 10 per cent recovery fee**
   
   We are gravely concerned about the 10 per cent recovery fee that is being applied. The decision to apply a 10 per cent recovery fee must be separate from the decision to raise a debt and must be considered using discretion. It may be applied where a person refuses to provide information, knowingly or recklessly provides false information or fails without a reasonable excuse to provide information. Where contact cannot be made with a person, a recovery fee charge should not be applied because it cannot be verified that they have received information about a debt from Centrelink (and therefore they are unable to provide a reasonable excuse).

3. **Length of time since the debt was incurred**
   
   Currently, the Department may seek to retrieve a debt from up to six years ago. As of 1 January 2017, there will be no limitation period (due to a legislative amendment passed in the Omnibus Bill 2016). For people to contest a debt, they are having to find old records of income or approach their former employer to get old payslips. This will be even more difficult if debts are sought from beyond six years ago. ACOSS calls for a time limit to be imposed for the collection of debts.

Dr Goldie also raised further issues in the letter. She noted that there had been consistent complaints that people had not been able to use the online system, either due to technical problems with the system or because they did not have access to the internet. The letter sent by DHS only offered online contact details, and did not provide a telephone number; this was, Dr Goldie pointed out, “inappropriate considering the importance of these letters and the requirement for people to engage with Centrelink within 21 days.”

Dr Goldie stated that she had reliable information that Centrelink offices were refusing to assist recipients with the process, and were instead directing them to go online.

With respect to debt collection, Dr Goldie noted that communication of a debt was occurring by mail, and that this was insufficient in circumstances where people had moved. She suggested that Centrelink should call people who had not responded to other means of communication. The scale and timing of the debt recovery process was “alarming,” particularly given the reduced capacity of people to engage with Centrelink at that time of year, due to factors including the limited seasonal operation of welfare rights centres, former employers and Centrelink itself.

Dr Goldie referred to the “consistent and alarming level of distress and concern this process is creating,” and urged the minister to take a number of actions including suspension of correspondence pending rectification of the system issues, waiver of the recovery fee in all cases, and suspending automated processes for reviews that had already been commenced pending personal contact by the department with recipients. She requested the convening of a “roundtable” with stakeholders in early 2017 to bring together key groups representing the interests of income support recipients and to work with the minister and the department to address the issues with the process.

On the same date, 21 December 2016, Senator Nick Xenophon wrote to Mr Tudge about Centrelink’s automated compliance system. Mr Xenophon raised similar issues to some of those outlined in Dr Goldie’s correspondence, including incorrect debt amounts, recipients being required to prove a debt is incorrect and recipients being requested to find records up to six years old.
On 23 December 2016, The Guardian newspaper published an article “Centrelink officer says only a fraction of debts in welfare crackdown are genuine.” The article reported that a Centrelink compliance officer had described the OCI system as “grossly unfair” and “error-prone.”

On 28 December 2016, the Shadow Minister for Human Services, Linda Burney, wrote to Mr Tudge about Centrelink’s correspondence to customers about alleged overpayments. Ms Burney sought clarification on various parts of the process, and asked that debt recovery action be paused while the issues were investigated.

On 30 December 2016, Terese Edwards (CEO, National Council of Single Mothers) wrote to Mr Tudge about Centrelink’s debt letters. Her organisation had been “overwhelmed” by women seeking guidance following the receipt of a letter claiming that they had a debt or overpayment. She noted that the letters did not contain an explanation of how the debt was calculated, and that the system did not appear to be capable of identifying circumstances where an employer and a trading name were the same business. She urged the minister to take a number of actions, including immediately ceasing the letters and undertaking a manual review of those that had been sent to determine if they were correct.

By December 2016, the OCI system had become the subject of increasing public criticism and complaint. Criticisms of the OCI system, particularly in the media, continued into the new year.
Exhibit 4-5577 - CTH.3023.0007.6024_R - RE: PAYG [DLM=For-Official-Use-Only].
Exhibit 4-5584; Exhibit 2-2275 - CTH.3027.0004.9345_R - Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal].
Exhibit 4-6449 - CTH.3027.0001.5679_R - RE- Legal Advice - Proposed digital intervention process [DLM=Sensitive-Legal]; Exhibit 4-5590; Exhibit 2-2277 - CTH.3027.0046.5345_R - 18594 JB SH.
Transcript, John Barnett, 10 March 2023 [P-4933: line 42-46].
Transcript, John Barnett, 10 March 2023 [P-4933: line 42-46].
Exhibit 4-6451 - CTH.3091.0027.0589_R - PAYG Pilot Stakeholder Meeting Minutes 14042015 v0 1.
Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015.
Exhibit 4-6323 - EKM.9999.0001.0008_R - EMC.000262238; Exhibit 4-6324 - EKM.9999.0001.0007 - EMC.000163237; Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015; Exhibit 4-6327 - CTH.3002.0008.0165_R - Online Compliance Intervention Meeting Draft Minutes-Action Items 20 Apr 2015 [DLM=For-Official-Use-Only]; Exhibit 4-6328 - CTH.3002.0008.0166 - Online Compliance Interventions Action Item Register 20042015; Exhibit 4-6329 - CTH.3715.0001.0636_R - PAYG Pilot Stakeholder Meeting Minutes 21042015 v0 1; Exhibit 4-6330 - CTH.3023.0004.8451_R - PAYG Online Compliance Intervention Detailed Requirements Document - Signed.
Exhibit 1-1204 - CTH.2000.0002.3645_R - Final Report - Pilot v0 2; Exhibit 4-5654 - CTH.3023.0002.0503 - GM feedback.
Exhibit 4-6461 - CTH.3027.0001.9662_R - Final Report - Pilot v0 2. [p 4-5].
Exhibit 4-5622 - CTH.3030.0010.1327 - PAYG High Level Assumptions V1 0; Transcript, Jason Ryman, 22 February 2023 [p 3559 - 3698].
Exhibit 4-5654 - CTH.3023.0002.0503_R - GM feedback.
Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only]; Exhibit 4-5654 - CTH.3023.0002.0503_R - GM feedback; Exhibit 4-5656 - CTH.3023.0002.0509 - Secretary Brief - PAYG Pilot v0 7; Transcript, Scott Britton, 23 February 2023 [p 3726].
Exhibit 4-5653 - CTH.3023.0002.0501_R - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
Exhibit 4-5658 - CTH.3023.0002.8902_R - FW- Checked with BI briefs 29-7 - still with GM - (MA) - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
Exhibit 4-5658 - CTH.3023.0002.8902_R - FW- Checked with BI briefs 29-7 - still with GM - (MA) - Urgent - Secretary Brief - PAYG Brief [DLM=For-Official-Use-Only].
Which Mr Ryman had earlier adopted in any event in his email to Mr Lange on 6 May 2015.
Transcript, Jason Ryman, 8 November 2022 [p 742-743]; Transcript, Scott Britton, 8 November 2022 [p 693: lines 32-40].
Exhibit 4-5657 - CTH.3023.0002.0512_R - Attachment A - PAYG Intervention Letter.
Exhibit 1-1104 - CTH.3001.0022.2183 - 1. OCI_Customer Contact Letter_FINAL v0 1 [p 747].
Transcript, Jason Ryman, 8 November 2022 [p 748: lines 1-25].
Transcript, Scott Britton, 23 February 2023 [p 3727].
Transcript, Scott Britton, 23 February 2023 [p 3724: lines 6-8]; Transcript, Scott Britton, 8 November 2022 [p 681: lines 31-33].
Transcript, Scott Britton, 23 February 2023 [p 3728-3729].
Exhibit 1-0843 - CTH.9999.0001.0033_R - [Consolidated] NTG-0001 [Clean], [p 54].
Exhibit 9887 - CTH.3002.0007.6024_R, RE: PAYG [DLM=For-Official-Use-Only].
For example, if a recipient provided an update to a match period, the PAYG income data would still be apportioned evenly across the period advised by the recipient. See: Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 14-16].

Such limitations can be found in the various iterations of DHS’s operational blueprint entitled “Acceptable documents for verifying income when investigating debts.”

For the duration of the Manual Program, just under 105,000 compliance interventions were commenced over the 12 months from 1 July 2015 to 30 June 2016. In the first six months of the operation of the OCI, from July 2016 to December 2016, just over 226,000 compliance interventions were commenced, most of which occurred in the months October to December inclusive (see: Exhibit 9367 - CTH.9999.0001.0148 - [Final] Services Australia - Response to NTG-0146.pdf [para 2.7]).

For example, if a recipient provided an update to a match period, the PAYG income data would still be apportioned evenly across the period advised by the recipient. See: Exhibit 4-7089 - CTH.3002.0009.4465 - PAYG CT Manual Compliance Intervention v03 [p 12-13 [p 12-13].

Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing [p 2, p 4].

Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.

Exhibit 2-2731 - CTH.3023.0004.6162_R - Test Summary Report EIM - DMR 67972 - System Integration Testing.

Exhibit 2-2732 - CTH.3023.0019.8459_R - FW- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

Employment Income Matching.

Exhibit 2-2732 - CTH.3023.0019.8459_R - FW- EIM SIT conditional sign off [DLM=For-Official-Use-Only].


Exhibit 2-2734 - CTH.3023.0019.8741_R - RE- EIM SIT conditional sign off [DLM=For-Official-Use-Only].

Presumably, in this context, an abbreviation for “Project Manager.”

Acting General Manager.

Exhibit 9943 - CTH.3072.0012.4980 - PN2015 5075 EIM PAYG July 2016 v0.7.xlsm.


Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

Exhibit 9927 - CTH.0030.0006.0121 - EIM - UAT v1.0 (NM and GM signed).

Exhibit 2-1318 - CTH.1000.0007.0113 - Online Compliance System - ICT Chronology (002); Exhibit 9949 - CTH.3715.0002.0064 - FW: UAT testers [DLM=For-Official-Use-Only]; Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022) [para 25.3].

Exhibit 1-1181 - CTH.3001.0032.7823_R - Re- Urgent [DLM=For-Official-Use-Only].

Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022) [para 25.3].

Exhibit 1-1181 - CTH.3001.0032.7823_R - Re- Urgent [DLM=For-Official-Use-Only].

Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.

Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1).

Exhibit 2-2695 - CTH.3000.0016.2584_R - EIM PN2015 5075 Out of session Meeting Minutes 24062016 v1.0.


Some documents before the Commission refer to BVT being “renamed” to SIP (see, for example, Exhibit 9950 - CTH.3715.0002.7111 - PN2015 5075 EIM PAYG October 2016 v0 8 GM cleared.xlsm. Others describe this as an “expansion in scope” and a “transition” (see Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022), para 23.15). There is reference in one draft brief to “the second phase of SIP,” which commenced on 19 September 2016 and in which 2,500 further reviews were initiated (see: Exhibit 4-6468 - CTH.3024.0006.5611 - OCIR Brief for DEP Sec OCI SIP_V0 17).

Exhibit 9951 - CTH.3715.0002.4220 - Post SIP EIM OCI Implementation Plan v0.6.docx [p 3].


ongoing monitoring and assessment of the programs was conducted through Programme Status Reports, which were cleared by the deputy secretary, Ms Golightly, and provided to the Portfolio Project Office (see Exhibit 2-2690 - KHA.9999.0001.0001_2_R - 20221204 NTG-0020 Statement of Karen Harfield [para 66-67]). The Portfolio Project Office formed part of governance structures within DHS which generally managed and coordinated programmes and projects across DHS, including delivery of Budget measures and service transformation initiatives, and conducting status reviews to provide assurance that projects were “staying on track” (see: Department of Human Services, 2015-16 Annual Report [p 103].

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Transcript, Tenille Collins, 3 March 2023 [p 4333: line 46 – p 4334: line 4].

Transcript, Tenille Collins, 3 March 2023 [p 4334: line 46 – p 4334: line 4].

Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 8-11].

Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 11-18].

Transcript, Tenille Collins, 3 March 2023 [p 4334: lines 18-20]; Exhibit 4-6379 - TCO.9999.0001.0008_R - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 118(c)].


Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 79].

Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.


In fact, this issue was still the subject of debate, and legal advice, in the context of Authorised Review Officer reviews as late as August 2019 (see: Exhibit 9956 - CTH.3091.0246.8395 - RE: ARO reviews of EIM intervention debts – offsetting and date of effect provisions [DLM=Sensitive]).

Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.


Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 79].

Exhibit 9953 - CTH.3023.0006.1594 - 06102016150317-0001.pdf.


Exhibit 2-2700 - CTH.3024.0006.9323_R - FW- September Debt and Compliance Report [DLM=For-Official-Use-Only].


Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only].

Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only].

Exhibit 4-5565; Exhibit 2-2297 - CTH.3001.0029.8524_R - FW- PRINTED FW- URGENT - compliance and debt report [DLM=For-Official-Use-Only].


Exhibit 2-2727 - CTH.2002.0006.0204_R - Escalation Template - Customers incorrectly impacted by OCI Dep Sec Clea.

Exhibit 2-2720 - CTH.3034.0030.3842_R - RE- URGENT Re- FOR INFORMATION- OCI issue impacting Employment Income Matching Budget measures. [DLM=For-Official-Use-Only].

Exhibit 9960 - CTH.3034.0031.8582 - Fwd: Escalation brief: Rejection of customer payments [DLM=Sensitive]; Exhibit 9961 - CTH.3034.0031.8583 - escalation brief 071216.docx.


Exhibit 9967 - CTH.3034.0032.3454_R - Debt reminder letters are not currently being issued for people who have not repaid their online compliance intervention debt.

Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 90].

Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 93].

Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 94].

Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 94].

Exhibit 1-1175 - SBR.9999.0001.0002_R - NTG - 0038 Response Statement (executed) [para 101].

Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].

Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].

Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].
January 2023 - Replacement) [REDACTED] [p 33].
204 Transcript, Alan Tudge, 1 February 2023 [p 2883: line 32 – p 2884: line 1; p 2884: lines 11-26; p 2893: line 12 – p 2894: line 31; p 2894: lines 35-45].
205 Transcript, Alan Tudge, 1 February 2023 [p 2896: lines 7-28; p 2897: lines 11-23].
206 Transcript, Alan Tudge, 1 February 2023 [p 2895: lines 1-13].
207 Exhibit 3-4636 - RBD.9999.0001.0371 - CTH.2000.0001.1558 - pages .1594 to .1596 and page.1606 [p 1].
208 Exhibit 3-4637 - CTH.0009.0001.0144_R – MB16-000483 MO.
209 Exhibit 3-4638 - CTH.3001.0030.3987_R – 2016-11-23 New technology helps raise $4.5 million in welfare debts a day_FINAL_docx.
210 Exhibit 3-4639 - CTH.3001.0030.6443 – Transcript.docx.
212 Transcript, Alan Tudge, 1 February 2023 [p 2915: line 27 – p 2916: line 23; p 2917: line 19 – p 2918: line 33].
213 Exhibit 2-3137 - ACS.9999.0001.0309 - Acoss criticises government’s appalling jail threats to welfare recipients _ Centrelink __The Guardian.
214 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 53]; Transcript, Alan Tudge, 1 February 2023 [p 2909: lines 25-47].
215 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 53].
216 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 5-15]; Transcript, Charmaine Crowe, 16 December 2022 [p 2027: lines 38-39].
217 Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [para 88].
219 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 5-15, lines 28-36].
220 Transcript, Dr Cassandra Goldie, 16 December 2022 [p 2027: lines 28-36].
221 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 1-27; p 2911: line 24 – p 2912: line 11]; Exhibit 3-4554 - CTH.9999.0001.0107_R - Response to NTG-0144 [para 88].
222 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 1-14].
223 Transcript, Alan Tudge, 1 February 2023 [p 2910: lines 24-27].
224 Exhibit 3-4693 - CTH.3001.0033.1063 - 2017.01.11 - Transcript - Radio National Breakfast - Interview with Minister for Human Services Alan Tudge.
225 Transcript, Alan Tudge, 1 February 2023 [p 2909: lines 24-34].
226 Transcript, Alan Tudge, 1 February 2023 [p 2913: line 45 – p 2914: line 24].
227 Transcript, Alan Tudge, 1 February 2023 [p 2914: lines 26-40].
228 Mr Wilkie appeared to be operating under a misapprehension that the new IT system was called “Welfare Payment Infrastructure Transportation” [sic], rather than OCI.
229 Exhibit 3-4641 - CTH.3001.0030.6877_R - BREAKING NEWS ALERT- Guilty until proven innocent - Centrelink gone rogue - Andrew Wilkie media call [SEC=UNCLASSIFIED].
230 Exhibit 3-4648 - CTH.3004.0002.4939_R - MB16-000483.
231 This statement was not correct. Evidence before the Commission demonstrates that the outcome of that exercise was that debts calculated using averaging of the ATO PAYG data resulted in debts that were, on average, 13 per cent higher than those calculated using actual income data.
232 Exhibit 3-4314 - CTH.3108.0001.03673_R - FW- For OK- The Guardian (ChristopherKnaus) - incorrect debt notices[SEC=UNCLASSIFIED].
235 Exhibit 2-1296 - CTH.1000.0006.8741_R - Section 8 Questions under I0s 2016-400007 and 2016-600004 [SEC=UNCLASSIFIED].
236 Exhibit 2-1297 - CTH.3001.0031.8290_R - Fwd- BREAKING NEWS ALERT- Calls for Ombudsman to investigate Centrelink debt recovery activity [SEC=UNCLASSIFIED].
237 Exhibit 2-3013 - ACS.9999.0001.0177_R - 161221 Letter to Alan Tudge final. Mr Tudge was on leave at this point in time, and did not receive this correspondence until sometime in January 2017.
Exhibit 3-4649 - CTH.3001.0038.4984_R - TUDGE, Alan 21 December 2016.
Exhibit 3-4652 - CTH.3007.0027.3923_R - Fwd- BREAKING NEWS ALERT- The Guardian [SEC=UNCLASSIFIED].
Exhibit 3-4653 - CTH.3001.0032.0480_R - ATODAtamchir rf.281216.
1  A watershed moment

The beginning of 2017 had all the hallmarks of becoming a watershed moment for the Robodebt Scheme (the Scheme). In the first few months of the year, the chorus of criticism was deafening. The usual checks and balances on government power were swinging into action, and it seemed the Scheme would be subjected to scrutiny and evaluation by bodies external to the Department of Human Services (DHS). The unfairness, probable illegality and cruelty of the Scheme were publicly laid bare. All signs pointed towards the possible abandonment or, at the very least, drastic revision of the Scheme as it was operating at the time.

Given the circumstances, one of the most remarkable aspects of the Scheme’s saga is how it continued, albeit in modified form, after the early months of 2017.

It was a period of great industry within DHS. Many witnesses who gave evidence before the Commission described it as a period involving long hours, high workloads and intense pressure and stress.

Despite this industriousness, by mid-2017 remarkably little progress had been made towards the identification of any issues of substance: the fundamental problems with the Scheme remained; and there was no legal advice which actually supported its fundamental premise. However, the intense public criticism from earlier in the year had quietened. A comprehensive report on the Scheme, and some of its failings, had been prepared and paid for, but was never received. The government continued to illegally raise debts against some of society’s most vulnerable.
2  The acting Minister for Human Services – Mr Porter

Criticisms of the OCI system in the media continued into the new year. While Mr Tudge was on leave over the Christmas and New Year period, Christian Porter, Minister for Social Services, assumed additional responsibilities as the acting Minister for Human Services.

Throughout the period in which he acted as the Minister for Human Services, Mr Porter made various requests of DHS for fact checks of media articles and information on the Scheme, in addition to the talking points provided to him by DHS.

Mr Porter’s evidence was that, initially, he accepted the departmental position on the issues including as they were represented in the talking points. At some point, he began to view the information he was being given with a degree of circumspection, which then turned to scepticism.

On 3 January 2017, Mr Porter was interviewed on ABC Radio National in relation to the OCI program. His responses were largely based on the talking points that had been provided by DHS. He told the interviewer that the debt recovery scheme was “working exceptionally well.” He also made the following statements:

- I think this [the Scheme] is about as reasonable a process as you could possibly derive...
- Ultimately, if a real discrepancy does exist then eventually we raise a debt, and that happens much later than this initial letter, and even then, there are many ways in which you can dispute that debt, if you think that a mistake has been made...
- It really is an incredibly reasonable process...
- Only in 2.2 per cent of instances [do people need to provide things like payslips]...
- 169,000 letters and the complaint rate is running at 0.16 per cent. So that’s only 276 complaints from those 169,000 letters. That process has raised $300 million back to the taxpayer.

Mr Porter was also asked, “How important is this debt recovery to the budget bottom line?” and replied:

It’s very significant. Four billion dollars over four years is evidently a very significant amount of money. That is helping us get back into surplus.

The Commission accepts that Mr Porter was simply repeating information from the talking points given to him by DHS staff. As it transpired, that information was wrong. The rate of complaint was most certainly not as low as 0.16 per cent of reviews. The Commission heard evidence that, in fact, the information with which Mr Porter was provided did not include complaints specifically relating to OCI that were held in DHS’s central complaints repository, and that even if it had, there were systemic problems with the recording of OCI complaints in that repository in any event.

Mr Porter’s comments, based on the talking points provided to him, suggested a high degree of confidence in the program generally and in particular the reasonableness of it, which was reiterated. They also gave the impression that recipients seldom had to provide information, and that the rate of complaint and internal review of debts generated under the Scheme was very low, suggesting that such debts were unobjectionable and, in turn, accurate.

On 9 January 2017, Mr Porter said on ABC Radio that “debts raised under the automated system were ‘fairly and legitimately calculated’.” He also noted that, in circumstances where a person did not respond to the initial letter, “it will be the case that the ATO estimate will be the preferred reporting and there will be an averaging out process.”

By the time Mr Porter made the statement about debts being “fairly and legitimately calculated,” it is likely that he was starting to appreciate that this position lacked credibility; that income averaging was liable to produce inaccurate results as to the existence and quantum of debts.
By around 10 January 2017, at the conclusion of his period acting as the Minister for Human Services, Mr Porter said he “was extraordinarily frustrated with the level of information and detail being provided,” and that “there was a greater number of queries and inquiries that were being generated by me and my staff in my office.”

The statements Mr Porter made in media interviews about the fairness of the process, and the statistics he cited, were wrong. One has to recognise, however, that he had been plunged in a maelstrom of media enquiries and public complaint about the Scheme, and there was not much he could do but rely on what DHS staff told him about the program. His performance in the short period he was Acting Minister for Human Services cannot fairly be criticised.

That is not true, however, of Mr Porter’s response in his role as Minister for Social Services. He was responsible under the AAO for the lawful administration of the Social Security Act and the Administration Act. The responsibility for ensuring that DHS officers lawfully exercised their DSS-delegated powers of overpayment identification and debt recovery under the legislation lay with him.

On 28 December 2016, the first day of Mr Porter’s acting position as Minister for Human Services, his office requested “talking points” on the OCI program and, later in the day, a briefing from DHS about the program. The request for the briefing said that the Minister wanted it to cover “averaging out of income provided to ATO by CLK [Centrelink] impacting on people who only earned income seasonally (e.g. students) – it appears CLK is averaging income over 26 fortnights and then raising debts.”

This was an obvious question to ask, as was accepted by Mr Porter in his evidence before the Commission. Inaccurate results produced by income averaging, with respect to both the existence and quantum of debts being raised by the OCI program, had been squarely raised as an issue in the media at the time. Mr Porter was trying to “get an understanding of some of the basic fundamental mechanics of the program.”

On 9 January 2017, Mr Porter asked, during a meeting with Mr Britton, a question to the effect of whether Centrelink could be given more frequent data on a person’s income. He evidently appreciated that the use of yearly data to calculate a person’s income was likely to give rise to inaccuracies, and that the provision of more frequent data would produce more accurate results. His office had already raised the query with DHS about its effect where the income of seasonal workers was concerned.

Mr Porter may not completely have understood what the OCI process was, but he did know it involved income averaging. It did not take a genius to see that averaging a person’s annual income to arrive at a fortnightly figure was likely to produce inaccurate results unless the person was on a consistent income. Mr Porter, from his inquiries, clearly appreciated that. It was not a big step from there to ask whether the Social Security Act allowed this. Mr Porter, as Minister for Social Services, should have made that inquiry.

In an ABC interview of 31 May 2020, Mr Porter said in respect of the Scheme: “We received advice at the time that the program was put together that it was lawful. Many governments have used ATO averaging... .” That suggested that at the inception of the Scheme, the government had obtained legal advice that the use of averaging in the way proposed was lawful; which it had not.

Mr Porter explained that statement as follows:

I’m referring to two things. Certainly, that recollection of a meeting during that period where I sought an assurance and got an affirmation about the underpinnings, and also the knowledge and experience that I had by that stage that, to have gone through the NPP process, this would have been scrutinised as to the issue of whether it required legislative change or not. But I certainly - I firmly had in my mind that I had put this question to people and that they had responded affirmatively.
As to the first part of that explanation, Mr Porter said that in the course of a meeting with persons from DHS, he raised “almost incidentally” the fact that he “was operating under the assumption that the departments had at some point been advised that there was sound legislative underpinning for the system as it was operating.” A participant in the meeting confirmed the correctness of his assumption by answering, “yes.” Giving evidence before the Commission, Mr Porter said he was unsure whether that person was from DHS or DSS.

As to the second part, Mr Porter did not in fact know whether the intention to use income averaging formed any part of the detail of the NPP or whether the process had scrutinised whether legislative change was needed.

Mr Porter could not rationally have been satisfied of the legality of the Scheme on the basis of his general knowledge of the NPP process, when he did not have actual knowledge of the content of the NPP, and had no idea whether it had said anything about the practice of income averaging. A simple “yes” to his question about whether there was advice was not enough to meet his obligation to ensure that the program was operating lawfully under the Social Security Act, particularly where he had already identified shortcomings in the information provided to him by DHS.

As Minister for Social Services, Mr Porter should at least have directed his department to produce to him any legal advice it possessed in respect of the legislative basis of the Scheme. If he had done so promptly when he became aware of the problems associated with the Scheme in late December 2016 or early January 2017, he would have discovered that the only legal advice DSS possessed (the 2014 DSS legal advice) advised that the income averaging proposal might not be consistent with the legislative framework because it was necessary to consider the amount of income received in each fortnight.

If he had made his inquiry after 24 January, he would have been provided with the 2017 DSS legal advice, obtained by DSS more than 18 months after the Scheme commenced operating. He would have found it was qualified by being expressed to be limited to the use of income averaging as “a last resort” and identified no legislative provision which actually authorised income averaging. In either event, the proper and obvious next step would have been to obtain external legal advice as to the legislative underpinning for the Scheme as it was operating, with the probable result that its unlawfulness would have been identified and the Scheme ended.
Mr Tudge returns

Mr Tudge took leave over the Christmas period in 2016-17; however, he cut his leave short and returned to work in early January 2017. By the time of his return, the Budget Savings (Omnibus) Act 2016 (Cth) had been passed. One of the effects of that Act was to remove the six-year limitation period on the recovery of social security debts. Another was that it enabled the department, in particular circumstances, to issue Departure Prohibition Orders, to prevent people with outstanding debts from going overseas.

Mr Tudge’s evidence was that in early 2017, he was “very much focused on the implementation of the Scheme.” His “intense focus in January and February” was on a number of issues that had been raised in the media, and issues that he himself subsequently discovered “weren’t being done well.”

During this time, Mr Tudge made numerous requests to DHS and his advisors for information about the Scheme and associated DHS processes, and he was provided with a steady stream of information in response.

Not all of the information provided by DHS to their minister and his advisors during this time was accurate, or reflective of the actual state of affairs.

Mr Tudge was provided with “OCI Talking Points” that had also been provided to Mr Porter and the department’s media spokesperson, Hank Jongen. Those talking points stated that OCI did not change how income was assessed or how debts were calculated. That was false. The talking points stated that the letter sent to recipients “has a number they can call if they would rather speak with someone.” At that point in time, that was false, and was contradicted by the copies of the letters that had been sent to the minister just three hours earlier. The talking points stated that:

... if a person fails to respond to the initial request and the reminder to confirm or update the information, a debt will be raised using data from the ATO as provided to them by the employer. This is not new and is consistent with procedures that have been in place for many years.

That was false.

Mr Tudge also had a number of meetings with officers from DHS in which he made requests for detailed information about the Scheme, and discussed income averaging with Kathryn Campbell (secretary, DHS) and Malisa Golightly (deputy secretary, DHS). Mr Tudge’s evidence was that he was frequently told in those meetings, by either Ms Campbell or Ms Golightly, that income averaging had been occurring for some time, and although he couldn’t remember a specific conversation, recalled coming to an understanding that it had been “part of the welfare compliance architecture for a very long time.”

Mr Tudge asked for information about the proportion of debts that had been raised in circumstances where a recipient had not responded to the department’s letter. This was a logical and obvious request to make. In what was most likely a response to this request, this information was included in a departmental “Key Facts” document, which was attached to an email indicating that “Karen will bring printed copies to meeting with Minister.”

The Key Facts set out the proportion of OCI recipients who had a debt, but had not had contact with DHS. This information was based on a random sample and indicated that:

- 57 per cent of recipients who were currently in receipt of a Centrelink payment had had a debt raised with no contact with DHS,
- 79 per cent of recipients who were not currently in receipt of a Centrelink payment had had a debt raised with no contact with DHS.
In circumstances where Mr Tudge was intently focused on the details of the program, had made a specific request for this information, and had met with DHS officers who attended the meeting with printed copies of the information he had requested, it can be inferred that he was informed of these percentages.

Mr Tudge in his evidence set out a number of problems that he had identified with the system during early 2017. These included deficiencies in the usability of the online portal, the inability to enter net income amounts into the system, a lack of clarity in the correspondence sent to recipients, a “too-readily applied” 10 per cent penalty fee, and the fact that a number of recipients had not received correspondence from DHS to initiate the review. All of those were problems related to the actual, practical operation of the processes under the Scheme or, as Mr Tudge characterised it, the “implementation” of the Scheme.

In January 2017, Mr Tudge exchanged messages with the prime minister, the Malcolm Turnbull, through the WhatsApp messaging service. Consistent with his identification of the system’s problems, Mr Tudge’s messages demonstrated that his planned approach to dealing with the criticisms of the compliance program was to introduce changes to address those operational defects. The proposed changes that Mr Tudge described to Mr Turnbull included those relating to the volume of correspondence, use of registered mail, and the online platform.

Mr Tudge indicated an intention to project a message that “the system is working, but we will continue to make improvements,” and he subsequently informed Mr Turnbull that there was “a complete plan as to how to make the system more defensible.” He agreed with Mr Turnbull that it was “important to have this settled down by the time we get back to parliament,” and that was “the key deadline that [he had] given.” He expressed optimism that his “…positioning this week hopefully allows us to do more “refinements” fast without losing too much face.”

In March 2017, Mr Tudge and Mr Porter sent a letter to Mr Turnbull about the progress of the online compliance system, the action taken to address the issues that had been raised in the media, and discuss how the online compliance program could be managed from that point forward. The letter set out the changes that had been made to the system to date, including changes to the initial letters, the suspension of the use of external debt collection agencies, and the removal of a requirement for recipients to have a myGov or Centrelink Online account to access an online review.

Many of the process refinements Mr Tudge instituted reflected his drive to improve the system and its usability. But it is apparent from his communication with Mr Turnbull that a large part of Mr Tudge’s motivation for focusing on those refinements was to allow him, as minister, and the government, to “save face” and to minimise public embarrassment; not surprisingly, given his full-throated public endorsement of the system the previous year.
4 The Human Services response

Much of the focus within DHS was similar to that of the minister. Efforts were made to iteratively address individual issues as they emerged. The purported solutions focused on the process and implementation of specific aspects of the operation of the compliance program, rather than involving any strategic consideration of the program as a whole or its fundamental conceptual underpinnings.

Through the early months of 2017, these changes were made to the online compliance process, largely at Mr Tudge’s instigation: a contact telephone number was included in the initial letters sent to recipients; initial letters were sent by registered mail; improvements were made to the online interface; the circumstances in which manual intervention would occur during a review were expanded; the system was able to accept bank statements and net income; debt recovery action was paused while a debt was under review; and the scope of the application of the 10 per cent penalty fee was revised.

It is obvious from the evidence before the Commission that the early months of 2017 were a frenetically busy and stressful period for many members of DHS staff. It was described as “a very difficult period for many staff including SES level staff,” where many staff were “in “coping” mode to deal with the volume and complexity of work under intense scrutiny.” The culture within the Compliance Branch was described as “particularly intense.”

Ms Golightly was the deputy secretary responsible for DHS’s response during this time. She was in frequent, direct contact with Mr Tudge and Ms Campbell about the response to issues being raised with the OCI program.

In early January 2017, Ms Harfield had a conversation with Ms Golightly about the problems with the OCI system, AAT appeals, increasing customer dissatisfaction and unfavourable media attention. Ms Harfield suggested that, given those factors, “it would be a suitable time to consider declaring a major incident response to re-evaluate if the original measure assumptions were still valid.” According to Ms Harfield, Ms Golightly’s “style” was to gather information about many individual issues, brief the secretary or minister, and then return with a set of proposed actions. Ms Harfield was trying to convince her instead to look at the OCI problems at a broader strategic level. That might involve, for example, bringing a group of specialists together to solve those problems.

The suggestion was not well-received. Ms Harfield said that an angry Ms Golightly “made it clear that what she expected of me was to do as I was told...she would tell me what needed to be done.” After this, she did not revisit the topic. Her interactions with Ms Golightly were about specific tasks and they never had a more general, strategic conversation about the compliance program. In March 2017, Ms Harfield was moved to a new division.

Ms Harfield’s description of the focus on specific tasks and issues, to the exclusion of more fundamental problems, is emblematic of the departmental response in early 2017 to the expressions of criticism and dissatisfaction with the OCI program. Some defects of the program were being regularly raised, by different sources, some with specialist expertise. The criticism that the system was raising inaccurate debts and that the use of income averaging in the debt calculation was often the cause of the inaccuracy, featured frequently. Despite the apparent obviousness of some of the problems, the approach in response centred around iterative and reactive remediation of defects in implementation, while dealing with the Scheme’s fundamental flaws was avoided. Examples of this are outlined further later.
5 The Employment Income Confirmation program

In February 2017, the OCI program became the Employment Income Confirmation (EIC) program. Mr Tudge described this change to the Scheme as a “re-naming.” At this point, one thing was clear: the compliance program could no longer operate under the name of “Online Compliance Intervention,” which even by this stage had become synonymous with incompetence and failure.

All OCI reviews that had been initiated, but in respect of which recipients had not contacted DHS or commenced an online process, were cancelled.

Initiations under the EIC began on 11 February 2017. To test the changes that had been made to the program, DHS prepared a staged implementation strategy which provided for compliance reviews to be gradually increased and rolled out to recipients with more complex circumstances throughout early 2017.

DHS undertook “Business Verification Testing” (BVT) during this period in relation to a sample of 100 EIC reviews. The BVT did not reveal any systemic issues with the operation of the EIC platform. On 30 May 2017, the BVT closure report was signed off and interventions under the EIC commenced in earnest.

Notwithstanding the changes between the OCI and the EIC programs, many of the fundamental features remained the same. From February 2017, under EIC, the system was modified to remove the automatic application of averaged ATO data to finalise reviews. This did not, however, represent the demise of the widespread use of averaging under the Scheme. Instead, the process of applying averaged ATO data to raise a debt was modified by requiring it to be undertaken manually.

From February until August 2017, the application of averaged ATO data was suspended for reviews in which a recipient had received an initial letter but had not commenced or finalised the review process. During that period, DHS introduced an internal policy requiring compliance offices to make two “genuine” attempts to contact a recipient by telephone where the recipient had not responded to an initial letter. From August 2017, where these attempts to contact were unsuccessful, the compliance officer would finalise the review using the averaged ATO income information.

For all of the fervour with which DHS had insisted that averaging had always been used, and its steadfast refusal to directly acknowledge the problems with its use, it speaks volumes that one of the main actions taken during a period of intense criticism and scrutiny was to suspend (for a period) the use of averaging in the absence of contact by a recipient, and to remove the automation of its use in the compliance process.

Despite all of the changes that had been, and continued to be, made, problems with the review process continued. As it turned out, by September 2017, it was clear that the changes that had been made to the process had resulted in the vast majority (in the order of 97 per cent) of EIC reviews needing some level of staff assistance in order to be completed.
6 The end of the Online Compliance Intervention program

The rebranding to EIC represented the symbolic end of the first automated, online iteration of the Scheme.

During the operation of the OCI program, DHS consistently and staunchly denied accusations of an “error rate” in the initial letters that were issued to recipients. The department had released information that, of the initial letters sent to recipients between July to December 2016, approximately 80 per cent had ultimately resulted in a debt following finalisation of the review. This resulted in public criticism in which this figure was characterised as a “20 per cent error rate.”

According to DHS, the criticism was “misleading and a misrepresentation of the process.” Departmental talking points and public statements were keen to point out that the initial letter was “not a debt letter,” that all the 20 per cent figure meant was that 20 per cent of people had been able to satisfactorily explain the discrepancy presented to them in the initial letter, and that the system was designed to work in this way.

Two aspects of that defence warrant comment.

Firstly, it was incorrect to describe that figure as an error rate, but not for the reasons given by the department. It was because what that figure represented was a subset of a more significant “error rate,” which was the rate at which the system was calculating inaccurate debts. That is something that is difficult to quantify, because, on the records before the Commission, it is apparent that the department was not actually measuring and recording that data.

Secondly, even if the term “error rate” is characterised as the percentage of initial letters sent that did not result in a debt being raised, it was higher than 20 per cent in any event. Under OCI, the percentage of recipients who did not ultimately end up with a debt raised against them after being issued with the initial letter was approximately 36 per cent.

In February 2017, the percentage proportion of debts that had been raised under the OCI program using averaging was calculated by the Department to be 76 per cent.
7 The Minister’s knowledge of the Scheme

Mr Tudge was clear in his evidence before the Commission that he had a “laser-like focus” during January and February 2017 on issues concerning the implementation of the OCI program, including a focus on “trying to understand and improve it.”

The evidence before the Commission is consistent with Mr Tudge’s recollection. As outlined above, there are numerous examples of Mr Tudge’s requests and DHS’s responses, such that in early 2017 Mr Tudge had the following knowledge of the Scheme.

By January 2017, Mr Tudge was aware that the OCI program was issuing inaccurate debt notices, including in circumstances where a process of averaging of income was used to calculate a debt.

Mr Tudge was aware that the OCI system applied a process of income averaging in circumstances where a recipient did not respond to DHS’s request for information, and where a recipient was unable to provide evidence of their earnings to the satisfaction of DHS. He knew that, in those circumstances, a debt raised against the recipient would not be an accurate debt based on what they had actually earned, and that it was “highly likely” to be inaccurate.

Mr Tudge had specifically requested information about the percentage of debts that had been determined in the absence of contact with DHS. He knew, or ought to have known from the information he received, that a significant percentage of recipients (approximately 60 per cent of current recipients and 80 per cent of former recipients) had had their debts raised using income averaging, and were therefore likely to have inaccurate debts.

Mr Tudge had asked numerous questions about the use of averaging, both in requests for information to DHS, and in meetings in which one or both of Ms Campbell and Ms Golightly were present, and it seems he was given to understand that averaging had been used for many years. Longstanding practice is not an answer to a definitive source of authority to use income averaging. However, the information with which he was provided, and the level of assurance he was receiving from DHS, is relevant to his understanding.

Mr Tudge had undertaken an analysis of the detail as between the pre-Robodebt process, the interim process and the OCI process and had particular reference to the process map provided to him in January 2017. He was aware of the features of the historical process that existed prior to the Scheme (that is, prior to 1 July 2015) set out in those documents. He therefore knew that the historical use of income averaging by DHS was subject to qualifications, including that:

- it was used only in reviews of cases involving the highest levels of income discrepancy.
- it was only used in circumstances where compliance officers had made inquiries with either one or both of a recipient and any employers to obtain information, so its use was confined to circumstances where the onus of obtaining or providing information in relation to income did not lie entirely with a recipient.
- prior to the implementation of the SIWP measure on 1 July 2015, there had never been a time where income averaging had been used in circumstances where the onus lay entirely on the recipient.
- it was only used in circumstances where a compliance officer would manually assess the outcome of an intervention, so that it could be assumed experience and judgment would be applied.

Though it predated his time as minister, Mr Tudge was aware that since the commencement of the Manual Program on 1 July 2015, DHS had ceased to use its compulsory powers to request information and instead placed the onus on the recipient to establish actual fortnightly income by providing information about their earnings. He did not know the basis (including the legal basis) upon which DHS purported to “require” that information from recipients (which was none).
As at January 2017, Mr Tudge was aware that the OCI process could not be implemented, or continue to be implemented, on the scale which had been approved by government under the measures, without retaining these features:

- the onus being on a recipient to establish actual fortnightly income by providing information about what they had earned, and DHS no longer using its compulsory powers to request that information, and
- the provision of information by a recipient and, in the absence of the provision of that information, the use of income averaging to calculate a debt.

It was with this state of knowledge and awareness of the OCI program that Mr Tudge took the approach that he did over the following weeks and months of 2017.
Mr Tudge’s approach generally

Mr Tudge stated that his concern, “within [his] authority as Human Services Minister,” was to ensure that the system could be easily understood and was as reasonable as possible for a person using the system. He gave examples including the use of bank statements, and contact with compliance officers for persons with a vulnerability indicator. His authority, he said, “was to fix and address the problems which I saw to make it fair and reasonable from that implementation perspective;” his “very sharp focus” was “to fix the implementation and the operations of the system.”

Mr Tudge considered his role was to implement the measures approved by Cabinet and announced by the government. He understood that obligation as applying to his department and also to himself as the responsible minister. He considered he did not have the authority to overturn decisions made by Cabinet to approve and implement the measures, including the Scheme’s fundamental features - the reversal of the onus onto a recipient and the use of income averaging – which he regarded as themselves Cabinet decisions.

However, that claim was made in circumstances where Mr Tudge did not know precisely what the proposals underpinning the Scheme that had been taken to and approved by Cabinet were, or whether the documentation Cabinet considered identified the use of income averaging under the measure.

At the end of Mr Tudge’s tenure as Minister for Human Services, these fundamental features – reversal of onus and income averaging - remained a part of the Scheme, although he knew there were problems with them. He knew that the Scheme could not continue to operate without them. He was willing to rectify aspects of the Scheme which did not interfere with these features.

Mr Tudge instituted a number of process refinements, and the Commission accepts that he was, in part, motivated to improve the implementation of the system and its usability. One of those was the removal of some level of automation in the system, by requiring a manual step prior to the calculation of a debt using averaging. But it was also for the purpose of attempting to repair the public perception of the Scheme, and to avoid transparent and open scrutiny of those aspects of the Scheme that were fundamental to its operation.

Mr Tudge was not open to considering any significant alteration, or cessation, of processes underlying those fundamental features. The Commission accepts he believed he was bound by the Cabinet decision to implement them, but that did not mean he could not have investigated the problems with them and raised any concerns with the appropriate senior minister.
Missed opportunities

The Scheme received early and ongoing criticism – in the media, from advocacy organisations, within academia and from DHS employees and whistle-blowers. It would be impossible to catalogue each example of such criticism of the Scheme because of its volume, particularly in the press. DHS’s own “comprehensive register of media coverage” spanned many hundreds of entries. DHS was well aware of these criticisms.

Each example of criticism, as well as its cumulative impact, presented DHS with further opportunities to investigate the concerns raised and react to them, particularly insofar as accuracy and illegality were raised. Those opportunities were not taken up by DHS. Some particularly pertinent examples of this follow.

Australian Council of Social Service

During a time in which the compliance program was drawing intense criticism, and DHS and its minister were attempting to remedy and improve aspects of that program, including its usability by recipients, one of the most obvious sources of feedback and constructive criticism was community bodies with expertise in social security policy. One such body was the Australian Council of Social Service (ACOSS).

As has been detailed earlier, Dr Cassandra Goldie AO, the CEO of ACOSS, had written to Mr Tudge in December 2016 about the compliance program, and had raised a number of concerns including inaccurate debt assessments due to the use of income averaging, and the reversal of the onus to the recipient to “disprove” a debt. Dr Goldie had also referred to the “consistent and alarming level of distress” the process was causing social security recipients.

Representatives of ACOSS met with Mr Tudge on 18 January 2017 and repeated the concerns expressed in their December correspondence. The following day, 19 January 2017, Dr Goldie again wrote to Mr Tudge reiterating those concerns and calling for an immediate end to the compliance program and for a stakeholder roundtable to be convened to “design a humane and fair approach to debt recovery.” Dr Goldie said:

During our meeting, we highlighted to you the unique power that the Commonwealth Government has over people’s lives whether as recipients of social security or as taxpayers. As a result, it is essential that the Commonwealth adhere to the highest of standards with respect to the raising of debts against people...

Ms Campbell was also aware of ACOSS’s warning that the Scheme raised inaccurate debts, and its calls for the Scheme to be terminated. On 20 January 2017, Ms Campbell received a daily media update which referred to a media interview involving Dr Goldie, as follows:

Interview with Australian Council of Social Services CEO Cassandra Goldie. Goldie met with Human Services Minister Alan Tudge about the Centrelink “robo-debt scheme” yesterday. She initially wrote to the Minister amidst disturbing assessments of alleged debts which aren’t owed. She says changes announced in the last week do not address their concerns, and has urged him to abandon the automation of debt collection. She says a human should be involved in debt assessment, and there needs to be a humane approach to how debt is recovered.

Ms Campbell requested a transcript of the media interview, saying:

Can someone get me the transcript of the Spears / Goldie interview. I thought she said at the end that she was ok with automation as long as it was always beneficial to the recipient. If so, it will be a good line for us to use in the future – we have to make sure it is in accordance with the law, not just beneficial to the recipient.

After receiving the transcript, Ms Campbell concluded that she “must have misheard.”

Significantly, Ms Campbell’s focus on the interview was not the substantive problems raised with respect to the Scheme, but rather about the possibility of obtaining a “good line for us to use in the future.” Her reference in her response to having “to make sure it is in accordance with the law” seems to have been
solely concerned with its use for rhetorical purposes, not any intention to that effect; because there is no evidence that Ms Campbell did anything to ensure the Scheme’s lawfulness.

Mr Tudge wrote to Dr Goldie in a letter which was undated but which ACOSS received in the first week of February 2017.118 The final version of this correspondence had been the subject of some amendment, both by the minister himself and at a departmental level.119 It contained an assertion which, by this stage, had become a familiar refrain from the department:

While the online compliance system uses more technology for part of the standard compliance review process, it does not change how income is assessed or how debts are calculated. [Emphasis added]

The statement’s inaccuracy was obvious to those with experience of the social security system.

In Dr Goldie’s evidence before the Commission, she explained that, at the time she received the minister’s response in February 2017, she understood that the statement was not correct.120 It was also non-responsive to the significant issues that she had raised.

ACOSS had, by this point, written two detailed letters and had met with the minister himself, expressing its specific concerns with the Scheme. The correspondence had identified a number of issues which rendered DHS’s statement demonstrably false. Where specific and particular examples of problems with changes to both income assessment, and debt calculation, were raised, it was clearly no answer to respond by doggedly insisting that there had been no change.

Despite this, DHS continued to insert this statement into correspondence and departmental documents almost compulsively, as though with repetition it might become true. Some of the DHS officers using it could not have given it any critical consideration, because they did not seem to realise its falsity.

Mr Tudge again wrote to Dr Goldie in a letter which was undated, but was received by ACOSS on 13 March 2017.121 The letter sought to provide an update “on the performance of the Online Compliance system and some of the recent refinements that the government has made to it.” The updates that were described in that letter included the addition of a DHS telephone number in the letters to recipients, upgrades to the online compliance system functionality, and the pausing of debt enforcement action where a recipient had requested a review of that debt.

While some of these changes represented incremental improvements to the usability of the program, neither the February nor the March letter addressed the issues that Dr Goldie had raised which related to the fundamental underpinnings of the Scheme. The letters did not deal with debt inaccuracy, or the underlying debt calculation methods that Dr Goldie had called into question, or give any substantive response to the detailed concerns she had expressed about placing the onus on recipients. Instead, the correspondence focused on peripheral issues and how flaws in the implementation and operation of the Scheme were being addressed, rather than the problems concerning its more fundamental features.

On 29 May 2017, Dr Goldie wrote once more to Mr Tudge.122 She acknowledged the refinements that had been made but again raised specific concerns relating to the fundamental features underpinning the Scheme, saying:

…We acknowledge the refinements that have been made to the Online Compliance Intervention program, including the stay on debt recovery where an alleged debt is under review. This is an important reform. However, the program continues to issue inaccurate debt notices, place the onus of proof onto current and former income support recipients and detect and calculate debts without human involvement…

[emphasis added]

Mr Tudge replied by way of another undated letter which ACOSS received on 23 June 2017.123 Soon after, on 16 August 2017, Dr Goldie and Charmaine Crowe (ACOSS senior adviser) met with Mr Tudge, Ms Campbell and others.124 The concerns with respect to the fundamental features of the Scheme, that had now been raised by ACOSS in at least five instances of direct communication, were not addressed in either the June correspondence or at the meeting.125
ACOSS is a peak industry body with specialist knowledge in the administration of the social security system. In December 2016, Dr Goldie’s letter to Mr Tudge represented one of the earliest and most detailed warnings to both the minister and his department about problems associated with the Scheme, including those relating to the Scheme’s fundamental underpinnings. This included an identification of issues with respect to inaccuracy of debts, often due to the use of income averaging, and the reversal of the onus of proof of a debt onto social security recipients.

Dr Goldie’s letter identified many of those issues with striking accuracy, particularly given that, at the time it was written, there was very little information about the Scheme available publicly, and what was available often contained vague or opaque explanations. But perhaps the accuracy with which ACOSS was able to identify those issues reflected the fact that the identified flaws were glaringly obvious to anyone with experience in the social security system.

Importantly, ACOSS had informed Mr Tudge, and through him, his department, that the operation of the Scheme was causing distress to those who were subject to it.

ACOSS was not a lone voice in delivering its message. Similar concerns, which are discussed in more detail throughout this chapter, were being raised through other sources, including the department’s own staff, members of Parliament and the media.

Mr Tudge took some steps to address the problems that Dr Goldie had raised, and responded to those parts of her correspondence that dealt with those implementation issues but he did nothing about the fundamental concerns: reversal of the onus and income averaging.

### 9.2 Human Services employees

On 10 January 2017, it was brought to Mr Tudge’s attention that a “long-time Centrelink worker who was working in income reviews and eligibility assessments” had spoken to a journalist about problems with the income compliance system. The Centrelink worker described warnings from her colleagues to DHS officers that “computer-based data matching would lead to incorrect debts being issued and a lot of problems.” Less than 15 minutes later, Mr Tudge had dictated written comments to be provided to the journalist in response. None of these comments addressed the issue of incorrect debts.

Michael Tull (assistant national secretary, CPSU) wrote to Mr Tudge on 13 January 2017. He described DHS staff as being under “extraordinary pressure and stress from the volume of queries and complaints that are arising from the program.” He said:

> Previously, there was human intervention prior to the letters being issued, which meant that staff could prevent letters that were manifestly incorrect from being sent. This is no longer the case.

Also on 13 January 2017 an article was published in The Guardian newspaper called “Internal Centrelink records reveal flaws behind debt recovery system.” The article described flaws in the OCI system including “letters to old addresses, wildly wrong earnings figures, duplicated employers and inaccurate averaged yearly income.” It referred to “a series of staff logs” and displayed screenshots of the automated system.

On the same date Mr Turnbull sent a message to Mr Tudge drawing his attention to the media coverage. Mr Tudge replied to Mr Turnbull, saying:

> …My assessment is that apart from abc and guardian, this is now no longer a story of any significant size. We have staff leaking to abc – Dhs is very highly unionised – which we have to manage. I gave our position to abc yesterday re latest allegations of theirs…

On 19 January 2017 Lisa Newman (deputy national president, CPSU) wrote to Ms Campbell, relaying concerns raised by staff that “debts are being issued where there is no proof that a debt exists.” The correspondence from the CPSU was based on member complaints to it as well as a whistle-blower letter...
which had been publicised in the media and drawn to the attention of CPSU representatives.\textsuperscript{133} It also stated that “The staff we have spoken to indicate the directions they are being given and the potential harm it is causing to customers is resulting in high levels of personal distress.”

A response was drafted that said “Unfortunately the information that you have been provided is incorrect,”\textsuperscript{134} but it does not appear that it was sent, and there is no evidence that it reached Ms Campbell’s desk.\textsuperscript{135}

On the same day Mr Tudge sent an email to Ms Campbell, requesting that she “call to discuss” the whistle-blower’s allegations.\textsuperscript{136}

A summary of the communication from the whistle-blower\textsuperscript{137} explained that debts raised under the Scheme were frequently inaccurate for a number of reasons. It stated:

> I am a compliance officer with Centrelink. I’m writing because I along with so many of my co-workers have tried to stop the wrong that is being done to thousands of our customers on a daily basis and I can no longer live with what we are doing. I spoke confidentially to my wife and she has urged me to speak out about what is actually happening inside Centrelink, before it is covered up. Both myself and my wife understand this could mean that I lose my position....

> We are struggling daily with our consciences and pushing back against our leaders every single day ... I see these reviews every working day and I am horrified at what I am being directed to do. I am risking my job sending this information in the desperate hope that exposing such as corrupt and unjust system might just make a difference.\textsuperscript{138}

The summary described the raising of debts that were “incorrect” and outlined the five main system errors that caused the debts to be incorrect, which were:

- doubling up of income due to errors in the correct identification of employers or income types,
- the inclusion of non-assessable income which should be excluded from the assessment,
- incorrect calculation of the amount of payments made to recipients,
- the application of a recovery fee in circumstances where it should not be applied, and
- directions to compliance officers which had the effect of inhibiting their ability to correct errors.\textsuperscript{139}

In particular, it was said, “Centrelink officers are not allowed to check the results of the automated system against evidence previously provided by the person or their employer....”\textsuperscript{140}

A short time later, Ms Campbell circulated a “para” as a basis for a communication to be issued to DHS employees, which read:

> The Online Compliance Intervention is a new way of approaching overpayment identification. It takes advantage of data from the ATO and when a mismatch between that data and the data reported to Centrelink is identified, the Centrelink Payment recipients [sic] is asked to clarify the information. In the past, staff did this work for the recipient. This was very time consuming and meant that a relatively small number of overpayments could be addressed. Some of our staff believe that intensive one-on-one management of recipients is always required. As with other online initiatives in Centrelink, this intensive support is still available for those recipients who need it and complex cases. Many recipients prefer to manage through an online system, in their own time, rather than dealing with a staff member. Also, some staff do not welcome technology driven change because they are concerned for the future of their jobs. We will continue to work with staff to explain how the system operates and the role they play.\textsuperscript{141}

That paragraph did not respond substantively to the accuracy concerns raised in the whistle-blower letter, but rather dismissed them at a high level as the self-focused, out of date preoccupations of a staff member concerned about their employment.

In response to the whistle-blower’s allegations, a media statement was published on the DHS website.\textsuperscript{142} That response had been developed with the input of Ms Campbell, Ms Golightly and Mr Tudge.\textsuperscript{143} The media statement asserted that the claims made in the whistle-blower document about the OCI program did not “accurately represent how the system work[ed]” and that each of the five main allegations of
system error outlined in the document was “incorrect.” It also said that “The system is designed to identify anomalies and these are sent to a staff member for review.”

Again, the media statement did not address the substance of the concerns expressed by the whistle-blower – that is, that debts being raised under the Scheme were themselves “incorrect.”

Also on 19 January, Mr Tudge visited frontline Centrelink officers as part of his consultation process. A DHS officer made notes of his meeting with staff on that date, and the suggestions that were made to him about improving the system. The notes stated on two occasions that the minister had made no commitment to any changes additional to those that were already being pursued. Ms Golightly emailed those notes to Ms Campbell, with the assurance, “We will start work on reviewing each of the suggestions – some we already have answers to!”

A few days later, Mr Tudge emailed staff in his ministerial office. Among the instructions given to them was “A push on the ideas that came out of the Centrelink visit.” Mr Tudge seems to have been more motivated than his departmental officers to consider suggestions from staff, and commit to changes beyond those “already being pursued.” Mr Tudge emphasised in his email his support for recipients being able to access the online portal “without having to sign up for MyGov,” a change that was in fact implemented in early 2017.

On 25 January 2017 Mr Tudge’s chief of staff telephoned the CPSU regarding its 13 January 2017 letter to Mr Tudge. He advised the CPSU that their letter had “raised some important issues around staffing and…[they] should raise those issues with the department.” There was no response to the problem of incorrect debts. The CPSU had, in fact, already raised similar issues about staff distress in their letter to Ms Campbell on 19 January.

Also on 25 January 2017, Ms Campbell sent an email to staff referring to misrepresentations in the media and assuring them that there had been no change to the way DHS assessed income or calculated and recovered debt. The use of that representation was both false and non-responsive to the substance of the concerns that were raised. Its use in correspondence to DHS staff, including compliance officers, many of whom would know more about the processes for assessing income and calculating debts than the senior executive officers of the department ever would, was an invitation for correction. That is precisely what occurred.

“You are being misled”

Colleen Taylor, an experienced DHS compliance officer, saw the departmental media release and read the email from Ms Campbell on 25 January 2017. It was almost a year to the day that Ms Taylor had emailed the Compliance Helpdesk and her managers about problems with the Manual Program (detailed earlier). She had continued to raise concerns with the Scheme, both verbally and by email, since that time.

Ms Taylor said that she was “shocked” when she read Ms Campbell’s email. In particular, she was “very concerned that she [Ms Campbell] had said that there had been no changes in how we assessed income or calculated and recovered debt, when I knew that was not correct.” Ms Taylor considered the new approach to be “dramatically different,” and that what Ms Campbell had said was “quite wrong.” Clearly of a charitable disposition, Ms Taylor concluded that Ms Campbell “obviously did not know what was happening in the implementation of the Scheme,” so her reaction was:

I wanted to tell her how dreadful the changes were and the effect they were having, because someone was obviously telling her that nothing had really changed, which was not true.

On 7 February 2017, Ms Taylor sent an email directly to Ms Campbell, copying in Hank Jongen, the departmental media spokesperson. She referred to Ms Campbell’s statement that there had “been no changes to how we assess income or calculate and recover debt” and did her best to enlighten her:
Please allow me, as a loyal employee of many years standing who has only ever raised concerns in-house, to respond to you directly as your statement tells me that you are being misled and I want to ensure my words reach you...

There has been a very dramatic change within the last 18 months to the way in which compliance assesses income and calculates and recovers debt...

[emphasis added]

Ms Taylor’s correspondence to Ms Campbell raised specific concerns about the accuracy and legality of debts raised pursuant to the Scheme, and about the reversal of the onus of proof on to a recipient, including that:

- DHS was raising “debts... that were never incurred and debts raised for amounts higher than warranted”
- Prior to the Scheme, a process of averaging was “very rarely... used because we know the PAYG Payment Summary data is corrupt for our purposes”
- DHS was engaging in a process considered by Centrelink workers to be “a fraud perpetrated by us on our customers” and “we should not be the ones stealing from our customers” and
- there were numerous circumstances in which a recipient, who did not have the skills of a compliance officer or compulsory powers to obtain information, would be unable, or unaware of a need, to provide information that would be required to accurately calculate a debt.

Like the whistle-blower, Ms Taylor raised the issue of deficiencies in the system’s ability to detect information already present on a recipient’s record. She cited the example of an employment separation certificate as something that should be checked at the start of the review process, and that had been disregarded under the review process in place at the time she had identified an issue (during the Manual program).

Ms Campbell’s evidence was that she did not read “the full extent of Ms Taylor’s documents.” Instead, she had “referred them to the relevant line area.”

This is consistent with documents before the Commission which demonstrate that, approximately four minutes after receiving Ms Taylor’s email, Ms Campbell forwarded it to DHS officers including Ms Golightly, stating “Can I have some analysis undertaken on this urgently. I expect it will already be with the CPSU.”

A short time later, a telephone conference was arranged between Ms Taylor and two members of the senior executive service of DHS. Ms Taylor described feeling “very pleased,” because she thought that “someone was listening and my concerns would be considered.” During the phone call, Ms Taylor recalled talking about the concerns she had raised in her response to the secretary and also some additional matters, including problems with averaging. At the end of that call, Ms Taylor remarked to her team leader, “I don’t think she listened to a thing I said.”

A departmental Minute was prepared which contained, among other things, a summary of the telephone conversation with Ms Taylor. It stated:

It was clear during this phone conversation, that Ms Taylor did not understand the processing capabilities of the online compliance system...

What was, in fact, clear was that there were a number of senior departmental officers who did not understand the online compliance system or its effects. To compound that problem, when people like Ms Taylor raised legitimate concerns, which in substance reflected the reality of what was occurring to those subject to the system, they were, effectively, ignored.

A document attached to the departmental Minute also referred to Ms Taylor’s concern that there were circumstances in which compliance officers had been instructed to undertake reviews “without reference to the customer’s record which could explain the discrepancy.” It sought to dismiss that concern by saying that Ms Taylor had taken “out of context” Helpdesk advice to staff in January 2016 that “they should not be interrogating customer records and looking at periods not relevant to the review.”
That was wrong; the advice given was that while there was nothing to stop staff looking at the record relevant to the review, there was no expectation that they would do so; the policy was to apply the match data if the recipient did not make contact. And staff involved in the preparation of the departmental Minute had located a similarly restrictive instruction to all staff in relation to OCI, published in a newsletter in November 2016, which said:

...It is important that staff do not investigate the record looking for documents to alter the outcome of an intervention, as the outcome should be based on the updates provided by the customer...If the customer makes the decision to accept the match data without making changes, then the match data is to be applied in its entirety.

The same process applies for Staff Assisted customers; the intervention is done on behalf of a customer using their own responses. Staff should not look for evidence on a customer’s record unless the customer advises that they provided documentation previously...171

Ms Taylor was clearly correct in what she had said about the instructions to staff. The comment that the advice to staff had “been represented out of context” was removed in the final version of the document that went to the secretary.172

Ms Taylor received a brief response from Ms Golightly on 14 March 2017.173 That response advised “The Secretary has asked that I respond on her behalf.” It did not respond substantively to the concerns raised by Ms Taylor but simply stated:

I can assure you that your suggestions are being considered and will be taken into account in our continuous improvement processes.

On receiving Ms Golightly’s letter, Ms Taylor, who was given to hoping the best of people but was also a realist “wasn’t overly confident that things would change.”174

Ms Taylor retired from the public service in July 2017. In her statement, Ms Taylor said:

Before Robodebt was introduced I loved my job. I felt I had expertise in my area and I felt I was making a contribution as a public servant. Having tried my hardest to get something done at the highest levels of the Department to change the scheme, I felt I had no option other than to leave my position and retire from the public service.175

In oral evidence, when asked what her reason was for retiring, Ms Taylor said:

I just – I was just spent, I think. I just – it was just the, I guess, callous indifference, that you just thought, is that what people do to each other? And it was just so sad...176

[emphasis added]

Response to staff concerns

Mr Tudge was asked, in his oral evidence, about the issue of staff being unable to check a recipient’s record for relevant information in order to check the accuracy of a debt, specifically in the context of employment separation certificates,177 which the whistle-blower had raised. According to Mr Tudge, that restriction no longer occurred:

From that point onwards, there – there was a compliance officer. So the debts were paused, as I said, until the end of August. And at the end of August, there was a compliance officer there to do that checking, precisely dealing with the matter which she raises.178

The fact that it was recognised as necessary to introduce a manual check demonstrates that the response in the media statement, which dismissed the whistle-blower’s claims as “incorrect,” and made no mention of any known issues with the system, or any steps being taken to address them, was specious. The manual check was also tacit confirmation of the validity of some of the staff concerns that had been raised with the system.
Both the secretary of DHS, and its minister, had specifically been made aware of the concerns of the departmental whistle-blower. Ms Campbell knew of Ms Taylor’s email. The CPSU had informed them that the program was causing stress and distress for staff, and that debts were being issued that were incorrect. Numerous sources, inside and outside the department, had raised problems with debt inaccuracy, which was a consistent theme of the criticisms of the Scheme at the time, and required close scrutiny.\textsuperscript{179}

In contrast with the attention he gave process changes, Mr Tudge refrained from asking what authorised the department to raise inaccurate debts, and did not respond to the substance of the allegation of debt inaccuracy, instead participating in a response to staff that asserted that the specific system concerns that had been raised were “incorrect.” Mr Tudge’s conduct in his response to staff concerns was another example of his selectively responding to implementation issues with the Scheme, while avoiding fundamental concerns, including that of debt accuracy.

Ms Campbell failed to engage with the concerns that both the whistle-blower and Ms Taylor had raised. Her response to staff concerns, including those about income averaging and debt accuracy, was not to seek external assurance or even make inquiries about the matter with her chief counsel or other departmental lawyers. Instead, it was to issue the staff communication on 25 January 2017 which contained the representation that there had “been no change to how we assess income or calculate and recover debts,” which she knew to be false. When Ms Taylor expressly brought the falsity of that statement to her attention on 7 February 2017, Ms Campbell took no steps to correct it. Ms Campbell accepted that the persons to whom she had delegated the review of Ms Taylor’s complaints had not followed up and addressed them in any systematic way. The responsibility was hers, but she took no further action.\textsuperscript{180}
10 The 10 per cent penalty fee

In her December correspondence to Mr Tudge, Dr Goldie had raised a concern about the “routine” imposition of a 10 per cent “recovery” fee.\textsuperscript{181} That was a reference to the application, by the department, of a penalty fee, euphemistically called a “recovery fee,” in circumstances where a compliance review resulted in a debt. Economic Justice Australia had also met with DHS in January 2017 and had raised concerns including with respect to averaging and the 10 per cent penalty.\textsuperscript{182}

The Social Security Act provided for the addition of an amount, by way of penalty, to a debt which arose in certain circumstances because a person had either not provided, or had provided false or misleading, information about their income.\textsuperscript{183} The penalty did not apply where the person had a reasonable excuse for either refusing or failing to provide the information. The amount of the penalty under OCI was 10 per cent of the amount of the debt.

Eventually, it would come to light through the Amato proceeding that the underlying debts to which the penalty fee had been applied were invalid (due to the use of income averaging), and that none of the necessary preconditions for the application of the penalty were present. However, even before that eventuated, there were still problems with the application of the fee.

Crucially, the provision in the legislation which provided for the application of the penalty fee stated that it arose in circumstances where a person had been “required, under a provision of the social security law, to provide information in relation to the person’s income….”\textsuperscript{184} Legal advice in January 2015 had pointed out to DHS that the initial letter sent to recipients at the start of the process was “not a coercive notice under social security law;” instead it was a request to a recipient to provide information voluntarily.\textsuperscript{185} It follows that the initial letters sent out under the review process provided no legal foundation for the application of the 10 per cent penalty fee provision, and no basis upon which to charge the penalty.

In averaging cases, the only conceivable argument for the penalty’s application required a conclusion that there must have been a failure to report correctly in each fortnight represented by the supposed overpayment of benefit, on the basis of an assumption that the averaged amount represented the recipient’s correct income for every single fortnight of the supposed overpayment which constituted the debt. That would be a very large assumption indeed, particularly given that the charging of a penalty required the serious conclusion that the recipient had breached the Social Security Act.

All of these problems apparently went unnoticed, despite a number of legal advices which dealt with the issue of the 10 per cent penalty fee.

10.1 Changes to the application of the penalty fee

The way in which the penalty was administered under OCI was that, when the recipient went online to complete their review, there was a question on one of the screens that asked “Were there any personal factors that affected your ability to correctly declare your income during the above periods?.”\textsuperscript{186} If the recipient answered, “Yes,” then the penalty fee would not be applied. If they answered “No,” it would be applied. Where a person did not respond, it would also be applied.\textsuperscript{187} Legal advice had been obtained from DSS in relation to the issue in July 2016.\textsuperscript{188}

In early 2017, as part of the changes that were being made to the OCI process, Mr Porter and Mr Tudge had conveyed to the department that they wanted to change the online screens so that they defaulted to answering “Yes” to the personal factors question outlined above (even in circumstances where a person did not respond), and a 10 per cent penalty fee would not be applied.\textsuperscript{189} The ministers were also involved in the re-wording of a number of the letters for the OCI process. One change that had been requested by Mr Porter was the removal of information about the 10 per cent penalty fee from the initial letter.\textsuperscript{190}
By the time of the Ombudsman’s report in April 2017, those changes had occurred. The Ombudsman recommended that, in certain circumstances, DHS should manually reassess those debts already raised under OCI where the “recovery” fee had been applied automatically. Those circumstances included where a recipient contacted DHS (or a debt collector) to raise a concern, seek information, or seek a reassessment in relation to an OCI debt which included a penalty fee. DHS had had no small hand in the drafting of the wording of that recommendation, its having been the subject of significant revision by DHS, and substantial acceptance of those changes by the Ombudsman.

DHS’s letter in response to the Ombudsman’s recommendation stated that the “recovery” fee had been automatically applied in “limited circumstances,” namely where a recipient had not contacted the department or where “the recipient did not tell the department they had a reasonable excuse for inaccurate reporting.”

There were obvious problems with that response. Firstly, the “limited circumstances” in which the fee had been applied represented approximately 74 per cent of the completed reviews under OCI from July 2016 to January 2017. Secondly, it implied that the raising of a debt had necessarily arisen as a result of “inaccurate reporting” by recipients, in circumstances where the department was well aware that there were significant system issues causing errors in debt calculations, and they had not undertaken any comparison of what the recipient had, in fact, reported, as contained on their departmental record. Thirdly, the circumstances in which a recipient “did not tell” the department they had a reasonable excuse included those where a recipient may have:

- understandably, not been aware of or understood the nature or context of, or the complex underlying statutory provisions relating to, a “reasonable excuse” and its relationship to the application of a penalty
- not made a connection between the impenetrably vague language of the online question about “personal factors” affecting their ability to declare their income, and its import with respect to the automatic application of a penalty fee, or
- not even seen the question on the online screen because they had not received the initial letter.

In any event, DHS advised the Ombudsman that it had commenced contacting people who had had the fee applied, and would write to all recipients who had an OCI debt, to remind them of their review rights, “including the application of the recovery fee.”
11 The use of the media

A particularly mean-spirited aspect of the government’s defence of the Scheme in 2017 was the employment of the media in a form of counter-attack against criticism, which included singling out recipients who complained.

11.1 Media strategy

In January 2017, Mr Tudge’s media adviser, Rachelle Miller, developed a media strategy with respect to the OCI program. This strategy included the use of a “counter narrative” in “more friendly media,” which focused on themes of “cracking down” on welfare cheats, restoring integrity to the welfare system and using “cutting-edge” technology to ensure that the welfare system was sustainable.

The strategy involved:

- placing media stories about “legitimate” debts that were being detected by the OCI system, including “real life ‘case studies’”
- placing media stories about convicted “welfare fraudsters” and
- as possible.

Mr Tudge was advised of some of Ms Miller’s suggestions for that strategy by an email on 9 January 2017, which said “There is a strong defence here and a story of a system that is doing what it is supposed to do, if we aim it at the right media.”

On 18 January 2017, Bevan Hannan (acting national manager, Customer and Media Engagement, DHS) sent an email to senior DHS officers including Ms Campbell, Ms Golightly, Ms Harfield and Mr Withnell (general manager, Business Integrity). He outlined the “likely approach from the Minister’s office over the next week” with respect to media, attributing the thinking behind it to the Minister’s media advisor.

That approach included an observation that “News Corp isn’t interested in the line being run by left-leaning media – but is keen on the alternative view. As such, the focus will be on working with News to achieve this.” Elements being considered for this “narrative” included statistics on the success of current compliance activity, correction of customer cases “where we are certain of the facts,” de-identified “cameos” demonstrating the types of debts being recovered, and highlighting the percentage of “valid” debts within cases featured in the media.

Consistent with this approach, requests for information soon followed from the minister’s office, including for:

- “information on media cases that we know have been misrepresented when reported”
- “case studies of situations uncovered, through the new system, where people have owed legitimate debts, preferably large debts where there is a clear case of under reporting”
- full lists and details of cases that had been featured in the media and
- the “top 20 $ value potential overpayments identified through the OCI system.”

Mr Tudge personally involved himself in responding to media, manifesting his acceptance of those of Ms Miller’s suggestions that were ultimately adopted, and of a strategy involving a “strong defence,” and the “story of a system that is doing what it is supposed to do.”

Mr Tudge submitted to the Commission that, in effect, he did not adopt a strategy in order to respond to criticism in the media; instead, his “focus was on addressing the implementation issues with the Scheme, rather than engaging in a strategy of deflection.” His evidence was that part of the role of a minister included working with the media to communicate the government’s message, and that it was an important and expected part of that role, which he took seriously.
Certainly Mr Tudge’s communications with Mr Turnbull included telling the prime minister that:

- “My messaging will be that the system is working but we will continue to make improvements, as we have since we first came to office”

- he had been monitoring media coverage that morning (13 January 2017). Later that day, he said that he had a “complete plan as to how to make the system more defensible” and “My plan is to signal more of these “refinements” on Monday” and

- “My positioning this week hopefully allows us to do more “refinements” fast without losing too much face.”

While it is accepted Mr Tudge did have an implementation focus, his media strategy did not stop at conveying the refinements he had made. He also employed it to deflect criticism of the Scheme and quell negative public comment. He was personally involved in its execution. He received and reviewed the details of case studies reported in the media, and edited and analysed details of some of those case studies and statistics that were derived from them. In one instance, with respect to a response to the case studies that had been developed by his ministerial staff, Mr Tudge commented, “These lines are not robust enough.” Mr Tudge also approved information about the case studies to be sent to a journalist at The Australian newspaper.

Mr Tudge’s assistant advisor undertook part of the analysis of the case studies that were sent to the minister’s office in late January 2017. In an email sent on 20 January, she indicated that she had discussed the matter with Mr Tudge that afternoon, and that he had requested further data analysis. In her email, which was subsequently forwarded to Mr Tudge, she noted that the spreadsheet of cases provided by DHS contained original debt amounts raised against recipients, and observed:

In a number of cases this has been substantially revised down – this could present a bit of a risk about the quality and accuracy of the original data-matching system.

A journalist at The Australian newspaper, Simon Benson, was provided with the information that had been approved by Mr Tudge. On 26 January 2016, The Australian published an article by Mr Benson entitled “Debt scare backfires on Labor.” The article described the recent criticism of the compliance program by the opposition as “an embarrassing blunder,” and characterised the people who had spoken publicly about their experiences with Centrelink debts as “so-called victims.”

The same day, Mr Tudge was interviewed on radio 2GB, where the article was discussed, and the following exchange occurred:

WARREN MOORE: …Well you must be quite happy that Simon Benson has written this piece in The Australian today.

ALAN TUDGE: Well, it’s a very significant story that he’s written, and what it shows is that Labor has been deliberately putting up cases to the media alleging that people have been so-called victims of the online compliance system, when in many cases, in fact, they do owe significant amounts of money.

Now, we’re recovering that money where there has been a clear overpayment, and that’s good for the taxpayer and it’s also good for the welfare system, because it means it’s going to be a more sustainable system in the long run...

The minister also made the decision for his office to publicly release the personal details of one particular person to the media, following an opinion piece she wrote, critical of her treatment by Centrelink, which was published in various newspapers.
The opinion piece related to that person’s experience with Centrelink concerning a debt that was not raised under the Scheme. However, its relevance to the Commission’s investigations was that it occurred in the context of a media strategy to discourage public criticism of the Scheme. It was a response, from both DHS and the minister’s office, to a person who had described their negative experience with a Centrelink debt. The information released related to a particular named individual, rather than being an anonymised case study or part of an aggregate of data about a number of case studies and it was released by both the minister’s office and DHS.

Mr Tudge said that, in hindsight, he considered that the information should have come from the department to “correct the record,” and not from his office.220

This particular release had an observable impact on the willingness of people to publicly speak out about their experiences in the media. Ms Miller commented that, as a result of the release of this personal information, “there were less people speaking out in the media, which was the intention.”221 It had the effect of shutting down most of the personal stories appearing in the media which were critical of the Scheme.222 Ms Crowe, from ACOSS, described the release of the information as “a shocking abuse of the government’s power at the time.”223 She was worried that it would “silence people who were affected by Robodebt” and agreed with the proposition that the release of the information in fact had “a chilling effect” on people who wanted to complain about DHS.224

There may well have been other reasons for the drop in Robodebt stories at the time, but it is reasonable to infer, particularly given the observations of Ms Miller, a media professional, and Ms Crowe, who dealt regularly with recipients subject to the Scheme, that it was largely due to the release of information by the minister’s office in response to complaints.

It can be accepted that a minister may often be called upon to defend government policy in the media, including unpopular policy. However, this strategy went further than that. Mr Tudge submitted that the use of case studies, and the release of information relating to a particular person, was intended to “correct the record” in the media. Correcting errors in reporting may be a legitimate exercise. But this was not done openly. Instead, the minister’s office fed information to the press, and in the case of the 26 January article in The Australian, Mr Tudge the same day exclaimed over the “significant story” on radio without disclosing that his office had been the source of it.

If “correcting the record” were the only purpose for the collation and release of this information, then it would have been equally important for the minister’s office to do the same in respect of at least some of the cases where DHS or the system had made mistakes. Instead, in instances where debts had been discovered to be incorrect, recipients were dealt with by contact with DHS.225 The effect of the strategy employed by the minister and his office, of publicly correcting the record by emphasising “legitimate debts,”226 “preferably large debts”227 and “top 20 $ value potential overpayments”228 without doing the same with respect to instances where mistakes were also occurring, and debts were either inaccurate or non-existent, was that it was apt to create a general perception that debts under the Scheme were owed and the system was working.

Mr Tudge’s engagement in this media strategy, and use of the media in this way, had the effect of discouraging criticism of the Scheme, and inhibiting open dialogue and analysis of the flaws of the Scheme. It also had the effect of undermining the credibility of complaints and concerns about flaws in the Scheme.

As a minister, Mr Tudge was invested with a significant amount of public power. Mr Tudge’s use of information about social security recipients in the media to distract from and discourage commentary about the Scheme’s problems represented an abuse of that power. It was all the more reprehensible in view of the power imbalance between the minister and the cohort of people upon whom it would reasonably be expected to have the most impact, many of whom were vulnerable and dependent on the department, and its minister, for their livelihood.
11.2 Department media

On 28 and 29 December 2016, Ms Golightly emailed Ms Harfield about the articles about the OCI program that were proliferating in the media at the time. Ms Golightly apologised to Ms Harfield for “bother[ing her] over the break,” but indicated that the issue was in the mainstream media and “we will need to get it shut down as quickly as possible.” Ms Golightly indicated that she was “keeping up the pressure on media to get the details” and that the media interest had “the potential to derail the good work we are doing and we need to get it dealt with.”

On 2 January 2017 Ms Golightly sought “options and advice” on a proposed media strategy to deal with the media reporting on the OCI program. Mr Hannan subsequently signed off on a “Communication Plan” for the OCI program, and commenced development of a “script...from the standard words” and talking points “drawn from the ones sent to the minister.” Mr Hannan was of the view that such a plan should have been considered at a far earlier time and, by January 2017, the department “had missed the opportunity for a well-executed launch and the situation was beyond rescue from communications.”

Part of DHS’s engagement with the media involved its spokesperson, Hank Jongen. Mr Jongen’s role included releasing “official statements” to the media and participating in broadcast interviews to represent the department. Mr Jongen’s evidence was that, with respect to the Scheme, he engaged with the media “in accordance with direction provided by DHS in line with approved statements,” and that he would be provided with “media statements” or “talking points.” Mr Jongen explained that it was the “business owner” (in this case, Ms Golightly) who was responsible for media content; his role was to deliver that message.

Ms Golightly demonstrated a desire to keep control of the media narrative and the dissemination of information for that purpose. On 4 January 2017, in response to a query about information required for a media appearance by Mr Porter, Ms Golightly replied “Thanks for the offer of assistance, however it is my team that should be handling this and will do so.” Ms frequently amended proposed media responses, including ensuring “standard words” were added.

In January and February 2017, Ms Campbell replied to media summaries, dismissing the reporting as “fabrication” and “distortion” and criticised the reporting for leaving recipients’ stories “unchallenged.” On 4 May 2017 Ms Campbell responded to a media update saying “good to see no questions on OCI today. Maybe it’s easing...” A further specific example of Ms Campbell’s approach to the use of media follows, with respect to the income support recipients who had been subject to the Scheme.

DHS’s approach to the media, particularly during the period of intense publicity in the early months of 2017, was to respond to criticism by systematically repeating the same narrative, underpinned by a set of talking points and standard lines. There was no critical evaluation of this messaging, or its accuracy, because the “gatekeepers” of its content were more concerned with “getting it [the media criticism] shut down as quickly as possible,” and “correcting the record” with standard platitudes that failed to engage with the substance of any criticisms.
12 Suicides associated with the Scheme

The Commission is aware that a number of people who had alleged debts raised against them under the Scheme have died by suicide. While each of those deaths may have prompted an internal review of the particular case, they did not galvanise either DHS or DSS into a substantive or systemic review of the problem of illegal, inaccurate or unfair debt-raising.

Further detail about some of these cases, and the serious human impacts arising from the Scheme, are contained in the chapter on Effects of Robodebt on individuals. The following section is concerned with the response of DHS and the minister’s office to two suicides which occurred in early 2017.

On 16 February 2017 at 8:35 pm, Ms Campbell asked for “our response on the customer case for the Saturday paper.” Ms Campbell was referring to a request from a journalist from The Saturday Paper, who had inquired with DHS about information relating to Rhys Cauzzo. At 9:17 pm and 9:19 pm Ms Golightly emailed Ms Campbell in response to her request. Both emails included the information that Mr Cauzzo’s debt was not raised by way of the OCI iteration of the Scheme.

On 18 February 2017 emails were circulated by DHS, including to Ms Campbell and to the minister’s staff, seeking a correction to the article published on Mr Cauzzo’s death in The Saturday Paper; in particular making the key point that the debt raised against Mr Cauzzo “was not tied to the OCI system.”

On 18 February 2017 at 11:03 pm, Ms Golightly wrote to Ms Campbell in respect of the death of Mr Cauzzo:

Hi Kathryn - The Saturday Paper updated story has not used most of the info we sent them today - they do include that it was a manual process right at the end but this is after the whole body of the report which still implies it was all to do with OCI. Clearly they are not interested in the facts or in printing what we provide to them. As per Cathy’s email earlier this evening, we will work on a narrative around the processes re debt collectors and vulnerable people for use in other forums or if this story gets picked up. I am envisioning something which says that we followed the normal processes in the case - the same processes that apply for any debts raised across any Centrelink programme and which have been in place for many years. We will check that this is an accurate statement of course.

Ms Campbell’s response was sent on 20 February 2017 at 8:50 am stating:

Thanks Malisa.
Jonathan, Annette and Cathy

From now on, I want to be more direct with media outlets when a recipient or representative makes claims which are inconsistent with our records. After getting legal advice, I want to say that the information is inconsistent with our records or some other form of words. This may require a discussion with the MO.

Happy to discuss further. Kathryn

The exchange demonstrates that Ms Campbell and Ms Golightly were, first and foremost, preoccupied with distancing Mr Cauzzo’s death from the OCI program and to “work on a narrative.” Ms Golightly had proposed words to the effect that standard processes had been observed, noting as an addendum that they would check those words for accuracy, having already “envisaged” the message she wanted to deliver. In her oral evidence, Ms Campbell explained that the approach was because “staff were feeling that they were under siege” but acknowledged that, with respect to Mr Cauzzo’s death, it did not matter “what, if anything, had... contributed. This was a tragic circumstance.”

DHS’s emphasis on whether the debt was the product of its earlier, manual system, or its current, automated system (both of which involved averaging) is symptomatic of its senior executive officers’ emphasis on controlling the narrative surrounding the Scheme rather than dealing with the actual concerns being expressed in many quarters about the accuracy, fairness and legality of debts raised under it.
Mr Tudge was also made aware of Mr Cauzzo’s death, and that the media report had indicated that letters relating to a social security debt were a factor relevant to his suicide. He requested an investigation into the circumstances of Mr Cauzzo’s case. The intent behind Mr Tudge’s request was described by a departmental liaison officer as being able to write to Mr Cauzzo’s mother and convey that he “[was] confident that the Department had done everything correctly.”

Mr Tudge was provided with a brief on the outcome of that investigation in April 2017. The brief stated that DHS had identified one system issue relating to an incorrect date on a letter and that all of DHS’s interactions with Mr Cauzzo “were appropriate and undertaken within the parameters of departmental processes.”

Consistent with the intent behind Mr Tudge’s request, the investigation was conducted, and conclusions were drawn on the basis of a superficial examination of procedural and operational compliance by DHS. The investigation should have identified that a “vulnerability indicator” ought to have been recorded on Mr Cauzzo’s Centrelink record, given that (as the investigation report attached to the brief recorded) in September 2015 DHS was made aware he suffered from anxiety and depression and had reported suicidal ideation. A vulnerability indicator would have triggered the additional responsibilities in dealing with Mr Cauzzo, including exercising caution when considering compliance action and taking any vulnerabilities into consideration with respect to possible non-compliance.

Mr Tudge’s letter to Mr Cauzzo’s mother, Jennifer Miller, said:

> While the review identified some minor errors of an administrative nature, it concluded that both the Department’s and its agent’s interactions with your son were handled appropriately, professionally and sensitively.

Those conclusions were wrong and the letter misleading. The error was not minor, and Mr Cauzzo’s case was not handled appropriately or sensitively.

Mr Tudge was made aware of a second suicide relating to a discrepancy letter issued under the compliance program, which by this time was known as EIC, in July 2017. (The individual involved will be referred to as “Ms A.”)

Mr Tudge’s chief of staff, Andrew Asten, received an email in relation to Ms A’s suicide on 14 July 2017, and requested a further update to be given later that day. He recalled telephoning Mr Tudge and “effectively relay[ing] the contents of the original escalation email to him.”

Documents provided in response to a specific request by the Commission reveal no record of any further communication to or from the minister about this case.

DHS’s summary of the circumstances of the case indicated that Ms A did not, in fact, owe a debt. Her employment had ended prior to the period in which she commenced receipt of welfare payments. This information was available on DHS file when the discrepancy letter was sent, in the form of an employment separation certificate which gave the correct end date for her employment. Under the compliance review system that was in place prior to the Scheme, it is most likely that no discrepancy letter would have been sent to Ms A at all, because, under that system, before proceeding, compliance officers would check a recipient’s record to determine if there were information that could explain a discrepancy.

Mr Tudge conceded in oral evidence that while it was not possible to say that the Scheme was the cause of the suicide, it was equally not possible to say that it was not.

In fact, it seems highly probable that it was. An email setting out DHS history of the case provides the following information:

- Ms A had provided medical evidence to DHS that she suffered from depression and other mental ill-health; as DHS knew, she had suffered from workplace bullying and was seeing a psychologist; she had previously contacted DHS to discuss financial hardship.
• In mid-June 2017, a compliance officer had spoken to Ms A about contacting her employer for additional documents; she was sent a reminder letter; within a week of it her sister contacted DHS and advised that Ms A had died shortly after receiving it.

• Ms A’s sister suggested that given she had gone through an unfair dismissal process, the prospect of having to speak to her previous employer could have been overwhelming and brought back memories of her experiences, with an impact on her continuing mental health problems.

As previously outlined in more detail, the media statement issued, with Mr Tudge’s input, in response to the whistle-blower’s document had asserted that the system errors it outlined were “incorrect,” and made the claim, “The system is designed to identify anomalies and these are sent to a staff member for review.”

In Ms A’s case, in July 2017 the system could not, and did not, identify any “anomaly” and an initial letter was automatically generated in circumstances where it should not have been. The deficiencies in the automated system were twofold:

• the system was unable to identify a crucial piece of information that was already contained on Ms A’s Centrelink record, namely the end date of her employment contained on an employment separation certificate, and

• in the absence of the ability to identify that information, the system had erroneously used the incorrect end date of employment contained within the ATO PAYG data to generate the initial letter to her commencing the review process.

Mr Tudge had said in his evidence that after Ms Taylor’s email, a process had been introduced where a compliance officer would check the information on a recipient’s file. In the context of being asked about the July 2017 case, where Ms A was required to respond to a discrepancy letter, he explained that this was a check at a different stage in the compliance review process; the compliance officer would review the materials during the debt raising process.

The best stage of the process in which to insert a compliance officer was, Mr Tudge said, after the discrepancy was identified but prior to the raising of a debt.

Mr Tudge was asked by Senior Counsel Assisting why it would not be best to insert a compliance officer at the start of the process, to review material and prevent unnecessary initial discrepancy letters from being issued at all.

THE HON ALAN TUDGE: Well, I can only reflect on why the Cabinet made that decision in 2015.

MR GREGGERY: Mr Tudge, this was not a Cabinet decision in 2015; this was your fix in 2017.

THE HON ALAN TUDGE: With – with due respect, Mr Greggery, those – the essential issues which you raised then were Cabinet decisions of 2015, because it was putting the onus back on to the recipient, which enabled a lot more reviews to be undertaken. And my reading of the Cabinet minutes is that there was a desire to undertake more reviews, because there was an identification that there was as much as 3.5 per cent of the welfare expenditure, being $100 billion per year, was an overpayment. And yet up until that point, only a tiny fraction was reviewed.

And in order to be able to do more reviews, the structure of the system had to change, and the Cabinet made that decision, to change two key elements of the structure. One key element was to put more responsibility on to the recipient to collect that income information, and the second key structural element then was to create an online interface for the recipient to upload that information, both of which, those two things, enabled the additional compliance checks to be done. Without those two things, you could not do those additional compliance checks.

There is no evidence that Mr Tudge was sufficiently concerned about the circumstances of Ms A’s suicide to request any further information, brief, or investigation after his initial briefing from Mr Asten, so he may not have had sufficient details to connect what had happened in this case with the system deficiency identified by the whistle-blower earlier in the year. However, he seems previously to have recognised the problems that could arise at the initial letter stage; he had made inquiries about involving a compliance officer prior to an initial letter being issued. On 23 March 2017 Mr Tudge signed two ministerial briefs
produced in response to his office’s request “that the Department... produce costings to demonstrate the impact of every initial letter, and every finalisation with a debt outcome letter, being checked by a compliance officer prior to being sent to welfare recipients.” Those figures were provided to him. Although departmental processes were changed to allow for additional manual steps later in a review process (as outlined in the changes to the Scheme under EIC, described above), no action was taken to have the initial letters checked.

By July 2017, Mr Tudge knew that at least two people had died by suicide, and that their family members had identified the impact of the Scheme as a factor in their deaths. Nonetheless, Mr Tudge failed to undertake a comprehensive review into the Scheme, including its fundamental features, or to consider whether its impacts were so harmful to vulnerable recipients that it should cease.
13 The issue of lawfulness

Early 2017, as has already been mentioned, saw a flurry in departmental activity. Because it was the holiday season, many officers were on leave, and others acted in their positions.

Between 23 December 2016 and 16 January 2017, Jonathan Hutson (deputy secretary, DHS) was on leave, and Sue Kruse acted in his place.269

Between 3 January and 15 January 2017, Annette Musolino (chief counsel, DHS) was on leave. Between 3 January and 8 January 2017, Paul Menzies-McVey acted as chief counsel, and between 9 January and 15 January 2017, Lisa Carmody acted as chief counsel.270

During December 2016 and January 2017, Mark Gladman acted as general counsel, Programme Advice and Privacy, DHS. That role was usually occupied by Maris Stipnieks.271

Between 22 December 2016 and 9 January 2017, Ms Campbell was on leave. During that time, Barry Jackson acted as DHS secretary.272

During the first week of January 2017, the Office of Legal Services Coordination (OLSC) raised with Mr Menzies-McVey whether the Scheme gave rise to a significant issue in the provision of legal services which was required to be reported to the OLSC or the Attorney-General. Communications between the OLSC and Mr Menzies-McVey, and Ms Musolino, on her return from leave, continued throughout January 2017, with no report being made. The details of those interactions are set out in the chapter on Lawyers and Legal Services.

13.1 Mr Jackson’s period as acting secretary of Human Services

Mr Jackson was aware that towards the end of December 2016 and into January 2017, DHS was the subject of substantial adverse media publicity in relation to the Scheme.273 That adverse publicity included media reporting and commentary about the use of income averaging in the Scheme, including with respect to the accuracy and lawfulness of debts raised under it.274

DHS officers were also required to respond to enquiries from the acting minister responsible, Mr Porter (and subsequently Mr Tudge upon his return from leave),275 about the Scheme and the use of averaging. Mr Jackson stated that his first “actual awareness of the problems associated with [the] Robodebt Scheme was on 23 December 2016, when there was the first significant media coverage.”276 He said “that level of media coverage obviously required my attention as Acting Secretary.”277 This is consistent with Ms Campbell’s evidence that when she returned from leave on 10 January 2017 the Scheme was receiving media attention warranting daily meetings and phone calls until early February 2017.278

13.2 “A weapon of math destruction”

One example of a media article which raised the use of income averaging in the Scheme, including with respect to the accuracy and lawfulness of debts, was an article by Peter Martin published in the Sydney Morning Herald on 7 January 2017, entitled “How Centrelink unleashed a weapon of math destruction.”280 The prime minister, Mr Turnbull, had drawn the article to Mr Tudge’s attention,281 and he in turn sent a link to his chief of staff saying “PM sent me this one and has the clearest critique. Please forward this to Malisa.”282 The chief of staff did so; however, the article had already come to Ms Golightly’s attention, she having forwarded it to Mr Withnell that same day.283

The article described the “automated Centrelink debt recovery system.” It contained a quote from a “former Centrelink worker with 30 years’ experience” about the historical process that had been in place.
That worker provided a description of the compliance review process that had been in place prior to the introduction of the Scheme.

The article then made the following crucial point:

> What’s important in this description is the humans charged with applying the law didn’t issue debt notices unless they had evidence that a debt existed. To do so without evidence would be to break the law.

[emphasis added]

The article described the use of income averaging by the Centrelink system which “produces consistently false estimates of debts by dividing by 26 the annual wages employers report paying in order to overestimate income received during the smaller number of fortnights claimants get benefits.”

In response to Mr Turnbull, Mr Tudge asserted (erroneously) that the description of the averaging methodology over 26 fortnights was “not correct,” but that Mr Martin had identified the “key methodological change” of the reversal of the onus onto a recipient. There was a brief discussion of the article between the two, the focus of which was the apparent age of some of the debts and the difficulties for recipients obtaining records after that length of time. Neither Mr Tudge nor Mr Turnbull demonstrated an awareness of an issue with legality in that correspondence.

On 8 January 2017 Mr Tudge sent an email to Ms Campbell, Mr Jackson, and Ms Golightly and others. He outlined his requests for information for a meeting the next day with DHS employees and said “Please look at the Peter Martin column in FAIRFAX which PM has read.”

Later that day Mr Withnell prepared what he described as “a brief overview of the Peter Martin article.”

With respect to the paragraph of the article which dealt with legality (set out above), the document said:

> Important that humans who issued debt only did so with evidence a debt existed to do otherwise would break the law. The difference in income between ATO and DHS records already suggest a debt. The system only raises a debt after the customer has verified or updated the data (therefore making it accepted data) unless they fail to respond in which case the individual is technically breaking the law and would leave DHS legally entitled to take a relevant course of action (should check with Legals).

Mr Withnell, it seems, was one of the many who were not very clear on the authority by which DHS was requiring responses under the Scheme; the correct answer being that there was none.

The next day, on 9 January 2017, DHS officers including Mr Jackson and Ms Golightly met with Mr Tudge. There is no record to indicate whether the Peter Martin article was specifically discussed. Mr Jackson recalled that the focus of the meeting was on the OCI “client facing portal,” the nature of the letters being sent to recipients and the overall experience of recipients. A list of requests from the minister, including data requests and directions for improvements to the operation of the system, was compiled and emailed to the meeting participants later that day.

To Mr Jackson’s recall the legal basis for the Scheme was not discussed during that meeting. DHS officers including Ms Golightly had said that the Scheme had been operating this way for a long period of time. Mr Jackson’s request for advice was not raised (that is detailed in the following section), and Mr Tudge was not advised of it at any stage.

### 13.3 Mr Jackson’s request for legal advice

In that context of media coverage and ministerial inquiries, Mr Jackson had received repeated assurances from DHS officials, especially Ms Golightly, that income averaging was a longstanding practice. Despite this, Mr Jackson sought to satisfy himself that there was a proper legal basis for income averaging, by requesting legal advice about it. At the time of Mr Jackson’s request, on 6 January 2017, DHS had not obtained internal or external advice about the lawfulness of income averaging as used in the Scheme. Mr Jackson’s expectation, given the significance of the issue, was that the advice would be from an external source, such as the Australian Government Solicitor (AGS).
On the same date, this request for advice was communicated by Ms Kruse to Mr Menzies-McVey for his consideration. It appears that Mr Menzies-McVey became aware of Mr Jackson’s request for advice after his 6 January 2017 conversation with the OLSC representatives. In submissions, Mr Menzies-McVey indicated he was not aware that the request for advice originally came from Mr Jackson.

By email dated 6 January 2017, Mr Menzies-McVey asked that Mark Gladman prepare advice in response to Mr Jackson’s request.” He stated:

Sue Kruse would like us to develop, as a top priority next week, a paper on the department’s current practice of averaging income for the purposes of calculating payments under the social security law. This paper should look at the legislative basis for this practice for each payment, and identify the circumstances where it is permissible for the department to assume (in the absence of other evidence) that income over a period has been earned pro rata over the period. If, in some or all cases, the department should use its information gathering powers to obtain detailed information about when income has been earned (i.e. by compelling detailed information from an employer), rather than relying upon averaging, this should be identified. Any guidance in the Guide should also be identified.

The following day, on 7 January 2017, Mr Menzies-McVey re-sent his instructions to Mr Gladman saying “If you need to rope Glyn [Fiveash] in to assist, that’s fine – let me know.” Mr Menzies- McVey forwarded that correspondence to Mr Fiveash, stating “Glyn See below for info. Mark might need a bit of help.”

Mr Gladman carried out this task with the assistance of John Barnett (deputy general counsel, DHS) and Matthew Daly (lawyer, Legal Services Division) and provided the resulting draft advice to Ms Carmody, who ultimately provided a version of it to Ms Kruse.

Mr Fiveash held the position of deputy general counsel, DHS. His evidence was that he could not recall helping Mr Gladman; however, on 11 January 2017, Mr Fiveash provided an advice to Tracy Tozer (acting director, WPIT Programme) on the issue (the Fiveash advice).

The Fiveash advice concluded:

The Department cannot apply an income amount received over a larger period (e.g. 12 months), in any way against a customer other than in the matter in which the person received it in those individual fortnights; i.e. the annual amount cannot simply be divided by and applied as the person’s income over 26 payment fortnights. Rather, the annual amount needs to be apportioned between the relevant fortnights in the period at the rate at which it was actually earned, derived or received.

Unlike other internal advices, this advice actually addressed the statutory definition of “income” and, though brief, it encapsulated the fatal flaw at the heart of income averaging as used in the Scheme: that DHS could not (legally or justly) assess a recipient’s entitlement to payment on one basis and then seek on a different basis to recover the payments made.

The Fiveash advice was sent to Ms Musolino on 23 January 2017 but there is no evidence that she brought it to Ms Campbell’s attention.

The evidence shows that a number of critical events took place by and on 10 January 2017 in relation to the proposal to seek external legal advice. These are:

- First, Mr Gladman had formed the view that the arguments in favour of averaging were “weak” and that AGS should be retained to provide an independent advice on the topic. Mr Barnett and Mr Daly came to conclusions to the same effect.
- Second, a draft of the advice responding to Mr Jackson’s request had been prepared (the draft advice) and was in circulation within DHS. That advice explicitly recommended that external advice be sought. Ms Carmody accepted in her evidence that the arguments in the draft advice in support of averaging were “unconvincing.” Further work was done on the draft advice, including the preparation of a more developed version on 11 January 2017. The draft circulated the following day still contained the recommendation that external legal advice be sought. Versions of the draft advice continued to be circulated for some days, including a version which was provided by Ms Carmody to Ms Kruse in hard copy on 13 January 2017.
• Third, Mr Gladman spoke to Ms Carmody, conveying his view as to the weakness of the arguments in favour of averaging in the context of preparing the draft advice and as to the need, as he saw it, for AGS advice to be obtained. 310 He stated in the covering email to Ms Carmody providing a version of the draft advice for her consideration, “As discussed... I've left in the suggestion about seeking external advice.” 311 Those words confirm that the matter had been a specific topic of conversation between the two. Mr Gladman’s evidence is that when he informed Ms Carmody of his recommendation to seek AGS advice, Ms Carmody said “I will go and speak to [Ms Kruse] about it.” 312

• Fourth, Ms Carmody spoke with AGS lawyer, Leo Hardiman, who confirmed that he had the “capacity and experience” to provide “urgent legal advice on the process that... DHS is using to identify potential overpayment of social security payments.” 313

• Fifth, Mr Gladman was circulating draft instructions to AGS within DHS. 314 While it may have been that further work was required to develop settled comprehensive instructions to AGS, DHS was in a position on 10 January 2017 to retain AGS and iteratively develop more detailed instructions later. 315

Accordingly, it is clear that by 10 January 2017 there was an internal view held by a number of lawyers at DHS that the arguments in favour of averaging were weak and unconvincing, and that external advice should be sought on that question. Steps had been taken to obtain that advice, including confirming that there was an AGS solicitor available to give it, and drafting the questions to be answered by the external advice. All of that was consistent with Mr Jackson’s request.

Two further significant events took place on 10 January 2017. The first was Ms Campbell’s returning from leave. On or about that date, Mr Jackson said, he provided Ms Campbell with a verbal briefing, in which he informed her of his request for legal advice about averaging. 316 In a statement, Mr Jackson said:

I provided verbal advice to Ms Campbell that I had raised the issue of legislative authority with respect to Averaging with Ms Golightly who had advised me that she was progressing my request.

Ms Campbell did not recall a substantive handover 317 but did recall speaking to Mr Jackson 318 and accepted that she had been communicating with Ms Golightly while on leave, following the adverse media reporting on the Scheme. 319 Ms Campbell denied knowledge of Mr Jackson’s request for advice. 320 Her evidence was that she was:

...unaware that a request for legal advice in the terms described by Mr Gladman had been made and [was] unaware that any such advice, draft or otherwise, had been prepared. 321

The second significant event that occurred on 10 January 2017 was the Ombudsman’s formally notifying DHS by way of correspondence to Ms Campbell that it would undertake an Own Motion Investigation into the Centrelink automated debt raising and recovery system (including the issue of adherence to legislative requirements). 322 The Ombudsman’s investigation would obviously and necessarily require the provision of information by DHS to the Ombudsman, with heightened scrutiny of the Scheme and DHS’s conduct in respect of it.

13.4 The legal advice work ceases

As matters eventuated, the draft advice was not finalised and AGS was not retained to provide advice on the lawfulness of income averaging. From around 13 January 2017, it appears that work on these matters ceased. The reason for this is the subject of some controversy.

Both Mr Jackson and Ms Musolino gave evidence to the effect that, following 9 January 2017 (that is, Mr Jackson’s final day as acting secretary), Mr Jackson’s request for advice could only have been withdrawn by Ms Campbell. 323 Ms Campbell denied making any such instruction.
In submissions made on behalf of Ms Campbell it was asserted that “a far more plausible inference” than any direction by Ms Campbell to withdraw the request for advice was that she assumed that Ms Golightly had the matter under control and would report to her if necessary. Another possibility was said to be that Mr Jackson’s request “fell through the cracks” as the officers who had been acting in roles over the Christmas break and were responsible for obtaining the AGS advice failed to properly brief the substantive officeholders when they returned to their positions. The Commission does not accept these submissions.

On the basis of Mr Jackson’s evidence, the Commission is satisfied that Ms Campbell was made aware of Mr Jackson’s request for advice and its progress.

It is clear that from 6 January 2017, the process of responding to Mr Jackson’s request for advice gained significant momentum within DHS. The cessation of this process coincided with, firstly, Ms Campbell’s return from leave, secondly, Ms Campbell’s briefing with Mr Jackson and, thirdly, Ms Campbell’s being notified of the commencement of the Ombudsman’s investigation. A much more likely explanation for the demise of Mr Jackson’s request than inaction by Ms Golightly or the process falling ‘through the cracks’ is that Ms Campbell instructed that the steps towards obtaining an opinion from AGS and finalising the draft cease.

Significantly, in providing a late iteration of the draft advice to Ms Kruse on 13 January 2017, Ms Carmody said: “I realise to some extent circumstances have moved beyond this.” Ms Carmody’s description of a change in circumstances suggests something more than inaction, lending support to the conclusion that there was some positive instruction that the process of finalising the draft advice cease.

The Commission finds that Ms Campbell instructed DHS officers to cease the process of responding to Mr Jackson’s request for advice, motivated by a concern that the unlawfulness of the Scheme might be exposed to the Ombudsman in the course of its investigation.

### 13.5 Ms Musolino returns from leave

Ms Musolino returned from leave on 16 January 2017, six days after DHS had first been in a position to retain AGS. By that stage, the draft advice had not been finalised and AGS had not yet been retained, despite Mr Menzies-McVey and Ms Kruse having assigned the matter “top priority.” The draft advice had been emailed to Ms Musolino’s chief counsel positional email address on 11 January 2017, so she would likely have seen it either on screen when reviewing the contents of her inbox on her return from leave, or because it was printed for her and brought to her attention in that context.

The latter seems likely. Subsequently, when Ms Carmody asked Ms Musolino whether a request for legal advices included work she (Ms Carmody) had done in the week of 9 to 13 January 2017, Ms Musolino replied that she thought she had everything printed for that week.

On 16 January 2017 there was a hand over meeting between Ms Musolino and Ms Carmody. Although Ms Carmody does not have a specific memory of the handover meeting, her evidence was:

- that Ms Musolino was provided with a hard copy folder of all relevant documents from the week which she expects would have included the draft advice and draft instructions to AGS
- that her expectation was that she informed Ms Musolino that the arguments in support of averaging were unconvincing and that a view had been formed within the Legal Services Division that there was a need to get AGS advice and
- that she “…broadly recalls discussing with Ms Musolino that this matter consumed most of the week, that we had been asked a range of questions and prepared a range of advice and draft advice in response and that the extent to which we had existing relevant legal advice was not yet resolved.”
Given: the substantial adverse media publicity about the Scheme, including with respect to income averaging; that the acting secretary had requested legal advice about averaging; that the request had been assigned “top priority” by Ms Kruse and Mr Menzies-McVey; and the negative views about the lawfulness of averaging that had been formed by the Legal Services Division; it is implausible that Ms Carmody did not fully brief Ms Musolino about:

- Mr Jackson’s request,
- the draft advice that had been prepared and the substance of it,
- the draft instructions to AGS that had been prepared,
- the fact that an appropriate AGS lawyer had been contacted and confirmed that he was available to advise on averaging, and
- the fact that lawyers within the Legal Services Division of DHS had formed the view that the legal arguments in favour of averaging could be described with words such as “weak,” “unconvincing.”

Ms Musolino, having reviewed the draft advice and the markedly tentative arguments it offered in support of averaging, and/or having received the information provided to her orally by Ms Carmody, must also have appreciated that the legal arguments in favour of averaging were weak and unconvincing.

### 13.6 “Scare the horses”

On 21 January 2017, Ms Golightly sent Ms Musolino and Mr Hutson an email which in turn forwarded an email from the DHS media unit, detailing various media reporting about DHS. The reporting included an article in *The Guardian* about consideration being given to a class action concerning the Scheme. Ms Golightly foreshadowed the prospect of inquiries from the minister, and possibly prime minister, and stated:

> ...Given we haven’t changed the way we to the data matching or the way we assess or calculate the debts – ie we are doing it the same way we have done it for many years – does this form the kernel of any immediate legal advice we may need to give? (This has been our position to date when other mentions of legal issues have come up in the press)...  
> Not sure we need formal external legal advice just yet – unless you have a different view? Just want to be ready with something **but not scare the horses**. We don’t want to give the impression we are concerned when we are not. [emphasis added]

There is no sensible reason why Ms Golightly would not want external legal advice if she genuinely wanted a definitive legal view on that question; but instead it appears from her email that what she wanted was internal legal advice, from the Legal Division of DHS, confirming the lawfulness of income averaging.

Mr Hutson responded to Ms Golightly’s email with a query as to whether AGS advice ought to be obtained for “reassurance.” Ms Musolino chose her words carefully in responding to Mr Hutson’s query, saying, “If the department wants assurance on the legal issues, I recommend we get the end to end review,” identifying legal issues that might be considered in such a review as including “Is it lawful to ‘average’ absent any other income information?.

What Ms Musolino failed to acknowledge in her email was what must have been clear to her by that time; that the Legal Services Division had only managed to develop “weak” and “unconvincing” legal arguments in support of income averaging, that the legal position of DHS with respect to it was therefore uncertain and involved substantial legal risk, and that the only prudent and sensible course for it to adopt was to seek independent legal advice.

The Commission infers that she did not do so because she knew that DHS executives, particularly Ms Campbell and Ms Golightly, did not want to be told they should seek independent advice because of the likelihood of its confirming that income averaging was unlawful and the professional consequences that they would face in that event. If she did give written advice pointing out the weakness and legal risk of
DHS’s position on averaging and recommending independent advice be sought, they would have difficulty in explaining why they did not get it.

On 23 January 2017, Ms Musolino sent a group email to various lawyers within the Legal Services Division requesting that they provide any legal advices that they, or their teams, had provided that were relevant to the Scheme. Among those who responded was Mr Fiveash. In an email he sent to Ms Musolino the same day, he attached the Fiveash advice.

The Commission rejects Ms Musolino’s evidence that she relied on Mr Stipnieks to collate the responses to her 23 January 2017 email, and therefore did not read the Fiveash advice. Mr Stipnieks has no recollection of being asked to collate, or collating, the advices in the manner described by Ms Musolino, and Ms Musolino does not point to any other documentary evidence to support her oral evidence. Having made the request, it is likely that Ms Musolino read the email from Mr Fiveash and the attached advice. This could only have reinforced in her mind the weakness and legal risk of the DHS position on averaging, and the need for her to clearly advise DHS executives in writing to that effect. However, at no stage did she do so.
14 Social Services in early January

Catherine Halbert (group manager, DSS) said she first became aware of media criticism of the OCI program shortly before Christmas 2016 and worked with Emma Kate McGuirk (group manager, DSS) to gather information to brief the secretary, Finn Pratt. Ms Halbert said “these briefings were verbal” because of the close proximity of Serena Wilson’s (deputy secretary, DSS) and Finn Pratt’s (secretary, DSS) offices. The briefings concerned DSS’s involvement in the conception of the Scheme.

Prompted by Mr Porter’s media interviews in early January 2017, Ms McGuirk said, she sought information from persons in DHS and DSS relating to the OCI program. On 5 January 2017 Ian Joyce sent Ms McGuirk an email trail including the 2014 DSS policy advice prepared by David Mason (acting director, Rates and Means Testing Policy Branch, DSS) and the description of the proposal in respect of which the advice was provided. Mr Mason had asserted that the use of averaging in the way proposed did not ‘accord with legislation, which specifies that employment income is assessed fortnightly’. Mr Mason also identified a number of policy flaws associated with the proposal.

It included Mr Mason’s observation to Mr Joyce on 21 December 2016:

It is not clear in what form this measure was ultimately implemented. It seems like when a discrepancy is uncovered that the customer is contacted and given the opportunity to clarify and provide fortnightly income amounts. It is not clear, however:

1. how granular the ATO income details are – is if for a specific period or just for a FY
2. following from 1, how accurate the parameters for identifying a discrepancy are
3. If the customer doesn’t respond or does not have the information about their fortnightly earnings (for what may be a period a fair way in the past), is a debt raised on the basis of averaging?
4. What a Tribunal’s view of debts being raised based on averaging would be – under Social Security Law, a fortnightly income test applies.

The email from Mr Joyce to Ms McGuirk also included Mr Joyce’s observation to Andrew Whitecross (acting group manager, DSS) on 21 December 2016:

I will also send you a further e-mail that was sent to you that confirms that legals had provided advice that the DHS proposal at the time was not supported by the social security law.

In evidence, Ms McGuirk admitted the flaws identified by Mr Mason in the 2014 DSS policy advice were of “some substance.” The concepts the subject of the 2014 DSS policy advice were not foreign to Ms McGuirk. She was aware that the fortnightly income test was “central” to the calculation of entitlement.
Under that heading, there is a table, which contains a column headed “Percentage of debts that the table in fact contains the percentage of people who had a debt and had not had contact with the Department, and where the heading and column heading in the table indicate that the nature of the information, it is obvious that the reference to contact with the Department is an error, not had contact with the Department, and that the heading and column heading in the table indicate that this information is responsive to the Minister’s request for the percentage of people who had a debt and had not had contact with the Department (either online or by telephone) prior to the OCI debt notice being issued.” In circumstances where this information is responsive to the Minister’s request for the percentage of people who had a debt and had not had contact with the Department, and where the heading and column heading in the table indicate that that is the nature of the information, it is obvious that the reference to contact with the Department is an error, and that the table in fact contains the percentage of people who had a debt and had not had contact with the Department.
47 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
48 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
49 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].
50 Exhibit 3-3671 - DSS.5003.0001.0945_R - MC17-004721 Letter to the Prime Minister.
51 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [p 35-38].
52 Exhibit 4-6379 - TCO.9999.0001.0008_R2 - Clean PDF - Statement of T Collins NTG-0166 amended 22 February 2023 [para 564].
53 Exhibit 1-1136 - JRY.9999.0001.0002_R - NTG-0019 - Statement of Jason Ryman 27.10.22 [para 62].
54 Transcript, Alan Tudge, 1 February 2023 [p 2921: lines 30-43; p 2922: lines 29-37; p 2923: lines 39-46]. See also, for example: Exhibit 3-4671 - CTH.3001.0032.7133_R - Fwd- MB17-000023 - Online compliance and debt letters [DLM=For-Official-Use-Only]; Exhibit 3-4661 - CTH.3001.0032.6581_R - Fwd- UPDATE- FINAL- OCI Talking Points [SEC=UNCLASSIFIED]; Exhibit 3-4663 - CTH.3001.0032.6615_R - Fwd- Old Interim and online processes [DLM=For-Official-Use-Only]; Exhibit 3-4664 - CTH.3001.0032.6216_R - Phone call from Minister Tudge; Exhibit 3-4673 - CTH.3001.0032.8374_R - Further request from Minister.
55 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 190].
56 Transcript, Karen Harfield, 15 December 2023 [p 1914: lines 28-30].
57 Transcript, Karen Harfield, 15 December 2023 [p 1914: lines 16-32].
60 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 191].
61 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 191].
63 Exhibit 2-2690 - KHA.9999.0001.0001_2_R2 - 20221204 NTG-0020 Statement of Karen Harfield(46617405.1) [para 205].
64 Exhibit 10012 - CTH.3000.0031.5113 - Employment Income Confirmation Case Selection Strategy v0 5.docx [p 5].
65 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED][para 98].
66 Exhibit 3-4751 - CTH.3005.0004.0143_R - MS17-000277- Minister signed brief.
67 Exhibit 8935 - CTH.9999.0001.00145_R - [Final] Services Australia - Response to NTG-0096 [p 7: para 2.1].
68 Exhibit 10012 - CTH.3000.0031.5113 - Employment Income Confirmation Case Selection Strategy v0 5.docx.
70 The EIC program ran from February 2017 to September 2018. Though the time periods are not directly correlative, the percentage of debts that were calculated using averaged ATO data was 79.4% for the 2016-17 financial year, 52.4% for the 2017-18 financial year, and 66.7% for the 2018-19 financial year (see: Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103, para 1.7).
71 Exhibit 8935 - CTH.9999.0001.00145 - [Final] Services Australia - Response to NTG-0096 [p 7: para 2.1].
72 Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [para 1]; Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [para 3.47].
73 The EIC program ran from February 2017 to September 2018. Though the time periods are not directly correlative, the percentage of debts that were calculated using averaged ATO data was 79.4% for the 2016-17 financial year, 52.4% for the 2017-18 financial year, and 66.7% for the 2018-19 financial year (see: Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103, para 1.7).
74 Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [p 1: para 1].
75 Exhibit 3-4801 – CTH.0009.0001.2661_R – MS17-000740 MSB [p 1-2: para 2]
77 See Exhibit 10014 - CTH.3500.0003.3804 - 29 - 110-13090010 as at 29092017 - 03102017.docx [p 3]; Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096 [para 3.48]; Exhibit 3-4801 - CTH.0009.0001.2661_R - MS17-000740 MSB [para 3].
78 Exhibit 3-4802 - CTH.0009.0001.0829_R – MB17-000635 MSB.
[5424] That is comparable with the figure Services Australia gave the Commission, of 79.4 per cent of debts raised on the basis of averaging in the 2016-17 financial year (see: Exhibit 3-4806 - CTH.9999.0001.0060 - [Final] Services Australia - Response to NTG-0103, [para 1.7]).

[5508] Transcript, Alan Tudge, 1 February 2023 [p 2930: lines 18-22; p 2937: lines 1-24; p 2938 lines 1-8].
118 Exhibit 4-7058; Exhibit 2-2872 - ACS.9999.0001.0029_R - MC17-001263 - Cassandra Goldie; Exhibit 9989 - CTH.3075.0002.5290 - FW: MC17-001263 – Goldie response [DLM=For-Official-Use-Only]; Exhibit 9990 - CTH.3075.0002.5291 - MC16-009579 Final.docx; Exhibit 9991 - CTH.3075.0002.5295 - MC17-001263 MO words.docx; Exhibit 9992 - CTH.3075.0002.5299 - MC17-001263 MO words updated (tracked).docx; Exhibit 9993 - CTH.3075.0002.5300 - MC17-001263 MO words updated (Sue Kruse updates tracked).docx.


120 Transcript, Cassandra Goldie, 16 December 2022 [p 2041: lines 1-19].

121 Exhibit 2-2964 - ACS.9999.0001.0122_R - 2017.03.13 Letter from Minister Tudge re CL debt.

122 Exhibit 3-4734 - CTH.3001.0045.6164_R - 20170529L Minister Tudge Centrelink recommendations.

123 Exhibit 2-1639 - CTH.3001.0047.2281_R - MB17-000417 Minister Signed brief and letter.

124 Exhibit 3-4735 - CTH.3005.0006.1617_R - MB17-000572 Ag Dep Sec signed brief with attachments for progression to the Minister.

125 Transcript, Charmaine Crowe, 16 December 2022 [p 2044: lines 20-31].


127 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP (20 January 2023 - Replacement) [REDACTED] [p 46].

128 Exhibit 3-4324 - CTH.3051.0015.1406_R - RE- Centrelink insider comments [SEC=UNCLASSIFIED].

129 Exhibit 3-4681 - CTH.3004.0002.5216_R - Correspondence to Minister Tudge from CPSU Acting National Secretary 13.

130 Exhibit 3-4680 - CTH.3000.0024.0863 - Guardian_Internal Centrelink records reveal flaws behind debt recovery.

131 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023, [p 10].

132 Exhibit 2-1794 - CTH.3001.0034.1319_R - Response to the CPSU re online compliance measures [DLM=ForOfficial-Use-Only].

133 Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLM=ForOfficial-Use-Only].

134 Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLM=ForOfficial-Use-Only].

135 Transcript, Melissa Donnelly and Lisa Newman, 12 December 2022 [p 1636: line 20 – p 1637: line 34]. Neither the Royal Commission nor the CPSU have a record of a response.

136 Exhibit 3-4736 - CTH.3004.0002.5438_R - Please call to discuss; Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

137 The summary appears to have been prepared by GetUp! who provided it to a journalist. See: Exhibit 4-7008 - CTH.3005.0002.2317_R – Fwd: GetUp releases “explosive” new Centrelink whistleblower document; Exhibit 4-7009 - CTH.3005.0002.2319 – Whistleblower Document Plain English Summary.pdf; Exhibit 4-7010 - CTH.3005.0002.2323 – Centrelink Whistleblower Document.pdf.

138 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

139 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary.

140 Exhibit 3-4737 - CTH.3004.0002.5439 - Whistleblower Document Plain English Summary. The document that was sent to Mr Tudge was a summary of the whistle-blower document. The whistle-blower document itself (Exhibit 2-1993 - CTH.3001.0033.6563 - Centrelink Whistleblower Document) specifically mentioned notices from employers confirming termination or non-employment as an example of documents that “the online OCI process does not check.”

141 Exhibit 2-1786 - CTH.3001.0033.6820_R - Para [DLM=ForOfficial-Use-Only]; Exhibit 2-1787 - CTH.3001.0033.6821 - The Online Compliance Intervention is a new way of approaching overpayment identification.

Exhibit 4-5813 - CTH.3135.0001.0002_R - Lisa and Annette handover [SEC=UNOFFICIAL].

Transcript, Lisa Carmody, 27 February 2023 [p 3901: lines 0-5]; Exhibit 4-5812 - LCA.9999.0001.0002_R - [FINAL] Services Australia - Response to NTG-0192 (Lisa Carmody) [para 50].

Transcript, Lisa Carmody, 27 February 2023 [p 3900: line 35 – p 3901: line 40]. Ms Musolino does not accept so much but does not deny it, she simply does not recall it: Transcript, Annette Musolino, 1 March 2023 [p 4134: line 40 – p 4135: line 5].

Transcript, Lisa Carmody, 27 February 2023 [p 3901].

Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].

Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].


Exhibit 2-1744 - CTH.3007.0004.3585_R - Possible Legal issues - for discussion with Malisa [DLM=Sensitive-Legal].

Exhibit 4-5934 - CTH.3007.0004.3599_R - URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal].

Exhibit 4-5106A - CTH.3007.0004.3601_R - RE- URGENT Online Compliance Intervention - Debt system [DLM=Sensitive-Legal]; Exhibit 4-5107 - CTH.3007.0004.3602_R - FW/ debts [DLM=For-Official-Use-Only].

Ms Musolino’s evidence is found at Transcript, Annette Musolino, 1 March 2023 [p 4145 - 4147]. That evidence was specifically rejected by Mr Stipnieks in his statement of 9 March 2023: Exhibit 8520 - MAS.9999.0001.0003_R - 20230309 Supplementary statement M Stipnieks 22006293(47392112.1) (004) [para 10-22].

Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C) 22006293(46543944.1) [para 20].

Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C) 22006293(46543944.1) [para 20].

Exhibit 2072 - DSS.9999.0001.0025, Statement of Catherine Halbert 25 November 2022, para 20.

Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4248: lines 34-38].

Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4246: line 39 – p 4247: line 8].

Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4247: line 18].
Chapter 7: 2017, part B – Inquiries and Investigations
1 Complaints management at Human Services

The Department of Human Services (DHS) received a significant number of complaints about the Robodebt scheme (the Scheme), particularly in late 2016 and early 2017. The volume of Robodebt-related complaints imposed stress on DHS’s complaint management systems.

During the life of the Scheme, DHS had the capacity to receive complaints in a number of ways: face-to-face, by phone, email, post, fax, online or though social media. With the exception of “escalated complaints” (those received by the minister’s office and the Ombudsman), complaints were handled through a Customer Feedback Tool and had “input from relevant business areas.”

Complaints recorded through the Customer Feedback Tool were categorised as either Level 1 – a complaint that could be managed at the first point of contact, or Level 2 – a complaint that required referral upwards: “escalation”. Once escalated to Level 2, complaints were dealt with based on their particular features. There was no option to escalate a complaint on the basis of a recipient’s being vulnerable or high risk, although it was said to be possible to capture such information within the “complaint notes.”

From late 2016, there was an increase in complaints concerning the Scheme. Complaints identified as relating to the Scheme had been referred to the Customer Compliance Division (CCD). In October 2016, an option was added to the Customer Feedback and Complaints Line (a platform where complaints were received by DHS) which allowed callers the option to go directly to the CCD phone line. In November 2016, a business process was established to identify and track Robodebt complaints. This process involved the identification of Robodebt complaints as a Potential Systemic Issue.

In evidence, Christopher Birrer (Services Australia), agreed that there was no certainty that the Customer Feedback Tool had captured all complaints related to Robodebt, as the categorisation involved a “human step” and was, in consequence, open to error.

Mr Birrer described in his evidence how, during the Scheme, complaints were largely managed within the Integrity and Information Group which, among other things, sought to ensure that the public messaging was aligned with the “underlying narrative... that they were seeking to maintain.” Outside that group, there was said to be “limited visibility.” He spoke of the lack of “an appropriate feedback loop” in identifying “underlying issues” that were being communicated through complaints. Despite the lack of visibility inherent in the complaint system, Mr Birrer noted that “you would have to have your head in the sand” to not have had some awareness of the concerns being expressed about the integrity of the Scheme.

Since January 2021, Services Australia said that it has implemented training and awareness for the purposes of raising the standard of its complaint management system, and has also taken steps to improve the quality of its information and data.

According to Mr Birrer, the current complaints processes were “designed to comply with industry best practice, including the Ombudsman’s ‘Better Practices Complaint Handling Guide’.” He outlined how complaints are now managed through the Multicultural and Tailored Services (MATS) Branch, which holds membership of the Society of Consumer Affairs Professionals, a peak body for Australian and New Zealand complaint professionals. Mr Birrer explained that, within MATS, there are specialist teams to provide personalised support to the agency’s most vulnerable and disadvantaged customers.
2 The Commonwealth Ombudsman’s inquiry

The investigation by the Commonwealth Ombudsman in early 2017 into the Scheme was a significant event. The scrutiny of the Scheme by an independent body, invested with investigatory and reporting powers, gave rise to the potential for its flaws and illegalities to be brought to light and for serious consideration to be given to the viability of the Scheme’s continuation.

The manner in which the Ombudsman’s office conducted the 2017 investigation, and consideration of the scope of the Ombudsman’s role and powers more generally, is examined in further detail in the chapter – The Commonwealth Ombudsman. What is examined in this part of the report is the chronology of how two government departments acted to deceive the Ombudsman’s office, avoid effective scrutiny of the Scheme and, in doing so, thwart one of the best opportunities that existed to bring the Scheme to an end.

2.1 An investigation commences

From October 2016, the Office of the Commonwealth Ombudsman had received high numbers of complaints about the Scheme, and had tracked these as an “issue of interest” in its complaints system. By December 2016, the Ombudsman’s office was aware of media reports about Centrelink’s automated debt letters.

In late December 2016, the Ombudsman’s office contacted DHS and sought information about the Scheme. It sought any advice obtained by DHS “about the legality of averaging income for social security overpayment calculations.”

There was further contact between the Ombudsman and DHS, culminating in a meeting between Ombudsman and DHS officers on 6 January 2017. At this meeting, DHS briefed the Ombudsman representatives on the Scheme, and presented a walkthrough of the system.

On 10 January 2017, the Ombudsman decided to conduct an “own motion” investigation into the Scheme. The Ombudsman wrote to Ms Campbell, Mr Pratt, Mr Tudge and Mr Porter advising them of the investigation. The scope of the investigation included, among other things, the Scheme’s “adherence to relevant legislative requirements” and the “accuracy of debts being raised via the platform.”

As set out below, DHS and DSS officers engaged in behaviour designed to mislead and impede the Ombudsman in the exercise of his functions. This, coupled with deficiencies in the Ombudsman’s own processes, had the consequence of diluting the effectiveness of the investigation. The illegality of the Scheme was not brought to light. The Scheme continued for years after the Ombudsman’s work was done.

2.2 Social Services initial response

In January 2017, the DSS staff assigned responsibility for its response to the Ombudsman’s investigation were Robert Hurman (director, Payment Integrity and Debt Strategy Section) and Ms McGuirk (branch manager, Work and Payments Study Branch). Mr Knox acted for Mr Hurman while he was on leave between 16 and 27 January 2017.

Russell de Burgh (branch manager, Pensions and Integrity Branch) was also involved in the Ombudsman’s response. He reported to Ms Halbert, who in turn reported to Ms Wilson.
2.3 Initial response to investigation

On 10 January 2017 a meeting was arranged for 16 January 2017 between employees of DSS and employees of the Ombudsman, in relation to the investigation.22

Prior to that meeting, on 12 January 2017, Mr Hurman, Ms McGuirk and Ms Halbert had been sent the 2014 DSS legal advice by Alan Grinsell-Jones (branch manager, Legal Services Branch Executive, DSS).23 That advice, dated 9 December 2014, by Simon Jordan and second counselled by Ann Pulford (principle legal officer, Social Security and Families) asserted that the use of income averaging to determine social security entitlement was unlawful.24 The 2014 DSS legal advice was directed at the question of whether a “debt amount derived from annual smoothing or smoothing over a defined period of time is legally defensible.” Significantly, the instructions upon which the advice was premised also described an early iteration of the proposal that would become the Scheme.

Upon receipt of the 2014 DSS legal advice, Ms McGuirk appreciated that the proposal that was the subject of the advice (i.e. the proposal that became the Scheme) did “not fit within the legislative requirements for raising debts.”25 Similarly, in evidence, Mr Hurman said that he understood the advice and its implications.26

2.4 Preparation for the meeting on 15 January

A meeting had been scheduled for 16 January 2017 between DSS and Ombudsman representatives. In preparation for that meeting, DSS and DHS officers participated in a teleconference on 15 January 2017. Invitees to that teleconference included Ms Golightly, Paul McBride (group manager), Murray Kimber (branch manager), Ms Wilson and Ms Halbert.27

In advance of the teleconference, Ms McGuirk sent an email to Ms Halbert, Ms Wilson, Mr Kimber and Mr McBride28 attaching the 2014 DSS legal advice and the 2014 DSS policy advice.29 Ms McGuirk also sent those officers sample correspondence sent to recipients under the Scheme (that she had received three days earlier).30

In evidence, Mr Kimber could not recall attending the teleconference.31 However, prior to the meeting, he sent the email to Ms McGuirk, Ms Halbert, Ms Wilson and Mr McBride in which he recounted what he recalled of the meeting on 27 February 2015 involving himself and Mr McBride from DSS, and Mr Withnell and Scott Britton (national manager, Compliance Risk Branch) from DHS to discuss the proposal that led to the Scheme.32 According to his emailed account, the DHS representatives identified these components of their proposal:

- a. DHS would target identified discrepancies based on analysis of the [PAYG] file obtained from the [ATO] compared with the reported earnings data that DHS holds...
- b. Where a significant discrepancy is detected this information will be presented to the recipient. This would not be a debt notice but rather the recipient would be afforded the opportunity to explain, correct, update or challenge the information...
- c. Any subsequent debt raised would take into account the information provided by the recipient.

Significantly, Mr Kimber recalled that DHS had also advised that there would be no change to “how income [was] assessed or overpayments calculated” as part of the proposal. Attached to Mr Kimber’s email was correspondence dated 4 March 2015 enclosing draft DHS New Policy Proposals (NPP) for the 2015-16 Social Services portfolio Budget submission process (including a draft of the NPP that would later inform Cabinet’s decision to authorise spending for the Scheme).33

Ms Halbert said she understood Mr Kimber’s email to convey that, during the 27 February 2015 meeting, DHS had indicated that the use of averaging to determine social security entitlement would not be a feature of the proposal. 34
2.5 The “last resort” email

Prior to the 15 January 2017 teleconference, Ms Harfield sent an email to Ms Golightly, copied to Mr Britton and Ms Wilson. In that email, Ms Harfield provided a “simple explanation for DSS reference explaining that the methodology to assess employment income has not changed.” The explanation was as follows:

In respect of the current on-line compliance system there has been no change to the methodology used for the assessment of employment income. It remains the same and has been used for many many years. An individual is required to report their employment income fortnightly and it is applied to the period worked. The averaging of employment income over the period worked is only used as a last resort if other information is unavailable...

Contrary to Ms Harfield’s assertion, under the Scheme averaging was not being used “as a last resort” and there had been a change to the methodology. Averaging was being used where a recipient did not respond or did not provide the required information, and DHS was not making the inquiries of employers and banks it had previously made.

In evidence, Ms Harfield admitted that the representations in her 15 January 2017 email were inaccurate, but said that they were consistent with her understanding of the Scheme at the time. The Commission accepts that Ms Harfield had never worked as a compliance officer and that her explanation of the program was, to a significant degree, based upon information other DHS officers had provided.

In an email dated 4 January 2017, the director, Compliance Risk Branch, DHS had told Ms Harfield that the “concept of averaging in the absence of detailed information” had been around since at least the 1980s. He provided Ms Harfield with the “operational blueprint” for the Scheme, which explained that it was possible to “use any evidence available to raise a debt, including an annual figure” in circumstances where “every possible means of obtaining the actual income information has been attempted.”

By email dated 13 January 2017, Ms Harfield had also been advised by the director of the Compliance Risk Branch, DSS, that there had been “no change to the methodology for the assessment of employment income;” averaging was only used “as a last resort if other information is unavailable.” Mr Withnell had also communicated this concept of “last resort” to Ms Harfield in an email dated 12 January 2017.

Ms Harfield’s email appears to have been sent in response to a request for information by Ms Wilson about 20 minutes before the meeting; but since it was only sent about a minute before the meeting’s scheduled start time, Ms Wilson may only have seen it after the meeting. Ms Wilson said Ms Harfield’s email gave her ‘assurance that there had been no fundamental change to the way PAYG income was assessed.’

2.6 The 15 January 2017 meeting

The 15 January 2017 teleconference was attended by Ms McGuirk, Ms Wilson, Ms Halbert, Mr Kimber and Mr McBride from DSS and Ms Golightly, Ms Harfield and Mr Britton from DHS.

At the teleconference, DHS officers disclosed to DSS officers that, under the Scheme, averaging was being used to determine social security entitlement. Ms McGuirk’s handwritten notes of the meeting disclose representations made by DHS officers that averaging was not being used “all the time”, only where there was “no other option.”

Ms Wilson’s evidence was that the 15 January 2017 meeting was the first time she had become aware that averaging to determine social security entitlement was a feature of the Scheme. She recalled being “surprised” “puzzled” and “taken aback.”

In evidence, Ms Wilson said that at the time of the 15 January 2017 meeting she recalled the various occasions in early 2015 when DSS had given DHS advice that income averaging, used in the way intended in the proposal which became the Robodebt Scheme, was unlawful. She admitted having “actual knowledge”, at that time, “that the law did not allow income averaging,” and conceded that the concept of last resort “didn’t matter to the question of legality.”
Mr McBride had no independent recollection of the meeting.\(^9\) That averaging was being used under the Scheme “came as a complete surprise” to him.\(^50\) He perceived that during the development of the Scheme, DSS had been misled by DHS in their description of the proposal.\(^51\) The 15 January 2017 meeting, Mr McBride said, “crystallised in [DSS’s] mind that [DHS] were doing something unlawful.”\(^52\)

Ms Halbert “vaguely” recalled the 15 January 2017 teleconference.\(^53\) She also recalled being “surprised”\(^54\) and “angered”\(^55\) to learn that DHS was using income averaging to calculate social security entitlement. She appreciated at that time that the practice was unlawful.\(^56\)

Ms McGuirk could not recall any discussion about the 2014 DSS legal advice during the meeting.\(^57\) However, it is plain that by 12 January 2017 Ms McGuirk knew of the advice and its conclusion that income averaging was unlawful. She was not aware of any other legal advice from DSS to the effect that income averaging was lawful.\(^58\) Prior to the meeting on 15 January 2017, Ms McGuirk said, she understood DHS were using averaging to identify a potential discrepancy, but thought that DHS had not changed the way it assessed income for the purpose of raising a debt.\(^59\) Income averaging being used “as a last resort” was, she claimed, a new concept to her.\(^60\)

### 2.7 Social Services knowledge of averaging prior to 15 January 2017

The Commission does not accept the evidence of Ms McGuirk, Mr McBride and Ms Wilson that they were unaware that averaging was being used under the Scheme prior to January 2017.

**Ms McGuirk**

In 2015, prior to the Scheme’s implementation, Ms McGuirk gave advice to DHS in relation to the Scheme’s “business process design.” She did so in her capacity as the then director, Income Support Means Test, DSS, and after she had participated in a walk-through of the processes.\(^61\)

Ms McGuirk’s advice was provided in response to an email dated 24 April 2015 from Danny Scott, (Business Integrity, DHS).\(^62\) In his email, Mr Scott summarised the proposed DHS business design process for the Scheme. A “key point” in the process was said to be:

> Applying the matched information to the customer record means that the total gross income (advised on the PAYG summary) will be evenly distributed across all fortnights in the employment period (advised on the PAYG summary), and then standard fortnightly attribution of income will be applied. It is important to note that the matched information will only be used for retrospective earnings related to debt calculations and not for the assessment of income in relation to ongoing rates of payment...

In a response dated 1 May 2015, Ms McGuirk advised:\(^63\)

> ... as long as the customer is given the opportunity to correctly declare against each fortnight and apportionment is the last resort, we support what you are doing...

In evidence, Ms McGuirk could not recall providing the 1 May 2015 advice.\(^64\) However, she accepted that at the time she knew that DHS proposed to use averaging to determine social security entitlement.\(^65\) Specifically, she had knowledge about “the use of averaging as a last resort in terms of what was proposed.”\(^66\) Ms McGuirk emphasised that her advice to Mr Scott was “programme management advice” and was not an expression of any legal opinion.\(^67\)

In submissions made on behalf of Ms McGuirk, it was said that in providing her advice, she was “focussed on the calculation of a rate for a social security payment, not the raising and calculation of a debt.” Her advice was said to have been “directed at a limited issue” and did not disclose “some broader understanding of how income averaging was being used to raise a debt nor the legitimacy of doing so.”
The Commission does not accept these arguments. Mr Scott’s instructions articulated, in clear terms, a process that involved the use of averaging to raise debts. Ms McGuirk’s advice made explicit reference to (and expressed approval of) the use of “apportionment” to this end. Contrary to her submissions, Ms McGuirk’s advice does disclose an historical understanding of the (then) proposed use of averaging to raise debts under the Scheme.

Incidentally, on 15 January 2017, Mr Britton had unsuccessfully (because he misspelled the email address) attempted to email a copy of Ms McGuirk’s own 1 May 2015 advice to her. Ms McGuirk could not explain what prompted Mr Britton to try sending the advice.

Ms Wilson and Mr McBride

In early 2016, both Mr McBride and Ms Wilson were involved in the preparation of a brief to Mr Porter, then Minister for Social Services. That brief, signed by Mr Porter on 6 April 2016, was provided in response to his request for information about “DHS Compliance Activity.” Attached to the brief was a document titled “Information on current compliance processes” that DHS had provided. The DHS document disclosed that, under the Scheme:

- recipients would initially be presented with “information obtained from the ATO” and “an assessment of their correct welfare entitlement based on this information,”
- recipients would then “have an opportunity to update the information prior to it being applied to their Centrelink record,” and
- DHS would rely upon ATO data as the ‘trusted source’ and as “the primary evidence rather than just a trigger.”

Both Ms Wilson and Mr McBride had been sent and had reviewed this material from DHS in the process of preparing the brief.

In the Commission’s view, the language used in the DHS document contemplated the use of averaging to determine social security entitlement under the Scheme. Indeed, the way that the measure was described by DHS was analogous to how it had been defined in the Executive Minute; that is, the proposal that had attracted significant concern on DSS’s part. It is difficult to reconcile Ms Wilson’s and Mr Bride’s exposure to this information in early 2016 with their evidence that they were “surprised” to learn in January 2017 that DHS was using averaging to determine social security entitlement.

Ms Wilson’s handwritten annotations on the DHS document and Mr McBride’s agreement to include that material in the brief is evidence of their close review of its contents. From the language employed by DHS, it should have been, and mostly likely was, clear to both Ms Wilson and Mr McBride that DHS was using averaging to calculate overpayment of entitlement. Given the seniority of Ms Wilson and Mr McBride and their previous involvement in the development of the measure, any argument that the language used by DHS did not disclose the true nature of the Scheme is untenable.

On 9 March 2016, a DSS Payments Forum meeting was held. The listed attendees at the forum included Ms Wilson, Mr McBride, Mr de Burgh, Mr Kimber and Ms McGuirk. Mr Britton gave a presentation at the forum concerning the Digital Compliance Intervention Project (i.e. the project that would later become the OCI phase of the Scheme). Although Mr Britton did not recall making explicit reference to averaging in his presentation, the visual slides he used in his presentation described a process of “online assessment” in which recipients were notified of discrepancies between ATO information and declared earnings to DHS. Recipients were warned that a failure to complete an online assessment would result in the ATO information being “applied to [the recipient’s] Centrelink record.”
In evidence, Ms Wilson accepted that she had attended the Forum (because she was also presenting) but could not recall whether she was present for Mr Britton’s presentation. Mr McBride and Ms McGuirk did not recall attending the Forum. Mr McBride accepted that Mr Britton’s presentation “should have raised concerns.” He described it as “a missed opportunity to be more forensic as to how [the Scheme] was operating.” Ms McGuirk accepted that it could be inferred from the presentation slides that income averaging was involved “in the creation of debt.”

The Commission is satisfied that Mr McBride, Ms Wilson and Ms McGuirk attended the Forum and that they were present during Mr Britton’s presentation, in which he used slides disclosing the use of averaging to determine social security entitlement under the Scheme.

On those occasions, Ms Wilson, Mr McBride and Ms McGuirk were exposed to information that should have disclosed to them that income averaging was a feature of the Scheme. The Commission does not accept that the three individuals, Ms McGuirk, Ms Wilson and Mr McBride, had no awareness or suspicion that under the Scheme averaging was being used to determine social security entitlement prior to the 15 January 2017 meeting. Contrary to their evidence, being told by DHS that income averaging was a feature of the Scheme on 15 January 2017 did not take Ms McGuirk, Ms Wilson and Mr McBride by surprise.

That conclusion is reinforced by the way these DSS officers behaved in the aftermath of the 15 January 2017 teleconference. The natural reaction to learning that DHS had been raising debts through a practice DSS had advised was unlawful would be to raise the alarm with their secretary and the minister. But nothing of the kind occurred. Instead, as explained in detail below, Ms Wilson and Ms McGuirk engaged in behaviour designed to mislead the Ombudsman.

**Mr McBride’s failure to act**

Following Mr McBride’s participation in the meeting on 15 January 2017, he took no step to ensure that the behaviour of DHS and the unlawfulness of the Scheme was raised with either Mr Pratt or Mr Porter.

Mr McBride explained in evidence that it was not his responsibility to take such steps. In submissions, Mr McBride emphasised that Ms Wilson was present at the 15 January 2017 meeting. He said that, due to her position of seniority, it was reasonable to infer that Ms Wilson ‘would take the necessary steps to deal with the issue of unlawfulness.” He drew an inference that further advice received by DSS (the 2017 DSS legal advice discussed in detail below) “was a result of senior members in his team, particularly Ms Wilson, having taken steps to question and then satisfy themselves of the DHS position.”

Though, in evidence, Mr McBride said he became aware ‘through public discussion’ that there was “subsequent legal advice,” there is no evidence that he was ever provided with the 2017 DSS legal advice. Even if it were accepted that he had become aware of the existence of the advice, that would not be sufficient basis for a finding that Mr McBride properly satisfied himself that what DHS had done had been properly addressed. Nor was it sufficient for Mr McBride to rely upon Ms Wilson’s doing something about it.

Mr McBride was a senior public servant with knowledge and experience in social security policy. Through his involvement in the preparation of the NPP in 2015, he was acutely aware that the use of averaging to determine social security entitlement was unlawful. By the time of the 15 January 2017 meeting, Mr McBride knew that income averaging was being used under the Scheme. Given his senior position within DSS, Mr McBride had the capacity to act to ensure that the unlawful use of averaging by DHS was being properly addressed. He could have taken steps to ensure that the matter was squarely raised with Mr Pratt or Mr Porter. Instead, Mr McBride did nothing.
2.8 The 16 January 2017 meeting with the Ombudsman

On 16 January 2017, the scheduled meeting occurred between officers of DSS, DHS and the Ombudsman’s office. Attendees from DSS included Ms Wilson, Ms Halbert and Ms McGuirk. By the time of the 16 January 2017 meeting with the Ombudsman representatives, all DSS officers in attendance had knowledge that the Scheme involved the use of averaging to determine social security entitlement. Additionally, they had knowledge of the 2014 DSS legal advice that, in clear terms, said that the use of averaging in this way was unlawful.

At the 16 January 2017 meeting, DSS failed to disclose to the Ombudsman the 2014 DSS legal advice or that there were any doubts as to the legality of the Scheme.84 This was in circumstances where DSS had been made aware that the scope of the Ombudsman’s investigation included, among other things, the Scheme’s “adherence to relevant legislative requirements.” This was, in and of itself, misleading behaviour by Ms Wilson, Ms Halbert and Ms McGuirk.

Ms McGuirk took notes at the meeting, which attributed particular statements to Ms Wilson regarding the Scheme,85 to the effect that the Scheme did not represent any “changes to approach for assessing debt.” Ms Wilson said she was provided with a script by DHS, upon which she relied in discussing the Scheme with the Ombudsman’s representatives. She said that she had no reason to question the information she had been provided.86

Ms Wilson’s representation to the Ombudsman representatives that there had been “no change” to the assessment of debt under the Scheme was misleading. It did nothing to inform the Ombudsman of the true nature of the Scheme or that there was doubt as to its lawfulness. To the contrary, it had the effect of suggesting to the Ombudsman’s representatives that, because there had no change to the way entitlement was calculated, the Scheme was lawful.

Following the meeting with the representatives of the Ombudsman’s office, Ms Wilson and Ms McGuirk had a further conversation with Mr Britton about the OCI program.87 From notes prepared by Ms McGuirk at that discussion, it appears that Mr Britton explained that the government “didn’t want burden on employers” and that if recipients failed to contact DHS after being notified of a discrepancy, DHS would apply ATO data.88

2.9 2017 DSS legal advice

DSS subsequently sought further advice from Ms Pulford (an author of the 2014 DSS legal advice). Ms Wilson “considered it was necessary to obtain legal advice in relation to using income averaging of [sic] a ‘last resort.’” She asked Ms McGuirk to obtain it89 and the latter telephoned Ms Pulford to provide instruction.90

In evidence, Ms Pulford explained that it was “not as common” for a group manager (in Ms McGuirk’s position) to telephone a principal legal officer such as herself directly to seek legal advice. Ms Pulford said:91

I do recall that Ms McGuirk indicated that there was a Departmental business need to have some means of legally justifying taking action of this nature in these circumstances. Ms McGuirk sought my assistance as part of the legal branch to provide this justification.

Ms McGuirk’s evidence was that she could not recall the conversation with Ms Pulford.92

Later on 16 January 2017, Ms Pulford sent an email to another lawyer in the public law branch93 saying, “I’ve had a conversation with Emmakate on the basis we can make an argument to support the position discussed. I’m happy to talk you through it tomorrow.”94 In her oral evidence, Ms Pulford said:95

...I felt pressure from Ms McGuirk to provide an answer that justified taking action in circumstances which the broad general advice in 2014 would not have supported on its face. I now cannot recall whether that was done in full awareness of the Robodebt Scheme being in full flight or not.

On 16 January 2017, DSS created an Action Register, which set out tasks for the Payments Policy Group managed by Ms Halbert.96 The first task concerned the Ombudsman’s investigation, of which it was noted,
“The Main part of the scope concerning DSS relates to adherence to legislative requirements.”97 The task of dealing with the Ombudsman was allocated to Ms McGuirk and Mr Knox, who was replaced by Mr Hurman at the beginning of February.98 The register entry shows DSS was aware of the Ombudsman’s focus on issues of lawfulness.

On 18 January 2017, DSS officers participated in a walk-through of the Scheme with some DHS officers.99 Ms Wilson, Ms Halbert and Ms McGuirk attended from DHS, while Ms Golightly, Mr Britton, Ms Harfield were among the DHS attendees. Ms McGuirk said she could not recall whether the 2014 DSS legal advice was discussed at the walk through.100

On the same day, Ms McGuirk sent an email to Ms Pulford, formally seeking the advice.101 She said:

As discussed, am looking for advice please regarding a “last resort” method of debt identification for income support recipients. The SSAct details a fortnightly income test, which is applied for standard debt raising. However, in circumstances where there is available information about employment income and it appears an overpayment has been made but no available information from the recipient / ex- recipient about the period over which the income was earned, is it lawful to use an averaging method (as a “last resort”) to determine the debt?

On 24 January 2017 Ms Pulford sent her advice (the 2017 DSS legal advice) to Ms McGuirk.102 It was heavily qualified:

You’ve asked about whether using income averaging as a last resort to determine a social security debt was lawful, in circumstances where no other information about the person’s circumstances are available. We are providing this advice on a general basis, without details as to what information source is being used and for what period. We would appreciate your treating this advice on this general basis.

With this proviso in mind, the answer is yes. The Secretary must be guided in their decision-making by the range of information they are able to obtain, and whether this casts sufficient doubt about the correctness of the rate of social security payment to justify taking action.

Ms McGuirk thanked Ms Pulford for her “considered response”103 and sent the 2017 DSS legal advice to Ms Halbert,104 Mr Knox105 and Mr Hurman.106 Ms Halbert forwarded the 2017 DSS legal advice to Ms Wilson shortly after receiving it.107

Fundamentally, the 2017 DSS legal advice was not only inconsistent with the 2014 DSS legal advice; it was wrong. Averaged ATO PAYG data did not, as Ms Pulford argued, “justify the Secretary lawfully taking action” to raise a debt. This was so regardless of whether averaging was used “as a last resort.” In her advice, Ms Pulford relied upon ss 8, 79 and 80 of the Social Security (Administration) Act 1999 (Cth) (SSA Act), none of which provided a basis for the use of averaging to determine social security entitlement.

Ms Pulford gave evidence in relation to the 2017 DSS legal advice. She accepted that, save for the words “as a last resort”, she was in effect being asked the same question as was the subject of the 2014 DSS legal advice.108 She conceded that the qualifications in the first paragraph of the advice made it impossible to identify a practical application for her advice109 (although she appeared to reside from that position in subsequent evidence, saying “a practical application could be teased out”).110 Further, Ms Pulford accepted that the concept of casting “sufficient doubt” was a different thing from proving a debt,111 and that “casting doubt about something by incomplete information [did] not permit a decision-maker to affirmatively establish a debt.”112

The Commission is satisfied that Ms McGuirk sought this advice in circumstances where she was aware of the 2014 DSS legal advice and its conclusion that, in effect, the use of income averaging as the sole basis to determine social security entitlement was unlawful (whether it was done as a “last resort” or otherwise).

Submissions made on behalf of Ms McGuirk that she was genuinely uncertain as to the legal position expressed in the 2014 DSS legal advice are not accepted. The Commission makes no finding that Ms McGuirk, as it was framed in submissions made by her solicitors, “dictated to Ms Pulford what the advice needed to say.” However, in the Commission’s view, Ms McGuirk’s request for advice from Ms Pulford was not motivated by any genuine interest to resolve the legal question framed in her 18 January 2017 instructions. It is more likely than not that the impetus for DSS’s seeking the further advice from Ms Pulford was the Ombudsman’s investigation and a perceived need to justify the continuation of the Scheme.
Given Ms Pulford’s experience in social security law, it should have been, and most likely was, obvious to her that the 2017 DSS legal advice was incorrect. She was aware that the distinction drawn by Ms McGuirk (and others within DSS) between averaging as “a last resort” and averaging in other circumstances was entirely artificial and had no bearing on the question of whether the practice was lawful. The Commission is satisfied that Ms Pulford’s advice was influenced by pressure placed upon her by Ms McGuirk.

Subsequently, DSS used the 2017 DSS legal advice to support representations to the Ombudsman that the Scheme was lawful.

2.10 Deception of the Ombudsman by Social Services

The Ombudsman requests legal advice on averaging

In an email on 19 February 2017, Louise MacLeod (acting senior assistant Ombudsman) sought information from DSS about the legal basis for the use of averaging to determine social security entitlement.\textsuperscript{113} She requested from DSS “any legal advice it has received about averaging income for social security overpayment calculations.”

On 21 February 2017, Mr Hurman sent correspondence to Ms Pulford forwarding the Ombudsman’s request and attaching the 2017 DSS legal advice.\textsuperscript{114} Mr Hurman sought Ms Pulford’s approval to provide the 2017 DSS legal advice to the Ombudsman and asked whether there was “nothing more recent/better suited or anything else [Ms Pulford] thought should be done.” In response, Ms Pulford referred to (and attached) the 2014 DSS legal advice. She informed Mr Hurman that the 2014 DSS legal advice also seemed to be “within scope” of the Ombudsman’s request.\textsuperscript{115}

Initially, Mr Hurman and Mr De Burgh took a different view, but when Ms Pulford reiterated\textsuperscript{116} that both the 2014 and 2017 DSS legal advices fell within the scope of the Ombudsman’s request, which should not be “read down,”\textsuperscript{117} they agreed.\textsuperscript{118} Mr Hurman asked Ms Pulford to provide an explanation that could be provided to the Ombudsman as to why the 2014 and 2017 DSS legal advices “appear different but don’t contradict each other.”

The explanation that Ms Pulford provided was framed in the following way:\textsuperscript{119}

> The 2014 advice relates to the process of rate calculation under the social security law, and indicates the method of generating an accurate debt amount on the basis of full information. By contrast, the 2017 advice identifies circumstances in which the Secretary would be obliged by the social security law to take action to adjust a rate of social security payment, despite not having full information to generate an accurate debt amount. The advices are consistent but address different levels of available information to ground administrative decision making by the Secretary.

Contrary to the representations made by Ms Pulford, the 2014 and 2017 DSS legal advices were inconsistent. The distinction drawn between the use of averaging to calculate entitlement “on the basis of full information” and the use of averaging as a last resort was entirely artificial. As a matter of fact, the use of averaging as the sole basis to determine social security entitlement was unlawful. This was so whether it was done as a last resort or otherwise. The 2014 DSS legal advice had (correctly) made no distinction of the kind drawn by Ms Pulford in her 22 February 2017 email.

Interference in the response to the Ombudsman

On 22 February 2017 Mr Hurman sent the Ombudsman’s request to Ms Halbert, copied to Mr de Burgh.\textsuperscript{120} Ms Halbert forwarded the request to Ms Wilson.\textsuperscript{121}

On 23 February 2017, Mr Hurman emailed Mr De Burgh a draft response to the Ombudsman. The draft response referred to, and attached, both the 2014 DSS legal advice and the 2017 DSS legal advice.\textsuperscript{122} Reproduced in the draft response was the explanation provided by Ms Pulford the previous day.\textsuperscript{123} That response was not sent.
At 3:35 pm on 23 February 2017 an email was sent by Ms Halbert’s executive assistant to Ms Wilson enclosing a version of the 2017 DSS legal advice. That version had been reformatted to, relevantly, remove Ms McGuirk’s instructions to Ms Pulford in seeking that advice. At 4:10 pm, Ms Wilson replied to the email, stating, “Thanks – fine to go.”

At 4:21 pm, the DSS response was sent to the Ombudsman. The response included a covering statement:

Please find attached information containing legal advice from earlier this year, that is within scope of your request. This advice identifies circumstances in which the Secretary would be obliged by the social security law to take action to adjust a rate of social security payment, despite not having full information to generate an accurate debt amount.

Attached to the response was the reformatted version 2017 DSS legal advice. The 2014 DSS legal advice was not attached.

In evidence, both Mr Hurman and Mr de Burgh said they could not recall why the 2014 DSS advice was not initially provided to the Ombudsman. Mr de Burgh had no recollection of any change of mind from the position that he and Mr Hurman reached on 22 February 2017. He speculated that someone in a more senior role had overridden the decision to provide both advices. He acknowledged that “it was more complete for the Ombudsman to have both advices” and that providing the 2014 DSS advice had the potential to mislead the Ombudsman.

In evidence, Ms Wilson could not recall who decided to withhold the 2014 DSS legal advice from the Ombudsman. It was possible, Ms Wilson said, that either she or Ms Halbert made the decision. Ms Wilson denied that withholding the 2014 DSS legal advice had the capacity to mislead the Ombudsman.

In an email dated 28 February 2017 from Ms Pulford to Mr Hurman (addressed in detail below), Ms Pulford expressed her understanding to Mr Hurman that “it was decided (at deputy secretary level) not to provide the [2014 DSS legal advice] to the Ombudsman.”

In submissions made on behalf of Ms Wilson, it was said that because the evidence did not disclose the basis for Ms Pulford’s understanding, her 28 February 2017 email should not be relied upon.

The Commission does not accept that. Ms Pulford’s email, as a contemporary observation, adds significant weight to the evidence that it was Ms Wilson who decided to withhold the 2014 DSS legal advice. Ms Wilson’s settling of the reformatted version of the 2017 DSS legal advice discloses her direct involvement late in the process of DSS responding to the Ombudsman. It is not the case, as Ms Wilson’s representatives asserted, that Ms Wilson deciding to withhold the 2014 DSS legal advice in this instance was inconsistent with her later agreeing to provide the advice to the Ombudsman. That occurred only after the Ombudsman had expressly asked for it (as set out below).

The Commission is satisfied that it was Ms Wilson who, on 23 February 2017, decided to withhold the 2014 DSS legal advice from the Ombudsman.

DSS’s withholding of the 2014 DSS legal advice from the Ombudsman constituted a failure to comply with the Ombudsman’s 19 February 2017 request for information. The information that the Ombudsman had requested from DSS was clear. What was sought was “any legal advice... about averaging income for social security overpayment calculations.” That request was not limited by any concept of “last resort” (as suggested by Mr Hurman in his 21 February 2017 email to Ms Pulford), nor was it limited to “the Department’s current view” (as asserted by Mr de Burgh in evidence). Its omission had the capacity to mislead the Ombudsman, who, without it, might have been under the misapprehension that the only advice that DSS had obtained in relation to income averaging was the 2017 DSS legal advice.

In the Commission’s view, Ms Wilson’s conduct in instructing that the 2014 DSS legal advice be withheld from the Ombudsman was not motivated by doubt as to whether the opinion fell within the scope of the Ombudsman’s request for information. Rather, it was motivated by a concern that the Ombudsman might be made aware that averaging was being used to determine social security entitlement under the Scheme...
in circumstances where DSS had obtained advice that the practice was unlawful. Ms Wilson’s behaviour in this regard was an attempt to conceal critical information from the Ombudsman.

**The Ombudsman seeks further advice**

By the time of DSS’s response to the Ombudsman’s 19 February 2017 request for information, DHS had independently provided the Ombudsman with an Executive Minute signed by the Hon Scott Morrison MP on 20 February 2015. In relation to the PAYG proposal that ultimately evolved into the Scheme, the Executive Minute said: “DSS has also advised that legislative change would be needed to implement this initiative.”

On 24 February 2017, Ms MacLeod sent a further information request to DSS, referring to the Executive Minute and the notion of legislative change. She requested firstly, “the advice from DSS about the legislative change that would be needed” and secondly, “any other notes, documents or emails that relate to this advice.”

Janean Richards, chief legal counsel, DSS, asked Mr Grinsell-Jones to locate advices relevant to the Ombudsman’s request. She said that Ms Halbert and her team were “looking for advice that bridges/ explains why our approach has changed, from the view that legislative change was as required, to the view that it wasn’t.”

Mr Grinsell-Jones (and possibly Mr de Burgh and Mr Hurman) had a discussion with Ms Pulford on 28 February 2017, following which she emailed them with this “bridging” advice: she referred to the 2014 DSS legal advice and explained that, in 2015, DHS “was advised by DSS’s policy area in the context of subsequent discussions that legislative change would be needed to support the proposal” (i.e. the proposal that led to the implementation of the Scheme). Ms Pulford continued:

Since then, DSS policy has become more comfortable with DHS’s approach of using smoothed income, giving [sic] it is being applied as a mechanism of last resort when no more accurate income information is available. This appears to represent a change in DSS’s position, although it doesn’t represent a change in the legal position.

The basis for Ms Pulford’s assertion that “DSS policy [had] become more comfortable” with DHS’s use of averaging to determine social security entitlement is unclear.

In any event, that was not the response DSS provided to the Ombudsman’s 24 February 2017 request for advice. The response (the DSS explanation), emailed on 1 March 2017, was in the following terms:

In late 2014, the Department of Social Services (DSS) considered an early version of a proposal that has since developed to become the Online Compliance Initiative (OCI), which is the subject of the Ombudsman investigation.

As we do for many proposals, DSS considered the need for legislative change to implement the proposal. This is referred to in the Department of Human Services (DHS) Ministerial Brief provided by the Ombudsman’s office. DSS had some concerns at that time about whether the proposal was consistent with legislative arrangements. Specifically, DSS considered implications for the use of annual ATO income data for the purposes of calculating fortnightly payment entitlements (and, as such, potential debts). At that time, DSS sought internal legal advice about the legality of using this income data to determine entitlement. The advice received (attached) in December 2014, indicated that this approach would not be supported by the legislation. This was communicated to DHS and that appears to be reflected in the advice from DHS to their Minister. It is understood that DSS also indicated to DHS that legal changes would be necessary to allow the measure, as DSS understood it at that time, to be implemented.

Following this, DHS took DSS’ concerns into account and made adjustments to the process. By early 2015, DSS gained a better understanding of how the revised process would satisfy the legislative requirements. In particular, DSS understood that the intended implementation model provided recipients with the opportunity to correct any information presented to them based on ATO data matching, particularly apportioning of income data obtained from the ATO. As such, DSS no longer considered that legislation would be required to implement the measure and advice regarding specific legislative changes was not sought.
A key difference between the measure, as DSS originally understood it, and the approach that was ultimately implemented, is that averaged income is only used for the purposes of calculating entitlement (and, therefore, debt) where no other information is available and attempts have been made to seek information from the individual. This was not what DSS understood to be the proposal when the Department originally raised concerns over the legislative basis for the measure. This is evident in the 2014 legal advice.

Attached to the 1 March 2017 correspondence was a document that combined the 2014 and 2017 DSS legal advices (discussed further below).140

The DSS explanation was drafted by Mr Hurman,141 amended by Ms Halbert142 and Ms Lumley143 and settled by Mr de Burgh,144 Ms Halbert145 and, ultimately, Ms Wilson.146

In a statement, Ms Wilson said that she spoke to Mr Pratt “to let him know that the Ombudsman may raise the issue of the different advices.”147 There is no evidence of Ms Wilson’s advising Mr Pratt that the Scheme had been implemented in a way that was inconsistent with the 2014 DSS legal advice.

Concealment of information from the Ombudsman

The DSS explanation was dishonest. The assertion to the Ombudsman that, in developing the measure, “DHS took DSS’s concerns into account and made adjustments to the process” was plainly false. Contrary to the representations made in the DSS explanation, the Scheme (and the proposal that led to its implementation) at all times involved, firstly, providing recipients “with the opportunity to correct any information presented to them based on ATO data matching” and, secondly, the use of averaging “for the purposes of calculating entitlement... where no other information is available and attempts have been made to seek information from the individual.”

At no time (including after DSS’s 20 January 2015 advice to DHS) was there any “adjustment” or “revised process” in how income averaging was proposed to be used, or in how it was used. There is no evidence of any representation made by DHS to DSS in 2015 to this effect. It is entirely inconsistent with the claims of some of the DSS witnesses that they were not aware that income averaging was being used at all until 2017. There is no evidence that DSS ever adopted a position that legislative change was no longer required to implement the measure.

The assertion that the proposal upon which the DSS 2014 legal advice was premised did not contemplate the use of income averaging ‘where no other information is available and attempts have been made to seek information from the individual’ was also false, as would have been revealed had the instructions that led to the DSS 2014 legal advice been provided. They described a proposed process for the recovery of debts which involved, firstly, a recipient’s being notified of discrepancies between ATO data and earnings declared to DHS and, secondly, the recipient’s being provided with an opportunity ‘to provide evidence to explain the discrepancy’ prior to a debt’ being raised on the basis of ‘income smoothing’. That opportunity to provide information did not change in any iteration of the Scheme.

The omission of the instructions concealed the terms upon which the advices were sought. It was not possible for the Ombudsman to ascertain that, in fact, there was no material difference between the process described in Mr Jones’s 31 October 2014 instructions to Ms Pulford and the process later implemented under the Scheme. In evidence, Mr de Burgh admitted that “to only give the answer and not the question” would result in an “incomplete understanding of the application of the advice.” 148

“Other notes, documents or emails”

The Ombudsman’s 24 February 2017 request for advice was not confined to the 2014 DSS legal advice. It extended to “any other notes, documents or emails that relate to this advice.” Material of this kind was never provided to the Ombudsman. Indeed, there is no evidence that such material was ever sought. But this was not the result of ignorance. In the course of preparing the response, Ms Halbert had expressed to Mr de Burgh and others an awareness of “written advice” by DSS in relation to the Executive Minute
(presumably a reference to advice provided by DSS to DHS on 20 January 2015). This document was not disclosed to the Ombudsman.

In evidence, Mr de Burgh could not explain why this additional material was not provided. He accepted that his knowledge of the existence of the documents and the fact that no step was taken to locate or provide them to the Ombudsman suggested a deliberate choice by those considering the response to the Ombudsman. However, in submissions, it was suggested on behalf of Mr de Burgh that, among other things, there was some “misunderstanding” about the scope of the Ombudsman’s request.

In evidence, Ms Halbert accepted that DSS had the opportunity to provide the other material requested by the Ombudsman. She said “there was no reason why we wouldn’t have provided that.” But Ms Halbert offered little in terms of a coherent explanation for DSS’s behaviour. She admitted that DSS may not have considered the matter but later speculated that any decision to not provide the documents may have been informed by the Ombudsman’s office “[having] access to those documents anyway.” She thought it possible that DSS had engaged in “a conversation with the Ombudsman’s office about their access to other [documents] and things.”

In submissions made on behalf of Ms Halbert, it was asserted that had the Ombudsman required further clarification, “it ought to have raised it with [Ms Halbert] if her team had not provided everything that was requested.” Ms Halbert was “aware the Ombudsman’s office had viewed numerous documents from DHS and must have been told about the comments provided from 2014-15.” The Commission does not accept these submissions. DSS was obliged to provide all of the information that the Ombudsman had requested. Whether the Ombudsman “had viewed” other documents from DHS was irrelevant to the necessity for DSS to discharge that obligation.

Summary

DSS attempted to and did conceal critical information from the Ombudsman and represented that the Scheme was lawful.

In submissions made on behalf of Ms Wilson, it was asserted that she had “minimal” involvement in dealing with the Ombudsman’s requests. The Commission rejects this submission. On 1 March 2022, a draft version of the response (attaching the combined 2014 and 2017 DSS legal advice document) was provided to Ms Wilson for her settling. Ms Wilson said that she was “happy” with the draft but instructed that amendments be made. Specifically, she asked that a reference to “smoothing” be changed “apportioning.” The Commission is satisfied that Ms Wilson read the draft response, reviewed the attachment and understood the contents of this material.

Ms Halbert explained that she relied upon information provided to her about the contents of the draft response to the Ombudsman’s further request. She did not feel any sense of obligation to justify the legality of the Scheme to the Ombudsman. In submissions made on Ms Halbert’s behalf, it was asserted that, at the time, she held a belief that the 2014 DSS legal advice ‘related to an early policy proposal that had not yet been fully developed’ and that the 2017 DSS legal advice related to ‘a refined proposal that was being implemented’. The Commission does not accept this submission. For the reasons set out above, it was clear that both advices were directed at substantially the same process.

In submissions made on Mr de Burgh’s behalf, it was said that he held a belief “in good faith and on reasonable grounds” that the Scheme was lawful. It was submitted that Mr de Burgh had relied upon the conclusions drawn by the 2017 DSS legal advice and Ms Pulford’s representations to him that the 2014 and 2017 DSS legal advices were “consistent.” It was also emphasised on behalf of Mr de Burgh that he had not been involved in the implementation of the Scheme and that the response to the Ombudsman had been prepared by other DSS officers who were involved.

The Commission does not accept these submissions. It was not necessary for Mr de Burgh to have been involved in the conception and implementation of the Scheme to understand that there had been no adjustment or revision of the kind described in the 1 March 2017 response. The instructions that led to the
2014 DSS legal advice set out, in clear terms, the nature of the proposal as it existed in October of 2014. The DSS explanation on 1 March 2017 made these false representations to the Ombudsman:

- that in response to concerns expressed by DSS to DHS in 2015, there had been some revision or adjustment to how income averaging was proposed to be used under the Scheme,
- that as a result of the asserted revision or adjustment, DSS had adopted a position that legislative change was no longer required to implement the measure, and
- that the 2014 DSS legal advice was premised on a proposal that was different to the Scheme that was later implemented.

Ms Halbert, Ms Wilson and Mr De Burgh were all involved in preparing the DSS explanation and knew these representations to be false. They were aware of its contents and had knowledge of the 2014 DSS legal advice and its contents (including the instructions upon which the advice was premised). DSS’s withholding of the instructions upon which the DSS 2014 legal advice was premised was a deliberate decision by Ms Wilson, Mr de Burgh and Ms Halbert designed to conceal the falsity of the representations made to the Ombudsman.

Ms Halbert, Ms Wilson or Mr De Burgh did nothing to provide any information in response to the Ombudsman’s request for “any other notes, documents or emails” that related to the need for legislative change referred to in the Executive Minute. Its omission was calculated to conceal the warnings DSS had given DHS in early 2015 about the need for legislative change if income averaging were to form part of the proposal which began the Scheme.

The Commission is satisfied that the behaviour of Mr de Burgh, Ms Wilson and Ms Halbert in making the false representations and concealing critical information was designed to, and did, mislead the Ombudsman in the exercise of his functions.

### 2.11 Human Services’ chief counsel is made aware of the deception of the Ombudsman and takes no action

At 5:16 pm on 1 March 2017 Mr de Burgh sent a copy of the DSS response to the Ombudsman to Mr Stipnieks of DHS, copied to Ms Halbert and Mr Hurman, and said “Thanks for the conversation earlier today. Here is the information that we will forward to the Ombudsman. Happy to discuss further.” Mr de Burgh’s email replied to an earlier email from Mr Stipnieks at 1:36 pm that afternoon which had no content, only the title “Issue re brief.” Mr Stipnieks replied and copied in Ms Musolino and Michael Robinson (national manager, Ombudsman and Information Release Branch, DHS). Mr Stipnieks suggested there was little utility to organising a meeting between DSS, DHS and the Ombudsman’s office in view of the detailed response by DSS to the Ombudsman.

On 1 March 2017, Mr Stipnieks forwarded to Ms Musolino an email from Mr De Burgh setting out the DSS explanation, with the combined 2014 and 2017 DSS legal advices attached, advising that it was the information DSS proposed to forward to the Ombudsman. By that email, Ms Musolino became aware that in 2014 DSS had obtained internal legal advice to the effect that income averaging was unlawful. Mr De Burgh’s email explicitly acknowledged that further legal advice on that issue was not sought before 2017, asserting that this was because in 2015 DSS had come to “better understand” the proposal that became the Scheme. As an experienced lawyer it would have been obvious to Ms Musolino that this assertion was dubious, an attempted rationalisation for the commencement and continuation of the Scheme contrary to the 2014 legal advice.

Ms Musolino must also have suspected that the 2017 legal advice referred to in Mr De Burgh’s email was sought and obtained by those involved in the development and implementation of the Scheme to gain legal cover as a result of the adverse media publicity about the Scheme and the Ombudsman inquiry. The
2017 legal advice\textsuperscript{166} supported income averaging “as a last resort,” which Ms Musolino knew was not how income averaging was being used in the Scheme; she knew that it had effectively become a methodology that was being used by “default.”\textsuperscript{167} Further, the 2017 legal advice used language suggesting that it was highly qualified and legal reasoning which Ms Musolino, an experienced lawyer, must have known was highly questionable.

Mr De Burgh’s email could only have reinforced in Ms Musolino’s mind what she had already learned on her return from leave on 16 January 2017; that the legal arguments in support of income averaging were weak and unconvincing and involved substantial legal risk. Despite this, Ms Musolino took no steps to provide legal advice to DHS executives as to the extent of that risk and the need to obtain independent external advice. She did not do so because she knew that such advice was unwanted by them.

As chief counsel of DHS, Ms Musolino was responsible for the accuracy and completeness of information provided to the Ombudsman on matters of a legal nature.\textsuperscript{168} The Ombudsman requested legal advice about income averaging for the 2017 investigation into the Scheme by his office.\textsuperscript{169} Ms Musolino was aware that the Ombudsman had done so.\textsuperscript{170} Ms Carmody’s draft advice and the Fiveash advice were within the scope of the Ombudsman’s request, as Ms Musolino knew. However, she took no steps to ensure that those advices were produced to the Ombudsman.

On 6 March 2017, various persons within DSS were reminded of Mr Porter’s response to the suggestion that debts were raised erroneously by the Scheme; a suggestion that was described as “misinformation in the media.” On that date Ms Halbert received a copy of the joint letter from Mr Porter and Mr Tudge to the Prime Minister dated 3 March 2017,\textsuperscript{171} which responded to an email from his office to Ms Wilson and Ms Golightly on Friday, 20 January 2017 requesting an update on the Scheme. The letter, a copy of which was forwarded to Mr de Burgh and Mr Hurman, said in part:

\begin{quote}
Steps taken to address misinformation in the media

The OCI has been the subject of concerted campaigns by the Labor Party, the Greens, GetUp! and other parties. These campaigns have primarily been in regard to debt raising, which some parties alleged is entirely automated or not subject to review or appeal as well as claims that debts have been raised erroneously.

We have undertaken efforts to address the misinformation communicated as part of these campaigns, across both mainstream media and through social media.
\end{quote}

\subsection*{2.12 The Ombudsman seeks comment from Mr Pratt}

On 10 March 2017, Ms MacLeod sent a copy of the draft report of the Ombudsman to Mr Pratt, DSS secretary, with a letter inviting comments from DSS by 27 March 2017.\textsuperscript{172} The letter, signed by the acting Ombudsman, Mr Glenn, noted that the report made one recommendation relevant to DSS, which related to its responsibility for the \textit{Guide to Social Security Law}.\textsuperscript{173} Mr Glenn proposed to recommend that DSS include clear guidelines about the process for obtaining employment income evidence in the \textit{Guide to Social Security Law}, “to assist customers to gather evidence to effectively use the OCI.”\textsuperscript{174}

DSS officers prepared various drafts of a response to the Ombudsman on behalf of Mr Pratt.\textsuperscript{175} On 29 March 2017, the Ombudsman’s office sent the final draft of the report to DSS and requested a formal response from Mr Pratt on or before 5 April 2017.\textsuperscript{176} After a number of further drafts,\textsuperscript{177} Mr Pratt signed the letter to the Ombudsman on 4 April 2017.\textsuperscript{178} On 6 April 2017 a revised letter (also dated 4 April 2017) was sent to the Ombudsman which omitted paragraphs in the earlier letter that raised issues about the terminology used in the final draft report.\textsuperscript{179} That letter contained the following paragraph:\textsuperscript{180}
The Department is satisfied the system is operating in line with legislative requirements and there have been no changes to the way in which DHS assesses Pay As You Go employment income. The Department notes your office has consulted extensively with DHS and the revised versions of the report include improvements which acknowledge that the system is accurately identifying and raising debts based on the information available to DHS.

The letter became an appendix to the final report, “Centrelink’s automated debt raising and recovery system,” which was published in April 2017.

Mr Pratt was aware that the Scheme was the subject of significant public interest and media interest, particularly in late 2016, continuing into 2017; he remembered seeing media reports about it around this time. Mr Pratt recalled that the media he focused on related to the operational arrangements for dealing with recipients for potential debts; for example, the absence of DHS telephone contact numbers on the initial letters, and complaints about recipients not receiving those letters. Remarkably, he did not recall media reports on income averaging.

Mr Pratt was also aware that the controversy had triggered significant interest from the ministers associated with the portfolio, including the Minister for Social Services. In either late 2016 or early 2017, Mr Porter telephoned Mr Pratt about the media interest, and Mr Pratt arranged for the acting secretary of DHS to advise him, because the issues raised in the media “related to DHS service delivery actions.”

The media reactions in respect of the Scheme in late 2016 and early 2017 were described by a DHS media manager as “arr[iv]ing] ... like a cyclone.” The coverage attracted the interest of Mr Porter (who, as Acting Minister for Human Services, was advised by DHS about the issue), and caused Mr Tudge to return early from a period of leave. Mr Pratt’s evidence was that, even though he was largely unaware of the content of the media publicity (save to the extent it mentioned operational issues), he was at least aware that there was media interest sufficient to attract both the interest of Mr Porter and an Ombudsman investigation.

Mr Pratt said he did not take any steps to satisfy himself that the Scheme was “operating in line with legislative requirements.” All the briefings he received prior to signing the letter to the Ombudsman made similar assertions, but he did not see any legal advice to that effect. In relation to the assertion that there had been no change to the way DHS assessed PAYG income, Mr Pratt said he assumed that it was a change to the volume of interventions which involved automation, in contrast to the labour-intensive process prior to July 2015, but he did not ask how the system worked.

It can be readily accepted that as secretary of DSS Mr Pratt was entitled to rely on the expertise of DSS staff in developing draft correspondence for him to sign. However, that does not absolve Mr Pratt of any responsibility to make inquiry before making a public, positive assertion about the lawfulness of an entire Scheme. His Department held legal advice about the Scheme which demonstrated it was unlawful. Mr Pratt was not aware of that advice, but he did not take any steps to inquire about that prior to asserting the legality of the Scheme. He failed to make inquiries to satisfy himself that the representation made with respect to the legality of the Scheme in the letter he signed was correct.

The effect of Mr Pratt’s letter to the Ombudsman was significant. The Ombudsman placed substantial weight on Mr Pratt’s assurance that DSS was satisfied that the Scheme was operating in line with legislative requirements. Both DHS and DSS continued to cite the Ombudsman’s report, including Mr Pratt’s statement as to the Scheme’s meeting legislative requirements, to defend the Scheme. This is outlined in further detail in the chapter – The Commonwealth Ombudsman.
2.13 Human Services conduct in the Ombudsman investigation

While DSS was engaged in conduct designed to avoid providing the Ombudsman with the 2014 DSS legal advice, DHS was also avoiding giving responses to inconvenient requests for information from the Ombudsman and taking an approach designed to obtain validation of the DHS narrative about the Scheme.

The Ombudsman’s investigation had necessitated a series of meetings and correspondence with DHS over the early months of 2017. The Ombudsman’s office made numerous requests for information to facilitate its investigation, and there are a number of examples that demonstrate that DHS did not engage with the Ombudsman’s office with the frankness and candour that would ordinarily be expected of a Government department. Some of those examples represent concerning behaviour by certain DHS staff, who demonstrated an alarming readiness to mislead the Ombudsman and conceal information that was detrimental to the narrative DHS was determined to sell.

The exchange of drafts of the Ombudsman’s report, and DHS’ revisions to them, was also concerning. Early in the process, having been provided with a draft outline by the Ombudsman, a DHS officer made the extraordinary statement that “the department has been given a great opportunity to effectively co-write the report with the Ombudsman’s office.”

It may be accepted that in many circumstances it will be either acceptable or necessary for departments under investigation to provide comments or feedback on drafts of an Ombudsman’s report, for purposes such as fulfilling the requirements of procedural fairness, or to improve the efficiency or effectiveness of an investigation. However, in this instance the levels of DHS’s amendment and control of the drafting of the report, including its extensive tracked changes to the Ombudsman’s drafts, went well beyond any fairness requirements or process efficiencies. DHS took numerous opportunities to alter and adapt the report’s language and conclusions, and the report that was ultimately produced reflected DHS’s best efforts to further the narrative that it was presenting to the public.

The conduct of DHS throughout the Ombudsman investigation, including specific examples of the conduct outlined above, is examined in further detail in the chapter – The Commonwealth Ombudsman.

2.14 The subsequent use of the Ombudsman’s report to defend the Scheme

Given the conduct of both DHS and DSS in their interactions with the Ombudsman during the 2017 investigation, the use that was subsequently made of the 2017 Ombudsman report is particularly galling. Both DHS and DSS and their officers had used various means to influence the report so that it was consistent with their respective positions. The report was then used as an example of an independent review, to support the advocacy of those who sought to defend the Scheme.

In the report, the Ombudsman did not deal with the issue of the legality of the Scheme. The closest that the report came to expressing a position on that issue was the comment that the “business rules in the OCI that support the debt calculation are comprehensive and accurately capture the legislative and policy requirements.” This was, in fact, an indication that the rate calculators used to inform the technical specifications underpinning the ICT build of the platform had not changed. However, that was not explained in the report, and that statement, with its lack of clarity, readily lent itself to being misused and misinterpreted as endorsing the legality of the Scheme.

The situation was not assisted by the annexure to the report of Mr Pratt’s letter saying, “The Department is satisfied the system is operating in line with legislative requirements...”, signed by him despite having taken no steps to confirm its content and not having seen any legal advice to that effect.
The Ombudsman’s report also dealt with the issue of the accuracy of debts generated by the Scheme in a way that allowed it to be misused. The report stated:299

...We examined the accuracy of debts raised under the OCI...

We are satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by OCI are accurate, based on the information which is available to DHS at the time the decision is made.

However, if the information available to DHS is incomplete the debt amount may be affected.

The way in which this was phrased downplayed the significance of the qualification it contained. There were widespread problems with debt accuracy. The qualification that the system required particular inputs in order to perform accurate calculations was systematically not being met under the Scheme. That was implicit from the “key issues” identified elsewhere in the report,200 and would have been apparent to persons who knew that qualifications was not being met. However, the lack of an express acknowledgement of this in the report left open the opportunity, which was taken up on many occasions, for the report to be used to defend against criticism with respect to debt inaccuracy.

2.15 Use of the report by the minister

One of the first to seize the opportunity to use the Ombudsman’s report to deflect criticism was Mr Tudge. He issued a media release at the time the report was published, using parts of it to defend the Scheme. The media release said that the Ombudsman had found that “the system calculates debts accurately, is reasonable and appropriate in asking recipients to explain discrepancies in data, and the method of data matching has not changed from the approach used by successive governments.”201

The representation that the Ombudsman had found that the system accurately calculated debts was subject to the qualification that debts raised were accurate based on the information available to DHS at a time a decision was made, which was also set out in the media release. Mr Tudge understood the Ombudsman’s statement to mean that if recipients provided information, the system produced an accurate result.202

However, Mr Tudge knew that the Scheme was issuing inaccurate debt notices, including in circumstances where a process of averaging of income was used to calculate a debt.203 He also knew that a significant proportion of recipients had not entered information into the system, and that those debts were likely to be inaccurate.204

He was, therefore, aware that the qualification to the Ombudsman’s statement with respect to the system’s ability to accurately calculate debts, namely, that it depended upon a recipient’s input of information, had not been met for the majority of debts that had been raised under the Scheme, and that those debts were highly likely to be inaccurate.

In circumstances where the Ombudsman’s comments with respect to the accuracy of debts and debt calculations were only applicable to a minority of debts being generated under the Scheme, the report provided an incomplete and unsatisfactory answer to concerns raised about debt inaccuracy. Mr Tudge’s use of the Ombudsman’s report as a purported response to those concerns represented a continuation of his approach to avoid engaging with problems that were raised with respect to fundamental features of the Scheme, instead focussing on improvements relating to implementation of the Scheme.

The media release also represented that the Ombudsman had effectively found that “the method of data matching has not changed from the approach used by successive governments.”

This comment by the Ombudsman was confined, in both its language and its context, to the process by which data that had been received from the ATO was compared to data held by Centrelink, in order to identify discrepancies and select recipients to be subject to the review process.205 It was also apparent from the Ombudsman’s report that what had changed was the Scheme process itself.206
Mr Tudge knew, or ought to have known from inquiries with DHS and from a careful reading of the Ombudsman’s report that the Ombudsman’s reference to data matching was a specific reference to a process that occurred prior to the initiation of a compliance review under the Scheme. He should have known, therefore, that the Ombudsman’s reference to the method of data-matching having “not changed” for many years said nothing about the compliance review processes that occurred under the Scheme.

Mr Tudge, either himself or through his office, continued to use the Ombudsman’s report as a defence against concerns that had been raised, although he knew that the parts of the report relied on were subject to qualifications rendered the Ombudsman’s comments inapplicable with respect to a significant proportion of debts that had been raised under the Scheme.

Despite being aware that the Ombudsman’s report did not, in fact, provide an answer to concerns raised relating to fundamental features of the Scheme, Mr Tudge took advantage of the language used in the report to deflect criticism of the Scheme and in doing so, avoided engaging with the substance of those concerns.

### 2.16 Use of the report by Human Services

DHS’s use of the report echoed that of its minister, although it went even further in terms of the representations it was willing to make about the purported breadth and application of the Ombudsman’s findings. DHS used the Ombudsman’s comments with respect to the data matching process remaining unchanged to make the claim that the Ombudsman had found that debts were being raised consistently with previous processes of departmental investigation.

That was untrue, in two respects:

- the investigation processes adopted under the OCI phase were, in fact, different, which was apparent from the Ombudsman’s description of the previous processes carried out prior to the Scheme.
- what the Ombudsman had found was that the initial identification of a discrepancy through data matching was unchanged, but that “under the OCI the way DHS investigates ATO data discrepancies has changed.”

DHS also represented that the Ombudsman had found that the online compliance system “meets all legislative requirements.” The report provided no basis for any assurance that calculating social security debts using income averaging was lawful. It did not deal with that question or articulate any legal basis that could support such an assurance. To the extent it was sought to be relied upon by DHS as providing comfort as to the legality of the Scheme, that reliance was, on the most charitable view, misconceived.
3 Other inquiries

Two further inquiries indicative of heightened scrutiny of the Scheme took place in late 2016 and early 2017: a report conducted by the Australian National Audit Office (ANAO) and an inquiry by a Senate Committee.

Parliamentary privilege limits the uses to which evidence of those matters may be put. For present purposes, it suffices to say that those inquiries did not have the effect of bringing the Scheme to an end. The work done by the ANAO asked a different question from that posed by this Commission and could not have been expected to do so. The Senate Inquiry, however, touched on many matters similar to those dealt with by this Commission and recommended a form of termination of the Scheme. No such action was taken by DHS and DSS. Both inquiries will be dealt with briefly below.

First, the ANAO conducted an audit which included the Robodebt Budget measure. It released its report on Management of Selected Fraud Prevention and Compliance Budget Measures (ANAO Report)213 on 28 February 2017. The objective of the ANAO Report was to assess DHS’s and DSS’s “management of selected fraud prevention and compliance Budget measures” by reference to three key questions:

- have sound processes and practices been establishes to support the design and implementation of specific Budget-funded compliance measures?
- is there effective monitoring of the implementation and achievement of the measures?
- have expected savings and other benefits from the measures been achieved?

The focus of the ANAO Report was the realisation of expected savings. In respect of employment income matching, the ANAO Report found that though the activity levels achieved exceeded the projected targets, “the NPP substantially underestimated the costs of delivery; as a consequence, the implementation ... was not as cost-effective as the proposals put to government.”214

As already observed, the ANAO Report asked a different question from this Commission, so the deficiencies which are of present focus were not likely to be revealed by that process. There is no criticism of the work done by the ANAO. It is relevant only as a matter of history and to identify a further departmental engagement with investigative processes in late 2016 and early 2017. Versions of the draft report were provided to DHS and DSS for comment on 22 December 2016 and again to DHS on 10 February 2017. The ANAO report annexes correspondence from the secretaries of both departments send during that period.

Second, the Senate Inquiry on the Design, scope, cost-benefit analysis, contracts awarded and implementation associated with the Better Management of the Social Welfare System initiative (Senate Inquiry),215 had within its terms of reference the impacts of automated debt collection, the error rates in issuing debt notices, the adequacy of departmental management of the OCI and “advice and related information available to [DHS] in relation to potential risks associated with the OCI.” The report was published 21 June 2017 after nine public hearings between March and May of that year.

The first recommendation of the Senate Inquiry was that the OCI iteration of the Scheme be put on hold until “all procedural fairness flaws are addressed,” and until the other recommendations made by the committee were implemented. The recommendation went on to state that if those issues were addressed, the Scheme should only be continued (in its new form) after the implementation of the ATO’s Single Touch Payroll system (which would not require the use of averaging) was implemented in 2018.216

The Senate Inquiry also recommended that all those who had debts determined by way of income averaging should have those debts re-assessed manually by compliance officers, “using accurate income data sourced from employers.” That reassessment, the Committee continued, was to include the full range of unpaid, partially paid and fully paid debts incurred by recipients, including those outsourced to debt collectors.

4 External consultants

4.1 Digital Transformation Agency

In his communications with Mr Tudge in early January, Mr Turnbull suggested that if there were problems with the development of the online program, the Digital Transformation Agency (DTA) could be of assistance.217

A few days later, on 22 January 2017 Mr Tudge sent an email to his chief of staff and advisors, setting out some instructions with respect to the Scheme’s problems.218 One of those instructions was to continue the “ongoing push on the implementation table, particularly the portal.” He instructed his advisor to ensure that the DTA was “working almost daily with DHS on this. The DTA is very good at having things consumer oriented. This is important for other reasons also....” The last part may have been a reference to Mr Turnbull’s suggestion.

By 31 January 2017, DHS had asked DTA to review progress on improvements to the online compliance program, with “a focus on recommendations to quickly improve the user experience.”219 After meeting with DHS, the DTA provided recommendations, to be implemented within a four-week period.220

Four days later, on 3 February 2017, the DTA emailed Ms Campbell, copying in others, about the engagement.221 The DTA advised of “concerns” in relation to its engagement, which centred around the fact that, rather than the proposed four week period, the DTA had been told that deadline for improvements was in fact in four days’ time. The DTA advised “it is not possible to make improvements that we would have any confidence in within a four day time period”; so, it concluded, “therefore, the DTA’s involvement in this work should not be portrayed as an endorsement of any proposed changes to the user experience at this stage.”222

By 8 February 2017, DHS had provided the DTA with a presentation entitled “Employment Income Confirmation v1.8.”223 An internal DTA email stated “this is going to depress you (see attachment). Apparently going live this week.”224 A further internal email commented on the perceived limitations of the program, stating “very ‘crude’ application.”225 Very limited feedback was provided on the presentation from the DTA to DHS.226 Despite efforts by the DTA, no further correspondence relevant to this exchange could be identified.

After February 2017, the DTA does not appear to have had any further involvement with DHS that was specifically directed at the iterations of the Scheme.227

4.2 Data61

On 25 January 2017, Mr Tudge requested that Ms Campbell commission data research and development consultants, Data61 (an arm of the CSIRO), to “undertake an assessment of the data-matching functionality to determine if further refinements can be made.”228 Ms Campbell confirmed that Data61 was commencing work that day.229

By 1 February 2017, both the CSIRO and DHS had executed a consulting services agreement by which Data61 was to deliver “general advice on optimal algorithms to be used for the outcomes intended by DHS.”230 The start date was 30 January 2017 and the delivery date 2 February 2017. That work was to “analyse the Centrelink automated debt recovery system” and the process was to “review the quality of certain algorithms used by the Department in its operations.”231 The scope of that work included, in effect, an analysis of the accuracy of the debts calculated by the system.
Two key written work products were prepared by Data61 – a report \(^{232}\) and a series of presentation slides.\(^{233}\) The evidence of Data61 is that only slides 25-29 of it were drafted by Data61, with the remainder being drafted by the department.\(^{234}\)

The evidence before the Commission suggests that Data61’s final report was of limited utility because, as it transpired, there was an inadvertent error in the data provided to Data61, and upon which it based its analysis.\(^{235}\) No criticism is made of Data61 or the department in that regard; it appears to have arisen as a result of a system anomaly that was not discovered until after the work had been completed, on or around 21 March 2017.\(^{236}\)

However, it seems that although Data61 was subsequently engaged to do other work in 2017 and 2018, it was not engaged to revisit the work done in early February 2017 in relation to the accuracy of the debts raised under the Scheme.\(^{237}\)

On 2 March 2017, DHS provided “comments” on a draft of the report prepared by Data61, including the following:\(^{238}\)

> We do have concerns with some of the terminology being used particularly in the recommendations. For example the “overall accuracy of the ATO data” is not core to the department’s implementation as the point of the measure is for the customer to check their data. The use of the term “error-rate” is not terminology that the department uses and perhaps the meaning is meant to be “likelihood of debt being reduced” or a similar term more in line with the measure. [emphasis added]

It is a remarkable proposition that “the “overall accuracy of the ATO data” was not core to the department’s implementation” of the Robodebt Scheme. That proposition suggests both Departmental knowledge of its inaccuracy, and not just a disregard, but a positive acceptance, of it.

Internal correspondence at Data61 the following day stated, in respect of those comments received from DHS, “Well, they *want* us to change it, but what they want is fundamentally at odds with what we found... If we change it to what they want it basically nullifies our time there.”\(^{239}\)

It is important to reiterate that the inadvertent error in the underlying data provided to Data61 means that this Commission is unable to rely upon the report’s conclusions with respect to the accuracy of debts. However, what this interaction between DHS and Data61 demonstrates is that, prior to the discovery of the error, the department’s reaction was not to deal seriously with those concerns, but instead to ask Data61 to change its drafting and to revise the “terminology” used. This is another example of DHS seeking to control the narrative surrounding the Scheme and to shield the department from criticism of it.

### 4.3 The engagement of PricewaterhouseCoopers

On 31 January 2017, Ms Campbell contacted Mr Terry Weber, Partner at PricewaterhouseCoopers (PwC). Mr Weber’s recollection is that Ms Campbell informed him that she had concerns about the delivery of targets under the Scheme, and she wanted a review of the processes by an external organisation.\(^{240}\) Over the following fortnight, employees of PwC and DHS negotiated the terms of the engagement with PwC.\(^{241}\)

On 9 February 2017, Ms Golightly and Mr McNamara met with Ms Campbell about the engagement with PwC. The agenda for that meeting attached an 8 February 2017 version of the engagement letter between PwC and DHS.\(^{242}\) Ms Campbell initialled the agenda, stating “Agreed to proceed.” That engagement letter contemplated that PwC would prepare a final report.

PwC’s engagement formally commenced on 15 February 2017. The terms of that engagement, and a description of the services to be provided, were reflected in the final version of a letter of engagement dated 13 February 2017,\(^{243}\) and an official order dated 14 February 2017.\(^{244}\)

The engagement letter indicated that DHS required “an independent review of the compliance and fraud activities of...DHS, culminating in identification of areas for improvement, together with a high-level implementation plan.”\(^{245}\) The letter set out four ‘phases’ of work to be undertaken in the engagement.
The final phase, “Phase 4 - Implementation roadmap and report” envisaged the provision of a “high-level implementation plan or roadmap” which would “capture [PwC’s] key recommendations around productivity initiatives, and synthesise all preceding analysis in a final report.” PwC’s final report was intended to “synthesise the key steps and findings of all preceding stages of work and analysis, including an ‘artefact of key project steps and findings’, an evidence base and ‘case for change’,” an “analysis of options” and “final recommendations and implementation roadmap.”

The official order indicated that one part of the work required by the engagement, described as a “deliverable,” was a “[r]eport that identifies and analyses options for improvement and considers the implementation of current budget measures.” The report was to be provided at the end of the final “phase” of the work.

The scope of PwC’s engagement encompassed the compliance and debt management activities undertaken by DHS with respect to a number of Budget measures. 246 The OCI program (or its subsequent iteration, the Employment Income Confirmation program), and the measures underpinning it, formed a large component of that scope.

PwC estimated their total fees for the engagement at $853,859 (excluding GST), and proposed to invoice DHS for half this amount at the end of “Phase 2”, and the remaining half upon completion of the engagement.247

**PwC commences work with DHS**

PwC commenced the engagement by gathering information from DHS. PwC staff met with a number of DHS officers, across various divisions of the Department. They requested, and were provided with, documentation relevant to their engagement. From that information, PwC began developing spreadsheets, project plans, and process maps.

As part of this stage of the process, the engagement letter had specifically contemplated that one issue that might require review as part of “policies and compliance” would be “the legal basis for the rules and policies implemented as part of the department’s compliance activities.”248 It appears that there was some analysis done by PwC on this issue,249 but, consistently with the agreed scope of the engagement, that analysis was done at a reasonably high level.

The issue of income averaging, as had been raised in the media, apparently came to the attention of PwC, but like many others, it was apparently informed by DHS “time and time again that the process is the same as completed manually.”250 The issue of averaging seems to have been characterised by PwC, in passing, as a feature of compliance reviews that had garnered increased attention,251 but neither debt accuracy nor income averaging were included within the scope of work for which it was engaged.252

By mid-March, PwC had developed a number of “hypotheses,” which essentially represented the broad issues that it had identified as relevant to the scope of its work. The themes that were emerging, apparent from the hypotheses, included deficiencies in the experiences of recipients with the compliance program, flaws in the business rules and case selection processes in the system, a lack of clear governance and oversight of the program, and the risk of the program’s not raising the expected levels of debt within the timeframes that had been set in the Budget measure.253

On 10 March 2017, PwC staff met with DHS officers to provide an update on the progress of their work, including a discussion of the emerging hypotheses.254 In that meeting, DHS officers indicated that the work so far had “hit the mark”, and there was “no problem with what has been outlined.” PwC perceived that the meeting had gone well, and that DHS officers had been pleased with PwC’s progress, and the level of detail of the work so far.255

A further meeting between PwC and DHS was scheduled for 14 March 2017. PwC was informed that the “main topic” for discussion would be the actions that could be undertaken by DHS to “limit the outlays and increase the money they recover.”256 PwC perceived that “they [DHS] are expecting a significant shortfall relative to the savings targets they signed up for. Feels like they are desperate to stem the bleeding.”257
By 27 March 2017, PwC was nearing the end of what it called the “current state assessment phase”, and moving on to “reporting and analysis.” A draft outline of the report had been developed, and PwC had discussed the final report with DHS officers. An email summarising that discussion included the following:

...the report should be clear on whether the current design/approach is fit-for-purpose. There are quite a few in the department that think they can still use the approach by making some updates. If we think this is not the case (which I think we do) we will need to be clear...

...previous reports have focussed too much on high-level recommendations; they expect us to put some meet on the bones and clearly outline what the ‘better state’ should look like...

While the focus on recommendations has been good, I feel we will have to strengthen our assessment of the current state and substantiate why it is/isn’t fit for purpose going forward. [Emphasis theirs]

PwC had also asked DHS “whether they would like the final report to be in PowerPoint or Word.” DHS had indicated that its view, “noting the Secretary’s preference,” was that Word should be used.

The “current state assessment”

A series of meetings between PwC and DHS executives was scheduled for early April, for the purpose of discussion of PwC’s recommendations and “proposed roadmap.” Those discussions focussed on two main documents: firstly, a summary of PwC’s “insights” drawn from their assessment of the current state of the compliance program; and secondly, an overview of PwC’s proposed strategic priorities and recommendations.

The content of the “current state assessment” document was significant, because it was to form the basis of the content of the final report, and provide a “guideline” for the relevant part of the report to which it related, which part would “go into more detail.” Mr van Hagen said that while he could not be sure, he expected that PwC would have indicated at the executive workshops that a written report was to be delivered.

There was a number of issues of concern outlined in PwC’s current state assessment document. The document indicated that, in order to deliver on the Budget measures, the current system would need to be “redesigned in order to address structural issues in relation not the validity and use of data, customer experience and scalability”.

In oral evidence before the Commission, Mr van Hagen was taken to this document. He accepted that what was meant by the concept of a “redesign” was a new system which encompassed various features identified by PwC. This recommendation reflected a view that the EIC system was, effectively, not fit for the purpose of delivering the Budget projections and the analysis of the data it collected.

What PwC was intending to convey through this material was that while there were short term improvements that could be made, a new program had to be developed.

On 7 April 2017, DHS officers including Ms Golightly and Mr McNamara met with PwC staff, including Mr van Hagen. Mr van Hagen recalled that the main discussion centred on a presentation to the minister’s office (discussed further below), and that the report was also discussed briefly. One of the PwC attendees took notes of the meeting, which recorded Mr McNamara as saying “CALL REPORT ‘Strategy and PLAN’.”

As a result of that indication from DHS, the naming convention for the versions of the draft report that was being developed by PwC, which had previously been saved as “DHS BPI Final Report”, changed to “DHS BPI Implementation Strategy.” A number of PwC staff began referring to the document as the “not-report”, “non-report”, and other variations on that theme. One email said “Attached is the latest version of the DHS report (or not report, whatever you want to call [or not call] it).”

A presentation for the minister

During the first week of April, PwC was requested by DHS to prepare a presentation to Mr Tudge. At the meeting on 7 April 2017, Mr van Hagen recalled that the main discussion centred on this presentation.
The following Monday, 10 April 2017, PwC prepared a table which “summarise[d] the narrative requested and discussed on Friday and or [sic] observations to date on whether supporting information is available.” In conjunction with the table, PwC also developed two versions of a PowerPoint presentation. One was described as “reflecting the requested narrative”, and the other was a further version described as the “revised narrative.” The presentation for the minister was described as occurring “in parallel” to writing the report.

An updated version was sent through later in the evening, which was described as “better aligned to the narrative requested by Malisa and strikes a better balance between outlining the possibilities and noting the constraints.”

The draft presentation was subject to several revisions, based on instructions from DHS, and in particular, Ms Golightly. Ms Golightly sent numerous, lengthy emails requesting changes to the presentation.

PwC presented the PowerPoint to DHS and staff of the minister’s office, including Ms Campbell, Ms Golightly and Mr Aston, on 19 April 2017. The minister was not present on this occasion. Ms Golightly had discussed the presentation with, and provided a copy to, Ms Campbell prior to the presentation. In addition to the presentation, the current state assessment and strategic priorities and recommendations documents were also presented.

On 28 April 2017, PwC’s first invoice was issued, and was paid by DHS. The process maps that had been described in the official order and letter of engagement, due to be provided to DHS at the conclusion of “Phase 2” of the engagement, had been provided and were itemised on the invoice.

Also on 28 April 2017, Mr West emailed Mr Weber. Mr West said:

— There’s also a question about how the brief to the Secretary and Minister’s office relates to the work we’ve done (i.e. the extent to which we’re selling the message of Malisa in particular versus presenting our analysis and views)...  
— We’re also a bit concerned that they aren’t actually going to do things that should (sic), to actually change the way the compliance program works, so we need to form a view as to how we’ll handle that.

Mr West also expressed concern that “DHS seems to be looking at us to do a lot more than we’re going to be funded for to start with.”

Mr Weber replied that his belief was that the secretary was supporting the “scope change” for the moment “until we get the minister off our and her back”, and that once PwC had done the presentation to the minister, “we get back on scope of actually making it happen.” Mr Weber indicated that the PwC budget would not be a problem, saying “we will be there for the next 3 years and will actually take on the outsourcing of the data analytics functions...Happy days.”

The presentation to the minister was originally scheduled to take place on 11 May 2017. The minister was unable to attend on that date, but a meeting between PwC and DHS officers, including Ms Campbell, went ahead in his absence. On 12 May 2017, PwC sent DHS the final PowerPoint for presentation to the minister.

PwC presented the PowerPoint to the minister on 22 May 2017. Ms Campbell was also present. The PowerPoint presentation that had been sent to the minister’s office on 12 May 2017 was re-sent, unchanged, on 21 May 2017, under cover of a departmental brief.

**Work continues on report**

In tandem with the work on the presentation to the minister, PwC had continued to develop the report. By early May 2017, the draft of the report was up to its twenty fifth version. On 4 May, Mr van Hagen emailed the latest draft to Mr West, indicating that, “As discussed: if you’re comfortable with the current version it would be good to share a hard-copy version with Jason to give them an idea of the scope of the report and recommendations...”
Mr van Hagen accepted in his oral evidence that it was common practice for a draft of a final report to be provided to a client, so that they could identify any issues, including, for example, factual issues or information that may have been misunderstood in the development of the report.\textsuperscript{303}

On 5 June 2017, DHS emailed PwC requesting that PwC send an invoice “for the remaining amount for the contract.”\textsuperscript{304} The next day, Mr Bowe informed Mr West that PwC was in the process of raising the final bill, and that the final report was “awaiting response from Terry.”\textsuperscript{305} Mr Bowe could not recall precisely what he meant by those words, but said that it was likely that he was referring to either waiting from a response from Mr Weber to his email of 30 May about the final report, or that he was waiting for confirmation from Mr Weber about whether the report was going to be provided to DHS.\textsuperscript{306}

On 7 June 2017, PwC issued its final invoice to DHS. That invoice contained two itemised “Phase 4” deliverables, which were described as an “implementation roadmap” and an “implementation strategy.”\textsuperscript{307} DHS later paid the invoice.

The report that had been prepared by PwC was never formally received by DHS.

The total amount paid by DHS to PwC for the February to June 2017 engagement was $853,859 excluding GST.\textsuperscript{308} The portion of that total attributable to the report cannot be ascertained with precision,\textsuperscript{309} however, the evidence given by PwC representatives indicates that the best estimate is approximately $100,000.\textsuperscript{310}

**Commonalities between the report and the presentation**

Although the documents that were specifically described as “deliverables” represented the most tangible output of the engagement, a significant amount of the work done by PwC was directed at developing a knowledge base and understanding of departmental systems, processes and data, which informed subsequent analysis. It was a necessary consequence of the nature of PwC’s engagement that many documents (including the deliverables) were informed by the common body of work which underpinned them, and exhibited some similarities where they dealt with information or concepts derived from that shared foundation. It is unsurprising, therefore, that there is commonality, or overlap, of content as between a number of documents, including the presentation to the minister, and the report.\textsuperscript{311}

However, it is clear, on both the face of the documents themselves, and the evidence given before the Commission, that the report that was prepared by PwC contained significantly more detail than the presentation given to the minister. So much is indicated by their respective formats; the presentation consisted of eight PowerPoint slides, including one slide for the title page. The report was a Word document which comprised almost 100 pages.

The distinction between the two was not just a matter of format. In effect, the document presented to the minister was a presentation, at a high level, of some of the main findings and recommendations that were outlined in detail in the draft report.

The report, in line with the description set out in the letter of engagement, was to “synthesise the key steps and findings of all preceding stages of work and analysis.”\textsuperscript{312} It was to include “an evidence base and a case for change,” and, importantly, analyse and draw conclusions based upon “an independent review” of compliance and fraud activities at DHS.\textsuperscript{313} This included a review of Budget measures, achievement of targets under those measures, and advice on the further implementation of those measures, but this was one aspect among others.

The presentation was designed to inform the secretary and minister about PwC’s work, including PwC’s understanding of the situation and proposed solutions to identified issues. But the “main focus” was whether DHS’s then-current processes were capable of delivering the budgeted targets, and if not, how they could be improved.\textsuperscript{314}

What the report said explicitly, that the presentation, on one view, implied,\textsuperscript{315} was that the department’s (then) current implementation approach for the Budget measures needed to be completely redesigned.
This was consistent with the view that PwC had formed, and presented to DHS, in the context of the findings of the “current state assessment” outlined above. What PwC was effectively conveying was that while there were short term improvements that could be made, a new program had to be developed. The EiC system was effectively not fit for the purpose of delivering the Budget projections and the analysis of the data it collected.

4.4 “This would have just poured a whole heap of petrol on it”

The report identified, in detail, problems with the system that were not, or at least not in the same level of detail, contained in the presentation.

There were criticisms of the underlying Budget assumptions and the manner in which savings had been calculated. The report also highlighted inadequacies in the governance and decision-making with respect to the ongoing implementation and monitoring of the Budget measures, and noted that PwC had “faced significant issues in mapping the current state process due largely to the lack of end-to-end visibility.”

The report dealt with problems associated with some of the fundamental features of the compliance program, including the use of automation, and the way in which ATO data was used in the system. It indicated that the OCI process had operated indiscriminately on all identified discrepancies, with no apparent prioritisation, which had resulted in a large number of interventions with a lower likelihood of a debt’s existing. The shift to automation effected under OCI had resulted in “a loss of some of the strengths of the manual processes”, and specifically the previous prioritisation of high likelihood, high value debts.

Prior to the online process, the report pointed out, “human interaction provided a range of necessary checks and balances to ensure poor data did not adversely impact the process”. The increase in scale, and the use of automation, had resulted in a loss of “quality control mechanisms of the manual process that perhaps had not been previously recognised or codified”. The impact of that loss of human intervention was difficult to quantify, but was “no doubt significant to the challenges faced by the system”. The report suggested measures to improve and monitor the quality of data inputs, and cited the example of “incorrect employment period dates,” which were fixed in an ad hoc way, but for which the suitability of the modifications to the system had not been assessed or measured.

The report stated that the automation of compliance interventions had been “critical” to the underlying assumptions of the measures with respect to both the volume of interventions proposed to be undertaken, and the resources required to support those interventions. The changes that had been introduced under EiC in early 2017 had “drastically reduced” the volume of interventions that were automated, and this had had a significant impact on DHS’s ability to deliver in line with the Budget measures.

Consistent with the scope of PwC’s engagement, the report did not directly engage with issues of debt accuracy, or the impact of income averaging in the debt calculation process. However, the report was critical (though, at times, in euphemistic terms) of DHS’s use and management of data, including ATO data. There was “a lack of maturity in data capture and case selection and filtering, which presents a large opportunity for improvement.” DHS systems had limited ability to identify whether or not particular intervention targets were being achieved, and the information contained in DHS’s regular reporting with respect to the measures was described as “simplistic.”

The number of interventions that were initiated, but resulted in no debt (which was publicly referred to as the “error rate”, but vehemently defended by DHS as being part of the system functioning as intended), had increased from 20 per cent in 2016 to 24 per cent by March 2017. For interventions that did result in a debt, the value of that debt might be less than it had cost to identify and recover it; however, that could not be confirmed, because the data necessary to establish that was not captured or measured by the system.
The report noted that the underlying data used to identify discrepancies was collected by the ATO for purposes different to the purpose for which it was used by DHS.331 As a consequence, “the quality of data is not at the preferred level”, and there were limitations in using this data to identify discrepancies.332

Some of the report’s conclusions with respect to these aspects of the system were made in a context of the inadequacies in DHS’s use of the data to appropriately select and filter cases for compliance reviews, rather than a specific issue of debt accuracy in and of itself. However, it was still an unedifying reflection on both the system as it had operated under OCI, and the continuing problems with respect to data quality and management, despite the “fixes” that had been introduced under EIC.

Despite its delicate choice of language and focus on recommendations for short term improvements which could exist concurrently with a medium to long term redesign of the system, the report’s identification of the compliance program’s original design reflected extremely poorly on DHS. On one view, the report identified that the Scheme, as it had been designed and implemented, had failed. It had failed so badly that the only solution was to provide temporary, stop-gap solutions to allow it to limp along while a new program was being developed. It gave validity and credence to many of the public criticisms that had been made. DHS had requested an independent review of the Scheme. The report confirmed, in writing, that the Scheme as it existed was a failure.

In oral evidence, Mr McNamara accepted that had the report found its way into the public domain, it would have led to substantial adverse media publicity for DHS.333 With respect to this issue, he said “Well, I think at the time we were the story in the news. This would have just poured a whole heap of petrol on it.”334

**Human Services and the PwC report**

The Commission finds that, throughout PwC’s engagement with DHS, from February 2017 until the first week of June 2017, PwC employees were of the understanding that the report that they prepared over the course of the engagement was the deliverable component of the engagement described as a “report.” This was consistent with the evidence of each of Mr Weber, Mr Bowe, Mr van Hagen and Mr West.335

Moreover, throughout the engagement, there was a common understanding between DHS and PwC that PwC was preparing a report, which was separate from the presentation to the minister, and that report comprised the “report” deliverable component stated in the official order.

Mr Weber,336 Mr Bowe337 and Mr van Hagen338 were each of the understanding, or belief, that DHS was aware that PwC was preparing a report that was separate from the presentation to the minister. In contrast, Mr West gave evidence to the effect that he could not recall DHS ever having knowledge that PwC was preparing the detailed report that it had been drafting.339 However, Mr West later accepted, in submissions to the Commission, that even though it was not his specific recollection at the time of his giving oral evidence, it was likely that DHS was aware that PwC was preparing a draft report separate from the presentation, and in a more detailed format. That was a prudent and realistic concession.

The Commission rejects Mr West’s oral evidence and accepts the evidence of each of Mr Weber, Mr Bowe and Mr van Hagen, and Mr West’s updated position as stated in his submissions to the Commission.340 That is based on the following evidence:

- PwC undertook a considerable body of work was undertaken by PwC to prepare a report, as evidenced by the various drafts of it, the deliberations within PwC as to its contents, the number of PwC employees and partners involved in working on it341 and the value of the work.342 It is implausible that employees of a firm such as PwC, which was highly experienced in providing consultancy services to the Commonwealth Government, including DHS,343 acting under the supervision of its partners, would undertake such a considerable amount of work without there being a common understanding between PwC and DHS that the “report” was a separate document from the presentation to the minister and was to be in a form, and at a level of detail, at least similar to that of the drafts that were being prepared by PwC (even if its precise form was not entirely known to DHS).
• There were numerous meetings, workshops and consultation between PwC and DHS, and it is implausible that there would never have been a discussion, on at least some of those occasions, about the report, as distinct from the other work PwC was undertaking.

• The documentary evidence suggests there was a number of occasions where the report was discussed with DHS, including in circumstances where it was explicitly distinguished from the presentation to the minister. The internal PwC email dated 27 March 2017 referred to a discussion with DHS about the “final report” in which it was said that “[p]revious reports have focussed too much on high-level recommendations; they expect us to put some meat on the bones.”344 In a further internal PwC email on 28 March 2017, Mr van Hagen told Mr West about a conversation he had with Mr McNamara in which Mr McNamara had indicated that the secretary’s preference was for the “final report” to be in “Word” rather than in “PowerPoint.”345

• In a meeting on 7 April 2017,346 Mr van Hagen, who attended the meeting, distinguished between the “main discussion”, which centred around the presentation, and a discussion about the report, which was brief.347 As was reflected in notes that were taken at the meeting, a representative of DHS told PwC that the “report” should be called a “strategy and plan.”348 This is consistent with members of PwC subsequently referring to the draft report as the “not-report”, and variations on that theme,349 and the subsequent change to the naming convention for the draft report from “DHS BPI Final Report”350 to “DHS BPI Implementation Strategy.”351

• If there were any confusion or ambiguity within DHS about whether the PowerPoint presentation was the “report” that PwC was preparing pursuant to the engagement, that must have become apparent in discussions between PwC and DHS that occurred after the presentation had been provided to DHS on or around 12 May 2017.

• On 4 May, Mr van Hagen emailed the latest draft to Mr West, saying, “As discussed: if you’re comfortable with the current version it would be good to share a hard-copy version with Jason to give them an idea of the scope of the report and recommendations....”352

• On 16 May, Mr van Hagen set out a list of topics for Mr West to discuss with Mr McNamara the following day.353 That list included “the “report”, confirming that “he doesn’t expect anything before the 2nd of June.”354 It also included, as a separate and distinct bullet point topic, “The Minister’s presentation on Monday: no changes expected/logistics etc.”

It is likely that a conversation occurred at some time in May in which DHS and PwC agreed that PwC would provide the “DHS Implementation Strategy document” to DHS around 2 June. Mr Bowe said as much in an email he sent to Mr Weber on 30 May 2017, attaching the most recent version of the report for Mr Weber’s review.355 Mr Bowe confirmed that his reference to the “DHS Implementation Strategy document” was a reference to the report,356 which is also clear on the face of the email and its attachment.357 Mr Bowe also stated that the report was “intended by DHS to be marked as “PROTECTED/Sensitive: Cabinet.”

From the face of the email, it was clear that there had been agreement, at some earlier point in May, between PwC and DHS that an “implementation strategy document” would be provided to DHS around 2 June. Given Mr van Hagen’s suggestion, in his 16 May email, that this precise topic (of the “report” and the date of 2 June) be discussed with DHS on 17 May, it is more probable than not that this discussion took place then, and the agreement was reached to provide the document to DHS (by 2 June).

At that point in time, the document that was discussed could not have been the presentation. This is because, firstly, DHS already had the final version of the presentation to the minister, having received it on 12 May, and secondly, both DHS and PwC were aware that the presentation to the minister had been rescheduled for 22 May, which would have made a nonsense of agreeing to provide the PowerPoint presentation document by 2 June. That is consistent with the 16 May email listing the minister’s presentation, scheduled for “Monday” (that is, 22 May 2017), as a separate and distinct bullet point topic from that of the report.
Mr McNamara did not recall being shown a version of the report in hard copy, but said in oral evidence that he “[did] not dispute that [he] could have been shown something in hard copy.”358 Given the indication by PwC staff that they were going to do so, Mr van Hagen’s evidence as to this being a common practice,359 the subsequent email indicating agreement had been reached with DHS about the provision of the report by 2 June, and Mr McNamara’s acceptance that it could have occurred, the Commission finds that it is more probable than not that Mr McNamara was shown a hard copy of a draft version of the report.

Why the report was never received by Human Services

The report that had been prepared by PwC, which had been the product of 34 previous drafts and spanned almost 100 pages, was never formally received by DHS.

All of the PwC witnesses indicated that, at some point in early June, they formed an understanding that DHS considered that the presentation that had been prepared for the minister would satisfy the “report” deliverable for the engagement, and that PwC could proceed to issue a final invoice for the completion of the work under the engagement.

What is significant for this Commission is that what this indication meant, in effect, was that DHS communicated to PwC that the draft report was not to be finalised and provided to DHS.

Mr Bowe was asked by Senior Counsel Assisting whether, in circumstances where the final report had been worked on for months, and was in the very last stages of drafting, it was unusual that it not be provided. Mr Bowe replied, “I haven’t been involved in another project where that has occurred”, and said “I’m sure it was odd to me at the time, yes.”360

It is worth noting that Ms Campbell made the decision to engage PwC, initiated that engagement, and approved the engagement letter, which included specific reference to the production of a final report as a deliverable under that engagement. Ms Campbell was involved in monitoring the work of PwC, including in personally attending presentations and the presentation to the minister. A communication by DHS that the “report” deliverable component was no longer required, and that the presentation would instead suffice, either required, or amounted to, a variation of the official order.

The lack of contemporaneous records about how this aspect of the engagement came to an end is concerning. However, there is some evidence before the Commission as to what occurred. Mr Van Hagen gave evidence of a conversation with Mr West or Mr Bowe in which it was said that Mr Weber spoke to Ms Campbell and that “a report was not required.”361 Mr Bowe’s evidence was that he was informed that DHS did not require the report, and that he believed that it was either Mr Weber or Mr West who told him.362 He understood that the reason DHS did not require the report to be provided was because the Department was “keen to focus on the implementation of improvement initiatives and minimise media interest on the challenges of the previous system.”363 Mr Weber could not recall, but accepted that it was possible that the communication from DHS to PwC that a report was not required occurred between Ms Campbell and himself.364

The Commission finds that on or about 6 June 2017, Ms Campbell communicated to Mr Weber that the report was not to be finalised and provided to DHS. Despite the importance of that indication from DHS, it does not appear to have been documented at the time.

As detailed above, the report was far more extensive and critical of the Scheme’s failings than the PowerPoint presentation; it revealed that it would not deliver the projected budget savings, that it was producing a significant percentage of inaccurate debts, and, crucially, that the online process had been a failure.

The Commission concludes that Ms Campbell made the decision that it should not be finalised and delivered to DHS. The rational inference is that although the report was contracted for and all but finalised, Ms Campbell formed the view that its detail as to the deficiencies of the Scheme was damaging and that it would be better for the department’s reputation, and her own, if it were not produced.
5 Administrative Appeals Tribunal cases

5.1 Early reflections on the Administrative Appeals Tribunal cases

By 8 November 2016, lawyers at DHS had noted that the Administrative Appeals Tribunal (AAT) had “been more strident in its criticism [of PAYG debt cases] but this is limited to a few cases (which are unpublished)” and in particular that that “criticism... extends further to the debt raising processes associated with the PAYG program.” These observations were made by Ms Alice Linacre, General Counsel, FOI and Litigation Branch of DHS in the context of a report relating to the PAYG program and the response to it in the AAT. The effect of the report was that the AAT’s commentary “continues largely in the same vein” as the similar report which was circulated on 11 October 2016 report but with “more critical comment.”

Between November 2016 and January 2017, Mr Sparkes prepared a document which analysed AAT decisions in relation to the Scheme. The document purported to provide a legal analysis of relevant AAT decisions and of administrative law principles affecting the use of income averaging in the Scheme.

The document suggested that two past decisions of the AAT provided relevant guidance. However, at best, those decisions endorsed the use of income averaging in specific factual circumstances that involved:

- a social security payment type (age pension) where income averaging was permissible, or
- the social security recipient agreed for the purposes of the tribunal’s decision.

The document referred to criticism in a decision of the AAT of the use of income averaging. It contained the following analysis in response to this criticism:

The fundamental question that arises is whether the department is adhering to the principles of good administrative decision in the PAYG decision making: i.e. considering all legal requirements; considering all relevant matters; acting fairly (procedural fairness - hearing rule, bias rule and no-evidence rule); and taking into account any relevant policy.

The legislative requirements would include the principles of administration set out in section 8 of the Social Security (Administration) Act 1999 including the delivery of services in a cost-effective manner and minimising abuses.

Providing the customer with the opportunity to put his case complies with procedural fairness and the debt raising process is consistent with government policy around the PAYG project and, we understand, endorsed by DSS. To pursue every possible evidentiary trail would frustrate the policy objective and would be administratively burdensome.

The criticism levelled in the referenced decision is the comment of one lone tribunal member and is not repeated in the vast majority of decisions of the AAT. It is also a criticism that lacks balance by failing to take into account all of the principles of good decision making, in particular the underlying public policy and the statutory imperatives to deliver services in a cost-effective manner and minimising abuses.

Furthermore, it is noted that although the PAYG Program area has said that the PAYG Program is not under the provisions of the Data-Matching Program (Assistance and Tax) Act 1990 the process adopted would appear to be consistent with the requirements in that Act.
5.2 The 8 March 2017 decision, and decisions in 2016 and 2017

Indeed, there were a number of decisions of the AAT in 2016 and 2017 that set aside DHS decisions involving income averaging. As made clear in the 8 November 2016 report referred to above, some of those decisions were critical of income averaging and some found that the specific debts in issue which were raised by way of averaging were unlawful.

On 8 March 2017 in particular, the AAT made a significant decision relevant to Robodebts more generally. The 8 March 2017 decision concluded that the “methodology” of income averaging itself was unlawful. That decision contained a careful and considered analysis of relevant legislation and legal principle and unqualified directions prohibiting DHS from recalculating the social security recipient’s debt set aside in that case by the Tribunal with the use of income averaging.

Relevantly, the 8 March 2017 decision concluded that income averaging was unlawful because it provided an insufficient evidentiary basis for the calculation. As was said at [54]-[56] of that decision:

54. [There is]... 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 [raise a debt].

There was no appeal from the 8 March 2017 decision. As Ms Bundy (national manager of Appeals) accepted, so much is an admission of the correctness of the decision. Similarly, Mr Brazel (acting national manager/ general counsel, FOI & Litigation) agreed that the internal advice on further administrative review of the 8 March 2017 decision accepted that it was unlawful to calculate social security entitlements using averaging and that he did not disagree with the position communicated in it.

On 27 March 2017, Mr Brazel brought the 8 March 2017 decision to Ms Bundy’s attention in an email. Ms Bundy gave evidence that she knew it “needed to be looked at and considered in the light of all the other focus on the program” in the email Mr Brazel said:

I will look into where this is at. It was brought to my attention on Friday, but I have not escalated.

Ms Bundy responded:

We need to escalate this asap.

The 8 March 2017 decision was one of ten AAT decisions referred to in an email from Ms Bundy to Mr Brazel and Ms Musolino dated 19 April 2017 in which Ms Bundy said:

We are going to pull together the list of the 10 set aside decision relating to OCI. We need to have a better feedback loop with these I think where we aren’t appealing and how we are going to manage and then ensure feedback goes back down regarding decisions. If we aren’t appealing then we are accepting the decision is correct which means there is either new evidence (that’s ok) but if there has been something we should or shouldn’t have done along the way the ARO down we need to address.

In these circumstances, it may be inferred that it was obvious to Ms Bundy that the 8 March 2017 AAT decision and the others identified in the AAT OCI Case Summaries document were significant. One might expect that, consistently with her role as National Manager of the Appeals Branch, she would have read the 8 March 2017 decision and taken steps to understand its implications, including, if necessary, obtaining legal advice about whether it had significance for the lawfulness of debt decisions made under the Scheme. Ms
Bundy did not do those things.\textsuperscript{382} The Commission regards this as another instance of DHS officers failing to critically reflect on serious challenges to the fundamental underpinnings of the Scheme. This was a function of the culture within DHS which did not allow for those officers to undertake any such reflection.

Later in the day on 19 April 2017, Ms Bundy provided Ms Musolino with the AAT OCI Case Summaries document which set out some key Robodebt decisions set aside by the AAT and in particular those that “... raise the issue around [DHS] relying on averaging without obtaining other information.”\textsuperscript{383} That AAT OCI Case Summaries document was updated over time and provided again to Ms Musolino, including on 18 May 2017.\textsuperscript{384}

Accordingly, the Commission finds that Ms Musolino became aware of the 8 March 2017 decision by no later than 18 May 2017 when she received the further updated version of the AAT OCI Case Summaries document containing reference to it,\textsuperscript{385} which stated that there were no grounds for appeal of that decision.\textsuperscript{386}

The 8 March 2017 decision was significant, but so too was the AAT OCI Case Summaries document itself. It tracked AAT decisions adverse to the Scheme and was updated over time by DHS lawyers and circulated within that division. It made clear that decisions involving income averaging had been set aside by the AAT, including, that in some cases, the AAT held that income averaging was unlawful.\textsuperscript{387}

That document was as close as DHS came to having any method of systematic review of AAT cases. Two things ought to be said about that. First, the AAT OCI Case Summaries document was entirely inadequate for the task of monitoring AAT decisions, but the existence of it makes clear that there was at least some awareness and concern about the AAT criticism of debts raised by way of the Scheme. Second, the inadequacy of that document is symptomatic of the failure by DHS to put systems in place which would enable monitoring of the legal issues arising in the AAT. Those failures will be dealt with in more detail in the chapter – The Administrative Appeals Tribunal.

None of the AAT decisions identified in the AAT OCI Case Summaries document or otherwise contained any statement of legal principle or references to legislation justifying the use of income averaging in the absence of other evidence to support conclusions reached with the use of income averaging. That would have been obvious had there been a systematic process in place to monitor such decisions.

It was Ms Musolino’s responsibility to ensure that systems were put in place that would enable monitoring by the Legal Services Division of legal issues arising from AAT decisions so that DHS and DSS were properly advised about those issues. Ms Musolino accepts that she failed to do so.\textsuperscript{388}
6 2017 AIAL conference

By 20 June 2017, Ms Musolino was aware that she would be unable to attend the 2017 Australian Institute of Administrative Law annual conference at which a paper was to be delivered on the Scheme.393 As a consequence, Ms Musolino made a request for someone from the Legal Services Division to attend and “report back noting the sessions of particular interest to DHS.”394 By 10 July 2017, DHS had identified “potentially 8 lawyers going including 3 SES officers.”395 The attendance record indicates 9 attendees from DHS including three general counsel (Mr Stipnieks, Mr Ffrench and Mr Roser).392 There were no attendees from DSS.

At the AIAL conference, on 20 July 2017, Peter Hanks KC presented a paper about the Scheme.393 Mr Hanks is an eminent barrister with extensive expertise in administrative law.394 Mr Hanks argued in his presentation and his paper, later published, that the manner in which income averaging was used to calculate debts in the Scheme was unlawful.395 In both the paper and the presentation, Mr Hanks identified the “critical question” as whether DHS had DHS the “legal authority” to raise debts under the Scheme.396

That presentation, and the publication of the paper shortly after, ought to have been a further red flag for both DHS and DSS as to the legality of the Scheme. Little was done within DHS in response to it and there is no evidence that the conference or paper attracted any attention at all at DSS.

At DHS, Mr Stipnieks provided Ms Musolino with a summary of what Mr Hanks said in his presentation in a series of emails sent in real time during the delivery of the paper at the conference.397 Ms Musolino provided Ms Campbell and Mr Hutson a summary of what Mr Hanks had said, based on Mr Stipnieks’ summary, by email at 8:41 pm that evening.398 Ms Musolino’s email said that Mr Hanks’ “…speech was extremely critical of the OCI program” and summarised the key points made, including that “Someone should look to test the matter in the Federal Court” and “Raising of debts using averaging is not consistent with the terms of the social security law.”

Nonetheless, Ms Musolino said in her covering email to the secretary, “None of the criticisms are new, however noting that organisations such as ACOSS and Legal Aid were present, the comments may end up in a press release or in the media.” While those propositions were factually true, those words emphasised the possibility of negative publicity over the substance of the criticisms and the suggestion that they did not amount to anything “new” suggested that there was no necessity for the secretary to act responsively to them. Those words tended to diminish the significance of the arguments made by Mr Hanks.

Ms Campbell annotated, by hand, a printed copy of the summary email on 24 July 2017 with the words “Noted Thanks K Campbell 24 July 2017.”399 Ms Campbell’s office relayed to Ms Musolino by email that “the Secretary has noted this advice” sent at 5:36 pm on the same day. There is no evidence before the Commission that Ms Campbell read or even requested a copy of Mr Hanks’ paper delivered at the AIAL conference or took any steps in response to the summary email apart from “not[ing]” it.

The summary email contained nothing by way of rebuttal of the legal arguments Mr Hanks KC had presented. Given the serious repercussions for the government, DHS and vulnerable welfare recipients if those arguments were right and given that they were raised by a highly-qualified academic and an experienced legal practitioner in the field, Ms Campbell should, at a minimum, have requested a brief on the arguments raised, if not further work from the Legal Service Division and independent advice assessing the merit of them. Ms Campbell did not ask to see the paper. As it turned out, the arguments Mr Hanks raised were substantially correct, as ultimately demonstrated by the Solicitor-General’s advice and also foreshadowed by the Clayton Utz advice (described below) and the AGS draft advice in 2019.400 Had that work been done, it would probably have exposed the unlawfulness of the Scheme.

In submissions made by her solicitors, it was said that Ms Campbell had not actively chosen not to take further action in light of Mr Hanks’ criticisms; no such proposal was raised with her by the lawyers responsible for doing so. The Commission does not accept these submissions.

It is the apparent lack of interest by Ms Campbell in the arguments expressed by Mr Hanks that is of
concern. The obvious and appropriate response for a person in Ms Campbell’s position would be alarm upon being told about Mr Hanks’ arguments; arguments that a Scheme for which Ms Campbell was responsible was, in effect, unlawful. However, Ms Campbell made no request for advice, nor did she make any attempt to ensure that DHS was acting upon the criticisms.

Ms Campbell’s conduct is inexplicable except on the basis that she had an expectation that Mr Hanks’ arguments were properly made and that further work would have exposed the unlawfulness of the Scheme.

Ms Musolino read Mr Hanks’ paper in or about August 2017.401 There is no evidence before the Royal Commission that Ms Campbell read that paper or requested it. In any event, neither the presentation nor the publication of it resulted in DHS’s doing anything to address Mr Hanks’ criticisms. Ms Musolino took no steps to ensure that the merits of Mr Hanks’ arguments articulated at the AIAL presentation and in his paper were properly investigated. She neither instructed members of the Legal Services Division of DHS to do any work to investigate the merits of Mr Hanks’ arguments, nor did any further work in this respect herself.402

In evidence, Ms Musolino asserted that she had relied on Mr Stipnieks and others within the Legal Services Division of DHS, in order to justify her failure to properly advise the executives of DHS.403 However, that evidence is not supported by that of Mr Stipnieks who understood that the matter was under consideration by his team but did not recall anything coming out of that404 and denied ever forming a considered view as to whether or not averaging was lawful.405

A number of current and former DHS lawyers gave evidence before the Commission. All acknowledged the significant legal issue that Mr Hanks’ paper presented for DHS and the indisputable need for independent advice to be obtained.406

Mr Stipnieks’ evidence was that he expected that Ms Musolino would have had a “frank” conversation with Ms Campbell about the issues that Mr Hanks raised.407 He is right to have expected such an approach to the matter. However, no such conversation occurred. In the very least, the substance of the arguments raised by Mr Hanks ought to have been investigated and had that been done, the need to bring them to secretarial and ministerial attention would have been clear.

Ms Musolino’s duty as general counsel of DHS was to ensure that appropriate and documented legal advice was provided to DHS executives, including Ms Campbell and Ms Golightly. That advice would have been that the arguments articulated by Mr Hanks raised serious questions as to the legality of the Scheme and that external legal advice ought to be sought by DHS. The only rational explanation for Ms Musolino’s failure to give that advice is that she knew DHS executives, including Ms Campbell, did not want advice of that nature.

Mr Porter gave evidence that in his view the matter “ought to have been brought to at least Mr Tudge’s Secretary [at the time of the presentation] or even to [his own] attention.”408 Mr Tudge’s evidence was that consideration ought to have been given to raising the matter with him.409 It seems that both ministers accept that the matter was not properly dealt with. That is a symptom of DHS’s lack of engagement with the arguments raised and DSS’s apparent ignorance that they had even been made.
7 Transition to secretary Leon at Human Services

Ms Campbell was the secretary of DHS from March 2011 to 17 September 2017 and the secretary of DSS from 18 September 2017 to July 2021.\textsuperscript{410} Renee Leon was appointed secretary in September 2017 and commenced in that role in October 2018.\textsuperscript{411}

Ms Leon gave evidence that she was aware about the culture at DHS before she commenced in that role. In particular she stated:

I already knew something about the culture of the Department before I started, because one of my Deputy Secretaries at the Department of Employment had come to me in order to escape the culture in the Department of Human Services, which she described to me at the senior levels as very robust and challenging. And I understood that to mean from the description that she had of it that it was a culture in which there was a lot of aggression expressed at senior levels, where behaviour that I don’t think is appropriate was modelled and encouraged, such as yelling at people or publicly shaming them in front of others and allowing discussions to occur between senior colleagues that were about attributing blame rather than working together to solve problems.

When Ms Leon started at DHS she was briefed on the Scheme. Ms Leon’s evidence was that she was told two things: first, that averaging was a long-standing practice and second, that though there had been criticisms of the Scheme, they related to the roll out and customer experience, seemingly as distinct from its fundamental methodology.\textsuperscript{412}

Ms Leon’s appointment to the role as secretary of DHS represented the end of Ms Campbell’s tenure in that role. Ms Campbell had been responsible for a department that had established, implemented and maintained an unlawful program. When exposed to information that brought to light the illegality of income averaging, she did nothing of substance. When presented with opportunities to obtain advice on the lawfulness of that practice, she failed to act.
1 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 - Revised at [4.1] to [4.2].
2 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 - Revised at [4.4].
3 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 - Revised at [6.2].
4 Exhibit 3-3406A - RBD.9999.0001.0362_B - CFT Data Analysis (Updated).pdf
5 Exhibit 3-3356 - CTH.9999.0001.0102 - [Final] Services Australia - Response to NTG-0128 - Revised at [4.10].
6 Transcript, Christopher Birrer, 23 January 2023 [page 2194: line 5-14].
7 Transcript, Christopher Birrer, 23 January 2023 [page 2185: line 23-34].
8 Transcript, Christopher Birrer, 23 January 2023 [page 2200: line 5-40].
9 Transcript, Christopher Birrer, 23 January 2023 [page 2194: line 22-32].
10 Exhibit 8494 - CTH.9999.0001.0167 - [Services Australia] Supplementary Response to NTG-0128 (Complaints).pdf at [2.2].
11 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied), [para 40-43].
12 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied) [para 44].
13 Exhibit 2-1296 - CTH.1000.0006.8741_R - Section 8 Questions under IOIs 2016-400007 and 2016-600004 [SEC=UNCLASSIFIED].
14 Exhibit 2-1299 - CTH.1000.0006.9025_R - Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED]; Exhibit 2-1300 - CTH.1000.0006.9027_R - RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].
15 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied), para 34; Exhibit 2-1303 - CTH.1000.0007.4557_R - scannedscreen shots [SEC=UNCLASSIFIED]; Exhibit 2-1303 - CTH.1000.0007.4558_R - 21-03-2017_11-45-33.
16 Exhibit 4-7125 - LMA.9999.0001.0011_R - 20230228 - NTG-0006 MacLeod First Statement with Annexure and Document IDs (AGS review) (Redaction Applied) [para 38].
17 Exhibit 2-1305 - CTH.3001.0033.5489_R - IOI-2016-400007 - Ms Kathryn Campbell CSC; Exhibit 2-1306 - CTH.3502.0001.0948_R - a. EC17-00064 Att A; Exhibit 3-3603 - DSS.5113.0001.0054_R - IOI-2016-400007 - Mr Finn Prattt AO PSM; Exhibit 3-3604 - DSS.5113.0001.0055_R - IOI-2016-400007 - The Hon Christian Porter MP.
18 Exhibit 3-3596 - RHU.9999.0001.0003_R - NTG-0140 Hurman Updated Statement(46933793.1) [para 15].
19 Exhibit 4-1018 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuir(g) signed 22006293(4618006.1) [para 7]; Transcript, Robert Hurman, 25 January 2023 [p 2400: lines 19-22]; Transcript, Emma-Kate McGuir, 2 March 2023 [p 4244: lines 13-26].
20 Exhibit 3-3596 - RHU.9999.0001.0003_R - NTG-0140 Hurman Updated Statement(46933793.1) [para 21].
21 Exhibit 3-3590 - RDB.9999.0001.0003_R - NTG-0053 Revised statement of Mr de Burgh [para 13].
22 Exhibit 3-3600 - DSS.5051.0001.0001_R - Meeting between DSS and CO relating to Centrelink Debt Recovery Investigation [SEC=UNCLASSIFIED].
23 Exhibit 1-0002 - DSS.5006.0003.1833_R - Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain; Exhibit 3-3602 - DSS.5031.0001.0001_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
24 Exhibit 3-3602 - DSS.5031.0001.0001_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal].
25 Transcript, Emma-Kate McGuir, 2 March 2023 [p 4245: line 29].
27 Exhibit 4-6353 - DSS.5063.0001.0003_R - RE- Teleconference details [SEC=UNCLASSIFIED].
28 Exhibit 2-2105 - DSS.5023.0002.2163_R - Background to issue [DLM=Sensitive].
29 Exhibit 2-2106 - DSS.5023.0002.2164_R - 2.017011509547157+16; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuir (signed) 22006293(46180806.1), para 19.
30 Exhibit 4-6351 - DSS.5023.0002.2242_R - Sample Letters [DLM=For-Official-Use-Only]; Exhibit 4-6342 - DSS.5020.0001.0054_R - Letter - Initial Contact Letter (1).
31 Exhibit 2-2114 - MKL.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46933028.1), para 101 - 103; Exhibit 2-2116 - MKL.9999.0001.0005_R - 20221118 NTG-0090 Response (Kimber, M)(46473783.1), para 8-9; Transcript, Murray Kimber, 8 December 2022 [p 1418: lines 30-37].
32 Exhibit 4-5575; Exhibit 2-2104 - DSS.5023.0002.2174_R - RE- Background to issue [DLM=Sensitive].
33 Exhibit 2-2103 - DSS.5023.0002.2176_R - FW- DHS NPPs for inclusion in the 2015-16 PB Sub [DLM=For-Official-Use-Only].
34 Transcript, Cath Halbert, 9 December 2022 [p 1464: lines 29-34].
35 Exhibit 1-1217; Exhibit 2-2808 - CTH.3001.0033.3350_R - FW Response to DSS - Employment Income Compliance Process [DLM=Sensitive].
37 Exhibit 2-2717 - CTH.3001.0032.1109_R - FW- Averaging Income [DLM=For-Official-Use-Only].
38 Exhibit 4-6475 - CTH.2002.0005.4474_R - FW- Averaging Income [DLM=For-Official-Use-Only].
39 Exhibit 4-5661 (CHT.3002.0033.2103)
40 Exhibit 6353, DSS.5063.0001.0003_R.
41 Exhibit 1213 - SWI.9999.0001.0005_R, Statement of Serena Wilson 8 November 2022, para 43; Exhibit 5731 - SWI.9999.0001.0006_R, Statement of Serena Wilson, 21 February 2023, para 18.
42 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
43 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
44 Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings.
45 Transcript, Serena Wilson, 9 November 2022 [p 796: lines 35-37]; Transcript, Serena Wilson, 23 February 2023 [p 3669: lines 8-22]; Exhibit 4-5731 - SWI.9999.0001.0006_R - Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 22].
46 Transcript P-3671 lines 9 to 19.
47 Transcript P-800 lines 35 to 46.
48 Transcript P-805 lines 20 to 23.
49 Transcript, Paul McBride, 9 March 2023 [p 4844: line 23].
50 Transcript, Paul McBride, 9 March 2023 [p 4849: lines 13-15].
51 Transcript, Paul McBride, 9 March 2023 [p 4844: line 19].
52 Transcript, Paul McBride, 9 March 2023 [p 4847: line 29].
53 Exhibit 2-2072 - DSS.9999.0001.0025_R - 20221125 NTG-0092 Statement (Part 2) (Halbert, C)
54 Transcript, Cath Halbert, 9 December 2022 [p 1454: lines 18-21]; Transcript, Cath Halbert, 9 December 2022 [p 1455: lines 30-32].
55 Transcript, Cath Halbert, 9 December 2022 [p 1454: line 47].
56 Transcript, Cath Halbert, 9 December 2022 [p 1457: lines 15-24].
57 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 276: line 36]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4249: line 32 – p 4250: line 36].
58 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4249: line 30].
59 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 285: lines 1-4].
60 Transcript, Emma-Kate McGuirk, 2 November 2022 [p 284: lines 8-9]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4253: lines 11-26]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4265: lines 1-8].
61 Exhibit 4-6323 - EKM.9999.0001.0008_R - EMC.0000262238; Exhibit 4-6324 - EKM.9999.0001.0007 - EMC.000163237; Exhibit 4-6326 - CTH.3715.0001.0401 - Online Compliance Interventions Meeting Minutes 20042015; Exhibit 4-6327 - CTH.3002.0008.0165R - Online Compliance Intervention Meeting Draft Minutes Action Items 20 Apr 2015 [DLM=For-Official-Use-Only]; Exhibit 4-6328 - CTH.3002.0008.0166 - Online Compliance Interventions Action Item Register 20042015; Exhibit 4-6329 - CTH.3715.0001.0636_R - PAYG Pilot Stakeholder Meeting Minutes 21042015 v0 1; Exhibit 4-6330 - CTH.3023.0004.8451_R - PAYG Online Compliance Intervention Detailed Requirements Document - Signed.
62 Exhibit 4-5577 - CTH.3023.0021.7097_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6334 - CTH.3023.0004.6562_R - FW- Online Compliance- PAYG matching [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6376 - CTH.3023.0021.7101_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only].
63 Exhibit 4-6322 - CTH.3715.0001.4283_R - FW- Proposed PAYG process [DLM=For-Official-Use-Only]; Exhibit 4-6331 - CTH.3027.0004.9343_R - RE- Proposed PAYG process [DLM=For-Official-Use-Only].
64 Exhibit 4-6321 - EKM.9999.0001.0006_R - NTG-0112 - statement of Emma Kate McGuirk - 23 Feb 2023, para 20;
65 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4252: line 32].
66 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4257: lines 9-13].
67 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4257: lines 9-13].
68 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4260: lines 12-14].
69 Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4276: lines 34-38].
70 Exhibit 3-4854A - DSS.5001.0001.3994_R - MS16-000130 DHS Compliance Activity.
71 Exhibit 3-4854B - DSS.5001.0001.3994_R - MS16-000130 DHS Compliance Activity [p 1 of 10].
72 Exhibit 4-5697 - CTH.2004.0005.2164_R - FW- MS16-000130 - WIP version (2) (3) [SEC=UNCLASSIFIED]; Exhibit 4-5698 - CTH.2004.0005.2166_R - Covering email; Exhibit 4-5699 - CTH.2004.0005.2168_R - Min sub; Exhibit 4-5700 - CTH.2004.0005.2171 - Attachment A.
Exhibit 4-7942 - DSS.8500.0001.1186_R - FW- Information on DHS compliance - assurance for Minister Porter [DLM=For-Official-Use-Only]; Exhibit 4-7943 - DSS.8500.0001.1188 - DSS Response for Minister Porter; Exhibit 4-7937 - DSS.5105.0001.7121_R - RE- Follow up to MB15-000996 [SEC=UNCLASSIFIED]; Exhibit 4-7938 - DSS.5123.0001.0269_R - MS16-000130 - WIP version (2) (3) [SEC=UNCLASSIFIED]; Exhibit 4-7939 - DSS.5123.0001.0270_R - MS16-000130 - WIP version (2) (3).

Exhibit 8942; Exhibit 4-5639 - DSS.5023.0001.6194 - Minutes Payments Forum Meeting 31.

Exhibit 8945; Exhibit 4-5638 - CTH.3023.0003.5070_R - Digital Compliance Intervention_V1 2.

Transcript, Scott Britton, 23 February 2023 [P-3722: line 26 – P-3723: line2].

Transcript 8945; Exhibit 4-5638 - CTH.3023.0003.5070_R - Digital Compliance Intervention_V1 2.

Transcript, Serena Wilson, 23 February 2023 [P-3656 line 25 – P-3657 line 13].

Transcript P- 4835 lines 20 – 22; Transcript P-4261 lines 22, and 45 to 46.

Transcript P-4836 lines 27-30.

Transcript P-4836 lines 30-34.

Transcript P-4262 lines 5 to 6 and line 17.

P-4849 lines 4 to 15.

Transcript, Serena Wilson, 9 November 2022 [p 813: line 38]; Transcript, Emma-Kate McGuirk, 2 November 2022 [p 281: lines 17-29]; Transcript, Emma-Kate McGuirk, 2 March 2023 [p 3676: lines 1-6].

Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes, p .0032 (underlining in original); Transcript, Emma-Kate McGuirk, 2 November 2022 [p 278: lines 1-10, p 279: lines 4-15).

Transcript, Emma-Kate McGuirk, 2 March 2023 [p 3675: lines 34-46].

Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes [p 4].

Exhibit 1-0141 - DSS.5029.0001.0031 - Ombo meeting notes & Scott meeting notes [p 4].

Exhibit 4-5731 - SW.9999.0001.0006_R - Robodebt Royal Commission - Further Supplementary Statement of Serena Judith Wilson - 21 Feb 23 [para 23]; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20212021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 28].

Exhibit 1-0067 - APU.9999.0001.0001_R - 1002411563_1_20221021 Statement of Anne Pulford re NTG-028 [para 54-57].

Exhibit 1-0067 - APU.9999.0001.0001_R - 1002411563_1_20221021 Statement of Anne Pulford re NTG-028 [para 57].

Transcript, Emma-Kate McGuirk, 2 November 2022 [p 283: lines 18-20].

Transcript, Anne Pulford, 2 November 2022 [p 232: line 10].

Exhibit 1-0080 - DSS.8001.0001.0376_R - Smoothing income re debt calculation [DLM=Sensitive-Legal].

Transcript, Anne Pulford, 2 November 2022 [p 239: lines 41-44].

Exhibit 3-3611 - DSS.5113.0001.0206 - Pal input - Social Security Stream - Action Register week of 23 January ... (2).

Exhibit 3-3611 - DSS.5113.0001.0206 - Pal input - Social Security Stream - Action Register week of 23 January ... (2); Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4243: line 26 – p 4244: line 11).

Exhibit 3-3609 - DSS.5113.0001.0204_R - Pal input - Social Security Stream - Action Register [SEC=PROTECTED, DLM=Sensitive-Cabinet]; Exhibit 3-3611 - DSS.5113.0001.0206 - Pal input - Social Security Stream - Action Register week of 23 January ... (2); Transcript, Emma-Kate McGuirk, 2 March 2023 [p 4243: line 39 – p 4244: line 18]. Mr Knox was Acting Director (EL 2), Payment Integrity and Debt Strategy Section, Payments Policy Branch, Social Security Division in place of Mr Hurman who was on leave (see Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 38(b)]. His acting role involved coordination of meetings and collation of information (see Transcript, Serena Wilson, 23 February 2023 [p 3667: lines 32-45]).

Exhibit 4-6354 - CTH.3001.0033.4395_R - Walk through the New Online Compliance System [SEC=UNCLASSIFIED]; Exhibit 1-0138 - EKM.9999.0001.0002_R - 20221021 NTG-0027 Statement of Emma Kate McGuirk (signed) 22006293(46180806.1) [para 25-27]; Exhibit 1-0145 - DSS.5035.0001.0001 - Notes from 1501017 and 180117 meetings [p 3].

Transcript, Emma-Kate McGuirk, 2 November 2022 [p 282: lines 29-34].

Transcript, Emma-Kate McGuirk, 2 November 2022 [p 282: lines 29-34].
Exhibit Transcript, Anne Pulford, 2 November 2022 [p 247: line 4].

Exhibit Transcript, Anne Pulford, 2 November 2022 [p 247: line 24].


Exhibit 3-3636 - DSS.5018.0002.4233_R - RE: URGENT ACTION- Due Wednesday, 22 February 2017 - Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 3-4].

Exhibit 3-3636 - DSS.5018.0002.4233_R - RE: URGENT ACTION- Due Wednesday, 22 February 2017 - Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 2].

Exhibit 3-3636 - DSS.5018.0002.4233_R - RE: URGENT ACTION- Due Wednesday, 22 February 2017 - Request for meeting and-or documents [SEC=UNCLASSIFIED] [p 2].

Exhibit 3636, DSS.5018.0002.4233_R; Transcript P-2449 lines 4 to 6.

Exhibit 3637, DSS.5113.0001.0596_R; Exhibit 3613, DSS.5113.0001.0600_R; Exhibit 3638, DSS.5113.0001.0602_R.

Exhibit 82, DSS.8001.0001.3303_R.

Exhibit 1-0082 - DSS.8001.0001.3303_R - RE: URGENT ACTION- Due Wednesday, 22 February 2017 - Request for meeting and-or documents [SEC=UNCLASSIFIED].

Exhibit 2-1372 - DSS.5023.0002.2781_R - FW URGENT ACTION Due Wednesday, 22 February 2017 Request for meeting andor documents [SEC=UNCLASSIFIED].

Exhibit 2-1372 - DSS.5023.0002.2781_R - FW URGENT ACTION Due Wednesday, 22 February 2017 Request for meeting andor documents [SEC=UNCLASSIFIED].

Exhibit 3-3639 - DSS.5113.0001.0588_R - FW- URGENT ACTION- Due Wednesday, 22 February 2017 - Request for meeting and-or documents [SEC=UNCLASSIFIED].

Transcript, Robert Hurman, 25 January 2023 [p 2442: line 26 – p 2443: line 32].

Exhibit 2-1377 - DSS.5051.0001.0052_R - Ombudsman [SEC=UNCLASSIFIED]; Exhibit 2-1377 - DSS.5051.0001.0053 - 2.01702231441301e+16.

Exhibit 2-1379 - DSS.5051.0001.0072_R - RE Ombudsman [SEC=UNCLASSIFIED].

Exhibit 3-3642 - DSS.5051.0001.0068_R - Request for meeting and-or documents [SEC=UNCLASSIFIED]; Exhibit 2-1380 - DSS.5005.0001.0530_R - RE Request for meeting andor documents [SEC=UNCLASSIFIED].

Exhibit 3-3643 - DSS.5051.0001.0070 - Ombudsman's request for advice - 23 Feb 2017 - Cleared.

Transcript, Robert Hurman, 25 January 2023 [p 2432: line 45].

Transcript, Russell De Burgh, 25 January 2023 [p 2465: lines 41-44].

Transcript, Russell De Burgh, 25 January 2023 [p 2465: line 46 – p 2466: line 17].

Transcript, Russell De Burgh, 25 January 2023 [p 2466: lines 19-29].

Transcript, Serena Wilson, 23 February 2023 [p 3676: line 38 – p 3677: line 3].

Transcript, Serena Wilson, 23 February 2023 [p 3678: line 11].

Exhibit 3-3646 - DSS.5051.0001.0121_R - 0.6 Minister Brief#2.

Exhibit 3-3652 - DSS.5051.0001.0191_R - FW- Request for information-documents [SEC=UNCLASSIFIED].

136 Exhibit 1-0132 - CTH.3007.0020.0538_R - ADVISE- Issue relating to Recovery Fee and PAYG Online Intervention

Exhibit 1388, DSS.5051.0001.0146_R.

Exhibit 112, DSS.8001.0001.3405_R.

Exhibit 2-1395 - DSS.5005.0001.0534_R - Request for information-documents [SEC=UNCLASSIFIED].

Exhibit 4-5607; Exhibit 2-1396 - CTH.3023.0006.8897 - Combined 2014 and 2017 advice.

Exhibit 3647, DSS.5051.0001.0174_R; Exhibit 3648, DSS.5051.0001.0187; Exhibit 3646, DSS.5051.0001.0121_R.

Exhibit 1390, DSS.5026.0001.0004_R.

Exhibit 3657, DSS.5031.0001.0062_R; Exhibit 3658, DSS.5031.0001.0076.

Exhibit 2151A, DSS.5045.0001.0004_R.

Exhibit 1393, DSS.5023.0002.2547_R.

Exhibit 1393, DSS.5023.0002.2557; Exhibit 3663, DSS.5023.0002.2560_R; Exhibit 1395, DSS.5005.0001.0534_R.

Exhibit 1-1213 - SWI.9999.0001.0005_R - Supplementary statement for Serena Wilson (Final signed) [para 49].

Transcript P-2468 line 35 to P-2469 line 1.

Exhibit 2-1390 - DSS.5026.0001.0004_R - RE Request for information-documents [SEC=UNCLASSIFIED].


Transcript, Cath Halbert, 9 December 2022 [p 1469: line 9].

Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 9-10].

Transcript, Cath Halbert, 9 December 2022 [p 1469: line 5].

Transcript, Cath Halbert, 9 December 2022 [p 1469: lines 26-27].

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Transcript, Cath Halbert, 9 December 2022 [p 1452: lines 39-40].

Transcript, Cath Halbert, 9 December 2022 [p 1468: line 8].

Exhibit 3-3665 - DSS.5086.0001.1110_R - RE- Issue re brief [DLM=For-Official-Use-Only].

Exhibit 3-3668 - CTH.3827.0001.0909 - Combined 2014 and 2017 advice.

Exhibit 3-3665 - DSS.5086.0001.1110_R - RE- Issue re brief [DLM=For-Official-Use-Only].

Exhibit 4-5599; Exhibit 2-1402 - CTH.2004.0009.8539_R - FW- Issue re brief [DLM=For-Official-Use-Only].

Exhibit 1-0003; Exhibit 1-0090 - DSS.5006.0001.2713_R - [D17 226681] Legal to Emmakate - advice re using smoothed tax data as last resort to raise debt Advice please.

Transcript, Annette Musolin, 30 January 2023 [p 2670 – p 2671].

Transcript, Annette Musolin, 30 January 2023 [p 2621 – p 2622].

Exhibit 4-5615; Exhibit 2-1315 - CTH.1000.0006.9906_R - RE- Online compliance investigation - section 8 questions [SEC=UNCLASSIFIED].

By no later than 30 January 2017: Exhibit 2-1325 - CTH.3007.0004.4949_R - FW- Outline of OCI Own Motion investigation report (A444638) [DLM=For-Official-Use-Only].

Exhibit 3-3670 - DSS.5003.0001.0944_R - PR30003911_MMC17-004721 (NFA) - Online Compliance Intervention system - PM Brief - Letter to PM OCI; Exhibit 3-3671 - DSS.5003.0001.0945_R - MC17-004721 Letter to the Prime Minister.

Exhibit 4-7961 - DSS.8500.0001.1198_R - FW- Ombudsman draft report - opportunity to comment [SEC=UNCLASSIFIED]; Exhibit 4-7962 - DSS.8500.0001.1200_R - Appendix A and B; Exhibit 4-7963 - DSS.8500.0001.1215_R - 20170310 - s 8(b) letter to DSS (A480911); Exhibit 4-7964 - DSS.8500.0001.1217_R - Report-Centrelink’s automated debt raising and recovery-March 2017 (A447388).

This was a “set of online resources that [DSS]...maintained to assist decision-makers in [DHS]” and “the overarching authority...of translating both the Social Security Act and the Social Security Administration Act into a somewhat more accessible form” – See: Transcript, Serena Wilson, 9 November 2022 [p 760: lines 12-19].

Exhibit 4-7963 - DSS.8500.0001.1215_R - 20170310 - s 8(b) letter to DSS (A480911).


Report on DHS OCI system 30 March; Exhibit 3-3751 - DSS.5113.0001.0054_R - Draft report - DHS-Centrelink’s automated debt raising and recovery-28 Ma; Exhibit 3-3752 - DSS.5113.0001.0200_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2) [SEC=UNCLASSIFIED]; Exhibit 3-3753 - DSS.5113.0001.0201_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2); Exhibit 3-3754 - DSS.5113.0001.0473_R - FOR REF- COPIES OF DOCS- Secretary Minute - Response to Ombudsman Draft Report on DHS OCI System ... (2) [SEC=UNCLASSIFIED]; Exhibit 3-3755 - DSS.5113.0001.0474_R - TRACKED CHANGES DSS Draft Response to Ombudsman Draft Report on DHS OCI system 30 March 2017 (2); Exhibit 3-3756 - DSS.5113.0001.0477 - Clarifications to be provides to Ombudsman’s office.

Exhibit 3-3761 - DSS.5038.0001.0017_R - DSS Response to Ombudsman - DHS Online Compliance system.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

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Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.

Exhibit 3-3767 - DSS.5003.0001.0715_R - Updated DSS Response to Ombudsman’s Report on DHS OCI System.
info- Ministerial response - The Canberra Times (Noel Towell) - Senate Committee Report [DLM=For-Official-Use-Only]; Exhibit 9447 - CTH.3001.0047.3151 - 2017-06-21 - media release (update 5.40am) - DHS Senate Inquiry response + with MO.docx; Transcript, Jason McNamara, 5 December 2022 [p 1077: line 39, p 1078: line 40].

208 Exhibit 9487 - CTH.3004.0008.5297_R - Re: For clearance: Media enquiry - ABC (Ange Laviopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4440 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and ChristopherKnaus) - Online compliance [SEC=UNCLASSIFIED]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax media on 5 April 2018 quoted Hank Jongen as stating that the Ombudsman’s independent review found the online compliance system ‘met all legislative requirements and accurately calculated debts when the required information was entered’ and Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only].

209 Exhibit 3-4744 - CTH.3044.0003.7539 - 4.3 Ombudsman Report-Centrelinks automated debt raising and recovery system April 2017 [para 1.8.1-1.11].


211 Exhibit 9487 - CTH.3004.0008.5297_R - Re: For clearance: Media enquiry - ABC (Ange Laviopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4440 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and ChristopherKnaus) - Online compliance [SEC=UNCLASSIFIED]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only]. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax media on 5 April 2018 quoted Hank Jongen as stating that the Ombudsman’s independent review found the online compliance system ‘met all legislative requirements and accurately calculated debts when the required information was entered’ and Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only].

212 Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink’s automated debt raising and recovery system - April 2017 copy.


215 report.pdf

216 The Committee referred to this as “One Touch Payroll”, though it came to be implemented as Single Touch Payroll.

217 Exhibit 4-6724 - MTU.9999.0001.0001_R - SIGNED - Statement of The Hon Malcolm Bligh Turnbull AC - 20.02.2023 [p 10].

218 Exhibit 3-4699 - CTH.3051.0015.6301_R - RE- Process for constit inquiries - IMPORTANT [SEC=UNCLASSIFIED].

219 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

220 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

221 Exhibit 3-4701 - CTH.3094.0003.0072_R - DTA work on compliance project [DLM=For-Official-Use-Only].

222 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 32-33; Exhibit 8971 - DTA.0001.0004.7083 - 7 Feb 2017 - Employment income solution_V1.8.

224 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 33; Exhibit 8970 - DTA.0001.0004.7080_R - Fwd- Employment Income Confirmation [SEC=UNOFFICIAL].

225 DTA.9999.0001.0001_R, Statement of Lucy Poole dated 27 March 2023, [33]; DTA.0001.0005.5375_R, Exhibit 8972.

226 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1), para 33; Exhibit 8972 - DTA.0001.0005.5375_R - Re- Employment Income Confirmation [SEC=UNOFFICIAL].

227 Exhibit 8965 - DTA.9999.0001.0001_R - 20230327 DTA Statement (signed) 22006293(47541626.1) [p 10: para 51].

228 Exhibit 2-1796 - CTH.3001.0034.2245_R - RE- Data61 [DLM=For-Official-Use-Only].
Exhibit 2-1796 - CTH.3001.0034.2245_R - RE: Data61 [DLM=For-Official-Use-Only].

Exhibit 8584 - CSI.0001.0001.0056_R - Data61 - Contract - Consulting Services Agreement - 2017010187 - Department of Human Services - DHS - Review of algorithms - Chelle Nic Ragnhaill - R-9797-1 (1).

Exhibit 8583 - CSI.9999.0001.0002_R - NTG-0171 - Statement.

Exhibit 8585 - CSI.0001.0001.0695_R - Data61 DHS Draft Report 02022017.

Exhibit 8586 - CSI.0001.0001.1309_R - Final_OCI V4.03 20170210.

Exhibit 8583, CSI.9999.0001.0002_R [p .0002 .0001].

Exhibit 3-4762 - CTH.3004.0003.4471_R - FW- Data61 Observations [DLM=Sensitive] [p 1].

Exhibit 3-4762 - CTH.3004.0003.4471_R - FW- Data61 Observations [DLM=Sensitive] [p 1].

Exhibit 8583 - CSI.9999.0001.0002_R - NTG-0171 - Statement.

Exhibit 8590 - CSI.0001.0001.1174_R - Data Pack comments from DHS [SEC=UNCLASSIFIED].

Exhibit 8591 - CSI.0001.0001.1197_R - Re- draft email to matthew.

Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 15].

Exhibit 3-4769 - PWC.1007.0016.0005_R - Fwd- Business process improvement [SEC=UNCLASSIFIED]; Exhibit 3-3820 - PWC.1007.1001.0008_R - Business Process Improvement Proposal; Exhibit 2-1664 - PWC.1007.1001.0009_R - PwC - Centrelink business process improvement_final; Exhibit 3-3821 - PWC.1007.1001.0032_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3822 - PWC.1007.1001.0033_R - PwC - DHS compliance and fraud activities business process improvement_final_draft_KF; Exhibit 3-3823 - PWC.1007.1001.0045_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3824 - PWC.1007.1001.0047_R - PwC - Centrelink business process improvement_updated_draft_08022017; Exhibit 3-3825 - PWC.1007.1001.0057_R - RE- word version of draft proposal [SEC=UNCLASSIFIED]; Exhibit 3-3826 - PWC.1007.1001.0059_R - PwC - Centrelink business process improvement_updated_draft_08022017; Exhibit 3-3827 - PWC.1007.1001.0086_R - PwC proposal [SEC=UNCLASSIFIED]; Exhibit 3-3828 - PWC.1007.1001.0087_R - PwC - Centrelink business process improvement_final_10022017; Exhibit 3-3817 - PWC.9999.0001.0005_R - Supplementary Statement of S West Robodebt Scheme_final - 6 December 2022 [paras 1-19].

Exhibit 2-1638 - CTH.3001.0035.6372_R - Sec annot brief BPI CustComp 090217.

Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

Exhibit 2-1635 - PWC.1007.0001.0013_R - 1. 20170214 - DHS Business process improvement review - Work order.

Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170214 - DHS Business process improvement review - Engagement letter.

Exhibit 4-6616 - PWC.1007.1001.1076 - 170307 DHS BPI project - Project Plan - v1.0.

Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter [p 4].

Exhibit 3-3892 - PWC.1007.0004.3072 - DHS Legislative Review Work Plan.

Exhibit 9994 - PWC.1007.1003.3470 - Re: Top article The Guardian today - Centrelink inquiry told ‘income averaging’ creating incorrect welfare debts. PwC’s review of the online compliance program involved comparisons to the Manual Program, rather than what had been in place prior to the Scheme’s commencement.

Exhibit 9994 - PWC.1007.1003.3470 - Re: Top article The Guardian today - Centrelink inquiry told ‘income averaging’ creating incorrect welfare debts.

Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 3].

Exhibit 3-3872 - PWC.1007.0004.2601 - 170309 Overview of Hypotheses - DRAFT - v0.2 JP.

Exhibit 3-4771 - PWC.1007.0015.0007 - 170310 Meeting 22 Notes - Project Sponsor Update Meeting, Jason McNamara.

Exhibit 9995 - PWC.1007.1003.2466 - DHS

Exhibit 4-6765 - PWC.1007.1008.0516_R - Re- Conversation with Kristen tonight.

Exhibit 4-6765 - PWC.1007.1008.0516_R - Re- Conversation with Kristen tonight.

Exhibit 4-6618 - PWC.1007.1003.3123_R - Preparing for the report- next steps.

Exhibit 9133 - PWC.1007.1012.7189_R - DHS BPI Report Outline; Exhibit 9134 - PWC.1007.1012.7190 – 170316 DHS BPI Final Report v0.01_JP.docx.

Exhibit 4-6618 – PWC.1007.1003.3123_R – Preparing for the report- next steps.

Exhibit 4-6618 – PWC.1007.1003.3123_R – Preparing for the report- next steps.

Exhibit 4-6619 – PWC.1007.1008.0685_R – Word or Google Docs-.

Exhibit 4-6622 – CTH.3007.0005.3093_R – RE- Proposed SES engagement [SEC=UNCLASSIFIED].
264 Exhibit 3-3894 – PWC.1007.1003.3467_R – Documentation for tomorrow’s SES Workshops.

265 Exhibit 3-3895 – PWC.1007.1003.3468 – 170405 Insights from Current State Assessment – DRAFT – v0.2.

266 Exhibit 3-3896 – PWC.1007.1003.3469 – 170405 Priorities and Recommendations Overview – DRAFT – v0.2.

267 Exhibit 3-3890 – PWC.1007.1032.3444_R – DHS BPI update; Exhibit 9134 – PWC.1007.1012.7190 – 170316 DHS BPI Final Report v0.01_JP.docx.

268 Exhibit 4-6612 – FVH.9999.0001.0002_R – 20230223 – Statement of Frank van Hagen – 23 February 2023[61408577.1] [para 38].

269 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2.

270 Transcript, Frank van Hagen, 3 March 2023 [p 4345: line 19 – p 4347: line 13].

271 Transcript, Frank van Hagen, 3 March 2023 [p 4347: lines 15-19].

272 Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8].

273 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023[61408577.1] [para 16].

274 Exhibit 4-6624 - PWC.1007.1026.0468 - RAW notes from meetings with Malisa and Jason.

275 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [p 6: para 40]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023[61408577.1] [p 4: para 17].

276 Exhibit 4-6620 - PWC.1007.1003.3143_R - Draft Report outline; Exhibit 4-6621 - PWC.1007.1003.3144 - 170316 DHS BPI Final Report v0.01_JP; Exhibit 4-6620 - PWC.1007.1013.4707 - 170410 DHS BPI Final Report v0.03_JP.

277 Exhibit 4-6652 - PWC.1007.1013.8856 - 170420 DHS BPI Implementation Strategy v0.14_JP; Exhibit 4-6659 - PWC.1007.1003.3896 - 170502 DHS BPI Implementation Strategy v0.22.

278 Exhibit 4-6652 - PWC.1007.1013.6440_R - Budget measure issues; Exhibit 4-6651 - PWC.1007.1013.8855_R - DHS report (not report); Exhibit 4-6660 - PWC.1007.1003.4865_R - Talking points for meeting with Jason tomorrow; Exhibit 4-6662 - PWC.1007.1003.4993_R - DHS report.

279 Exhibit 4-6651 - PWC.1007.1013.8855_R - DHS report (not report); Exhibit 4-6652 - PWC.1007.1013.8856 - 170420 DHS BPI Implementation Strategy v0.14_JP.

280 Exhibit 3-4622 - ATU.9999.0001.0048_R - The Hon Alan Tudge MP - Statement of Hon Alan Tudge MP [20 January 2023 - Replacement] [REDACTED] [p 24: paras 110 – 111].

281 Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023[61408577.1] [para 16].

282 Exhibit 4-6625 - PWC.1007.1013.4901_R - Wednesday presentation.


284 Exhibit 4-6629 - PWC.1007.1013.4706_R - Draft DHS report for review.

285 Exhibit 9182 - PWC.1007.1013.6226_R - Re: For your review: final draft presentation.

286 Exhibit 4-6639 - PWC.1007.1013.6883_R - Updated Draft Presentation; Exhibit 4-6641 - PWC.1007.1013.7052_R - Re: Updated presentation; Exhibit 4-6645 - PWC.1007.1013.7098_R - Re: Revised presentation for your review.

287 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [para 65, 71]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023[61408577.1] [para 44]; Exhibit 4-6650 - PWC.1007.1003.3723_R - DHS robo.

288 Exhibit 4-6646 - PWC.1007.1013.7802_R - Re: revised slides and notes for Malisa [SEC=UNCLASSIFIED].

289 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2.

290 Exhibit 3-3896 - PWC.1007.1003.3469 - 170405 Priorities and Recommendations Overview - DRAFT - v0.2.

291 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Bowe dated 22 February 2023 [paras 59, 61, 65-66].

292 Exhibit 4-6656 - PWC.1007.0002.0038_R - 1. 20170428_Invoice37033779_DHS.

293 Exhibit 4-6657 - PWC.1007.1003.3866_R - Re: Catch up prior to pipeline RE: DHS.

294 The word ‘orientation’ is used in the email. Mr. Weber clarified in his statement to the Commission that this was a typographical error, and that the correct word was ‘presentation’. See Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T. Weber – Statement [para 103].

295 Exhibit 4-6657 - PWC.1007.1003.3866_R - Re: Catch up prior to pipeline RE: DHS.

296 Exhibit 9289 - PWC.1007.1001.1643 - 9.30am Kathryn/Malisa/Jason/Minister/MO Staff/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED]; Exhibit 9999 - PWC.1007.1001.1646 - 10.00am Kathryn/Malisa/Jason/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED].

297 Exhibit 9289 - PWC.1007.1001.1643 - 9.30am Kathryn/Malisa/Jason/Minister/MO Staff/PwC Officials re: compliance process improvement review [SEC=UNCLASSIFIED]; Exhibit 9293 - PWC.1007.1014.6101_R - Re: Meeting with the Secretary tomorrow.

298 The presentation was emailed to DHS on 11 May 2017 [see: Exhibit 9998 - PWC.1007.1001.1648 - Re: could you send me a non-pdf version of the slide deck [SEC=UNCLASSIFIED] but did not reach DHS that day because of
an email issue. It was re-sent and reached DHS on 12 May 2017 [see: Exhibit 9294 - PWC.1007.1001.1650, Re: An email message with encrypted content has been quarantined; Exhibit 9295 - PWC.1007.1001.1652 170511 Presentation on Implementation Strategy - DRAFT.pptx; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023[61408577.1] [para 99].


300 Exhibit 4-6789 - JMN.9999.0001.0013_R - 20230214 Second Statement of Jason McNamara (NTG-0181), para 33(f), Annexure A; Exhibit 2-1625 - CTH.4700.0001.2303_R - MB17-489 Minister signed brief; Exhibit 3-4773 - PWC.1007.1003.5348 - 170509 Presentation on Implementation Strategy - DRAFT - v1.41.

301 Exhibit 3-3900 - PWC.1007.1003.4116_R - Draft Implementation Strategy; Exhibit 3-3901 - PWC.1007.1003.4117 - 170504 DHS Integrity Modernisation Implementation Strategy - DRAFT - v0.25.

302 Exhibit 3-3900 - PWC.1007.1003.4116_R - Draft Implementation Strategy; Exhibit 3-3901 - PWC.1007.1003.4117 - 170504 DHS Integrity Modernisation Implementation Strategy - DRAFT - v0.25.

303 Transcript, Frank van Hagen, 3 March 2023 [p 4356: lines 4-10].

304 Exhibit 9307 - PWC.1007.1008.1392 - Fw: Invoice.

305 Exhibit 4-6664 - PWC.1007.1003.5483_R - DHS update.

306 Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Rowe dated 22 February 2023 [para 49].

307 Exhibit 4-6665 - PWC.1007.1001.1825_R - Pwc Invoice; Exhibit 4-6666 - PWC.1007.1001.1826_R - Tax Invoice Number AT37047704_DHS_20170607.

308 Exhibit 4-6655 - PWC.1007.0002.0038_R - 1. 20170428_Invoice37033779_DHS; Exhibit 4-6666 - PWC.1007.1001.1826_R - Tax Invoice Number AT37047704_DHS_20170607.

309 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 60-61]; Exhibit 4-6612 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 65]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Rowe dated 22 February 2023 [para 88].

310 Exhibit 4-6662 - FVH.9999.0001.0002_R - 20230223 - Statement of Frank van Hagen - 23 February 2023(61408577.1) [para 66]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Rowe dated 22 February 2023 [para 89].

311 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 46]; Exhibit 4-6614 - TBO.9999.0001.0001_R - RC - Statement of Thai Rowe dated 22 February 2023 [para 19-21].

312 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

313 Exhibit 2-1634 - PWC.1007.0001.0001_R - 1. 20170213 - DHS Business process improvement review - Engagement letter.

314 Exhibit 4-6610 - TWE.9999.0001.0002_R - 20230223 T Weber – Statement [para 37].

315 The presentation referred to the need for the implementation approach to “be adjusted to enhance the current solution”, “further enhancements to the online solution and supporting data analytics capability” and “improvements required to address issues with: use of data; customer experience; and service capacity.” The word “redesign” is not used in the presentation.

316 Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8].

317 Transcript, Frank van Hagen, 3 March 2023 [p 4347: lines 15-19].

318 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 55-56].

319 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 54].

320 PWC.1007.1003.5090_R, Exhibit 4775, at .5107.

321 PWC.1007.1003.5090_R, Exhibit 4775, at .5106.

322 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

323 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

324 PWC.1007.1003.5090_R, Exhibit 4775, at .5121.

325 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 19].

326 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 19].

327 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

328 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0 [p 23].

329 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy -
Transcript, Annette Musolino, 1 March 2023 [p 4152].
Transcript, Annette Musolino, 1 March 2023 [p 4156 – p 4158].
Transcript, Annette Musolino, 1 March 2023 [p 4152: lines 15-45].
Transcript, Maris Stipnieks, 3 February 2023 [p 3235: lines 20-30].
Transcript, Maris Stipnieks, 3 February 2023 [p 3205 – p 3206, p 3229].
Transcript, Matthew Roser, 21 February 2023 [p 3466: lines 35-45]; Transcript, Maris Stipnieks, 3 February 2023 [p 3228: lines 19 – 45, p 3230: line 41, p 3233: line 35]; Transcript, Tim Ffrench, 22 February 2023 [p 3496: line 18, p 3499: line 34]; Transcript, Anna Fredericks, 27 January 2023 [p 2510: line 18, p 2517]. See also 19 July 2017 Programme Advice & Privacy Branch Weekly Report which included the following dot point: “Consideration of OCI related issues following AIAL conference where legislative authority for debt recovery was question in main conference lecture by Peter Hanks QC.”: Exhibit 3-5099 - CTH.3024.0008.8331_R - Weekly Dot Points 26.7.17. Mr Stipnieks gave evidence that his Centrelink Team including John Barnett and Matt Daly were again considering the issue following attendance at the AIAL conference: Transcript, Maris Stipnieks, 3 February 2023 [p 3234 – p 3235]. See also Transcript, Jonathan Hutson, 6 December 2022 [p 1226: lines 11-16].
Transcript, Maris Stipnieks, 3 February 2023 [p 3232: line 40, p 3232: line 10].
Transcript, Christian Porter, 2 February 2023 [p 3099: lines 1-20].
Transcript, Alan Tudge, 1 February 2023 [p 2900 – p 2904].
Exhibit 4-6874 - KCA.9999.0001.0021_R - 20221118 NTG-0043 Statement of K Campbell, para 18; Transcript, Kathryn Campbell, 11 November 2022 [p 963: line 4-7].
Transcript, Renee Leon, 28 February 2023 [p 3994].
Transcript, Renee Leon, 28 February 2023 [p 4001]. See also Exhibit 4-6213 - CTH.3003.0001.0009_R - Incoming Secretary Brief FINAL.
Chapter 8:
2018 – the Robodebt Scheme rolls on
1  The Robodebt Scheme rolls on

In 2018 the Robodebt Scheme continued to fail to meet its proponents’ expectations. The notion of an online system had failed; for the 2017-2018 financial year, when the Employment Income Confirmation (EIC) iteration of the scheme was in place, 93 per cent of PAYG reviews involved staff-assisted completion. The consequence was that DHS had been forced to engage 580 temporary workers on six-month contracts and from the beginning of 2018 resorted to using a labour hire force of some 1000 workers. Meanwhile, the Scheme continued to be the subject of controversy about the accuracy of its debts and the legality of income averaging and DHS continued to rely on statements in the Ombudsman’s 2017 Investigation Report as justification on both counts.
2 Michael Keenan becomes Minister for Human Services

Onto the scene came a new Minister for Human Services, the Hon Michael Keenan, who was appointed on 21 December 2017. As minister, Mr Keenan was responsible for all aspects of the implementation of the Robodebt Scheme during his tenure, including the lawfulness of the actions taken by his Department under the Scheme.

DHS briefed its new minister with an “Incoming Minister Brief,” which included income compliance matters. Notably, the Incoming Minister Brief contained this information about Robodebt:

Data-matching, sending letters and calculating differences in income and payments has been at the core of the department’s welfare compliance activities since the 1990s. In 2016–17 the department introduced an online compliance portal... The portal did not change how data-matching was undertaken or the way income was assessed and differences calculated. However, the initial rollout impacted many thousands of individuals and gave rise to unprecedented media attention, sustained political commentary and community backlash. In hindsight, this is something the department could have anticipated and mitigated to some extent.

The department responded by introducing a range of enhancements to the portal in line with recommendations from the Commonwealth Ombudsman. The Ombudsman did, however, find that the system could accurately calculate debts, providing assurance that debt calculations were consistent with the previous manual process. Throughout this period the Government remained firm that people should get the correct welfare payments and that debts should be repaid...

The reference to the Commonwealth Ombudsman’s findings was in fact a misquoting of a passage from the Ombudsman’s report about his investigation into the Robodebt Scheme (the 2017 Investigation Report) in which he made a number of recommendations designed to improve the OCI iteration of the Scheme. The Executive Summary to the 2017 Investigation Report said:

...We examined the accuracy of debts raised under the OCI. We are satisfied the data matching process itself is unchanged. The number of instances where no debts were raised following contact with a customer (approximately 20 per cent) was consistent with DHS’ previous manual debt investigation process. This figure has been incorrectly referred to as an ‘error’ rate. We are also satisfied that if the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter, the OCI can accurately calculate the debt. After examination of the business rules underpinning the system, we are satisfied the debts raised by the OCI are accurate, based on the information which is available to DHS at the time the decision is made. However, if the information available to DHS is incomplete, the debt amount may be affected...

Mr Keenan was provided with the Executive Summary of the 2017 Investigation Report in a briefing pack for January meetings with the secretary and deputy secretaries of his department. In evidence, Mr Keenan confirmed that he “would have read the Ombudsman’s report;” indeed, he said that he had placed reliance on it.

If he had considered the Ombudsman’s report closely, Mr Keenan would have seen that it did not at all say what was attributed to it in the Incoming Minister Brief. The Ombudsman’s benign assertion that the OCI could accurately determine debts was wholly contingent upon the recipient’s being able to obtain the necessary employment income information and upload it to the system. The Ombudsman gave no basis for assurance that the debt calculation process was consistent with the previous manual process. Indeed, he expressly recognised that “if the information available to DHS is incomplete, the debt amount may be affected...” In any case, the assertion in the Incoming Minister’s Brief that “debt calculations [under what was now the EIC program] were consistent with previous manual processes” said nothing about the accuracy (or lawfulness) of debts raised under the Scheme. The Ombudsman certainly did not express any state of satisfaction that the use of averaging was an accurate indicator of overpayments or that it was lawful.
The Incoming Minister Brief was not the only information Mr Keenan received on his commencement in the role. In evidence, he described being advised by Craig Storen (General Manager, Customer Compliance at DHS) at an initial briefing in early January 2018 that the legal position in relation to the Scheme was “sound.” Mr Storen was not a lawyer.

Though the Incoming Minister Brief alluded to “unprecedented media attention, sustained political commentary and community backlash,” it did not give any detail of the substance of the criticisms directed at the Scheme. Nor does it appear that anyone from his department gave Mr Keenan a frank appraisal of the issues being raised about it, particularly the live controversy about the use of averaging to determine social security entitlement and its lawfulness. Mr Keenan’s briefing did nothing to equip him to respond adequately to the further scrutiny and questioning of the Scheme by the public, advocacy groups, media, politicians and academics which continued through early 2018 and beyond.

2.1 ACOSS raises concerns with Mr Keenan

That questioning began quite early in the minister’s tenure. On 12 February 2018, Mr Keenan met with Dr Cassandra Goldie and Charmaine Crowe from the Australian Council of Social Services (ACOSS). The first item on the agenda for that meeting was “The Department of Human Services’ work in the area of debt recovery, including the Online Compliance Intervention program.” The agenda noted ACOSS’s priority for debt recovery to be fair and pointed out that the OCI system (more accurately, the EIC) was still causing distress among those it affected. The agenda expressed ACOSS’ ambition: “We and other experts in social security are keen to work with government to develop a system of debt recovery that is accurate and humane.” The meeting was not documented at the time, although Ms Crowe made an email note afterwards that “taskforce integrity, narrative around Centrelink debt, and ACOSS’ work with DHS” were discussed. Ms Crowe noted that the minister’s office had not provided data on welfare debt as promised, although she had followed up.10
3 The introduction of labour hire workers

During the Scheme, DHS increased its reliance on employing short-term contract (“non-ongoing”) employees and in 2018 began using the services of labour hire companies to fill staffing shortfalls. Renée Leon, Secretary of DHS from September 2017, explained that the government was forced to abandon the idea that almost all the reviews in the Robodebt reviews would take place online, and had instead to put in place capacity for recipients to call and speak to a staff member.

At the same time, the government did not want to increase APS numbers for this role, so the work of departmental staff was to be undertaken by labour hire, referred to in some documentation as the “C1000” (1,000 labour hire workers).

Mr Keenan was the Minister for Human Services when labour hire staff were brought into the department to do the work of compliance officers, but he was not aware of any associated problems. The department’s secretary, Ms Leon, however, gave evidence of the difficulties associated with the introduction of labour hire staff. They needed training and skill development, and they were not as expert at the beginning of their roles as permanent staff. There was higher turnover among labour hire staff, because they did not have job security. Ms Leon agreed that they were unlikely, for the same reason, to feel as committed to the work as DHS employees. They would not have the “loyalty and adherence to mission” of the permanent workforce: the culture of customer service and motivation built up over time. And of course, they were much less likely to raise concerns “because if they were in any way seen as difficult, then they could just not be given more shifts.”

Another point Ms Leon did not make, but might have, is that labour hire employees are not bound by the APS Code of Conduct.
4 Happy days

In January 2018, Mr Bowe of PwC sent an internal email setting out “DHS Robo-debt stats” for the first half of the 2017-18 financial year. It was apparent that the Scheme was continuing to struggle in its achievement of both review volumes and debt amounts. Mr Bowe set out what would be necessary in order to achieve the revised volumes to which DHS had committed over the next six months, which involved completion of significantly more reviews, and raising of significantly more debt, than had been achieved in the previous six months. Mr Weber replied to Mr Bowe, thanking him for the “sobering update.”

It appeared that the significant focus on remediation of the technology and processes was failing to deliver even the revised savings targets and review volumes. Attention turned to other avenues as a potential means of improving the situation. In early 2018, in discussions with Mr West, DHS expressed an interest in PwC’s ability to assist DHS with “impro[v]ing] the productivity of DHS compliance officers” and addressing the “challenges” faced by DHS in expanding its compliance workforce. DHS subsequently engaged PwC to assist with “workforce optimisation and performance.” That involved assessment of the current and future requirements of the compliance division’s staffing arrangements, including labour hire workers, and the development of strategies and training packages with respect to staff.

PwC produced a “Perform diagnostic” document, which identified DHS’ need to complete three million reviews, over the next four years. It noted that “work to improve technology and processes is ongoing, but broader solutions to uplift people productivity are needed.” The document stated that DHS was intending to hire a significant number of additional staff, which would “doubl[e] the size of the operation in a very short space of time.”

PwC’s suggested solution for DHS was the use of PwC’s “Perform” methodology, to “uplift” productivity and increase the finalisation of compliance reviews.

In April 2018, DHS engaged PwC to implement a pilot program using that methodology. Throughout 2018, PwC assisted in the redesign and management of the compliance program, which included income compliance reviews, and was now under the responsibility of the “Integrity Modernisation” Division of DHS.

The work undertaken by PwC included the development of materials such as process maps and ICT documents, and of detailed case selection and filtering methodologies to allow DHS to selectively initiate compliance reviews in line with the strategies that had been developed with the assistance of PwC. PwC also provided financial analysis support to DHS as part of DHS’s “redefinition” of the Budget measures and the revision of anticipated savings, (discussed in further detail in a separate section of this report).

PwC continued to “provide advice, analysis and recommendations” with respect to numerous aspects of DHS’s compliance activities, including: management of design, implementation and governance arrangements; case selection methodologies, strategies and initiations; forecasting and review of assumptions underpinning Budget compliance measures; establishment of the Confirm and Update Past Income (CUPI) iteration of the program; and the development of data sources and management dashboards for the senior executive of DHS. It was largely as Mr Weber had predicted in an email to Mr West in April 2017, where he had indicated that the PwC budget would not be a problem: “We will be there for the next 3 years and will actually take on the outsource of the data analytics functions...Happy days.”
5 Interest charges

Another 2018 development in the Scheme was the expansion of the scope of interest charges on debts raised under the Scheme. Again, it was something which had been decided on before Mr Keenan commenced as Minister for Human Services. In the 2015-16 MYEFO, the Government had decided to apply interest charges (which had previously applied to some recipients of student payments) to social welfare recipients to encourage them to pay their debts or enter repayment arrangements. But Mr Keenan was involved in decisions about the process. He was provided with a brief dated 12 February 2018, which explained that there were two stages which would be implemented in relation to former welfare recipients whose debts were raised after the measure was introduced. In the first stage, they would get a letter telling them that a debt had been raised with an interest warning; and if, 28 days later, they had not started complying with an arrangement for repayment, an interest charge would be applied to the debt. In the second stage, anyone who ceased repaying their debt would have an interest charge letter sent and after 28 days the charge would be applied.

The remaining question was what was to be done about people who had debts before the measure was introduced and who might have no current contact details. The minister was given three options, two of which involved more complicated processes for ensuring people were contacted, but adopted a third option. That was simply to use the Department’s contact address to send the interest charge letter and apply the charge if no repayment arrangement was entered, while allowing for a reversal of the decision if it turned out the contact address was wrong. The minister seems to have been unconcerned by the scope for error, issuing a media release titled “Repay debts or face interest charges.” It took a strong and censorious tone towards those affected by the measure, making no exceptions:

All those being contacted no longer receive a benefit, but previously received payments they were not entitled to and have made no effort—in some cases for over a decade—to repay what they owe.

To make it clear what type of people the Commonwealth was dealing with here, it continued:

Some cases involve serious criminality including one person who deliberately defrauded $800,000 from the Commonwealth and is still refusing to enter into a repayment plan.

That was to be contrasted with

the tens of thousands of former welfare recipients who are doing the right thing by repaying what they owe [who] will not have to pay interest.

It does not appear, though, that the minister, or anyone in his department, turned their mind to whether the Commonwealth was doing the right thing (or even the legal thing) by demanding payment of the debts in the first place.
6 Scheme extends in time

Despite controversy about its fairness and legality as well as its failure to turn the expected savings, the government pressed ahead with the Scheme in the May 2018 Budget, which introduced the “Social Welfare Debt Recovery” measure. It extended the scheme for the 2019-20 financial year and the two financial years following. In addition, from 1 July 2019, DHS would focus its debt recovery activities on former recipients with high value debts where they were either not in a payment arrangement or were in one, but could pay more.
7 Departure prohibition orders

On 29 June 2018, Mr Keenan approved a proposal to enable the imposition of departure prohibition orders on individuals with debts raised under the Scheme, saying, in giving his approval, “We can go harder with this measure.” As the name suggests, a departure prohibition order prevents an individual against whom it is made from leaving the country. The object was, by placing pressure on those who might be affected, to make them enter debt repayment arrangements. Mr Keenan set the tone in the first sentence of his media release:

Welfare debt dodgers are being warned they could be hit with international travel bans as part of a new push to recover hundreds of millions of dollars owed to taxpayers.

The media release continued on the same note:

...no apologies for the tough action... many of those in our sights have known about these debts for years... The simplest way to avoid having your travel plans disrupted is to contact the Department immediately to arrange a repayment plan.29

The threat was an effective one, as some of the experiences described in the chapter Effects of Robodebt on individuals, illustrate. The prospect of departure prohibition orders added another layer of punitiveness to the Scheme.
8 Update to the penalty fee application

In October 2018, the Ombudsman commenced an implementation investigation into the extent to which the recommendations contained in the 2017 Ombudsman’s report had been implemented by DHS, and the extent to which the intended outcomes had been achieved. As part of that investigation, the Ombudsman’s office sought a detailed update from the Department about the application of the 10% penalty fee.

The percentage of debts to which the fee had been applied had reduced since its peak at 74% in early 2017, to approximately 37% in the period from February 2017 to October 2018. However, the Department acknowledged, upon questioning by the Ombudsman, that the reduction could have occurred partly due to the Department’s not beginning to process reviews in the “due date processing pool” until May 2018.

The due date processing pool was a reference to a cohort of recipients who received an initial letter some time since February 2017, and: had not contacted the Department, or had contacted but had not finished the process; had reached the due date for the finalisation of their review; but the review had not yet been finalised by the Department.

The fact that the Department had not begun processing that cohort of recipients until May 2018 meant that prior to that date, the majority of reviews that were being finalised involved recipients who had responded to or communicated with the Department about their review, and no penalty fee was being applied in those circumstances. As the Department worked through finalising the outstanding reviews in the due date processing pool, it was likely that there would be a significant proportion of recipients in that pool who would not engage, and would subsequently have a penalty fee imposed upon them if their review resulted in a debt. As recognised by the Ombudsman, and the Department, that would likely have the effect of increasing the percentage application of the penalty fee.

In its final Implementation Report (published in April 2019, and discussed further below), the Ombudsman found that its 2017 recovery fee recommendation had been met, because “customers were provided access to review of recovery fees.” DHS had written to all recipients who had incurred a debt between 1 July 2016 and 26 May 2017, who did not already have the debt reassessed or waived. The letter had advised that recipients could ask for a review, and that a review would “also check whether any recovery fees [could] be removed.”

However, the Ombudsman considered that DHS’ approach to the implementation of the recommendation had been “narrower than [the Ombudsman’s] original recommendation had envisaged.” This was because recipients who had been affected had had to proactively ask for a review when they made contact in order for the penalty fee to be reassessed. In the Ombudsman’s view, it would have been preferable for the review rights letter to have included more information about the reasons the recovery fee was applied. The Ombudsman recommended that, for recipients who incurred a recovery fee prior to 27 May 2017, DHS should explain in any debt recovery correspondence (such as account payable notices and debt outcome letters) why a recovery fee was applied, and provide options for recipients to advise of personal circumstances affecting their ability to declare income.

A declaration made by the Federal Court in the Amato proceeding would spell the end of the application of the penalty fee under the Robodebt Scheme. (That proceeding is discussed in further detail below.) Throughout the life of the Scheme, its euphemistic description as a “recovery” fee did nothing to ease the additional burden that the penalty fee’s imposition represented to many of those who could least afford it.
Throughout 2018, Professor Terry Carney continued in different ways to oblige DHS to consider (and dodge) the question of legality.

On 7 September 2017, Professor Carney had made a decision in the AAT on similar reasoning to that of his 8 March 2017 decision, setting aside a debt based on income averaging for want of an evidentiary basis. The social security recipient who was successful in that case sought compensation for his “time, costs and stress caused by the debt decisions” which the AAT had overturned. Annette Musolino sent Ms Leon an email about the case on 26 February 2018, noting that it contained comments critical of the OCI process. She also warned that it might attract media attention; the recipient had said that *A Current Affair* was interested. Ms Leon responded by email dated 1 March 2018, asking “Did we make an error?” and requested a copy of the decision.

Ms Musolino answered Ms Leon by email dated 6 March 2018, attaching a copy of Professor Carney’s decision. Her opinion was that DHS had not made any error; it had based its decision on the information that it had at the particular time. Ms Musolino asserted that a decision to raise a debt based on averaging was defensible and reasonable, although she provided no legal basis for saying so. Instead, she drew support from the fact that the Ombudsman (according to her) had considered the practice in his 2017 Investigation Report and “did not conclude that [it] was improper or unlawful.” Despite the fact that Ms Leon seemed to be seeking legal advice in relation to the matter, Ms Musolino provided no analysis of the legal issues in the decision or reference to relevant statute law or legal principle, relying instead on the Ombudsman’s failure to address the legality of income averaging in his report; which hardly amounted to authoritative legal support for it.

This was at a time when Ms Musolino was aware that DHS’ own analysis in January 2017 had not identified any convincing argument in favour of income averaging and knew that DSS had conflicting advices about it in the form of the 2014 DSS legal advice and the 2017 DSS legal advice. The second supported income averaging only as a “as a last resort,” which did not apply to its use in the Robodebt Scheme, where it was the default methodology for calculating debts. Ms Musolino knew that DSS had sought to rationalise its satisfaction that the practice was lawful in 2015 on the basis that DHS had provided more information about it, without either Department obtaining further legal advice. She had read Professor Carney’s 8 March 2017 and 7 September 2017 decisions and was aware of what Mr Hanks had said at the 2017 AIAL conference. She knew that there were substantial legal issues with respect to the lawfulness of income averaging which required consideration from both an evidentiary and legislative perspective before the question “Did we make an error?” could be properly answered.

Instead, and as she conceded in oral evidence, Ms Musolino’s response to Ms Leon was “not proposed or intended to be a comprehensive advice;” rather, it “effectively summaris[ed] the legal view held at that time.” Ms Musolino sought to justify the response that she provided Ms Leon on the basis that her response would have been drafted by the “Program Advice Team.” However, that could not obviate her own responsibility as chief counsel to ensure that her advice to the secretary of her Department answered the question the secretary asked and had a proper legal basis.

Ms Leon relied upon Ms Musolino’s opinion. This was early in her tenure as secretary; it was reasonable to rely on her chief counsel’s advice about the implications of AAT decisions.
9.1 Questions of legality and the “best available evidence” mantra

On 4 April 2018, an article by Professor Carney, *The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority*, was published. The article made the fundamental point that income averaging provided insufficient evidence of debts alleged under the Robodebt Scheme, there being no statutory scope for substitution of a notional average fortnightly income for actual fortnightly income. The article was based on the same reasoning as Professor Carney’s 8 March 2017 and 7 September 2017 AAT decisions, squarely raising once again the evidentiary sufficiency of income averaging to raise debts and the consistency of the practice with social security legislation.

On the same day that Professor Carney’s article was published, an article about it was published in *The Guardian* entitled “Centrelink Robodebt program accused of enforcing illegal debts.” This triggered an email from Ms Leon that day in which she requested “For advice please.” She was immediately forwarded the media response prepared by the DHS communications team, but, she said, she was actually seeking legal advice.

Two DHS lawyers were in fact preparing responses to the Carney article. The first was a “commentary” on the article, the second a draft which its writer said was meant to show “the reasonableness of the department’s management of OCI processes.” Neither addressed Professor Carney’s central point, the insufficiency of averaging as evidence of a debt. Instead, the commentary justified the use of income averaging on the basis that it resulted in a calculation of fortnightly income and thereby complied with the requirement that social security entitlement be based on fortnightly income (albeit the averaged income had no anchoring in reality). The other, “reasonable processes” document advanced a similarly fatuous argument, that income averaging involved the department applying “the best available evidence;” overlooking the obvious point that if evidence does not actually prove what is necessary, it is of no help that it is the best available.

While it referred to other AAT decisions said to support income averaging, the commentary did not consider whether they actually contained any statements of legal principle contrary to Professor Carney’s analysis. Both documents asserted that the Robodebt Scheme complied with the administrative law requirement of procedural fairness, which was not really to the point. (Giving someone a right of reply does not fix a demand wrongly made of them in the first place, or make it any the better if they do not in fact reply.) The commentary repeated the spurious argument that the Ombudsman’s failure to deal with the lawfulness of income averaging in his 2017 Investigation Report constituted an endorsement of the practice. The “reasonable processes” document said that Professor Carney was mistaken in saying that the onus of proof had been transferred to the recipient. The department was just helpfully providing an online portal to help recipients to comply with their legal obligations. Unfortunately, the writer did not think a little further, to what legal obligations there were actually were for recipients to respond to the Robodebt process. The answer, contrary to the tone of the letters sent to recipients, was that there were none, but the department was effectively placing an onus on recipients to provide information or have a debt raised against them.

The Carney article attracted the Ombudsman’s attention, and a meeting was arranged between representatives of the Ombudsman’s office and of DHS, including Ms Musolino and the Ombudsman himself, to discuss the Carney article. The week before the meeting, on 8 May 2018, Ms Musolino provided a written briefing to Ms Leon about the article and the anticipated meeting. The briefing asserted that Professor Carney had “fundamentally misunderstood aspects of the OCI process.” It drew on the commentary and the “reasonable processes” document the DHS legal section had prepared and provided to Ms Musolino the previous month. It similarly justified income averaging on the basis that DHS was entitled to make a decision “on the best evidence available to it at that time,” denied any shift of onus to the recipient, and claimed that the OCI process simply provided an online mechanism to enable recipients to meet their legal obligations.
In submissions Ms Musolino’s lawyers made on her behalf, it was argued that the briefing paper was not a legal advice, it was merely a statement of DHS’ proposed approach to the meeting with the Ombudsman. That is difficult to reconcile with the notation “Sensitive: Legal” which appears on every page, and the fact that the document sets out the legal points Professor Carney made and professes to address them. There is no question, though, that the briefing did represent the departmental approach. As Ms Musolino acknowledged in evidence before the Commission, it advocated for the DHS position regarding averaging, instead of providing objective advice as to whether the position had a proper foundation in law. That was contrary to what she also acknowledged should have been the approach taken: to provide Ms Leon with frank and objective advice about the accuracy or otherwise of Professor Carney’s statements about the law.

The meeting with the Ombudsman took place on 17 May 2018. The following day, Ms Musolino sent an email to the Deputy Ombudsman, Jaala Hinchcliffe, setting out “the department’s presentation” in the previous day’s meeting. The email repeated the arguments about “best available evidence” and there being no transfer of onus. In her response, Ms Hinchcliffe noted that during the meeting, DHS had conceded that averaging could lead to debts being raised for amounts greater than was owed. She asked if DHS had considered whether, to the extent they exceeded what was owed, such debts were invalid, and whether DHS had sought external legal advice on the point. Ms Musolino sent back an email dated 8 June 2018 setting out a series of arguments effectively rejecting Ms Hinchcliffe’s suggestion that the inaccuracy of debts could mean they were invalid. The email did not mention relevant legislative provisions; it repeated the incantation that the department made its debt-raising decisions “on the best information available to it.”

At about the same time, during one of their regular monthly meetings, Ms Leon said, she sought reassurance from Ms Musolino, asking more than once whether “... [we] were confident that the program was lawful?” to which Ms Musolino replied in the affirmative. On Ms Leon’s account, when pressed for a basis for that confidence, Ms Musolino informed her “... that it was a long-standing principle of administrative law that a decision-maker is entitled to rely on the best available evidence at the time.” People were given the opportunity to update their information. If they did, it was relied on; if they didn’t, “data-matching information” was used. Ms Musolino said that she did not recall the conversation, but the “best available evidence” terminology is entirely consistent with her regular form of words in trying to provide a legal justification for income averaging as used in the Robodebt Scheme.

The expression “best evidence available,” as has already been pointed out, has no particular legal status and illuminates nothing; what is necessary is the best evidence which can actually support the decision to be made. As an experienced lawyer, Ms Musolino should have known better. As she conceded in evidence before the Commission, there is no judicial authority whatsoever supporting a principle of administrative law that she represented to Ms Leon to be “long-standing.” However, it seems to have sufficed to convince Ms Leon, who regarded Ms Musolino as knowing more about the subject than she.

Unlike Ms Campbell and Ms Golightly, Ms Leon had not been involved in the development and implementation of the Scheme. As a relatively new DHS secretary she needed, and may have welcomed, frank and candid advice about the weakness of the legal position regarding income averaging and the need to obtain independent legal advice. Ms Musolino, however, was in a difficult position. In 2017, she had represented to Sara Samios that there was no “significant legal issue” arising from the Robodebt Scheme; she had not put in place systems to ensure that legal issues arising from AAT decisions were monitored; and she had not advised DHS executives of the weakness of the DHS legal position and of the need to obtain independent legal advice. Appropriate advice to Ms Leon now would give rise to questions as to why it was not provided in 2017, with the prospect of criticism and possible discipline by her employer. Instead, Ms Musolino emphatically represented to Ms Leon that the DHS legal position in respect of income averaging was strong, when she had no reasonable basis to do so.
9.2 Mr Keenan’s response to the Carney article

Professor Carney’s article also attracted political attention. On 5 April 2018, Linda Burney MP, then Shadow Minister for Human Services, issued a media release concerning “illegal debt notices on innocent Australians,” which made specific reference to Professor Carney’s article and raised concerns as to the lawfulness of averaging to determine social security entitlement.

The Guardian article about the Carney article was provided to Mr Keenan’s office, and might have been expected to cause some questioning of the Scheme’s legality. The office prepared talking points in response to the article and asked DHS for “advice/words” on, most relevantly, “the legality of the averaging/smoothing method.” The tone of Mr Keenan’s email in reference to the Carney article’s author may have suggested to his staff that words about legality, rather than considered legal advice about it, would suffice: “A former member of the AAT – what a lofty authority.”

It does not appear that the minister’s office obtained legal advice from his department. DHS officers involved in preparing responses to the Guardian article and other media reporting of the Carney article did seek advice from Ms Musolino, but Maris Stipnieks, General Counsel, let them know that she was not available. However, he suggested DHS include these words in its response: “The Department of Human Services strongly refutes any claims that it has conducted its compliance activities in a manner which is inconsistent with the legislation.” He did not himself hold the degree of confidence he expressed in the legality of the Scheme.

9.3 The Carney article, another AAT decision and the Clayton Utz advice

The Carney article also caught the attention of DSS employees, one of them Kristin Lumley (assistant director, Payment Integrity, Payment Conditionality, Design and Policy Branch, DSS). Ms Lumley had held concerns about the lawfulness of income averaging in the Robodebt Scheme since early 2017, and those concerns had strengthened in April 2018 when she became aware of Professor Carney’s article. She had sought approval to seek external legal advice, which was declined.

However, by May 2018 Allyson Essex also had concerns that the process of income averaging as it was used in the Robodebt Scheme might not be lawful, having become aware of the Carney article and another AAT decision made on 4 May 2018. Ms Essex was the branch manager of Ms Lumley’s branch, but quite frequently she was acting group manager of the Welfare and Housing Group in place of Brenton Philp, and James Kemp would sometimes become acting branch manager, assuming Ms Essex’ role.

The 4 May 2018 AAT decision cited and relied on the reasoning in the Carney article. It set aside a debt raised against a social security recipient on the ground that it had been unlawfully raised using income averaging. The Advice on Further Administrative Review prepared by a DHS senior government lawyer stated that an appeal was “not necessarily recommended” for these reasons:

The difficulty with this case is that DHS has been using a methodology that has an continues to be subject to criticism from a number of quarters. However, to appeal the AAT1 decision would be to put that squarely into the public arena. To successfully defend the approach the various arguments mounted against the process would need to be addressed. There is otherwise a risk that the whole approach of the OCI would be undermined.

Ms Essex was aware of the 2014 and 2017 DSS legal advices about averaging, one of which indicated that averaging was not lawful and the other that it was lawful only as a “last resort.” The AAT decision, however, recorded that in that case an authorised review officer (ARO) had refused to consider bank statements offered as evidence, which seemed to show that averaging was not being used as a “last resort” in the Robodebt Scheme. Ms Essex had concerns which were both specific - whether the way averaging was used in that case was lawful - and general, that it might not be lawful at all.
An appeal was initially lodged against the AAT decision, but was withdrawn following legal advice. Ms Essex understood this to mean that DSS had effectively accepted the position taken in the AAT decision that income averaging as it was being used in the Robodebt Scheme was unlawful.

Somewhere around 9 July 2018, while she was Acting Group Manager of DSS’s Welfare and Housing Group, Ms Essex instructed that legal advice be obtained on the lawfulness of income averaging. Ms Lumley gave the necessary instructions to two DSS lawyers, Anne Pulford and Anna Fredericks, on 11 July 2018. With the agreement of Ms Lumley’s Director, Philip Moufarrige, the law firm Clayton Utz was retained, rather than AGS. Mr Moufarrige noted, in an apprehensive tone, “the measure that this relates to is very controversial and has already been implemented … any advice will come under intense scrutiny.”

The advice was to be provided on 23 July 2018. By that time, DSS had been notified that the Ombudsman had commenced its Implementation Investigation. Clayton Utz did not quite meet the prescribed time, but it provided its advice, in draft, by email to Ms Fredericks on 14 August 2018. The advice dealt with the lawfulness of income averaging in determining entitlement for youth and Newstart allowance:

“*The Social Security Act 1991 (Cth) (Act)*, in its present form, does not allow the Department of Social Services [*Department*][sic] to determine a youth allowance or Newstart recipient’s fortnightly income by taking an amount reported to the ATO for a person as a consequence of data matching processes and notionally attributing that amount to (or averaging that amount over) particular fortnightly.” [emphasis in original]

Ms Fredericks promptly forwarded the advice to Ms Pulford and another DSS lawyer, warning them in her email that

the advice is somewhat unhelpful if the mechanism [ie averaging] is something the Department wants to continue to rely on.

One of the Clayton Utz lawyers had said that

they might be able to rework the advice subtly if this causes catastrophic issues for us, but … there is not a lot of room for them to do so.

Ms Pulford then forwarded the advice to Ms Lumley, noting that Clayton Utz had concluded that averaging “is not supported” by the legislation, and asking, “Let me know how you’d like to progress this, given the conclusion, and limited room to adjust the outcome.” Ms Lumley forwarded the advice to Ms Essex on 15 August 2018, noting the comments by Ms Pulford.

On 21 August 2018, Ms Essex held a meeting with her team, Mr Moufarrige, Ms Lumley, the person who had been Acting Branch Manager in her place, and Mr Kemp, who was about to move into that role, in respect of the Clayton Utz advice. She told those present that she would raise the advice with the DSS deputy secretary to whom she then reported, Nathan Williamson, “when the time was right;” by which she meant, she said in evidence, that she would raise it with him once she had read it and had enough facts to have a sensible conversation with him.

According to Ms Essex, she discussed the Clayton Utz advice with Mr Williamson during one of their regular meetings, within a week of the meeting with her own team. (One of her meetings with Mr Williamson occurred on 26 August 2018.) On Ms Essex’s account, Mr Williamson told her that there “was an established view that the program was legal based on the Ombudsman’s consideration of the Robodebt Scheme” and that while “people have said it is unlawful before. It has been found to be lawful.” She did not recall discussing the Scheme with Mr Williamson again.

Mr Williamson gave different evidence, denying that he had made the statements Ms Essex attributed to him. He recalled that he had a very brief conversation with someone in 2018 who told him that DSS getting legal advice on the online compliance program. He recalled wondering why DSS was getting advice on a program DHS administered; he did not recall being aware that the advice would go to the “fundamental lawfulness” of the Robodebt Scheme. He had pointed out that advice should only be obtained in consultation with DHS, reflecting his concerns that any instructions to the lawyers would
otherwise be incomplete. He did not become aware of the Clayton Utz advice until November 2019.

There was a need for those who knew of the Clayton Utz advice to act with alacrity in respect of it. If correct, the effect of the advice was that income averaging was being unlawfully used on a massive scale against recipients of Newstart and Youth Allowance, the two categories of social security payments with which it dealt. Ms Essex, seeking to explain a failure to act on it, said that she told the attendees at the 21 August 2018 meeting that they were to work with the DSS legal branch to ensure that all relevant questions had been asked and all possible issues had been explored. She had asked them to discuss differences in the legal reasoning between the Carney article and the Clayton Utz advice. In addition the advice was confined to two types of payment, so that raised the question whether it would apply in relation to other payment types. That might involve getting other advices, which might take months. Ms Essex did not think there was urgency, because she believed that in connection with an Estimates Variation process, DSS had taken the position, in response to a DHS proposal for additional funding for an extension of the Scheme, that it should end.

As already mentioned, the Scheme was extended in the May Budget, and although it did not in 2018 meet its Budget projections, it seems most improbable that Ms Essex had any reason to believe that it would not continue in some form. The differences in reasoning between the Clayton Utz advice and the Carney article were merely that the advice’s authors based their conclusions on principles of statutory interpretation, rather than legal principles relating to standards of proof and procedural fairness. The difference in the paths by which the different lawyers reasoned was no cause for inaction; their conclusions were the same. Moreover, it had been made clear in Ms Fredericks’ email that there was unlikely to be any change of substance to the opinions expressed in the Clayton Utz advice once it was finalised. It was also clear to Ms Lumley that all relevant questions had been asked of Clayton Utz. Even if some distinction could be identified between the payments the subject of the Clayton Utz advice and other social security payments, these were the bulk of the payments subject to the Scheme. In the circumstances, the puzzle is why the Clayton Utz advice was not finalised in a matter of weeks.

Other events in August made the advice highly relevant. On 20 August 2018, the Ombudsman had written recommending that DSS make publicly available guidelines for decision-makers about how their information gathering powers under s 192 of the Social Security (Administration) Act would be used. The letter noted the Ombudsman’s acceptance in that context that “it may be open to the Government to argue that the EIC process of ‘averaging’ income is legal.” A response to the letter was to be provided by 18 September 2018.

The government’s firm line on the legality of averaging was, there is no doubt, a factor affecting independent office-holders’ investigations conducted in the public interest under a Commonwealth statute. The previous (Acting) Ombudsman, Richard Glenn, had been influenced by the representations of public servants that they were satisfied of the lawfulness of the Scheme in deciding not to comment on the legality of averaging in the 2017 Investigation Report. As it turned out, the current Ombudsman would later rely on the government’s maintaining its position to similarly refrain from commenting on the issue in his 2019 Investigation Report. Any position that DSS might take in respect of the Clayton Utz advice was clearly material to what the Ombudsman had raised in his 20 August 2018 letter, so there was a need to settle on that position before the due date for response to it. As it happened, the DSS response to the Ombudsman’s letter sent in September 2018 attached draft guidelines as recommended by the Ombudsman, but said nothing about the independent legal advice in DSS’ possession, which indicated that income averaging was unlawful.

There was another reason to act promptly on the Clayton Utz advice. A new Minister for Social Services, Paul Fletcher, took office at the end of August 2018. It might ordinarily be expected that a new minister would be informed of advice as significant in its implications as the Clayton Utz advice in his incoming ministerial brief. However, that did not occur.

On 11 September 2018, prompted by Ms Lumley, James Kemp, who was then Acting Branch Manager, raised the Clayton Utz advice with Ms Essex. Ms Essex agreed that a ministerial submission should be prepared outlining the advice and the issues that it raised. Mr Kemp ceased acting in the role of
Branch Manager on 14 October 2018, having given Ms Essex, who returned to the role, a handover document indicating that the next step in relation to the Clayton Utz advice was the preparation of a ministerial submission.

Ms Essex in turn handed over the Group Manager role to Brenton Philp, and claimed in evidence that she raised the Clayton Utz advice, and the fact that a ministerial submission was to be prepared, with him during the handover. In her first written statement to the Commission she described their discussion about the advice as “short” because MYEFO was looming and DSS was dealing with a number of matters at the time. In her oral evidence, Ms Essex said that Mr Philp observed in respect of the Clayton Utz advice, “advice is just advice” and did not necessarily have to be followed. In a supplementary statement, Ms Essex said she told Mr Philp she had a draft advice from Clayton Utz as to which she still had some questions before it was finalised, to which he responded, “Keep me in the loop.”

Mr Philp said he did not recall ever being informed of, discussing, or reading the Clayton Utz advice, which he said he would have recalled, given its significance to the Robodebt Scheme. He pointed to an email Ms Essex sent him on 28 November 2018 with the subject matter “robo debt – context,” in which she recounted the Government’s enthusiasm for ensuring the integrity of the welfare system and described enhancements to the Scheme, without a word of the Clayton Utz advice. And he denied making the remarks about legal advice which Ms Essex attributed to him. Dismissive remarks of the character Ms Essex ascribed to Mr Philp do not really seem consistent, it must be said, with a desire to be kept in the loop.

At some time, possibly in November 2018, Ms Lumley provided Ms Essex with a hard copy folder containing a chronology she had prepared, listing various legal advices related to Robodebt, and all the advices, including the Clayton Utz advice.

On 11 December 2018, Ms Lumley became more concerned about the fate of the Clayton Utz advice after seeing A Current Affair segment on the legality of income averaging as used in the Scheme and, in particular, the prospect that a prominent silk, Gavin Silbert QC, would challenge the Scheme in the Federal Court. Alarmed, she emailed Mr Moufarrige:

I am extremely concerned that we are sitting on the legal advice. I think you should make sure that Brenton is aware of it. It will definitely end up in the Federal Court – Kristin.

Mr Moufarrige forwarded Ms Lumley’s email to Ms Essex on 11 December 2018. She spoke to him briefly in person, telling him that the Advice was being dealt with at senior levels within the department, and later that day emailed both him and Ms Lumley:

Philip-Kristin, I am aware of both the legal advice and its contents. I am also aware of at least two external legal advices (to the Ombudsman and DHS) which come to a different (and opposite) conclusion. In formulating further advice, I am having regard to the inconsistencies between the advices and the differences between the various requests for advice. I am not ‘sitting on’ the advice, which could have been clarified by further discussion with me. I do not think it will ‘definitely end in the Federal Court.

When asked in evidence what external advices she was referring to, Ms Essex said that they were “...two that Mr Williamson had mentioned...in the past,” which she had not seen. The Commission has found no evidence of the existence of legal advices meeting the description in the email and it is difficult to see how Ms Essex could have regard to “inconsistencies” in them if she had not seen them. The evidence before the Commission suggests that by the time of the 11 December email, nothing was in fact being done with the Clayton Utz advice. Ms Essex said in evidence that she had discussed the advice with Ms Lumley and Mr Moufarrige around 21 December 2018, and told them that she would be comfortable with its being finalised; in fact she would have been happy to finalise it a couple of weeks earlier. They did not give any equivalent recollection. But at that date, none of the further work discussed in the 21 August 2018 meeting, which Ms Essex said was necessary before the advice could be finalised, had been carried out.
Ms Essex claimed that she discussed the Clayton Utz advice with Mr Philp on 17 December 2018 and provided him then with the hard copy folder containing the advice and the chronology that Ms Lumley had given her. In a supplementary statement, Ms Essex said it was during this discussion that Mr Philp made the “advice is just advice” statement; but that was contrary to her oral evidence that he made that statement during their handover meeting in October 2018. In her supplementary statement, Ms Essex said she had informed Mr Moufarrige that she had given the Clayton Utz advice and folder to Mr Philp; but Mr Moufarrige had no recall which could support that. Ms Essex also said that she reminded Mr Philp of the Clayton Utz advice on 14 January 2019, after he returned from leave, just before she herself ceased working at DSS. Those claims, of course, are contrary to Mr Philp’s evidence.

Ms Essex’s former Executive Assistant gave evidence that when Ms Essex left DSS, as part of the packing up process, she (the EA) delivered half a dozen folders to Mr Philp’s office. They included the hard copy folder containing the advice. She told Mr Philp that the folder contained “Robodebt and other documents.” She could not recall whether he told her to put it on the bookshelf or on his desk. Her statement came after Mr Philp gave evidence, but assuming it to be correct, there is no evidence he ever looked at the content of the folder or appreciated that it contained the Clayton Utz advice.

The Commission accepts the evidence of Mr Philp and Mr Williamson that they were not told about the Clayton Utz advice. There is a pattern of inconsistency and evasiveness which emerges from Ms Essex’s evidence. The Commission concludes that when she emailed Mr Moufarrige and Ms Lumley on 8 December, denying that she was “sitting on” the advice, she was prevaricating; that is precisely what she was doing. She had done nothing to have the advice finalised and briefed to those who most needed to know about it: the Minister for Social Services, Mr Fletcher, the secretary, Ms Campbell, and the deputy secretary, Mr Williamson. It may be that, having been responsible for procuring an advice she must have realised would be highly problematic for Ms Campbell, Ms Essex dithered about what to do with it for months until she left the Department and it was no longer her problem.

The Clayton Utz advice was never finalised, despite the firm’s invoice being paid by DSS. Consistent with what appears to be the usual practice within the Australian Public Service, the DSS legal unit left it to the officers within DSS who had requested that the advice be obtained to decide what to do with it. Ultimately, that was nothing. More than a year after DSS received the Clayton Utz advice in draft, the Scheme was continuing and debts were still being raised unlawfully against social security recipients on a massive scale.
10 The Check and Update Past Income program

PwC had continued to work with DHS throughout 2017 on the systems and processes involved in DHS’s compliance activities, including those associated with PAYG. In line with the recommendations developed by PwC at the time, while short to medium term improvements to DHS’ systems and processes were implemented, there was a need for a long term solution in the form of a redesign of the online platform.

In September 2017, PwC was asked, among other things, to provide advice and assist with the design and management of the “user-centric online compliance tool” to be implemented from February 2018. A ‘key focus’ for that tool was the PAYG compliance activity, and the plan was to establish that online service in February 2018 and ‘phase out’ the old service, with the transition to occur over the months up to June or July 2018.

By January 2018, the Compliance Modernisation Programme Board minutes record that the service was not ready for full release in February 2018. The Board decided to instead release the system iteratively, over stages, or “drops.” Throughout 2018, a series of system enhancements was introduced, with updates to the content of letters and staff workflows, and further updates to the online system, including changes to the selection of cases for review and attempts to improve the usability of the online system.

Compliance reviews within the system, which had come to be known as the Check and Update Past Income (CUPI) platform, commenced on 2 October 2018. Despite the changes that had been made to the system, the methodology of applying averaged ATO income information remained the same under CUPI as it had been under EIC (after the refinements made to that system). There was still a range of circumstances in which averaging was used in CUPI. Firstly, averaging occurred where a recipient accepted the use of the ATO data in either an online or manual compliance review. Secondly, where a recipient had either not responded to an initial letter, or where they had commenced, but not finalised, a review, and the due date had passed for its completion, compliance officers would make two attempts to contact a recipient by telephone prior to finalising the review. Where these attempts were unsuccessful, the review would be finalised using the averaged ATO income information.

Under the EIC, the percentage of recipients that were issued with an initial letter, but did not have a debt raised against them, was approximately 48 per cent. Over the EIC and CUPI iterations of the program, across the 2017/18, 2018/19 and 2019/20 financial years, the percentage rate at which averaging was used in the calculation of debts ranged between approximately 52 per cent to 66 per cent.
11 Mr Keenan’s office receives more media enquiries about legality

On 22 November 2018, DHS received an enquiry from Mr Cameron Houston, a journalist from The Age, about whether DHS had "successfully defended debts generated by the robo-debt program in a court or tribunal." Subsequently, an adviser from Mr Keenan’s office wrote to DHS requesting information about AAT decisions, albeit with a certain slant: “are there any recent AAT decisions that back us up that we can point to?” The adviser continued:

...Let’s also get a copy of the ombudsman’s report out and reference it heavily in our response. Our response should also not be shy about selling the virtues of “robodebt” It is this simple; people told the tax office one thing about their earnings and told DHS another. We contacted them and asked them to explain the discrepancy. Those who couldn’t copped a debt.

There is no evidence that Mr Keenan’s office was provided with any information about AAT decisions in response to the request, possibly because DHS encountered some difficulty in finding any that would actually back up the debts produced by income averaging. But the statement, "It is this simple; people told the tax office one thing about their earnings and told DHS another" demonstrated either a profound misunderstanding, or a cynical misrepresentation, of the Scheme and the limitations of the evidence relied upon in the Scheme. Mr Keenan, at least, knew that for any number of reasons a discrepancy between ATO PAYG income data and social security recipients’ income reports to DHS did not necessarily indicate a debt, let alone a deliberate misleading of DHS. The adviser’s enthusiasm for heavily referencing (and usually misquoting) the Ombudsman’s report was, as is shown elsewhere in this chapter and this report, typical of DHS strategy in responding to Robodebt criticism.
12 Mr Keenan’s performance as minister

During his tenure as Minister for Human Services, Mr Keenan became aware that, under the Scheme, averaging was being used to determine social security entitlement, and he knew it could produce inaccurate debts. DHS did not properly brief him, however, on the controversies associated with the lawfulness of averaging. He was told, instead, that the legal basis for the Scheme was “sound” and that the Ombudsman had endorsed the capacity of the Scheme to accurately determine debts.

In his statement, Mr Keenan asserts:180

I did not regard it as my function, as someone without legal qualifications, to second-guess the views of lawyers in the public service. That was especially true in relation to the Scheme, because my understanding was that: (A) the Ombudsman had confirmed it was consistent with the legislation; (B) the same basic framework had been in place since the 1995...; (C) before my time as Minister, the latest iteration of the Scheme had gone through the Cabinet process, which meant the Commonwealth’s lawyers would have had to consider its legality.

Notably, Mr Keenan’s understanding of the matters described at (A) and (B) above is wrong, but it is traceable to representations made to him in DHS briefs. In evidence, Mr Keenan said it was not his practice to seek legal advice, and he had “great confidence” in what his department told him.181 In his statement he indicated that he had “relied on the many lawyers employed by Commonwealth departments to alert [him] if there was real merit in any suggestion in the media that the government had done something illegal.”182 He assumed that DHS’s recommended responses to criticisms of the Scheme in the media “had been cleared by its lawyers.”183 In his submissions, Mr Keenan made the further point that had he made requests for advice from his departmental secretary or DHS chief counsel, he would have received assurances that the Scheme was lawful (consistent with other representations they made).

That is true, but Mr Keenan did not think that at the time. Yet, while there is evidence of Mr Keenan seeking advice generally for the purposes of responding to public criticism in the media and academia, there is no evidence that he sought advice directly from the secretary or the chief counsel at DHS about the legal questions raised about the Robodebt Scheme. And ministers are not wholly dependent on the information their departments give them. Mr Keenan could, for example, have indicated that he wished to have external legal advice sought.

In submissions, Mr Keenan’s representatives argued that besides the fact that his department and its senior lawyers were telling him the Scheme was lawful, it could not be concluded that he should have questioned that position, because the Solicitor-General in his Opinion given in respect of the Scheme in 2019184 confirmed that in “key respects” the Scheme did operate lawfully, and expressed his view of the unlawfulness of income averaging as used in the Scheme at no higher level than that there was “a considerable risk that court would set aside a debt decision ... based on inferences drawn from a comparison of the ATO PAYG information and the customer’s reported earnings and an adverse inference from failure to provide information in response to appropriate correspondence in circumstances where a power exists to enable the officer to make relatively straightforward inquiries that would yield information capable of confirming or denying the correctness of the assumption that underlies the use of the ATO PAYG data.”185

Putting it in terms of “considerable risk” showed, Mr Keenan’s lawyers said, that the Solicitor-General’s opinion was equivocal, and anyway it was judicially untested.

The first argument, that the Scheme was a little bit lawful, turned on the Solicitor-General’s recognition in his Opinion that income averaging could be a legitimate way of identifying that a debt might exist, but not its amount, and that it could be the basis for a debt decision where there was evidence that the recipient received a consistent fortnightly income over the period in question. There is no argument with either of those points, but they do not assist here, where the use of the ATO PAYG data did not stop at identifying the existence of the debt but went on to its calculation in the absence of any other evidence. As to that, the Solicitor-General expressed the following view:
In our opinion, apportioned ATO PAYG data cannot properly be given “decisive” weight in deciding either that a debt is due, or the amount of that debt. That is, apportioned ATO PAYG data cannot, without more, support a conclusion that a person has received benefits to which they were not entitled.\(^\text{186}\)

The passage cited as to “considerable risk” as to what a court would do, is taken out of context from the Solicitor-General’s answer on the point, which was:

\text{... in the absence of some evidence that a customer earned income in equal fortnightly amounts during the period that he or she received benefits, it is not open to a decision-maker to base a debt decision solely on apportioned ATO PAYG data, taken together with the customer’s failure to respond to the Department’s letters.}\(^\text{187}\)

That was hardly equivocal. The reason the Solicitor-General’s view of the unlawfulness of income averaging as used in the Robodebt Scheme went judicially untested was that the Commonwealth Government agreed to settlement of the Amato proceedings, with relief including a declaration that an alleged debt raised against Ms Amato on the basis of averaging ‘was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that a debt was owed.’\(^\text{188}\) And of course, Mr Keenan was part of the government when it, in 2020, admitted that the practice of averaging to determine social security entitlement was unlawful.

Accordingly, the Commission does not accept Mr Keenan’s submissions on this issue.

In any case, the issue is not whether in 2018 Mr Keenan should have reached any firm view either way about the lawfulness of income averaging as used in the Robodebt Scheme. It is whether, as minister, he should have recognised that there was a question that needed consideration and independent legal advice.

Apart from his general responsibility as minister for ensuring that his department acted lawfully, there are three reasons for thinking Mr Keenan should have taken action to check that the Scheme was operating in accordance with the law.

The first was the making of specific and rational criticisms of the Scheme by Professor Carney and ACOSS, sources with knowledge and expertise, and the persistence of more general media complaints about it, including the reported threat of litigation by Mr Silbert QC, throughout Mr Keenan’s tenure. The second was the implications if the Scheme were being carried out using an unlawful practice. Mr Keenan was responsible for a program that affected many thousands of social security recipients. If the advice to him that the Scheme’s legality was ‘sound’ proved to be wrong (as it did), it would have followed that DHS was demanding and recovering money from recipients to which it had no lawful entitlement. The third was that Mr Keenan was himself involved in taking steps to increase the onerousness of the Scheme for the recipients against whom debts were raised, in the imposition of interest charges on debts and the prospect of departure prohibition orders where debt repayment arrangements were not made. It was incumbent on him to make sure that the underlying debts were lawfully imposed.

Given that there was reason to question the Scheme’s legality, the implications of illegality were dire, and further hardship was being inflicted by his department on those affected, Mr Keenan failed in his responsibility as minister to satisfy himself that his department was acting lawfully.
2018 – the Robodebt Scheme rolls on

Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].

Exhibit 3-4254 - CTH.2001.0009.3942_R - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal].

Transcript, Annette Musolino, 30 January 2023 [p 2645: lines 14-44]; Exhibit 3-3667 - CTH.3827.0001.0907_R - RE- Issue re brief [DLM=For-Official-Use-Only]; Exhibit 3 – 3665 – DSS.5086.0001.1110_R.

Transcript, Annette Musolino, 1 March 2023 [para 145].

Response to NAF-MUS, 5 May 2023 [para 149-150].

Transcript, Renee Leon, 28 February 2023 [p 4016: line 15].

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 5-10].

Exhibit 10023 - OCI - issues in response to Carney article [DLM=For-Official-Use-Only].

Exhibit 10024 - CTH.3007.0008.5900.

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 35-40].

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 33-37].

Transcript, Annette Musolino, 1 March 2023 [p 4164: lines 33-37].

Response to NAF-MUS, 5 May 2023 [para 145].

Exhibit 3-4218 - CTH.3004.0008.3193 - 006-Carney.

Transcript, Maris Stipnieks, 3 February 2023 [p 3236: lines 6-11].

Transcript, Maris Stipnieks, 3 February 2023 [p 3224: lines 30-32, p 3229: lines 29-32].

Transcript, Kristin Lumley, 27 January 2023 [p 2544: lines 1-5].

Transcript, Allyson Essex, 27 January 2023 [p 2571: line 1].

Exhibit 3-4257 - CTH.3007.0009.1941_R - OCI [DLM=Sensitive-Legal].

Exhibit 3-4257 - CTH.3007.0009.1941_R - OCI [DLM=Sensitive-Legal].

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 35-40].

Transcript, Annette Musolino, 1 March 2023 [p 4176].

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 35-40].

Transcript, Renee Leon, 28 February 2023 [p 4017: lines 35-40].

Exhibit 3-4179 - DSS.5036.0001.0008_R - [REDACTED] - AFARm.


Transcript, Allyson Essex, 27 January 2023 [p 2571: lines 15-38]; Exhibit 1-0116 - DSS.8001.0001.5219_R - [D17
136 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments) [para 25].
138 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 30].
139 Transcript, Brenton Philip, 6 March 2023 [p 4510: lines 2-13].
140 Transcript, Brenton Philip, 6 March 2023 [p 4509: lines 39-41]. Exhibit 4-6778 - BPH.9999.0001.0003_R - 20230220 NTG-0200 (Philp) Statement of Brenton Philp (Redacted) [para 12].
141 Exhibit 4-6778 - BPH.9999.0001.0003_R - 20230220 NTG-0200 (Philp) Statement of Brenton Philp (Redacted) [para 12].
142 Exhibit 3-4167 - DSS.5093.0001.0316_R - FW- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
143 Exhibit, Kristin Lumley, 27 January 2023 [p 2557: line 16].
144 Exhibit 3-4165 - RBD.9999.0001.0335 - Centrelink robo-debt recovery scheme at centre of legal case.
145 Exhibit 3-4166 - DSS.5093.0001.0312_R - RE- Media - Robodebt [SEC=UNCLASSIFIED].
146 Exhibit 3-4167 - DSS.5093.0001.0316_R - FW- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
147 Exhibit, Kristin Lumley, 27 January 2023 [p 2557: lines 40-41].
148 Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Moufarrige [para 23].
149 Exhibit 3-4167 - DSS.5093.0001.0316_R - FW- Online Compliance Legal Advice Timeline and Summary [DLM=Sensitive-Legal].
150 Transcript, Allyson Essex, 27 January 2023 [p 2596: lines 15-26].
151 Transcript, Allyson Essex, 27 January 2023 Transcript [p 2590: line 15].
152 Transcript, Allyson Essex, 27 January 2023 Transcript [p 2586; p 2588].
153 Exhibit 3-4136 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 31].
154 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 39].
155 Transcript, Allyson Essex, 27 January 2023 [p 2592: line 21; 35-40].
156 Exhibit 10128 - AES.9999.0001.0003_R - Statement - Allyson Essex - FINAL(62433751.5) copy.pdf [para 39].
157 Exhibit 9841 - PMO.9999.0001.0001_R - NTG-0255 Philip Moufarrige [para 27].
158 Exhibit 3-4163 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 32].
159 Exhibit 3-4163 - AES.9999.0001.0001_R - NTG-109 - Statement of A Essex (Footnote Amendments)[para 34].
160 Exhibit 9746 - BTI.9999.0001.0036_R - NTG-0252 - Statement of E Tisdell (updated Doc IDs) (48063575.1).pdf [para 34].
161 Transcript, Anne Pullford, 2 November 2022 [p 258].
162 Transcript, Melanie Metz, 10 March 2023 [p 4973].
163 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 8-10].
164 Exhibit 3-3895 - PWC.1007.1003.3468 - 170405 Insights from Current State Assessment - DRAFT - v0.2.
165 Exhibit 3-4775 - PWC.1007.1003.5090_R - 170530 DHS Integrity Modernisation Implementation Strategy - DRAFT - v1.0; Transcript, Frank van Hagen, 3 March 2023 [p 4347: line 21 – p 4348: line 8]; Exhibit 3-4778 - PWC.1007.1001.1842_R - FW- Amendment to PWC (Phase 2) contract - Integrity Modernisation support [SEC=UNCLASSIFIED].
166 Exhibit 3-3816 - PWC.9999.0001.0004_R - Statement of Shane Michael West_30 November_2022_final [p 11-12; Exhibit 9322 - PWC.1007.0001.0164_R - 3. 20170911 - DHS Advice and programme management - Work order.pdf; Exhibit 9323 - PWC.1007.0001.0170_R - 4. [date]- DHS Extension of advice and programme management - Work order.pdf.
167 Exhibit 10130 - CTH.3004.0007.4968_R - Agenda Item 2 CMP Board - Previous Meeting Minutes.doc [p 2-3].
169 Exhibit 10131 - CTH.3000.0039.6566_R - Item 2 CMP Board - Previous Minutes 25 Jan 2018.doc; Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 8: paras 2.1 to 2.3].
170 Exhibit 8538 – CTH.9999.0001.0144, [Final] Services Australia - Response to NTG-0097 - Revised [p 7: para 2.1 – p 8: para 2.3].
Chapter 9: 2019 – The end of Robodebt
1 Preliminary

The Robodebt Scheme remained just as troubled in 2019. A number of events demonstrate that although some years had passed since the Scheme’s inception, it continued to be plagued by problems.

On 21 March 2019, a brief to Ms Leon, secretary of DHS, noted that technical issues were affecting the debt explanation letters sent to participants in the EIC and CUPI platforms. The letters purported to detail the elements of the debt calculation but were erroneous and incomplete.

On 28 March 2019, at a meeting of the Compliance Modernisation Programme (CMP) Board, DHS considered the results of user testing undertaken in relation to the initiation letter used under the CUPI phase of the Scheme. The user testing took place in November 2018, on the recommendation of the Commonwealth Ombudsman, and was aimed at testing ways to better explain the concept of income averaging to recipients. The results of the testing were an indictment on the Scheme’s reliance on placing the onus on the recipient to provide information. Of the 15 participants involved in the testing, only two participants understood and could articulate the concept of income averaging after reading the revised initiation letter that was designed to explain the process to them. The vast majority of the participants did not understand from the letter what would happen if they did not provide the information requested, with most participants thinking that their payments would either be suspended, cancelled or otherwise affected, and other participants simply stating that they were “going to be in trouble.”

This testing was a clear illustration that most recipients were unlikely to understand the basis upon which debts were being raised by DHS, even in 2019, when the letters had undergone years’ worth of “refinements” and “improvements.” This was not a reflection on recipients; rather, it was indicative of the fundamental lack of understanding of those developing and administering the Scheme that the social security system was complex and intricate, and if the onus was to be borne by those subject to the Scheme, it required much more than the materials the Department was producing to assist recipients.

The Department continued to deal with outstanding reviews from the Scheme’s first online iteration, OCI, well into 2019. A debt recovery pause with respect to these reviews had been in place up to 30 April 2019, which was longer than had originally been intended. In what was described as an absence of “appropriate controls…to govern the continuance of this pause activity,” the debt recovery pause was lifted and close to 9000 debt letters were issued in error to recipients.

The difference in 2019, was that the Scheme encountered some problems that proved insurmountable. The year 2019 represented the beginning of the end for the Robodebt Scheme. On 18 November 2019, the use of averaging to determine social security entitlement under the Scheme was ceased. On 30 June 2020, the Scheme was ended altogether.

The catalyst for the Scheme’s demise was two judicial review proceedings in the Federal Court, both commenced by former social security recipients against the Commonwealth in 2019. Both sought to challenge alleged debts raised on the basis of averaging. The first, an application by Madeleine Masterton, led to DHS seeking advice from the Australian Government Solicitor (AGS) and the Solicitor-General that would affirm the illegality of averaging. The second, an application by Deanna Amato, was the first proceeding in which the Commonwealth made an explicit concession that the practice was unlawful.
2 Commencement of Masterton, advice from the Australian Government Solicitor and recalculation

On 4 February 2019, Ms Masterton filed an originating application for judicial review in the Federal Court. Her application challenged a decision by the secretary of DHS to raise and recover from her an alleged debt resulting from overpayment of social security benefit.

The alleged debt the subject of Ms Masterton’s application arose from a supposed overpayment of social security benefit in the period 2011 to 2016. Originally in the amount of $4049.29, it had been raised on 12 June 2018 by averaging Ms Masterton’s earnings as they appeared in PAYG information. It was added to by erroneous duplication of some of that data.

Ms Masterton sought, amongst other things, a declaration that the alleged debt was not “a debt due to the Commonwealth” under the Social Security Act 1991 (Cth) and that it could not lawfully be demanded. The core argument Ms Masterton advanced was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt under the relevant statutory framework. The litigation was significant. A ruling on that core ground would, in effect, be a ruling on the lawfulness of the averaging component of the Scheme.

Ms Masterton’s motivations in making the application went beyond self-interest. She recognised that success in the proceeding “would have a greater impact socially.” The proceedings were the culmination of work done by her legal representatives, Victoria Legal Aid, in identifying a test case to challenge the lawfulness of the Scheme.

2.1 Initial recalculation

Shortly after the filing of Ms Masterton’s application, on 9 February 2019, DHS conducted a recalculation of Ms Masterton’s debt. This initial recalculation caused some confusion within the department. Mr Ffrench’s evidence was that the recalculation had taken place in the absence of instructions and that he had not been made aware of it until a later time.

In the initial recalculation, DHS removed duplicated amounts wrongly included in the debt. It had been alerted to the error by the affidavit material filed on Ms Masterton’s behalf in support of the application (the Masterton affidavit material). A recovery fee was also removed. The recalculation reduced the debt from $4049.29 to $748.26.

DHS then decided to conduct a further recalculation, the impetus for which was, to say the least, unclear. At a case management hearing in the Masterton case on 8 March 2019, the Commonwealth’s representatives said it was necessary because of a “clear calculation error.” There was said to have been “a degree of double-counting that occurred in the calculation of the debt” and it was proposed to “withdraw the penalty and the interest related to the debt and to recalculate the debt... having regard to the information that is available now.”

The Commission does not doubt that the Commonwealth’s representatives had instructions to that effect, but the basis of those instructions is mysterious. The purpose of the initial recalculation was to correct the erroneous inclusion of the duplicated amounts and to remove the recovery fee. Why the Commonwealth was proposing to do the same thing again is mysterious. In material provided to the Commission, Services Australia asserted that the further recalculation was necessary because “the [initial] recalculation did not properly apply income credits to the debt amount,” but in fact, the further recalculation did not account for income credits. Instead, it involved relying on representations made in the Masterton affidavit material as a basis for reducing the debt.
Whatever the reason, the Commonwealth sought and obtained orders from the Federal Court contemplating a redetermination of the debt.\textsuperscript{16} DHS then set about deciding the way in which the recalculation would take place. In doing so, it sought advice from AGS.

\section*{2.2 Draft Implementation Report and a “comment on legality”}

On 22 February 2019, Mr Manthorpe sent Ms Leon the Draft Implementation Report,\textsuperscript{17} which concerned the implementation of recommendations in the Ombudsman’s April 2017 Report. Mr Manthorpe gave Ms Leon an “opportunity to comment” on the Draft Implementation Report.

Part 4 to the Draft Implementation Report was described as a “comment on legality.” In it, the Ombudsman made a number of observations regarding the legality of the Scheme. They included:

- that “the question around the legality of the EIC system [was] still a matter of public debate”
- that the Ombudsman had “concluded that the complex question of the system’s legality could only be resolved with certainty by a court” and that “it would be unhelpful to speculate in a public report about what the Federal or High Court might decide on the untested and complex questions of legality raised by the EIC”
- that there was “a matter before the Federal Court where [issues of legality] may be considered” and that “with the benefit of hindsight, we consider a lesson arising from the implementation of the EIC is the importance of providing public assurance about the legality of decisions made under new digital systems,” and
- that ‘if the legality of programs of automation are [sic] not reasonably certain … agencies should ensure a mitigation strategy is in place.”

Express reference was made in the Draft Implementation Report to the Masterton proceeding and the prospect of questions of legality being considered in the course of that litigation. However, the Ombudsman did not make any finding or express any settled view as to the legality of the Scheme or the practice of income averaging.

\section*{2.3 Briefing of Ms Leon and 1 March meeting}

Ahead of a scheduled meeting between Ms Leon and Mr Manthorpe on 1 March 2019, DHS officers, including Mr Ffrench and Ms Musolino,\textsuperscript{18} prepared a brief for Ms Leon. The Ombudsman’s inclusion of Part 4 in the Draft Implementation Report was evidently of particular concern to those preparing the brief.\textsuperscript{19}

The brief, dated 25 February 2019,\textsuperscript{20} advanced a number of recommendations, including that Ms Leon adopt the position that:

the department considers that the “Comment on Legality” at paragraphs 4.4 and 4.5 of the Draft Implementation Report is beyond the scope of the implementation investigation and should be removed.

The brief asserted that “The legality of procedures for the EIC program [was] not uncertain.” It expanded on that proposition:

The draft report suggests the department should have obtained external legal advice that could be cited to reassure the public on the issue of legality. There was no need in the design of the EIC program to obtain legal advice given the measures at its heart were well established. Obtaining external legal advice, and then citing that advice in public, would amount to a waiver of privilege in circumstances where, as here, programs may be the subject of legal challenge. The department would be acting contrary to the interests of the Commonwealth were it to do so. Given that [issues of legality] may soon be considered by the Federal Court, such action would also have the potential to undermine the administration of justice.
Having received the brief, Ms Leon met Mr Manthorpe on 1 March 2019 to discuss the matters raised in his 21 February 2019 correspondence and DHS’ attitude in respect of the Draft Implementation Report. Ms Leon’s evidence was that she expressed views to Mr Manthorpe consistent with the recommendation in the brief she had been given – that is, that Part 4 should be removed from the Draft Implementation Report.

2.4 5 March 2019 AGS Advice

On 5 March 2019, AGS provided email advice to DHS about the proposed further recalculation of Ms Masterton’s debt. That advice was provided to Ms Leon on 6 March 2019. AGS presented two options. The recalculation could be done using averaging (‘Option 1’) in which case Ms Masterton’s challenge would probably proceed, or on the basis of a proper investigation of Ms Masterton’s income (‘Option 2’), which would avoid the arguments as to legal error associated with averaging. The writer noted, delicately, that AGS did not understand DHS to hold any “positive desire” to have the Federal Court rule on the legality of averaging or the “OCI system” (apparently a general reference to the Robodebt scheme, which had moved on from the OCI iteration by this time). In relation to Option 2, the advice observed:

If the debt is recalculated without averaging, Ms Masterton would not appear to have a sufficient continuing legal interest to seek the declarations in the present application that are predicated on the use of averaging, since they would relate to a debt that is no longer pursued on the impugned basis.

The advice continued:

In providing this short advice we have not been asked to consider the prospects of the present challenge to the lawfulness of the debt presently sought from Ms Masterton succeeding. Our observations here are confined to practical considerations. For the purpose of this advice, we observe only that on our present understanding of the case, Ms Masterton’s application does not appear to us to be hopeless such that the Department would prefer Option 1 on the basis that the Department could presently be very confident of a favourable judicial ruling... [emphasis added]

This aspect of the advice was significant. What was, in effect, a legal challenge to a fundamental feature of the Scheme – that is, the use of averaging to determine social security entitlement - had been described by AGS as not appearing to be hopeless; a roundabout way of saying that it had prospects of success. While the 5 March 2019 advice did not descend into any analysis of those prospects, it should have been clear at this time to Ms Leon and other readers of the advice that the legality of the Scheme was far from certain.

In her evidence (and in submissions to the Commission), Ms Leon expressed doubt as to whether the 5 March 2019 AGS advice was provided to her. She did not believe anyone had expressed to her an opinion that Ms Masterton’s application was not hopeless. But an email from the DHS Chief Operating officer makes it clear that Ms Leon was provided, at her own request, with the 5 March 2019 advice on 6 March 2019 in connection with a meeting planned for the following day. The advice was of importance to DHS, Ms Leon had asked for it, and she was to have a meeting about the litigation it concerned the following day. Despite her lack of recollection, the Commission’s view is that Ms Leon read and understood that advice before 8 March 2019.

There is evidence that, in a meeting on 7 March 2019, Ms Leon agreed to the suggestion of her acting Chief Counsel, Mr Ffrench, that comprehensive advice from AGS in relation to prospects in the Masterton litigation should be sought. In her statement, Ms Leon said she did not recall “being asked about seeking the [prospects] advice,” and, by implication, had no recollection of having asked for it. Given Mr Ffrench’s account and contemporary documentary support, the Commission considers it more probable than not that, at his urging, Ms Leon did instruct Mr Ffrench to seek the advice.
2.5 Initial adoption of Option 2

Initially, DHS decided to pursue Option 2. In doing so, on 18 March 2019, it sought to obtain evidence from Ms Masterton as to her actual income for the period 2011 to 2016 that “would assist in the recalculation of the amount of any debt that may be owed.” Ms Masterton refused to provide that evidence. Her representatives explained to AGS: “In circumstances where neither the motivation for the proposed recalculation nor its relevance to the proceeding is apparent, the applicant does not propose to undertake searches for (or provide) the information sought.”

Ms Masterton’s refusal to engage in the recalculation process posed a problem for DHS. The absence of direct evidence of Ms Masterton’s fortnightly earnings for the relevant periods made it impossible for DHS to accurately determine her entitlement and to, in turn, recalculate the debt in a way that would extinguish its averaging component. In effect, DHS was stranded with a debt infected by averaging.

2.6 8 March 2019 correspondence by Ms Leon to Mr Manthorpe

On 8 March 2019, Ms Leon sent email correspondence, prepared by Mr Ffrench and others, to Mr Manthorpe. In it, Ms Leon made comments about the Draft Implementation Report and expressed concern about the inclusion of Part 4:

...I should note that the Department does advocate for amendment of legislation to the relevant policy agency where it considers this would clarify legislation. We have not done so in this case because our position is and remains that the legal position in relation to the program is not uncertain. Accordingly it would be premature for your report to suggest the legislation needs amending...

...I am concerned that your comments clearly imply that there is doubt as to the legality of the EIC system. Comments made by the Ombudsman on this aspect will undoubtedly be cited in public commentary, in circumstances where a court is yet to determine the matter. I think it is particularly undesirable to buy into the argument about legality when litigation is on foot, as comments from the Ombudsman as a significant part of the administrative law system may be considered to be pre-judging the outcome or may in fact prejudice the issue.’

For these reasons, I ask that the commentary regarding the legality of the EIC system be removed from the Implementation Report and that further commentary be reserved until after the Federal Court matter has concluded. [emphasis added]

Those representations were significant. Firstly, Ms Leon was placing pressure on Mr Manthorpe to refrain from commenting on the legality of the Scheme on the basis that doing so had the capacity to influence or prejudice the Court’s decision-making process. Secondly, she had represented to Mr Manthorpe that DHS was satisfied there was no doubt or uncertainty about the legal position of the Scheme: that is, that it was lawful.

2.7 The Ombudsman yields

The pressure that Ms Leon had placed upon the Ombudsman had the desired effect. By email to Ms Leon dated 13 March 2019, Mr Manthorpe indicated that he had decided to remove the “section on the ‘legality’ issue” from the report.
2.8 Consideration

Ms Leon’s response to the Ombudsman’s commentary on legality arose in circumstances where DHS had, almost as a matter of reflex, used the April 2017 Ombudsman Report to justify the legal foundations of the Robodebt scheme in response to external criticism. It had done so despite the fact that the previous report had not descended into any substantive commentary as to the Scheme’s lawfulness. Now, when the Ombudsman actually proposed to provide some commentary on that very issue of legality, DHS was determined to prevent its publication.

The “prejudice to litigation” argument

Ms Leon argued that it was “undesirable” for Mr Manthorpe “to buy into the argument about legality” on the basis that doing so might serve to prejudice or otherwise affect the Masterton proceedings. That was not a credible argument.

The Ombudsman was not a party to the Masterton proceedings, nor did he have any capacity to influence the Court’s decision-making. In any case, all his commentary did was to record the fact that there was a matter before the Federal Court, with the appropriate observation that it would not be appropriate to speculate on what superior courts in general might decide on the Scheme’s legality; make the unexceptionable point that it was a good idea to reassure the public about the legality of digitally-made decisions; and recommend more cryptically, a “mitigation strategy” where the legality of automation programs was uncertain. None of that amounted to the expression of a view about the legality of income averaging or the likely or proper outcome of the litigation.

There was absolutely no reason Mr Manthorpe should not have made observations of the kind that he did in Part 4 to the Draft Implementation Report. It was consistent with the Ombudsman’s functions to make such a comment.

Ms Leon was, or should have been, aware that her arguments to Mr Manthorpe regarding prejudice to the judicial process lacked any legal merit. Indeed, giving evidence, she accepted the proposition advanced by Senior Counsel Assisting that “irrespective of what the Ombudsman might say in the exercise of their statutory function, [she] would have appreciated that the Federal Court….would be unaffected.”

As to the motivation for Ms Leon’s pressuring of Mr Manthorpe: by this stage, public and political criticism of the Robodebt scheme had been raging for some years. Commentary by the Ombudsman that suggested frailty in the legal foundations of the scheme would have undoubtedly added fuel to that fire. The risk of this further public scrutiny and political pressure is a far more likely explanation for the desire to have it removed than a misplaced concern for the integrity of a judicial process.

In submissions, Ms Leon’s representatives denied that she was ‘aiming to avoid public or political scrutiny of the Scheme’, asserting that there was no evidence to attribute to her motivations of this kind. It was also argued that caution was appropriate in commentary by parties to a matter before the Court and there was a real basis for thinking it undesirable for the Ombudsman to prejudge the legality of the matters in the Federal Court. The Commission does not accept these submissions. The inference it has drawn as to Ms Leon’s motivations is clearly open on the evidence. For the reasons described above, there was no impediment to the Ombudsman making observations of the kind that he proposed.

In the Commission’s view, Ms Leon’s request to Mr Manthorpe to remove comments concerning legality from the Draft Implementation Report was not borne of any genuine concern to preserve the integrity of the Court’s decision-making processes in the Masterton litigation. Rather, it was designed to avoid public and political scrutiny of the Scheme. Ms Leon’s representations to the Ombudsman about the possible effect of those comments on the Masterton litigation were misleading and made without any proper basis.
The contention that DHS’s legal position was “not uncertain”

Ms Leon represented to Mr Manthorpe, in her 8 March 2019 email, that the legal position of the Robodebt scheme was “not uncertain” in circumstances where she had received information that, to any reasonable person in her position, cast real doubt on the lawfulness of the practice of income averaging which was integral to the Scheme. This information was in the following forms:

- significant public questioning of the legal basis for the Robodebt scheme, in the media and academia
- at least one AAT decision where findings had been made to the effect that the practice of averaging was unlawful
- the 5 March 2019 AGS advice to the effect that Ms Masterton’s application did not appear to be hopeless, and
- the (accepted) advice of her Acting Chief Counsel, Mr Ffrench, on 7 March 2019 that an AGS advice on prospects in the Masterton litigation was needed.

The claimed position of DHS that the lawfulness of the Robodebt scheme was “not uncertain” cannot rationally be reconciled with that information. The claimed position can also not be reconciled with DHS’ approach to the Masterton litigation - that is, DHS’ adopting of Option 1 (as it had been described in the 5 March 2019 AGS Advice).

Ms Leon gave evidence that she had relied on advice from DHS legal officers in making the relevant representations to Mr Manthorpe as to the legal position of the Scheme. By her oral evidence, Ms Leon explained that, at the time of her 8 March 2019 correspondence to Mr Manthorpe, she “didn’t know that [her] legal people by then had doubts.” In evidence and in submissions, Ms Leon asserted that she had not read the 5 March 2019 AGS advice. For the reasons explained above, the Commission does not accept these arguments.

Both Ms Leon and Mr Ffrench in their evidence (and Ms Leon in her submissions) emphasised that the representation to the Ombudsman that the lawfulness of the Scheme was “not uncertain” was a description of DHS’s position at the time (as they understood it), not their personal view. Nonetheless, Ms Leon did not qualify her representation to the Ombudsman in that way; she described the absence of uncertainty as to the Scheme’s legal position as ‘our position’.

The Commission has carefully considered that evidence. It is true that, prior to 5 March 2019, there is no evidence that departmental officers had expressed to Ms Leon any uncertainty as to the lawfulness of the Scheme. To the contrary, Ms Musolino had informed Ms Leon on a number of occasions that the legal foundations of the Scheme were sound. In submissions, Ms Leon emphasised that, in making the relevant representations to the Ombudsman, she relied upon the advice of DHS lawyers.

It is necessary here to make a general comment about Secretaries’ reliance on advice from departmental officers. As a matter of practice, Secretaries are regularly briefed with advice, and there is always a risk that it will be wrong or misleading. But Secretaries are not, or ought not be, utterly reliant on the advice that they receive. They can undertake critical analysis of the reasoning expressed in advice and seek external opinions to validate (or refute) that reasoning. Whether it is necessary to do so depends, of course, on a number of factors; but a critical factor is the implications of acting in accordance with the advice if it turns out to be wrong.

In this case, the implications were significant. Ms Leon was making representations to an entity charged with the statutory function of investigating the Scheme and its administration. If the advice to her that the Scheme’s legality was not uncertain proved to be wrong, she would have misled the Ombudsman and caused him to act under a serious misapprehension in exercising his functions. It was therefore critical in this case that Ms Leon take substantial steps to make sure the advice was right.

Even if it were the position of some within DHS at the time of Ms Leon’s representation to Mr Manthorpe that the lawfulness of the Scheme was “not uncertain,” that position had no proper basis. Ms Leon did not delve into the grounds for the purported DHS position (by, for example, seeking from the legal officers...
any legal advice underpinning the Scheme or asking what the relevant provisions of the Social Security Act which governed it were). If she had made those inquiries, she would have known that any position that the lawfulness of the Scheme was “not uncertain” could not be sustained.

In oral evidence, Ms Leon sought to distinguish between a representation (as was contained in the 5 March 2019 AGS advice) that “someone’s case is not hopeless” and a representation that the Applicant “had very good prospects of succeeding.” The distinction is not a significant one in the context of what should have been drawn from the advice. It was enough to raise a question in the mind of any reasonable person in her position as to the lawfulness of the Scheme and the practice of income averaging. In light of that advice, the representation to Mr Manthorpe that the legality of the Scheme was “not uncertain” did not disclose the true state of affairs.

In submissions, Ms Leon’s representatives made a slightly different argument about the significance of the 5 March 2019 AGS advice: that it “was not advice that the Robodebt Scheme was unlawful” but was instead advice that “Ms Masterton’s case that she did not owe a debt was not hopeless.” That distinction is artificial. The central argument advanced in the Masterton proceeding was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt. A ruling on that core ground would, in effect, be a ruling on the legality of the Scheme. This would have been clear to Ms Leon.

Additionally, in submissions, it was said that material provided to Ms Leon was indicative that “Ms Masterton’s debt was erroneously calculated, not that there was a problem with the Robodebt Scheme.” But the statement that Ms Masterton’s application did not appear to be hopeless was made in the context of advice that Option 1 (i.e. a recalculation done using averaging) was not preferable. It was averaging, not some error in arithmetic that made Ms Masterton’s prospects of success not “hopeless.”

Ultimately, in the Commission’s view, Ms Leon represented to Mr Manthorpe that the lawfulness of the Scheme was “not uncertain” in circumstances where:

- there was no legal or factual basis for that position
- Ms Leon had been in receipt of information prior to her representations to Mr Manthorpe that would have been sufficient to raise doubts in the mind of any reasonable person that the lawfulness of the Scheme was certain, and
- Ms Leon had not made proper inquiries to satisfy herself that there was sufficient basis to make that assertion to Mr Manthorpe.

The representation made by Ms Leon to Mr Manthorpe in March 2019 that the lawfulness of the Scheme was “not uncertain” was misleading.

2.9 Draft Australian Government Solicitor advice

The situation that DHS found itself in became more pressing. On 27 March 2019, AGS provided the Draft AGS advice. It was sent to Ms Leon on the same date. The Draft AGS advice concerned the prospects of Ms Masterton’s claim succeeding and said:

> There is no statutory basis in the SSA, or related legislation, for deeming apportioned fortnightly income to be accurate or provide a sufficient basis on which to raise and pursue a debt.

It continued:

> [Ms Masterton] would have good prospects of succeeding in a claim for relief on the basis that the use of apportioned ATO PAYG data will not establish that she owed a debt under s 1223(1).

AGS added the qualification that this was a complex question, and not all the factual instructions had been received; but (it said) the view expressed was sufficiently robust to inform decision-making for the purposes of the Masterton litigation. Before any final decision about its implications for the Scheme as a whole, the obtaining of senior counsel’s advice was recommended. It was said that the Solicitor-General might wish to give an opinion.
The views expressed in the Draft AGS Advice had serious implications for DHS, not only in relation to Masterton, but also the Scheme at large. It was a strong indicator that the practice of averaging was unlawful. If correct, it followed that DHS was demanding and recovering money to which it had no lawful entitlement. The many thousands of social security recipients from which it did so included cohorts who were socially and financially vulnerable. It was imperative that DHS act quickly.

In accordance with the recommendation in the Draft AGS Advice, DHS set about briefing the Solicitor-General to provide advice on the lawfulness of averaging to determine social security entitlement. This process is dealt with in detail below.

### 2.10 Finalisation of Implementation Report


Ms Leon failed to advise Mr Manthorpe after she received the 27 March 2019 advice from AGS on 29 March 2019 that her description of the position in relation to the legality of the Scheme was wrong. Having received the 27 March 2019 opinion, any reasonable person would have understood that the lawfulness of the Scheme was very much in doubt.

In evidence, Ms Leon was questioned as to why she had not ensured that “the Ombudsman was informed that there was a legal question and that the Department was engaging with that question by taking various steps.” She responded, “I don’t think I turned my mind to the reply I had sent to the Ombudsman some weeks earlier on the day I received the AGS advice.” In submissions on this issue, Ms Leon referred to her volume of work at the time and her reliance on those below her to bring her attention to events requiring “revisiting earlier correspondence.” The Commission does not accept these submissions.

Having adopted the position consistent with the representation to the Ombudsman that the legal position of the Scheme was “not uncertain,” it was incumbent on Ms Leon to correct the record when that position changed. It became clear, in light of the 27 March 2019 advice that such a position was no longer sustainable. At no point after receiving the advice did Ms Leon advise the Ombudsman that there were serious questions as to the legality of the program and that her previous description to the Ombudsman of the position was no longer accurate. In fact, it was not until after DHS (now Services Australia) received the Solicitor-General’s opinion on 24 September 2019 that Ms Leon contacted the Ombudsman again in relation to the issue of legality.

In the Commission’s view, Ms Leon’s failure to advise Mr Manthorpe that her previous representation to him in relation to the legality of the Scheme had no proper basis was, in its effect, misleading, and denied him any opportunity to reconsider his findings. It was not sufficient for Ms Leon to rely upon other DHS officers to bring to her attention the need to correct the record.

### 2.11 Further recalculation

On 1 April 2019, Ms Leon met with a number of officers, including Mr Ffrench, Acting Chief Counsel for DHS and Ms Musolino, acting deputy secretary, to discuss Masterton. Ahead of the meeting, DHS officers sent a brief to Ms Leon seeking instructions as to how the Agency should proceed with the recalculation in the Masterton case. Three options were canvassed: Options 1 and 2 described in the 5 March 2019 AGS advice and a further option (Option 3).

Option 3 contemplated a “recalculation” of the debt on the basis of depositions in the Masterton affidavit material filed. The plan was to determine Ms Masterton’s entitlement to benefit by relying on paragraphs 6(a) and 53 of an affidavit dated 4 February 2019 by Mr Miles Browne, a lawyer at Victoria Legal Aid.
Browne had stated in his affidavit that Ms Masterton had told him that she had “properly reported her income to Centrelink whilst receiving social security payments;” and that “she reported income amounts fortnightly to Centrelink from July 2011 to March 2012.”

Although those briefing Ms Leon spoke of Option 3 as an approach to a “recalculation” of Ms Masterton’s debt, there was no arithmetic involved. Instead, it involved DHS, in effect, taking Ms Masterton’s word (or her solicitor’s recounting of it) for it.

Option 3 was presented to Ms Leon as the “best means of managing litigation risk.” There is not much doubt why. If it were accepted that Ms Masterton had correctly reported her income amounts to DHS, there could have been no overpayment of benefit. The debt the subject of the judicial review would likely be extinguished, leaving open the jurisdictional argument (that there was nothing left for the court to decide) eventually run by the Commonwealth.

The approach contemplated by Option 3 was unusual, to put it mildly. DHS was proposing to rely on hearsay evidence from Mr Browne that Ms Masterton had told him she had “properly reported her income.” There was no DHS policy operating in respect of the Robodebt Scheme that contemplated reliance upon bare assertions by social security recipients that they had properly reported in determining social security entitlement, much less second-hand evidence of such assertions.

At the meeting on 1 April 2019, Ms Leon agreed to pursue Option 3. DHS then sought advice from AGS as to whether Option 3 was “properly open to the Commonwealth” and whether it accorded with obligations imposed on DHS by the Legal Services Directions 2017. In advice dated 8 April 2019, AGS said in relation to Option 3:

> The information that is taken into account, or not, in that recalculation is largely a matter of Departmental policy and decision-making guidelines, as well as ordinary good administrative decision-making principles. We understand the proposed approach is consistent with the Department’s policy and will have the approval of the necessary decision makers. Subject to the qualification below, we are not aware of any reason why the recalculation should not be conducted on the basis proposed. [emphasis added.]

Notably, AGS had assumed, for the purposes of the advice, that the approach contemplated by Option 3 would be approved and was “consistent with the Department’s policy.” It might have been approved by the “necessary decision-makers,” but it was certainly not DHS policy.

On 12 April 2019, DHS recalculated Ms Masterton’s debt in accordance with Option 3. The result of the recalculation was that Ms Masterton’s debt was reduced to zero and set aside. On the same date, DHS wrote to Ms Masterton’s legal representatives and explained that, by virtue of the “recalculation decision,” Ms Masterton owed no debt to the Commonwealth. It continued: “As a result of the recalculation decision, the Respondent considers that there is no continuing utility to the present proceeding...”

On 26 April 2019, there was a case management hearing in the Masterton matter. Mr Peter Hanks KC appeared on behalf of Ms Masterton. Counsel for the Commonwealth submitted that the court no longer had jurisdiction to make the declarations Ms Masterton sought because the extinguishment of the debt meant that there was no longer “a matter in the sense of there being an immediate right, duty or liability to be established by the determination of the court” for the purposes of s 39B(1A)(c) of the Judiciary Act 1903 (Cth). In response, Mr Hanks made allegations of “bad faith” against the Commonwealth, describing it as having exploited a “forensic advantage” by “destroying the debt” to avoid judicial determination of the lawfulness of that debt.

Eventually, Ms Masterton would discontinue the proceeding before the Commonwealth’s jurisdictional argument could be resolved. The events that led to the conclusion of the Masterton proceeding are discussed in detail below.
2.12 More papering over the cracks

The Commonwealth’s approach to the Masterton case revealed a good deal about its motives and designs. The fundamental question in the proceeding was whether averaging could be used to determine social security entitlement. Through the Draft AGS Advice, DHS had been given a strong indication of what the answer to that question was. Armed with this knowledge, it was for DHS to decide how it wished to proceed. To fall on its sword and concede was one option. To allow the Court to decide the issue upon a contested hearing was another. Both scenarios would likely have exposed the unlawfulness of the Scheme to the world, vindicating those who had been critical of the program since its inception.

But DHS’s adoption of Option 3 was an attempt to avoid this outcome entirely. It was a strategy designed not only to avoid a judicial determination of the fundamental question, but also to ensure that the Commonwealth was not forced to show its hand.

The Draft AGS Advice was expressed to be sufficient to properly inform decision-making about the Masterton litigation while proposing more detailed consideration in connection with the “implications... for the system as a whole.” The distinction between “decision-making” in the Masterton case and decisions about “the system as a whole” was artificial. A concession by the Commonwealth that the use of averaged PAYG data was not sufficient basis to raise the asserted debt in *Masterton* would have been an effective concession that the averaging component of the Scheme was unlawful.

Still, it was arguably premature for the Commonwealth to concede that the debt had been raised unlawfully without obtaining more definitive advice, given the implications for the Scheme at large and given the reservations expressed in the Draft AGS Advice. At the same time, it would have been inappropriate for the Commonwealth to proceed to a contested hearing on the substance of the application, given the strong indications in the Draft AGS Advice that it would be unsuccessful. But the Commonwealth could instead have given its lawyers instructions to seek further time from the Federal Court to consider its position and to seek the necessary advice. That would not have had the effect of frustrating Ms Masterton’s claim.

Instead, the Commonwealth sought to avoid having to put its cards on the table altogether. It extinguished the debt, in a way that was inconsistent with its own policies, and ran the jurisdictional argument. The extinguishment of the debt was no solace to Ms Masterton. Her objectives were more ambitious than merely having it set aside; she sought declarations from the Court that would have wider implications for the Scheme at large.

The Commission does not ascribe any bad faith to Ms Leon in the making of this decision. She was acting upon advice from DHS officers. But in a broader sense, the Commonwealth’s behaviour in using its powers in an attempt to frustrate Ms Masterton’s objective was disingenuous. It was consistent with the Commonwealth’s continuing desperation to paper over the fissures in the Scheme’s foundations; fissures that were becoming more and more difficult to conceal.
3 Commencement of Amato

On 6 June 2019, Deanna Amato filed an originating application for judicial review in the Federal Court.49 Her application challenged a decision by the secretary of Services Australia to raise and recover from her an alleged debt resulting from overpayment of social security benefit. Like Ms Masterton, Ms Amato was represented by Victoria Legal Aid.

The debt the subject of Ms Amato’s application arose from alleged overpayment of social security benefit in 2012. It had been raised on 28 February 2018 by averaging Ms Amato’s earnings as they appeared in PAYG data and at the time of the Application, that debt was in the amount of $2,754.82.

By her application, Ms Amato sought declarations similar to those Ms Masterton sought, including a declaration that the alleged debt the Commonwealth was demanding was not “a debt due to the Commonwealth” under the Social Security Act 1991 (Cth). Again, the core argument advanced by Ms Amato was that the use of averaged PAYG data was not sufficient basis to raise an overpayment debt under the relevant statutory framework.

There were differences between Ms Amato’s case and Ms Masterton’s. On 3 September 2018, a total of $1,709.87 had been garnished from Ms Amato’s tax refund to recover part of her debt.50 By her application, Ms Amato sought an order requiring the Commonwealth pay to her money received through the garnishee, together with interest on that money pursuant to s 51A of the Federal Court of Australia Act 1976 (Cth). Ms Masterton had no such claim.

The claim that Ms Amato was entitled to interest on the garnished amount later enabled her to avoid the same jurisdictional arguments that had been made by the Commonwealth in the Masterton case.51

3.1 Amato recalculation

As in the Masterton case, the Commonwealth took steps in the Amato case to avoid a determination on the lawfulness of averaging. Days after Ms Amato’s filing of her application, Services Australia sought to obtain evidence of her actual income for the relevant period. No doubt the wiser for its experience in Masterton, Services Australia did not ask Ms Amato to provide any information herself. Instead, it sought and obtained information from her bank and former employer.

On 21 August 2019, Services Australia undertook a recalculation of Ms Amato’s debt, based upon the information it had obtained from her employer. With that recalculation, Ms Amato’s debt was reduced from $2,754.82 to $1.48. The debt was then waived52 and Ms Amato was reimbursed the total amount paid to service the debt (including the amount garnisheed from her tax return). Ms Amato was not paid interest on the amount taken from her tax refund.

The Commonwealth’s attempts to avoid having to show its hand proved unsuccessful. On 3 September 2019, Services Australia obtained an opinion from AGS. AGS advised that there was no basis for the Commonwealth to contend that there was “no jurisdiction or utility” in the Amato proceeding, because there was “still a live controversy”: Ms Amato’s claim for interest. In a briefing on 4 September 2019, Mr Ffrench advised Ms Leon:53

...there is still an issue for the Court to decide as Ms Amato has claimed interest on the money garnisheed from her tax return. This means that the Amato proceedings cannot be managed in the same fashion as Masterton, where the Commonwealth is arguing there is no purpose to the application after the debt was reduced to zero.

On 6 September 2019, there was a case management hearing for both the Masterton and Amato proceedings. Amato was set down for hearing on 2 December 2019. The Masterton case, in which the jurisdictional issue had been raised would be determined after a decision in Amato was handed down. The resolution of the Amato and Masterton litigation is dealt with in detail below.
4 Briefing Mr Robert

On 11 June 2019, the Hon Stuart Robert MP, Minister for Human Services, was given a brief on the Masterton case.\(^\text{54}\) It indicated that if the litigation were to result in an adverse decision concerning the lawfulness of the debt, consideration would have to be given to “legislative or revised administrative arrangements” for the Scheme. Ms Leon had reviewed a draft of the brief some days earlier. She had noted on the draft that the minister would “also need to be briefed orally.”\(^\text{55}\)

Mr Robert read and signed the brief on 22 June 2019,\(^\text{56}\) adding a comment that the deputy secretary, Integrity, (Ms Annette Musolino) was to brief him in the first week of July. That briefing duly took place on 4 July 2019. There is controversy as to what occurred at it.

4.1 Communication of Draft AGS Advice

Mr Robert was not, at any point, provided with a copy of the Draft AGS Advice. In evidence, Mr Robert emphasised that it would be extraordinary if an advice of such significance as the Draft AGS Advice were not presented to him as minister as a part of a written brief. There is force in that comment, but it seems that is what occurred.

What was the subject of dispute was whether Mr Robert was nevertheless briefed orally about the Draft AGS Advice. Ms Leon had made a notation on a brief delivered to her that the minister was to be briefed orally,\(^\text{57}\) in order to keep distribution of the advice itself to a more limited group than would receive a written ministerial briefing.\(^\text{58}\) Mr Ffrench said that in accordance with Ms Leon’s instruction, he attended the 4 July meeting, with Ms Musolino and others, to brief the minister. His evidence was that he took a copy of the Draft AGS Advice with him and explained to Mr Robert the difficulties raised by the Advice in relation to aspects of the Scheme. He informed Mr Robert that, as a result of the Draft AGS Advice, steps had been taken to obtain an opinion from the Solicitor-General.\(^\text{59}\)

According to Mr Ffrench, Mr Robert did not ask whether there was any existing legal advice on the issue of averaged PAYG data and did not say anything about obtaining external legal advice on the question.\(^\text{60}\) He believed that it might have been in this meeting that the minister made a statement to the effect that a legal advice was merely an opinion until a Court declared the law.\(^\text{61}\) Unfortunately, however, Mr Ffrench did not document the meeting in any way.

Mr Robert, on the other hand, maintained that he was never advised of the Draft AGS Advice, orally or in writing.\(^\text{62}\) Had he been, he said, he would have acted immediately to halt the Scheme. To the contrary, it was he who, in the 4 July 2019 briefing, first confirmed that there was no existing legal advice as to the use of averaged PAYG data\(^\text{63}\) and directed that legal advice be obtained from AGS or the Solicitor-General (he was not certain which) as to: the legality of using averaged PAYG data; options to move away from its use; and the litigation (Masterton and Amato) then on foot.\(^\text{64}\)

Mr Robert’s representatives made submissions as to why his recall should be preferred. Mr Ffrench’s account was not supported by documentary evidence, such as meeting notes; there was a lack of detail about the claimed briefing; Mr Ffrench had said his usual practice was to confirm oral advice in writing, and that had not occurred. Others present at the meeting - Mr Storen and Mr McNamara - had not given evidence about this aspect and they were not asked about it. (Ms Musolino was, but she maintained she had no independent recollection of it.) He had not appreciated that the evidence of Ms Leon and Mr Ffrench on the point would be given weight and had not therefore appreciated any need to seek leave to cross-examine them.

After the receipt of Mr Robert’s submissions, Mr Storen and Mr McNamara were asked for their recall of the 4 July 2019 meeting and what was discussed at it. Mr Storen said that while the Draft AGS Advice and emails about the meeting were familiar to him he had no particular recollection of the meeting itself or discussions about the Draft AGS Advice with the minister. Mr McNamara, while having no independent
recollection of attending the meeting or what was discussed or who was involved in it, nonetheless, was able to give his opinion that because he was not aware the income compliance program was “legally problematic” until he became aware of the content of the Solicitor-General’s advice later that year, he did not believe that the 4 July meeting involved discussions with the minister about income averaging being “legally problematic.”

Neither Mr Storen’s nor Mr McNamara’s evidence assists in resolving the question of whether Mr Ffrench did tell the minister about the Draft AGS Advice. It is not surprising that they were not able to assist with any recollection on that point. Neither was a lawyer and they were at the briefing for the purpose of speaking to slides which detailed the current compliance measures.

Mr McNamara’s opinion is not useful, because there is not actually any dispute as to whether the legality of income averaging was discussed at the meeting. Mr Robert’s own account was that he directed the obtaining of legal advice about the legality of its use and options to move away from it, as well as about the Masterton and Amato litigation. An email which Ms Musolino sent a couple of days later to the participants in the meeting identified the matters the minister’s office had sought briefing on as a result of it. It contained as its first item “Options for continuing or replacing income averaging (in light of current Federal court cases)” with an item which speaks of adjustments in the event of an adverse court outcome. That also very strongly suggests that the “legally problematic” aspects of income averaging were discussed.

Mr Ffrench’s account of telling Mr Robert about the Draft AGS Advice at the 4 July 2019 meeting was squarely put to Mr Robert when he gave evidence. He responded that he did not recall it occurring. For completeness, Ms Leon’s recollection was that she thought she or a staff member would have told Mr Robert about the advice, and he disagreed with that. Mr Robert did not seek leave to cross-examine either Mr Ffrench or Ms Leon on the matter, either when they gave evidence or subsequently, as he could have done. (The Commission in fact has not taken into account Ms Leon’s evidence on the point, because of its vagueness.)

The Commission found Mr Ffrench a credible witness, notwithstanding the lack of documentary record of the meeting, and found Mr Robert less compelling. Surrounding circumstances support Mr Ffrench’s account. Contemporaneous emails confirm that he was preparing an oral briefing for the minister on the Masterton litigation. The only point of his being at the 4 July 2019 meeting was to explain the legal position that Services Australia found itself in. Any such explanation would have involved describing the doubts arising from the Draft AGS Advice on prospects. It would also make very little sense, had Mr Robert expressed a desire to obtain external legal advice, that he would not have been informed by Mr Ffrench or others at the meeting - that steps were already under way to obtain the Solicitor-General’s Opinion (as they were), and it seems highly probable that he would have been told that was AGS’ recommendation in the Draft AGS Advice.

A further brief was provided to Mr Robert on 19 July 2019 (the 19 July brief). The 19 July brief referred to the Masterton and Amato litigation and went on to say that, given the risks and costs associated with that litigation, the use of income apportioning within the compliance program was actively being considered, by way of exploration of risk mitigations to support its continued use and other process changes. The brief did not elaborate on the risks but advised that a request to brief the Solicitor-General for advice on the use of PAYG data was in progress.

The content of the 19 July brief, referring to the risks and costs associated with the Masterton and Amato litigation is consistent with Mr Robert’s having received an account of the problems identified in the Draft AGS Advice. The reticence of the brief’s authors to elaborate on those risks is explicable if Mr Ffrench had, as he said, already explained them by reference to the AGS Draft Advice.

The Commission’s view is that, remarkable though the failure to provide the Draft AGS Advice in written form to Mr Robert was, he was nonetheless informed of its existence and effect on 4 July 2019. However, the Commission agrees with a further submission advanced on Mr Robert’s behalf. His being verbally briefed in relation to the Draft AGS Advice is unlikely to have changed the sequence of events. It is probable that the next step would have been the obtaining of legal advice from the Solicitor-General.
Mr Robert’s public comments

In his evidence, Mr Robert said that early in his tenure as Minister for Government Services, from around June or July 2019, he appreciated that only 10 per cent of welfare recipients had been engaging with the current iteration of the Scheme (the CUPI) and that a recipient who did not engage or explain their earnings would have a debt raised against them through the averaging of PAYG data. He also appreciated that averaged PAYG data alone was insufficient to raise a debt. In fact, his misgivings about the use of PAYG data were such, he said, that he delayed extending the Robodebt Scheme to vulnerable cohorts.

Despite what Mr Robert said was his “strong personal view” that income averaging led to incorrect calculations of debt, he was prepared to advocate for its use. In particular he claimed publicly that in 99.2 per cent of cases where a debt was raised, the debt was correct. He explained this figure in different ways.

In an interview on 31 July 2019, Mr Robert asserted that in 99.2 per cent of the 80 per cent of cases where recipients could not explain their income, Services Australia had conducted a review which showed that the recipient in fact had the debt. In a later doorstop interview, on 17 September 2019, he said it was based on a calculation that of the 80 per cent of cases where the recipient had not explained their earnings satisfactorily, only 0.8 per cent had been overturned on appeal, which meant a 99.2 per cent effectiveness rate. (A media release authorised by Mr Robert on the same day made a similar claim).

In evidence, Mr Robert suggested that the 0.8 per cent might consist of cases which succeeded on application to the AAT or, more generally, cases where error by Services Australia or the ATO had been identified.

The Commission has tried to establish how a figure of 0.8 per cent could have been arrived at as representing the percentage of inaccurate debts in those cases where a debt was raised. To begin with, the claim that debts were raised in 80 per cent of cases is flawed. According to figures provided to the Commission by Services Australia, across the life of the Robodebt Scheme, debts were actually raised in about 55 per cent of cases where recipients were required to respond to a discrepancy between declared income and PAYG data.

Turning to the figures for debts raised, a percentage as low as 0.8 per cent could only be arrived at confining consideration to debts revised after review in the Administrative Appeals Tribunal. This is to ignore debts revised internally after reassessment by Services Australia officers, after Subject Matter Expert (SME) review and after Authorised Review Officer (ARO) review, which, on the figures provided by Services Australia, accounted for about 16 per cent of cases where debts were raised. And, of course, it was based upon the unsafe assumption that if a recipient did not have the capacity to seek review, the debt raised against them must have been accurate.

The statement made in the 31 July 2019 interview was untrue (Services Australia had not reviewed 99.2 per cent of the cases where the income discrepancy had not been explained, let alone found the debt to be correctly raised). The statement made in the 17 September 2019 interview was, at best, misleading; it suggested that only a fraction of debts had been challenged and that the balance of 99.2 per cent was therefore correct.

In oral evidence, Mr Robert explained his interview statements as being part of his duty to defend the government’s programs, which Cabinet solidarity required ministers to do whether they agreed with the programs or not. “Government Ministers are expected to show confidence in the agenda of the government... Cabinet Ministers can’t go out and defend some parts of a government’s program and be wishy-washy on others.”

To the proposition that being a Cabinet minister did not compel him to say things that he did not believe to be true, Mr Robert replied: “until such time...as I’ve got the legal opinion, I could be wrong.” However, when it was pointed out to him that this was not a matter of law, it was a matter of maths, which he could see could not be correct, Mr Robert admitted that, “in [his] view, the maths could not possibly add up.”
Mr Robert’s lawyers made these submissions on this issue. He had adhered to “the letter of the Cabinet Handbook” and what he said was appropriate given that his personal views at the time were unsupported by legal advice. He was not aware when he made the 99.2 per cent effectiveness rate claim that it was untrue; the concession in his evidence that it was untrue was a reflection of what he knew at the time of his giving evidence, not when he made the representation. Mr Robert was not the “architect” of the flawed representation; DHS had given him the relevant figures.

The submission that all Mr Robert was conceding in evidence was that he knew now the figure was false, not that he knew it at the time, does not sit well with his actual evidence:

MR SCOTT: Well, your evidence was that you could not raise a debt based solely on averaging.

THE HON STUART ROBERT: That was my belief, yes.

MR SCOTT: And in 90 per cent of cases, that’s exactly what was happening under the program to your knowledge at the time.

THE HON STUART ROBERT: Yes, that is correct.

MR SCOTT: So what you said there, to your knowledge at the time, was false, wasn’t it?

THE HON STUART ROBERT: To my personal view, yes. But I’m still a Government Minister, and it’s still a government program. And this was the approach that Cabinet has signed off on three or four years earlier and had been going on. And until such time as I’m not a lawyer, I’ve got a competent legal view, it is still just my opinion.83 [Emphasis added.]

And later, on the same topic:

COMMISSIONER: But you are saying they were the Departmental figures. But you knew they couldn’t be right.

THE HON STUART ROBERT: I had a massive personal misgiving, yes, but I’m still a Cabinet Minister.

If Mr Robert did not know at the time he made the representations that the claim of a 99.2 per cent effectiveness rate was false, he at least had a very good idea, “a massive personal misgiving,” that it was most unlikely to be right.

Mr Robert’s views about the legality of averaging are irrelevant to this point. He was citing a figure as to the supposed 99.2 per cent accuracy achieved by CUPI, not making a statement as to whether the program was legal. As to the source of the figure, ministers are not entirely at the mercy of the information that they receive from their departments. Where dubious figures are provided, the minister is in a position to demand the basis for the information and confirmation of its accuracy. And Mr Robert held the view that “the maths could not possibly add up.”84

It can be accepted that the principles of Cabinet solidarity required Mr Robert to publicly support Cabinet decisions, whether he agreed with them or not.85 But Mr Robert was not expounding any legal position, and he was going well beyond supporting government policy. He was making statements of fact as to the accuracy of debts, citing statistics which he knew could not be right. Nothing compels ministers to knowingly make false statements, or statements which they have good reason to suspect are untrue, in the course of publicly supporting any decision or program.
6 Delay in briefing Solicitor-General

On 27 March 2019, Ms Leon had been provided with the Draft AGS Advice, which while expressing the view that Ms Masterton had good prospects of succeeding her claim based on averaging, recommended that, before any decision about the implications for and the steps to be taken in respect of the Scheme as a whole, senior counsel’s advice, possibly from the Solicitor-General, be obtained.

On 1 April 2019, Ms Leon met with a number of officers, including Mr Ffrench and Ms Musolino, to discuss the Masterton case. During this meeting, Ms Leon asserts, she asked that DHS officers proceed with obtaining the Solicitor-General’s advice. However, it was not until 27 August 2019 that the Solicitor-General was briefed to provide advice on the Scheme.

In the period between DHS’ receipt of the Draft AGS Advice on 27 March 2019 and its briefing of the Solicitor-General, the Scheme marched on. Debts determined on the basis of averaging continued to be raised, pursued and recovered in circumstances where the Government had advice that raised serious doubt as to the lawfulness of these practices. In the Commission’s view, this delay was excessive.

Mr Ffrench said that there was a delay during the period of the 2019 election (which was announced on 11 April 2019), and it was not unreasonable to hold off seeking the advice during that period, because if the government changed it might abandon the Scheme, or the questions to be asked of the Solicitor-General might be different. But it is highly improbable that a new government would not want an answer to the same fundamental question of whether averaging as used in the Robodebt Scheme was legal, particularly given that it was the respondent to litigation on that issue.

Ms Leon did seek and receive an update on the progress of the brief in early June 2019, and was told the questions for the Solicitor-General were still under development. Services Australia’s engagement with DSS in the formulation of the questions to be put to the Solicitor-General caused some delay. By early August 2019, she was becoming concerned about the length of time the process was taking. There was an email exchange with Mr Ffrench about the work being done with DSS on the brief, followed by a meeting between Ms Leon, Ms Campbell and their senior lawyers on 7 August 2019, at which both Secretaries conveyed, according to Mr Ffrench, “a desire to move things faster.” The brief was delivered to the Solicitor-General at the end of that month.

In evidence, Ms Leon explained:

…it’s possible that I didn’t follow [briefing the Solicitor-General advice] up as frequently as I might otherwise have done during that period. But in any event, when I then inquired in late July or early August, by then it seemed to me to have gone on too long. And I conveyed that to people in the Department who, by then, had been engaged in some protracted negotiations with the Department of Social Services about the wording of the question, which agreement had to be obtained because they owned the legislation. And so I hurried it along to get it finalised, and then it was.

In submissions made on Ms Leon’s behalf, it was said that she followed up the progress of the brief with the relevant DHS officers in accordance with the expected timeframe; her staff had told her that it would take some months to brief the Solicitor-General because DSS would have to be consulted, AGS would have to settle the question and there was a “technical process” involved in the briefing. When it became apparent that it was taking too long, she intervened to make sure “the brief was finalised in a timely manner.” It was conceded that she had not followed up the matter as often as she might have, but that was because she was “significantly occupied with certain other time critical matters” during the briefing process.

However, in the Commission’s view, none of this justifies the five-month delay in preparing and delivering the brief. The question that needed answering was a simple one – was the use of averaging to determine social security entitlement lawful? It should not have taken almost half a year for the question to be asked. If it were the case that Ms Leon was told that briefing the Solicitor-General would take “some months,” she should have made it clear that the urgency of the situation made that kind of timetable unacceptable.
As to the suggestion that Ms Leon was occupied with other “time critical” matters, it is difficult to conceive of a matter more critical than this. In light of the unambiguous opinion from AGS that the component of Ms Masterton’s claim relating to the lawfulness of averaging had “good prospects of succeeding,” it should have been clear to Ms Leon that the legality of the use of averaged PAYG data to establish a debt was in serious doubt. If that was correct, it followed that DHS was demanding and recovering money to which it had no lawful entitlement. The cohort from which it did so included many who were socially and financially vulnerable. Given her position as secretary of DHS and then Services Australia, it was Ms Leon’s responsibility to ensure that the Solicitor-General was briefed as a matter of urgency.
7 The Solicitor-General’s opinion

7.1 Receipt of the Solicitor-General’s opinion

Services Australia received the advice of the Solicitor-General93 (the Solicitor-General’s Opinion, or the Opinion) on 24 September 2019. Ms Musolino gave Ms Leon a copy of the advice the same day.94 In relation to “the use of apportioned ATO PAYG data in making debt decisions,” the Solicitor-General expressed the following view:

In our opinion, apportioned ATO PAYG data cannot properly be given “decisive” weight in deciding either that a debt is due, or the amount of that debt. That is, apportioned ATO PAYG data cannot, without more, support a conclusion that a person has received benefits to which they were not entitled.

The Solicitor-General’s Opinion was an authoritative opinion that the Commonwealth did not have a proper legal basis to raise, demand or recover asserted debts solely on the basis of income averaging, a practice fundamental to the Scheme. The effect of the Opinion was to make clear that, over the life of the Scheme in its various iterations, the Commonwealth had unlawfully been raising asserted debts against welfare (or former welfare) recipients.

Given the significance of the Solicitor-General’s Opinion to the Scheme and to Government more broadly, it was imperative that the Opinion be acted upon as soon as practicable. It should have been immediately obvious to those who received it that, at the very least, the practice of using averaging as a basis to raise and recover purported debts could not continue.

Instead, there was substantial delay before Services Australia acted on the Solicitor-General’s Opinion in any meaningful way. In the period between Services Australia’s receipt of the Solicitor-General’s Opinion on 24 September 2019 and the practice of averaging being ceased on 18 November 2019, the Scheme continued for a period of almost two months. Debts determined on the basis of averaging were still being raised, pursued and recovered in circumstances where the Government had unambiguous advice to the effect that these practices were unlawful. The following is a summary of events that occurred at the time and in the immediate aftermath of Services Australia’s receipt of the Solicitor-General’s Opinion.

7.2 Initial response

Not long before she gave Ms Leon the Solicitor-General’s Opinion on 24 September 2019, Ms Musolino sent a text message to Ms Leon saying:95

Secretary - the standard practice is that an advice from the SG will be copied to the AG. Given this I propose reaching out to MO tomorrow to indicate we are considering the advice but need to clarify a number of issues before briefing Min on advice and implications. Annette.

Ms Leon said in her evidence that she understood from the text message that Ms Musolino would be contacting Mr Robert’s office in relation to the Solicitor-General’s Opinion, and she had relied on her to do so.96 Mr Ffrench gave similar evidence: soon after Services Australia’s receipt of the Solicitor-General’s Opinion, Ms Musolino had advised him not to share the document and told him she would “attend to all further escalation” of the advice, including to DSS.97

Notwithstanding those indications to the contrary, it does not seem that Ms Musolino made any contact with Mr Robert’s office or DSS in relation to the Solicitor-General’s Opinion. On the evidence the Commission accepts, Mr Robert was not made aware of the Opinion until 29 October 2019 and DSS received it on 7 November 2019.
7.3 Consideration of options

There is very little documentary evidence about what happened immediately after Services Australia’s receipt of the Solicitor-General’s Opinion. Ms Leon said there was a period of some weeks after she received it that departmental staff spent in exploring “what changes could be made to the Robodebt scheme to bring it within legislation or whether the scheme was to be ceased.” During that time, she had “a number of meetings and received verbal briefings about these issues.”

According to Ms Leon, Mr Storen and Mr McNamara “spent about a month trying to work up other options for how we might be able to change how the online compliance program operated, to make it consistent with what we now knew to be the legal position.” Once the work was done, it was obvious that “we could not find a way to continue operating the scheme,” so she then made the decision to inform Mr Robert and DSS.

There is evidence that, under Ms Leon’s instruction, Services Australia officers worked throughout October 2019 to prepare a briefing to Mr Robert that outlined options for the redesign of the program. The work informed briefings given to Mr Robert after he was advised of the Solicitor-General’s Opinion.

7.4 Bringing the Solicitor-General’s Opinion to Mr Robert’s attention

The time at which Mr Robert was made aware of the Solicitor-General’s Opinion is the subject of dispute. He says he was first told about it by way of a brief that he received on or about 7 November 2019. Ms Leon’s evidence, however, was that she had made Mr Robert aware of the Solicitor-General’s Opinion’s nine days earlier during a teleconference on 29 October 2019.

On Ms Leon’s account, during that teleconference, she told Mr Robert about “the thrust of the advice” and made these points:

- “As a result of the Solicitor-General’s advice it is not permissible to raise debts based on averaging of income. We have held this advice very close due to its sensitivity. DSS is not yet aware of it. We will prepare a briefing to you to inform the Prime Minister”
- “Due to the timeframes in the Amato proceeding, we will need to act fairly swiftly to cease the averaging of income. DSS needs to take action in relation to the program, and its ongoing operation,” and
- “There will be financial implications and we will need to consider what should be done about past debts raised using averaging”

According to Ms Leon, Mr Robert responded: “Legal advice is just advice.”

In oral evidence, Mr Robert said he did not recall any conversation with Ms Leon on 29 October 2019. He denied having been notified of the Solicitor-General’s Opinion at this time or saying to Ms Leon, “Legal advice is just advice.”

The evidence points to Mr Robert’s recollection being flawed on this point. Ms Leon was able to produce a handwritten diary entry, which appears to be a contemporaneous note of her conversation with Mr Robert on 29 October 2019. The discussion recorded largely reflects Ms Leon’s account of the teleconference, and contains the phrase, “Advice is just advice.”

Mr Ffrench also observed that it was apparent from something Mr Robert said during a meeting on 8 November 2019 that the latter had been aware of the Solicitor-General’s Opinion for some time prior to the meeting, because he referred to his previous knowledge of it; which lends some further support to Ms Leon’s account of having informed him of it on 29 October 2019.
Also reinforcing Ms Leon’s evidence is the statement of Dr Roslyn Baxter, who commenced as deputy secretary, Integrity & Information Group at Services Australia on 28 October 2019. On 29 October 2019, on her second day in the role, Dr Baxter said, Ms Leon telephoned her and informed her of a conversation she had just had with Mr Robert. It included the detail that she had advised him that while the agency was still in the process of preparing a formal briefing about the Solicitor-General’s Opinion, it had no reason for confidence about the legal basis of income averaging and it would be necessary for the minister to come to a decision soon; to which Mr Robert responded that she should make some cautious overtures to the Department of Finance about the financial implications of halting the Robodebt Scheme.

Ms Leon also, in Dr Baxter’s recollection, referred to the expression “Advice is ‘just advice’,” but in the context of Mr Robert’s having attributed it to the Attorney-General, to whom, he said, he had spoken about the legality concerns in relation to the Robodebt Scheme.

In submissions on this issue, Mr Robert’s representatives again made the point that Ms Leon Mr Ffrench and Dr Baxter had not been cross-examined, and that part of Dr Baxter’s statement was redacted. Again, it was entirely predictable that there would be conflicts between the evidence of Mr Robert and Ms Leon on this issue. It was open to him to seek leave to cross-examine Ms Leon, and Mr Ffrench so far as his evidence supported hers. Dr Baxter’s statement was redacted for reasons of public interest immunity and it is to be noted that Mr Robert’s solicitors did not respond when asked if they wanted to apply for a ruling on whether that privilege should be maintained. Because Dr Baxter’s statement was given after hearings had closed, Mr Robert did not have the opportunity to seek leave to cross-examine her. But as has already been pointed out, the lack of cross-examination affects the weight to be given to a witness’ evidence, but it does not preclude its acceptance. Dr Baxter had a practice of making daily contemporaneous notes recording to whom she had spoken and what was said, which gives some confidence in the accuracy of her recollection.

Mr Robert’s solicitors were particularly concerned to rebut the claim that Mr Robert made the statement “Advice is just advice” on 29 October 2019, but in the alternative contended that if it were said, it was of “little consequence” and only “peripherally relevant” in light of what happened after.

The evidence of the three witnesses weighs strongly in favour of Ms Leon’s having spoken to Mr Robert about the Solicitor-General’s Opinion on 29 October 2019, and the Commission accepts that the conversation did occur. It seems probable, too, that the “Advice is just advice” comment was made in some context in this conversation. Mr Ffrench remembered Mr Robert saying something of the sort, although probably on a different occasion and in relation to a the Draft AGS Advice. Both Ms Leon and Mr Ffrench pointed to the fact that a brief delivered to Mr Robert on 7 November 2019 cautioned that, while the Solicitor-General’s Opinion did not amount to a “judicial declaration of law,” there was considerable reputational and legal risk in continuing the Robodebt Scheme. Both said the phrase was included as a counter to Mr Robert’s dismissive attitude to legal advice. And both Ms Leon and Ms Baxter had a contemporaneous record of the phrase’s use in the 29 October conversation.

But what is unclear is the context in which it was said – Dr Baxter recalled Ms Leon saying that Mr Robert attributed it to the Attorney-General – and whether it mattered. At the time of the 29 October conversation, Mr Robert had only just become aware of the Solicitor-General’s Opinion’s existence and had not had an opportunity to read it in full. Ms Leon and Mr Ffrench were sufficiently anxious about what Mr Robert’s comment portended to include a warning note in the July 7 brief, but in fact Mr Robert did act upon the Opinion soon after receiving a copy of it. The Commission does not consider that the evidence justifies attaching any significance to it.
8 Delay in informing Mr Robert and Ms Campbell of the Solicitor-General’s Opinion

What is more important is Ms Leon’s delay in telling Mr Robert and Ms Campbell about the Solicitor-General’s Opinion. Ms Campell was not told it had been received until 7 November 2019. That was the first time that DSS was notified of the advice; not surprisingly, Ms Leon recalled in evidence that Ms Campbell was “unhappy that it had not been shared with her earlier.”

The five-week delay between receiving the Solicitor-General’s Opinion and bringing it to Mr Robert’s attention, and the six week lapse of time before Ms Campbell was informed of it, are of concern. Having been provided with the Opinion, Ms Leon was in a pressing situation. Debts determined on the basis of averaging continued to be raised and recovered in circumstances where Services Australia had unambiguous advice that these practices were unlawful. It was vital that the Opinion be acted upon as soon as practicable.

Having received the Solicitor-General’s Opinion, Services Australia was obliged to do two things as a matter of urgency. The first was to provide Mr Robert with a copy of it. He was the minister responsible for Services Australia and had to deal with the significant implications that the advice posed for Services Australia’s activities. The second was to provide the Solicitor-General’s Opinion to DSS. It was the owner of the legislation under which the Scheme had been established. The involvement of both the minister and DSS was essential in order to bring the issue before Cabinet so that a decision could be made whether to cease the practice of averaging under the Scheme.

Services Australia’s obligation to provide DSS with the Solicitor-General’s Opinion was codified by paragraph 10.4 of the Legal Services Directions 2017 (the Directions). The effect of that provision was that, because Services Australia had obtained legal advice on the interpretation of legislation administered by DSS, Services Australia was required to provide DSS with a copy of the advice.

Subsection 19(1) of the Public Governance, Performance and Accountability Act 2013 (Cth) imposed statutory obligations on Services Australia to keep Mr Robert informed of the activities of Services Australia, to give to Mr Robert any documents or information he required in relation to those activities and to give Mr Robert reasonable notice if Services Australia became aware of any significant issue that may affect Services Australia. Clearly, the Solicitor-General’s Opinion was a significant issue that was likely to affect Services Australia and its activities.

But quite apart from those provisions, it was obvious that steps had to be taken without delay because the advice of the Commonwealth’s second law officer was that the Commonwealth was acting unlawfully. As secretary of Services Australia, it was Ms Leon’s responsibility to ensure that these steps were taken. Ms Musolino’s intimations that she would “reach out” to the minister’s office to let it know the Opinion was being considered and would “escalate” it to DSS did not absolve Ms Leon of her obligation to make sure that those who needed to know about the advice were told immediately and were given copies.

In her statement, Ms Leon said that on receiving the Solicitor-General’s Opinion, she formed the view that it would be necessary either to change the Scheme to “bring it within the parameters” of the Opinion or to cease it. She and Mr Ffrench discussed whether she could, consistent with her obligations under the Public Governance, Performance and Accountability Act 2013 (Cth), allow the Scheme to continue to operate while she explored the implications of the Solicitor-General’s Opinion. According to her, Mr Ffrench told her she could, “provided it was only for a reasonable time needed to properly explore the way forward.”

(Mr Ffrench did not give evidence on the point, but advice to that effect would have been consistent with advice he later gave Ms Leon on 17 November 2019 [detailed below].) The minister would expect a rigorous testing of options. Accordingly, Ms Leon said Mr Storen and Mr McNamara spent a month trying
to find ways to adapt the program so that it was lawful. When it became apparent there was not a way to continue the Scheme, she made the decision to inform the minister and DSS.

In oral evidence, Ms Leon was questioned specifically about the delay in notifying DSS of the Solicitor-General’s Opinion. She said that delaying telling DSS about the advice had no impact on the steps DHS took to respond to it. She was concerned to ensure that the Opinion remained confidential, given its significance. There was not, Ms Leon explained “a high volume of trust and comity” between her and Ms Campbell and Ms Campbell might have found it “somewhat uncomfortable” that the Scheme had been found to be unlawful. She said that she wanted to ensure that any briefing of Ms Campbell in relation to the advice was “conveyed appropriately.”

Ms Leon’s solicitors submitted in relation to this issue that the delay was a short one borne of a reasonable desire to work through the implications of the Solicitor-General’s Opinion, justifiable concern that it would be leaked, and a “judgment call that the best and fastest way to end the Scheme was to work out how to do so” before informing Mr Robert and Ms Campbell. That judgment call should not be considered in the light of hindsight, particularly when there was no evidence that Ms Leon was acting other than in good faith.

Ms Leon’s point in evidence, that the delay in providing the Solicitor-General’s Opinion to DSS had no impact on the steps Services Australia was taking to respond to it, was reiterated in submissions. Anyway, it was said, Ms Campbell was in no position to end the Scheme. And while the matter could not be brought before Cabinet without the involvement of Mr Robert and DSS, it also could not be brought before Cabinet without Service Australia’s work in the intervening period.

None of that, however, is an adequate explanation for the delay in Services Australia’s providing Mr Robert and Ms Campbell with the Solicitor-General’s Opinion. Both needed to know of it, and there was no reason that had to await Services Australia’s settling on a position in relation to the Opinion and its implications. The risk of the Opinion’s being leaked did not justify its being withheld from them.

Given the 27 March 2019 advice from AGS, the substance of the Solicitor-General’s Opinion should not have taken Services Australia by surprise. Ms Leon’s evidence that she was shocked upon receiving the Solicitor-General’s Opinion is difficult to reconcile with its confirming, in effect, the view that AGS had already expressed to Services Australia. In the five months that elapsed between the 27 March 2019 advice and Services Australia’s receipt of the Solicitor-General’s Opinion, senior Services Australia officers could have been contingency planning in the event of advice of the kind that was ultimately provided.

In fact, work does seem to have been under way. The 19 July 2019 brief mentioned earlier referred to the expected brief to the Solicitor-General and the fact that the use of “income apportioning” in the Scheme was being “actively considered.” DHS was currently exploring “risk mitigations [to] support the continued use of apportioned income” and process changes to support the program. Possible options were a letter reminding recipients of their obligations to provide income information and a requirement for the use of coercive powers to confirm income information through employer payslips or bank details before a debt was finalised. A further brief would be sent on receipt of the Solicitor-General’s advice.

That seems to have been the brief MS19-000365, sent to Mr Robert on 7 November and drawing on the work of Mr McNamara and Mr Storen. It identified proposed changes in the face of legal risks to the Robodebt Scheme and referred to the current Federal Court litigation, with its central issue of whether a debt could be raised based solely on income averaging. The brief suggested using quarterly superannuation information from the ATO to assist in determining whether customers had regular income; the possibility of better online and automated solutions for processing income from banks and employees; and an increased use of coercive powers to obtain information from financial institutions in place of averaging where recipients did not engage with Services Australia. It had nothing to say about the cessation of the Scheme as a whole.

In evidence, Ms Leon indicated that it “effectively had to be business as usual up to the receipt of the advice;” nothing could be put in place that might alert staff to the prospect that the Scheme might cease. But Services Australia was not contemplating an imminent wind-down of the Scheme, even with
the Solicitor-General’s Opinion; the considerations taking place in October 2019 were about how the Scheme might be adapted to conform with the Opinion; and they could have been (and probably were, to some extent) commenced earlier, with the briefing of Mr Robert.

One can only speculate whether the unlawful components of the Scheme would have been ceased any more quickly had Mr Robert or Ms Campbell been promptly notified of the content of the Solicitor-General’s Opinion. At the least, they lost an opportunity to act on the Opinion some weeks earlier.

There is no suggestion that Ms Leon was acting in bad faith at any time. It is possible that her hesitance in passing on the Opinion to the minister and her colleague at DSS was, at least in part, symptomatic of a culture at Services Australia and DSS that discouraged the conveying of adverse information; a culture that existed long before Ms Leon’s tenure as secretary.
9 Cessation of averaging

At the end of the first week in November 2019, Services Australia delivered two briefs to Mr Robert’s office.

The first was the MS19-000365 brief already referred to. Dr Baxter was involved in its preparation; she described it as a policy issues brief. Attachment A to the brief was a draft letter to the Prime Minister. Attachment C set out “Implementation steps and indicative timeframe.” The brief was sent to the minister’s office on 6 November 2019, but with the wrong version of Attachment C. Dr Baxter forwarded a replacement brief at 6.34pm on 7 November 2019. She then sent an email to Ms Leon advising that Ms Mulhearn, the staff member in the minister’s office who received it, had undertaken to replace the brief, assuring her that she was the only one in possession of it at that stage. Mr Robert later signed the MS19-000365 brief with the date 14 November 2019.

The second brief, MS19-000372, prepared by Mr Ffrench, had attached to it the Solicitor-General’s Opinion. The brief conveyed the effect of the Opinion: a decision-maker could not rely only on averaged PAYG data in deciding whether a debt existed, because that data could not by itself support a conclusion as to entitlement. Included in the brief was the caution that although the Opinion was not a judicial declaration of law, there was considerable risk in continuing the program, and there was also personal risk to the secretary, given her obligations under the Public Governance, Performance and Accountability Act 2013 (Cth).

Mr Robert signed that brief and dated it 6 November 2019, although he said that the date must have been an error, because as his diary note for 7 November 2019 demonstrated, he was not in fact in Canberra until the following day. That must be right, because not only was he not in Canberra, but the brief had not yet been sent. Mr Ffrench sent an unsigned version of the brief to the minister’s office at 6.18pm on 7 November 2019, advising that a signed copy would be provided the following day. The signed copy was in fact forwarded at 9.34am on 8 November 2019.

9.1 8 November 2019 meeting

According to Mr Robert’s statement, after he received the Solicitor-General’s Opinion, he formed the view that the sole or partial use of ATO averaged income data should cease immediately, the program should be closed entirely and refunds should be provided. Mr Robert said he met Ms Leon on 8 November 2019 to discuss the Solicitor-General’s Opinion, the two briefs he had received (MS19-000365 and MS19-000372) and a discussion he had with the Prime Minister. At the conclusion of the meeting, he instructed her to cease the use of PAYG data as the sole or partial trigger for raising a welfare debt effective immediately and informed her that he would put the request in writing.

In support of his version of events, Mr Robert relied on the content of two electronic diary entries, the first bearing a time of 06:43 on 7 November 2019 and the second, 06:43 on 8 November 2019. The first diary note records that Mr Robert had flown to Canberra to find “Robodebt debacle legal briefs” waiting for him, which in the course of the entry, he identified as briefs MS19-000365 and MS19-000372. According to the 7 November 2019 diary note, Mr Robert took the following steps: he asked to meet the secretary the following day; annotated brief MS19-000365, suggesting another approach; and revised the letter to the Prime Minister which was attached to it, replacing it with one that said there was a need to stop using averaging, solely and partially. He then had his staff rewrite the letter before taking it with him to see the Prime Minister. He discussed the Solicitor-General’s Opinion with the Prime Minister and requested an urgent ERC meeting, to which he would put a strong recommendation to cease raising debts based on sole or partial averaging. His diary note records that he also informed the Prime Minister that, regardless of any such decision, he had immediately instructed the secretary, on the basis of the Solicitor-General’s Opinion he had received, to cease averaging income as the sole or partial basis for raising debts.
Mr Morrison, in the chronology which forms part of his statement, similarly records a meeting on 7 November 2019 with Mr Robert at which he was briefed on the Solicitor-General’s Opinion and the action Mr Robert had taken to instruct Services Australia “to immediately cease relying only on averaged income data to raise debts,” consistent with the Solicitor-General’s Opinion. He was not asked about the entry, and the source of his recollection is not known.

Mr Robert’s diary note for 8 November 2019 records that on that day, Mr Robert met with Ms Leon, formally instructed her to cease the use of PAYG data “for the sole or partial use of raising welfare debts” and informed her that he would be noting the instruction and putting it in writing.

Ms Leon gave a different account of the 8 November meeting. According to her, she said to Mr Robert words to the effect, “[T]he best course is to apologise to our customers, to admit the error, and to inform customers and staff of the steps we will take to correct the error.” She alleged that Mr Robert responded, “We absolutely will not be doing that, we will double down” and expressed an intention to “…find other means or other sources of data that could enable decisions to continue to be taken to identify debts.”

In evidence, Mr Robert denied making the “double down” comment to Ms Leon. He said that a response of the kind Ms Leon had attributed to him would be completely inconsistent with the steps he said he had taken: of obtaining the Solicitor-General’s Opinion and taking it to the Prime Minister, who had agreed to ceasing averaging and the holding of an urgent ERC meeting. It would make no sense for him to say that Government would “double down” on the same project.

Mr Ffrench and Dr Baxter were both present for the meeting. Mr Ffrench recalled discussion of whether the Robodebt Scheme could be saved and whether other forms of data could be used to determine income; whether, and if so, how the Robodebt Scheme should be ceased; whether there should be a pause of raising new debts; and whether debts would need to be refunded.

Dr Baxter said that it was clear to her at the meeting that Mr Robert understood and accepted the advice that the Scheme could not be continued legally and sought advice as to what should be done next. In that connection the options of writing to the Prime Minister and seeking an ERC determination were raised.

9.2 Steps taken after the 8 November 2019 meeting

An ERC meeting was scheduled for 12 November 2019. Dr Baxter gave an account of what she was told by Mr Robert’s advisor of the discussions between Mr Robert and Ms Ruston, Minister for Social Services in advance of that meeting. According to the advisor, they intended to seek an in-principle agreement to stop the use of income averaging, with an NPP to be prepared in relation to debt determination in the future:

The plan was to ‘double down’, that is, highlight the importance of protecting social outlays, and indicate that while averaging would be ceased, the next steps would be better and smarter, to ensure customers doing the wrong thing could still be detected, but through a more targeted pool.

Before the ERC meeting began, Mr Robert, Ms Leon, Dr Baxter, Mr Ffrench and others met in the Cabinet anteroom. The evidence of all those present, including Mr Robert, was that he asked the Attorney-General whether he agreed with the Solicitor-General’s Opinion and the latter answered that he did. On his evidence, Mr Robert then told Ms Leon that his instruction to cease the use of PAYG data had been confirmed by the Attorney-General and he handed a letter dated that day, 12 November 2019, to Ms Leon.

Asked whether his question of the Attorney-General was inconsistent with his evidence that he had accepted the Solicitor-General’s Opinion, Mr Robert said that he had wanted to make the position clear to those present so that he could give Ms Leon the letter and “get that moving.” Ms Leon’s impression, on the other hand, was that until the Attorney-General endorsed the Solicitor-General’s Opinion Mr Robert was “open to the notion” that a different legal view might be available.
The ERC meeting concluded on 13 November 2019 with the following results:

2. Noted the insufficiency of apportioned Australian Tax Office pay as you go data (‘income averaging’) information used in an unsupported way as an adequate factual basis for making a debt decision.

3. Noted the use of income averaging as the exclusive basis of making a debt decision would no longer continue but that its use as part of determining the existence of a debt has a legal basis.

5. Agreed the Minister and the Minister for Families and Social Services would come back to ERC as soon as practicable with welfare integrity improvement options:

   (a) to conduct a review, assessment and further reconciliation of past debts, noting that:

       (ii) individuals who had a debt raised via the use of income averaging as the exclusive basis for the decision may still be liable for the debt

   (b) for a process to be applied in future welfare compliance measures that ensures that income averaging is not the exclusive basis for making a debt decision

In evidence, Mr Robert said the date of an announcement by the Government was yet to be agreed at the time of the ERC meeting. Dr Baxter noted that, notwithstanding the ERC decision, there remained a need for a direction to Services Australia staff in order to affect the cessation of averaging. She understood from her communications with Mr Robert’s staff that he preferred the direction to await a public announcement by the Government and a clear decision about the next steps to be taken.135

On 15 November 2019, Mr Robert received a brief from Services Australia (signed by him on 18 November 2019),136 which recorded that ERC had decided to end income averaging in cases where it was the sole basis for determining the existence of a debt and that Services Australia had, from 18 November 2019, taken steps to end any action on compliance reviews which required unilateral income averaging and suggested different options for pausing debt recovery. (The steps were described in the past tense, although they were yet to be taken at the time the brief was delivered.) Some communication materials to assist with community enquiries were provided but Mr Robert decided that his office would be responsible for communication.

Dr Baxter said that on 15 November 2019, she was advised by Mr Robert’s chief of staff that the minister intended to write to Ms Leon to instruct her to cease averaging, but Dr Baxter did not recall seeing that letter before Ms Leon gave Services Australia the instruction to do so. In the same conversation, the chief of staff advised her that Services Australia staff should not be told to cease averaging until everything was agreed at a government level and ERC had made the decision.137

Ms Leon said that on 15 November 2019, she informed Mr Robert, in a telephone conversation, that Services Australia had started the process to end income averaging. She had already informed the Commissioner of Taxation and the secretary of the Department of Prime Minister and Cabinet that her statutory obligations required her to stop the use of income averaging. On 18 November 2019, Mr Robert informed Ms Leon that he had conveyed that information to the Prime Minister’s office and he would send a letter formalising a direction to her to stop using the averaging process, but communications to staff should be aligned with the Attorney-General’s settlement of consent orders in current litigation. Because she did not believe the Department had any reasonable basis to continue averaging, Ms Leon gave an instruction that staff were to be informed that afternoon that averaging was to cease.

Dr Baxter’s recollection was that Ms Leon was in “regular, increasingly urgent communication” with Mr Robert, his staff and the secretary of the Department of Prime Minister and Cabinet about the need to cease averaging before she actually gave that instruction on 18 November 2019. Ms Leon’s decision was made once she was informed by Mr Robert’s chief of staff that Mr Robert had signed the brief recording the decision to end income averaging, although she was also told that the minister wanted to delay the direction to staff until the announcement could be tailored to include government messaging. It was Dr Baxter who communicated Ms Leon’s determination to proceed to the minister’s chief of staff.138
On 19 November 2019, Mr Robert met Ms Leon to advise her of the announcement he proposed to make. That afternoon he announced that the Government had commenced some refinements to the income compliance system, while making no apologies for fulfilling its obligations to collect debts with the income compliance system. The key refinement in question was that “income averaging plus other proof points [would] be used as the final determinate [sic] for a debt to be crystallised or for a debt to be raised.” He had asked Services Australia to identify “the small cohort” of recipients who had a debt raised solely on the basis of income averaging. Services Australia would work with them to identify further proof points and ask them to engage with the Department to identify through bank statements or pay slips or other means that they did not have a debt; there was no change to the construct of the onus of proof.19

9.3 When were the instructions for the cessation of averaging first given?

Mr Robert asserted that he instructed Ms Leon to cease the use of averaged PAYG data as the sole or partial trigger for raising a welfare debt on 8 November 2019140 and its use in that way ceased following his instruction.141 In contrast, Ms Leon asserts that, at their meeting on 8 November 2019, Mr Robert did not instruct her to cease the practice of averaging. Instead, it was she who commenced the steps to cease the use of income averaging and informed Mr Robert that she had done so.142

In their submissions, Mr Robert’s representatives said that there was no basis in the evidence for finding Mr Robert’s account to be deliberately untruthful; there was competing evidence about what occurred on 8 November 2019 and there was no compelling reason to reject the contemporaneous evidence of Mr Robert’s diary notes. In addition, the suggestion that Mr Robert was dismissive in speaking of the Solicitor-General’s Opinion should not be accepted. Instead it should be found that Mr Robert understood and accepted the advice that the Scheme could not be continued legally.

In fact, there is reason to reject the contemporaneous diary notes as accurate records of what happened when, and reason to think that both Mr Robert’s notes and Mr Morrison’s chronology are wrong about a meeting on 7 December and the matters recorded as discussed in it.

Firstly, it seems improbable that Mr Robert could have come into possession of the two briefs on 7 November 2019 in time to take all the steps recorded in his diary note of that date. The unsigned version of brief MS19-000372 was sent to the minister’s office at 6.18pm on 7 November 2019,145 and a little later, at 6.34pm that day, a staff member in the minister’s office was assuring Dr Baxter that she was the only person in possession of brief MS19-000365.144 So it is clear that by the evening of 7 November 2019, Mr Robert had not yet personally received both briefs, and it seems improbable that he had time if he received them after that to carry out all the steps set out in the 7 November diary note. In fact, it seems more probable than not that he did not see the two briefs until the morning of 8 November 2019.

Secondly, the two diary notes conflict. The 7 November note has Mr Robert informing Mr Morrison that day that he had already instructed the secretary to cease using averaged income data as the sole or partial basis for raising debts (although there is no evidence that he and Ms Leon met or spoke at all on 7 November 2019, much less at night). But the 8 November diary note has him giving her that instruction at their meeting that day.

Thirdly, it is more likely that Mr Robert met Mr Morrison on 8 November 2019, after the meeting with Ms Leon, Dr Baxter and Mr Ffrench at which, on the evidence of all three, the question of how to proceed was discussed. Dr Baxter’s recollection in particular was that the options of approaching the Prime Minister and seeking an ERC meeting were raised. It is probable that Mr Robert decided after that meeting to act on those options.

Fourthly, the instruction to cease using income averaging as the sole or partial basis for debt raising recorded in both diary notes (Mr Morrison’s version is different in this regard) seems to reflect a different approach from that which was actually taken: what was decided by ERC (consistently with the Solicitor-
General’s Opinion) and announced by Mr Robert on 18 November 2019 was the cessation of debt-raising solely on the basis of income averaging.145

More generally, a clear instruction that averaging was to cease, whether given on 7 or 8 November 2019, does not seem consistent with the letter which Mr Robert handed to Ms Leon on 12 November 2019.146 It referred to their meeting of 8 November 2019, noting that he had been briefed then on the use of income averaging, but made no mention of any such instruction. Instead, it said that the Government had decided to strengthen the Income Compliance Program by using additional evidence-gathering processes, checklists and proof points before raising a debt. That is consistent with Ms Leon’s recall of the minister’s outlining his view that other sources of data, such as bank statements and employer records, would be found to enable continued identification of debts. It is also consistent with Mr Ffrench’s recollection to similar effect. And the giving of an instruction to Ms Leon to cease averaging is not consistent with Dr Baxter’s recall that as late as 15 November 2019, Mr Robert’s chief of staff was indicating the minister’s intention to write to Ms Leon to give her that instruction.

The Commission’s view is that the weight of the evidence is strongly against Mr Robert’s having given any instruction to Ms Leon on 7 or 8 November 2019 to cease income averaging as a sole or partial basis for debt raising. What seems to have happened at the meeting on 8 November 2019 was a canvassing of options. It is reasonable to suppose that Mr Robert still hoped to salvage the Robodebt Scheme in some respects.

The lack of a clear instruction to Ms Leon to cease income averaging is not surprising in light of the Government’s intention to publicly announce, through the minister, the end of income averaging in the most palatable terms it could find. Plainly, if a direction were given to departmental staff to end the process there was a strong risk that the announcement would be pre-empted by the media’s being informed of it.

Consequently, the Commission rejects Mr Robert’s claim to have acted to end the Robodebt Scheme quite as promptly as he professes. Ms Leon was in fact the first to take steps for that purpose. There is no reason to suppose, however, that had Ms Leon not taken the step she did, the Government’s announcement of the cessation of the practice would have been far behind.

The Commission does not consider that the evidence supports a conclusion that Mr Robert was dismissive of the Solicitor-General’s Opinion. Ms Leon did not say that Mr Robert rejected the proposition that debts could not be raised solely on the basis of income averaging; instead he wanted to look for other sources of information to identify debts. Dr Baxter’s firm impression was that Mr Robert accepted the advice that the Scheme could not continue as it was.

The expression “double down” (which the Commission finds probably was used) should not be taken as Mr Robert’s or the Government’s rejection of the Solicitor-General’s Opinion in respect of income averaging. It is likely to have been used in the sense that the Government would find other means of debt recovery and had no intention of admitting error, let alone apologising. That view is consistent with: the tenor of the letter of 12 November 2019; what Dr Baxter recalled she had been told of the use of the term in discussions prior to the ERC meeting; and what Mr Robert said on 19 November 2019 when he announced that income averaging would only be used with other proof points. The question Mr Robert asked of the Attorney-General prior to the ERC meeting does not suggest otherwise; it was reasonable to seek the Attorney-General’s assurance.
10 Resolution of Masterton and Amato

On 11 October 2019, DHS obtained advice from Counsel in relation to the Solicitor-General’s Opinion and its impact on the Masterton proceeding. That advice said:

• that there was no “material factual difference between the circumstances applicable to Ms Amato’s case and those upon which the opinions in the SG Advice were expressed,” and

• that the Commonwealth did not have “a properly arguable defence to Ms Amato’s claim” and that “every endeavour should be made to resolve the matter.”

On 13 November 2019, AGS wrote to Victoria Legal Aid and indicated that the Commonwealth “would consent to orders being made in substantially the terms sought by the Applicant” in the Amato proceeding. On 27 November 2019, Davies J made orders by consent in Amato. They included this declaration:

The alleged debt was not validly made because the information before the decision-maker acting on behalf of the Respondent was not capable of satisfying the decision-maker that a debt was owed (within the scope of s 1222A(a)), and any of the necessary preconditions for the addition of a 10% penalty were present.

This was the first time in which the Commonwealth made an explicit concession in Court that the practice of averaging was unlawful. On 24 December 2019, Ms Masterton discontinued her proceeding. She did so in light of the result in Amato and on the condition that the Commonwealth pay Victoria Legal Aid’s costs.147
11 The end of the Robodebt scheme

The cessation of averaging in November 2019 represented the beginning of the end for the Scheme. On 19 November 2019, the day on which Mr Robert announced that debts would no longer be raised solely on the basis of income averaging, a class action, *Prygodicz v Commonwealth of Australia*, was commenced, seeking various forms of relief in respect of debts raised unlawfully under the Scheme.

The Government made efforts to “investigate a replacement policy for Robodebt.” Mr Robert and others considered whether “other forms of data [could be used] to meet the threshold of sufficiency to raise a debt.” This work proved unsuccessful. In February 2020, the Government commenced work “to design a solution to refund debts [raised under the Scheme] via the MyGov platform.”

On 22 May 2020, the Solicitor-General gave his opinion that the Commonwealth was bound to fail in defending a claim for unjust enrichment made in the class action. On 29 May 2020, Mr Robert announced that Services Australia would refund all repayments made on debts raised wholly or partially using averaging of ATO data. The process for making refunds commenced in July 2020.

The Scheme was closed altogether on 30 June 2020. The Government’s decision to halt the Scheme signalled the end of a “shameful chapter in the administration of the Commonwealth social security system” and “a massive failure of public administration.”

The litigation in *Masterton* and *Amato*, in both cases conducted by Victoria Legal Aid, played a crucial role in the demise of the Scheme. It succeeded in exposing the illegality of Robodebt where other possible forms of check on the Scheme – the AAT, the Commonwealth Ombudsman, the sound advice of some lawyers – did not or could not.
The Commonwealth sought and obtained orders from the Federal Court contemplating a recalculation of the debt. Those made on 8 March 2019 required that the Commonwealth provide Ms Masterton with “notice of the outcome of the reconsideration of the debt…” by 12 April 2019: Exhibit 1-0040 - VLA.9999.0001.0019 - Order of Justice Davies at Case Management hearing.

Exhibit 4-6054 - CTH.1000.0011.5562_R - Draft Ombudsman’s report for comment - Employment Income Confirmation [SEC=UNCLASSIFIED]; Exhibit 4-6055 - CTH.1000.0011.5563_R - Ombudsman to Secretary DHS Draft EIC Report; Exhibit 4-6056 - CTH.1000.0011.5564 - 001 Draft Report V3.0 - EIC Stage 2 Implementation - draft for Secretary Comment.

Exhibit 4-5367 - CTH.3004.0011.4092_R - Ombudsman draft EIC Implementation Report received [DLM=Sensitive-Legal].

Exhibit 4-5368 - CTH.3007.0011.2505_R - FW- Ombudsman draft EIC Implementation Report received [DLM=Sensitive-Legal].

Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [para 138]; Transcript, Tim Ffrench, 22 February 2023 [p 3524: lines 6-34]; see also Exhibit 4-5384 - CTH.3035.0017.2984_R - RE-Masterton v Commonwealth [DLM=Sensitive-Legal]; Exhibit 4-5380 - CTH.3035.0017.2758_R - Masterton actions [DLM=Sensitive-Legal].

Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 175]; Exhibit 4-7129 - MMA.9999.0001.0001_R - 20230227 NTG-0202 - Statement of Michael Manthorpe dated 27 February 2023(47265784.1) [para 50].
Exhibit 4-6063 - CTH.3003.0001.0719_R - Fwd- Draft Implementation Report into Centrelink’s Automated Debt Rising and Recovery System [DLM=For-Official-Use-Only].

Transcript, Renee Leon, 28 February 2023 [p 4036: lines 16-21].

Exhibit 4-6046 - CTH.3009.0011.0311 - Sec annot notes alert of 040418 re debts; Exhibit 3-3495 - TCA.9999.0001.0013 - Terry Carney, The New Digital Future for Welfare- Debts Without Legal Proofs or Moral Authority (UNSW Law Journal).

Exhibit 4-6043 - CTH.3004.0008.1801_R - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal]; Exhibit 4-6044 - CTH.3004.0008.1802_R - [REDACTED] - Earned Income Intervention program debt and claim for compensation Secretary Annotations 010320; Exhibit 2-2707 - CTH.3000.0039.6396_R2 - Secretary Question - [REDACTED] - Earned Income Intervention program debt and claim for compensation - potential media interest [DLM=Sensitive-Legal]; Exhibit 4-6045 - CTH.3000.0039.6398_R - [REDACTED] - AAT1 decn Sept 2017.

Exhibit 4-6059 - CTH.2001.0013.0040_R - FW- Masterton v Secretary, Department of Human Services - Update and request for instructions by 4pm 7 March [DLM=Sensitive-Legal]; Exhibit 4-6060 - CTH.2001.0013.0043_R - AGS Advice 5 March 2019.

Transcript, Renee Leon, 28 February 2023 [p 4036: line 27].

Transcript, Renee Leon, 28 February 2023 [p 4036: lines 40-45].

Exhibit 4-6066 - CTH.3007.0011.6407_R - Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6067 - CTH.3007.0011.6408_R - Advice on prospects - Masterton - DRAFT.

Exhibit 4-6064 - CTH.3007.0011.6407_R - RE- Masterton v the Commonwealth - Litigation re OCI - further discussion [SEC=UNCLASSIFIED]; Exhibit 4-6066 - CTH.3007.0011.6407_R - FW- Embargoed report into the implementation of Employment Income Confirmation recommendations.

Exhibit 4-6069 - CTH.3007.0011.6488 - Masterton - key points and options - for discussion 1 April.

Exhibit 4-5402 - CTH.3007.0011.6487_R - RE- Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6069 - CTH.3007.0011.6488 - Masterton - key points and options - for discussion 1 April.

Exhibit 4-6042 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [para 101].

Exhibit 4-5356 - TFF.9999.0001.0005_R - 3 January 2023 Tim Ffrench Signed Statement [paras 158-159]; Transcript, Tim Ffrench, 22 February 2023, [p 3531-3532, 3538].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [para 63(b)].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [para 58].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [para 61]; Transcript, Mr Robert, 2 March 2023 [p 4215: lines 27-37].
The Commission’s Practice Guideline – Cross-examination of witnesses prescribed the making of an application for leave to cross-examination before the witness’ appearance, but also allowed for applications where circumstances did not allow that to occur.

By this stage AGS had provided, and Services Australia was considering, proposed draft questions for the brief to the Solicitor-General: Exhibit 1-0190 - CTH.3035.0018.5436_R - RE- Draft questions for Solicitor-General [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 48(c)]; Exhibit 9004 - CTH.3051.0046.4282_R - Stuart Robert Media Release - Handy guide to Labor’s record on robodebt [SEC=OFFICIAL].

Submissions of Stuart Robert, 23 May 2023 [p 7: para 30(b)].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 57].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)® [para 70].

Exhibit 1-0848 - CTH.9999.0001.0013 - [FINAL] RRC - Services Australia - Response to NTG-0009 (25 October 2022); Exhibit 8935 - CTH.9999.0001.0145 - [Final] Services Australia - Response to NTG-0096; Exhibit 8538 - CTH.9999.0001.0144 - [Final] Services Australia - Response to NTG-0097 - Revised.

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 17-21].

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 32-35].

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 45-48].

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 41-45].

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 46-47].

Transcript, Mr Robert, 2 March 2023 [p 4218: lines 17-19].

Exhibit 4-6064 - CTH.3007.0011.6407_R - Masterton v the Commonwealth - Litigation re OCI - further discussion [DLM=Sensitive-Legal]; Exhibit 4-6065 - CTH.3007.0011.6408_R - Advice on prospects - Masterton - DRAFT.

Exhibit 4-6042 - RLE.9999.0001.0004_R - 20230220 R LEON Signed Supplementary Witness Statement [p 30-31: paras 174-175].

Exhibit 4-6076 - CTH.3009.0025.5755_R - RE- MS19-000119 Secretary agreed Minister brief with annotations [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [para 72].

Exhibit 4-6041 - RLE.9999.0001.0002_R - 20221123 RL Statement FINAL 22006293(46499412.1) [paras 131-133]; Transcript, Renee Leon, 28 February 2023 [p 4047: lines 10-15].

Exhibit 9032 - CTH.3780.0001.0330 - MS19-000372: Income Compliance Programme - Legal Position [SEC=PROTECTED, SH=CABINET].

Exhibit 9031 - CTH.4000.0006.7453 - FW: MS19 000365: new attachment C [SEC=PROTECTED, SH=CABINET].

Exhibit 4-6306 - CTH.4750.0013.6758_R - Transcript - Stuart Robert - Doorstop - Sydney [SEC=OFFICIAL].

Exhibit 4-6305 - DSS.5000.0002.2901_R - 191112 Final letter to SECDHS.

Exhibit 4-6208 - CTH.3009.0020.4499_R - FYI- Update on Income Compliance Programme legal matters [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [para 128].

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [paras 141-142].

Exhibit 3-5044 - DSS.5015.0001.0048_R - 200522 - AGS opinion - In the matter of Prygodicz & Ors 1.

Exhibit 4-6273 - SRO.9999.0001.0002_R - Statement of Stuart Robert in response to notice date 20.12.22 (NTG-0116)* [paras 151, 153].

Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634, [5].