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)
Section 3: Effects of the Scheme
Chapter 10: Effects of Robodebt on individuals
1 Preface

At the heart of the “massive failure of public administration”¹ which was the Robodebt Scheme were the social security recipients who were targeted by what the former Minister for Social Services, the Hon Alan Tudge described as the “new tool... making a major contribution to the Government’s fraud and non-compliance savings goals,” a “great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems.”²

Some social security recipients who were affected by the Scheme gave evidence before the Commission.³ The Commission is grateful to these witnesses for their account of the trauma they suffered as a result of the Scheme: evidence which was not easy to give.

The Commission is also indebted to the community organisations which, with very limited resources, provided assistance to the Commission in explaining what they heard and did during the Scheme.

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

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2 Introduction

To this day, I feel worried when I check the mail out of a fear that Centrelink will have written to me about further debts or raising the amount that I owe them.  

It feels like if you get Centrelink at any point in your life, it stays with you forever.

The Commission’s terms of reference required consideration of the “kinds of nonpecuniary impacts the scheme had on individuals, particularly vulnerable individuals, and their families.” Advocates and individuals gave evidence about the complex and far-reaching effects of the Scheme on recipients and their families.

The Scheme affected different people in different ways. There is nothing uniform about the people who need income support at different times in their lives, and not all social security recipients can be described as vulnerable. However, social security recipients include some highly vulnerable groups: people who need access to the system at times of crisis because they are experiencing disadvantage, which might be due to physical or mental ill-health, financial distress, homelessness, family and domestic violence, or other forms of trauma.

While DHS made some attempt to exclude or deal differently with people classified as “vulnerable” in the operation of the Scheme, using vulnerability indicators, it was a hopelessly inadequate means of protecting that cohort. More information about vulnerability indicators can be found in the Concept of Vulnerability chapter.

This chapter discusses the effects the Scheme had on recipients, including:

- the barriers to engagement with the Scheme
- the general stigma associated with the receipt of social security payments
- the effect of unfair accusations
- the financial effects of the Scheme
- the effect of withholdings, garnishees and departure prohibition orders
- the Scheme’s emotional and psychological effects, including distress, trauma, anxiety, suicidal ideation and suicide, and
- the loss of faith in government which the Scheme generated.

The Commission has received evidence and submissions from recipients and their family members about how they were affected by the Scheme. The following 14 individuals gave evidence in person:

- Ricky Aik
- Deanna Amato
- Amy (pseudonym)
- Sandra Bevan
- Felicity Button
- Rosemary Gay
- Jennifer Goodrick
- Melanie Klieve
- Kathleen Madgwick
- Madeleine Masterton
- Jennifer Miller
- Katherine Prygodicz, and
- Matthew Thompson
The Commission received their evidence as representative of individuals’ experiences of the Scheme, while acutely conscious that there were many more stories that could have been told. Many people took the time to communicate their experience through submissions, for which the Commission was grateful. Others had stories which were not within the Commission’s terms of reference, but which demonstrated the many problems people using social security encounter.

Also valuable was evidence from representatives of community organisations and bodies, including the Australian Council of Social Services (ACOSS), Economic Justice Australia (EJA) and Welfare Rights and Advocacy Services. Their experiences advocating for and assisting individuals affected by the Scheme are explored in more detail in The Roles of Advocacy Groups and Legal Services chapter.

2.1 Barriers to engagement with Centrelink

The Scheme created many obstacles for income support recipients who tried to meet its demands for information, and dispute the debts it raised. Vulnerable and disadvantaged cohorts were hit the hardest by the legal and policy failings of the Scheme which shaped the way in which recipients could navigate the system. It was designed to make most recipients to go online to respond to the notices they were sent, while limiting access to assistance from Centrelink staff.

Confusing initial letters

Both recipients and staff found the initial discrepancy letter confusing and cryptic.10 EJA said many of these letters were misunderstood or disregarded by recipients because of their opaque wording.11 Colleen Taylor (a former DHS compliance officer) pointed out that the letters contained no information warning recipients that their failure to respond would result in DHS averaging their income from ATO data, or that their social security entitlements could be calculated using income averaging.12 Research procured by DHS in 2017 confirmed that the letters did not make it clear to recipients what they were required to do in response.13

Failure to account for the likelihood that past recipients might have changed their address or might not be monitoring correspondence from Centrelink

DHS failed to consider the likelihood that many people being sent discrepancy letters, especially in respect of income from some years prior, might not receive the letter because they were no longer living at the same address14 or, because they were no longer receiving payments, had no occasion to monitor their myGov account for Centrelink correspondence. For example:

• Katherine Prygodicz, one of the lead applicants in the Federal Court matter Prygodicz v Commonwealth of Australia (No 2),15 said that debt letters were being sent to an address she had not resided at for a ‘very long time’.16 Although she kept her address current while receiving Centrelink payments, she did not consider that there was any need to maintain current residential information with Centrelink after she stopped receiving benefits.17

• Sarah Harvey did not receive her initial letter because her address had changed a number of times from what was on record for Centrelink, and she had been homeless. She obtained the letter through her myGov account after a call from Centrelink18.

The onerous requirement to respond

The requirements placed on recipients to resolve the “discrepancy” identified in the initial letter were onerous and designed with little regard to the burden it placed on recipients to procure the necessary
Effects of Robodebt on individuals

Evidence. Payslips were often very difficult to obtain: Sandra Bevan told the Commission that two of her relevant former employers were no longer in business at the time she was required to provide that information. Ms Bevan experienced difficulties uploading material to the online portal and had to reconstruct her records as best she could through her diaries. In some cases, recipients did not respond to the request for evidence because they were overwhelmed and distressed.

Enforcing self-service procedures

Centrelink staff were required to direct recipients seeking help to use the online portal, even if they had difficulties in using it. Many recipients found it difficult to respond online because they lacked access to a computer or smart phone, had poor digital literacy, or a distrust or fear of digital platforms. Lived Experience Australia (LEA), a national representative organisation for Australian mental health consumers and carers, pointed out that the design of the online system had no regard to the abilities or capacities of people accessing Centrelink payments. This affected not only recipients who were attempting to engage with the system, but also service providers who were unable to assist when their clients sought help reporting their income and responding to debt notices using the online system.

DHS employees ill-equipped to help resolve recipient issues

Even when recipients managed to contact a DHS customer service officer in person, they were sometimes given inadequate or incorrect information. In some instances, DHS employees were unable to explain the basis on which a debt had been raised and would refer recipients to the myGov app which contained minimal and difficult to understand information. Recipients found that some Centrelink employees focussed on justifying the debt rather than engaging with them to identify possible waiver grounds or organise an internal review. Some DHS employees also lacked an understanding of the letter’s possible consequences.

Difficulties obtaining a review and pursuing freedom of information requests

The Commission heard evidence of reviews being requested but not happening and recipients being told by DHS that they would be denied the right to review unless they provided relevant new information (such as payslips). Advocacy bodies also had difficulties supporting recipients in appealing decisions. Following the introduction of the Scheme, recipients were told they needed to apply for information by making a formal freedom of information request. There were delays in these documents being released to recipients, a factor in the extended review timeframes.

Difficulties understanding how debts were calculated

When documents were received in response to freedom of information requests, they were voluminous: “reams of printouts of Excel spreadsheets with lots and lots of numbers” that were difficult to decipher. These types of documents could be impenetrable to recipients, who sought assistance from advocacy groups to understand why a debt had been raised and how it was calculated on the basis of the documentation they had received. However, in most cases, advocacy groups did not have capacity to assess the documentation from DHS.

Remoteness

Government agencies failed to consider the additional challenges for recipients who lived rurally or remotely when designing and implementing the Scheme.

Ricky Aik lived rurally and gave evidence that he found navigating the Scheme especially difficult given his remote location:
Because Chetwynd was so remote, I relied significantly on online services and would have to deal with most of my day-to-day issues over the internet. I recall that my internet was slow and unreliable. I could not afford a fast internet service. My phone service was also very poor. These matters made it very difficult for me. I think the isolation of my living situation also made it harder for me to manage the issues relating to the robodebt that I received from the government. Mr Aik recalled the difficulties in trying to contact Centrelink via phone:

I recall attempting to telephone Centrelink to provide Centrelink with the amounts recorded on those payslips. I was unable to do so. Again, recall being left on hold for hours and giving up. Because I was often working during the day, I was not in a position to be on the phone for long periods of time.

Having to make repeated and lengthy calls to Centrelink imposed an additional financial burden on recipients in working time lost and the cost of phone charges.

Mr Aik also recalled difficulties in providing payslips:

The only way that I understood I could provide the [relevant] payslips to Centrelink (other than by giving the information on the payslips to Centrelink by way of telephone) was to physically provide the payslips at a Centrelink office. This option was not practicable for me because there was no Agency office anywhere near my home in Chetwynd. The nearest Centrelink office was around 100 kilometres away.

Mr Aik’s evidence of his experience living rurally also manifested in a “very limited” support network.

2.2 Stigma

Australia is a signatory to the International Covenant on Economic, Social and Cultural Rights, which recognises the right of everyone to access social security. That citizens can access government support when it is needed is an accepted characteristic of a civilised society. Despite this, people who receive income support payments can in reality be subject to stigmatisation and social, cultural, and structural stereotypes, producing feelings of shame, oppression, isolation, and dehumanisation. The portrayal of those receiving income support can also be highly politicised.

This type of stigma can affect how people see themselves, as well as how their families, friends and the broader community perceive them.

As said in an anonymous submission: “There is an enduring assumption that all persons on welfare or pension payments are potential or actual cheats.”

Stigma surrounding income support recipients can be so deep-seated that it discourages eligible people from seeking support, even in the face of severe economic and personal hardship.

In the context of the Scheme, this stigma was exacerbated by the political narrative. Ministers did not distinguish between fraud cases (which were a miniscule proportion of social security payments, approximately 0.1 per cent of the total debts raised in 2015–16), and inadvertent overpayments which were inevitable in a system where reporting was complicated by the fact that most recipients’ income was irregular and employment periods did not align with social security reporting periods. (And, of course, the Scheme created a third category of people who were not overpaid at all but, because of income averaging, were wrongly treated as though they owed debts). Press releases and media interviews which described the various measures making up the Scheme dealt with fraud and overpayment together, as though they were much the same thing.

Dr Cassandra Goldie AO, ACOSS CEO, aptly summarised this attitude:

...you had a government that was using language about being a welfare cop, using language about, “We will come after you,” using language about, “We will find you and track you down. And if you don’t pay, you might end up in jail.” And so this notion of the Department of Human Services or Centrelink being there to help
people was the complete opposite of what the government was actually communicating. For people on very low incomes relying on income support, what they heard was, “This is a dangerous place to come. You won’t be safe.”

Recipients were made to feel like second-class citizens, criminals, and dole cheats. Witnesses gave evidence about how the term ‘cheat’, often used in the context of debt recovery measures, insinuated that there was an illegitimacy in their reliance on the welfare system. This accusation of dishonesty affected their sense of self-worth.

Melanie Klieve, a recipient forced to pay a debt she did not owe, told the Commission:

There’s a stigma attached to people on Centrelink, and I never felt that way because I always worked while I was on Centrelink. I only ever went on Centrelink because I desperately had to…it wasn’t a choice. It was a need. And so I never felt like I was second class when I was on Centrelink because...I had worked since I was 13, and I had worked three jobs at a time.

I had always, you know, done my bit and paid huge amounts of tax. And I thought, well, I’ve paid for my Centrelink...I have contributed to the tax that pays for Centrelink. So I didn’t feel guilty about getting Centrelink when I desperately needed it. With this, it made me feel like I was a criminal. And it made me feel like what I assume a lot of people on Centrelink feel like most of their life.

Similarly, Felicity Button said she questioned her own worth, whether she was a “good mother,” and “what happens if I become a public pariah? What happens if I’m labelled as a dole bludger or a system rort or a system cheat, when that couldn’t be further from the truth?”

### 2.3 The effects of unfair accusations

Many recipients experienced severe and long-lasting effects of being wrongly accused of owing a debt under the Scheme. They described feeling vilified and worn-down. That distress compounded the stigma generally experienced by recipients of social welfare.

Recipients were concerned that others would believe that they owed the alleged debts, and experienced a loss of faith in the system and a fear of repeat accusations or of being re-targeted.

Dr Goldie said:

We heard from people who had health conditions that were aggravated by the mere receipt of a Robodebt and dealing with the issue. People had to take time off work to deal with it. It caused stress within families because of the fact that people had received the debt. People hid it from their partners because they experienced shame...It caused the mental health issues for a lot of people just because...people felt very powerless to try and clear their name because they couldn’t get the information that they needed, and they felt helpless.

Ms Prygodicz described feeling “bad and distressed” when her partner’s family did not believe the alleged debt raised against her was incorrect: “they suspected that I had done something a little bit dodgy and that I had lied to the government.” To the contrary, Ms Prygodicz knew herself to be a “very honest and diligent person.” She explained:

My feelings of anxiety and distress were exacerbated by the fact that in the general community people who are thought to have received social security benefits they are not entitled to are considered to be frauds or to be ‘bludging’ off the system. This environment contributed to the negative impact that the Asserted Overpayment Debt had on my mental health.

...
Ms Bevan received a debt notice at a time when she was receiving Newstart Allowance and working casual jobs. She explained how the debt notice affected her:

I was trying my best to keep my house – the roof over our head. I was working so hard... It was just a really horrible time. And it was just made worse by these constant accusations of me... apparently doing the wrong thing when I went to such lengths to do the right thing.57

Although she knew that there had been an error because she had always reported her fortnightly income accurately, Ms Bevan still felt she “had been found guilty of this thing, fraudulently claiming benefits, and I had to prove my innocence.”58

Another submission to the Commission detailed how the person advocated on her daughter’s behalf after her daughter received notice of a debt owing, including writing to various ministers about the shortcomings in the debt review process.60 The debt was waived in 2018; however, the “stress of false accusations” had a long-lasting effect:

The impact on her mental and physical health was enormous. The repeated stress of false accusations on her integrity and the threats made eventually lead to her having to leave her employment. She spent 6 months in no state to work. She spent her savings and mine over this time as she was too frightened to engage with Centrelink for financial help. She was prescribed medication for her mental condition. We both spent countless hours and days proving her innocence.61

2.4 Financial effects

An inability to meet financial obligations is a stressful experience, emotionally as well as financially. For recipients who rely on income support payments, receiving an unexpected debt notice or being asked to explain a discrepancy in their reporting obligations can compound already existing stress.62 There is concern about maintaining access to the benefits they are receiving and anxiety about their ability to pay the debt alleged against them. Even a relatively small debt can make a massive difference to the lifestyle and wellbeing of someone who barely makes ends meet.

In response to demands for payment, recipients often felt pressured to use options which exacerbated their financial insecurity. Some took out loans,63 depleted their superannuation,64 or used credit cards65 to repay the debts raised against them.66

Ms Button spoke about the financial hardship she experienced as a result of having a debt and regularly being behind on payments:

[W]e found it impossible to meet our bills and expenses without borrowing money from my parents... we never had anything left over and were always behind...67

I recall repeatedly having to ask my daughter’s childcare provider to accept late payments because I did not have the money to pay my bills on time. I have felt anxious and upset at times when I have not had enough money to pay for these sorts of essential expenses. With many thousands of dollars of Centrelink debt hanging over me, I have often felt like my circumstances would not improve. I felt debilitated by financial stress.68

Ms Klieve gave evidence about how her financial circumstances were made worse by the debt:

[A]s a result of my financial stress and the debt being raised against me, I recall asking my parents for a loan. I was finding it difficult to support my daughter who was partially dependent on me at that time.69

... I recall that I went to the Salvation Army for assistance in mid-2019 but was only able to obtain $50 food stamps from that organisation. Additionally, I started to sell various possessions including my car so that I could cover my expenses.70
The financial effects on recipients were far-reaching, beyond the quantum of the debts themselves. Ms Prygodicz applied for, and was initially refused, a loan to buy a car after her debt had been wiped. She thought this may have been because the “debt” had affected her credit rating, which made her worry about how the debt would continue to affect her life.

2.5 **Withholding payments from recipients**

One way in which DHS recovered debts from current recipients was to withhold part of their social security payments. Under the Scheme, income support recipients were given 28 days after a notice of their debt was issued to enter into a repayment arrangement before withholdings were automatically applied to their income support payments.

The Commission heard evidence from Rosemary Gay, an aged pension recipient, who received a debt notice from DHS in late 2016. Part of her aged pension was withheld to repay the debt, which was raised under the Scheme.

Ms Gay described her feelings when she learned of the debt:

> It turned my life upside down. It was just sheer terror that (a) I owed a figure that was just such a huge amount that I’ve never earned that much money. How could I owe that much money? And the fact that I was to come up with that within a matter of three or four weeks - it was just sheer terror to me, and I didn’t - I had no idea what to do next. If it hadn’t have been for my daughter guiding me through that and suggesting I contact Centrelink - I did know, however, deep down that it just - it was an impossible amount for me to owe. I could not possibly owe that amount of money to Centrelink.

Ms Gay sought two reassessments of the debt and it was eventually cancelled on the basis that the debt was not correct and had been calculated based on income averaging.

In her statement, Ms Gay highlighted how important her access to the aged pension had been to her wellbeing since 2010:

> ... (it) help[ed] keep my head above water financially. This benefit has enabled me to live my life with dignity and to pay my living expenses. It has been particularly important given my health issues and inability to work full-time.

2.6 **The use and threat of garnishee notices**

Services Australia has the power to issue garnishee notices to third parties to recover part or whole of a social security debt. Former recipients’ tax refunds and savings, employment income, income from “a less common source such as a property settlement,” or compensation which they have received can all be garnished.

Throughout the Scheme, DHS issued garnishee notices to the ATO and to financial institutions. Some of those notices were generated by a manual process, but the vast majority were generated automatically. The scale of automatic generation of garnishee notices during the life of the Scheme is illustrated by the following table based on data provided by Services Australia.
<table>
<thead>
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<td>43,424</td>
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</table>

The power to garnish has been described by the Federal Court as an “extraordinary” one that carries with it “a special obligation” requiring “adventure to fairness” and “regard to the justice of the particular case.”

Catherine Eagle, the principal solicitor at Welfare Rights and Advocacy Services in Perth, told the Commission about their experience with people whose tax refunds had been garnished during the Scheme:

there is provision in the Act for debts to be recovered by garnishee in circumstances in which a person hasn’t entered into a reasonable repayment arrangement... If someone is no longer on a Centrelink payment, then the process should be that they are issued with the debt notice, they have the opportunity to enter into a repayment arrangement, and then it’s only in circumstances where they have failed or refused to do that, that their tax refund, for example, will be garnished.

Ms Eagle explained there were people who were first learning they had a debt when their tax refund was garnished:

...because people weren’t getting notices if they were no longer on Centrelink payments, because they probably changed address, so the first that they would know is when they had lost their tax refund...they were expecting to get.

Ms Eagle noted the process of having the tax refund garnishing decision reviewed:

...is a bit hit and miss...even where a debt was disputed or hadn’t been provide or the person hadn’t had the opportunity or was wanting to get that reviewed, that didn’t stop the tax refunds being garnished.

The Commission heard evidence from Deanna Amato who received five letters from Centrelink between mid-September 2017 to early September 2018 about her employment income and, later, debt. Ms Amato “did not receive the letters at the times when they were sent because the letters were sent to an address at which...[she] had not lived since 2014.”

On 3 September 2018 Ms Amato’s entire tax refund of $1,709.87 was garnished to repay a debt of $3,125.38 raised under the Scheme.

Ms Amato told the Commission:

When I found out that Centrelink had taken my entire tax refund, I was shocked. I had no idea that they could take money from people like this. I remember struggling to understand how this debt could have arisen, because I knew — to the best of my recollection — that I had always reported my income carefully. I was also scared about the size of the debt. I thought that because my whole tax refund had been taken, right down to the cent, there was probably more owing.
I had been hearing about other people being notified of Centrelink debts like this, and even though I could not think of how I had accrued a debt, I thought that Centrelink must have been correct. It was the only reason I could think of as to why they had taken my tax return.  

Similarly, Katherine Prygodicz had her tax refund of $142.54 for the financial year ending 31 July 2018 garnished. 

2.7 The use of Departure Prohibition Orders

A Departure Prohibition Order (DPO) is an order which prohibits a person from departing Australia for a foreign country if they have failed to repay a debt to the Commonwealth. The Commission received evidence from persons affected by the Scheme about how the threat of a DPO affected the way they responded to the debt, and how it affected their wellbeing.

The number of DPOs issued throughout the Scheme was relatively small. The Commission received evidence from Services Australia that the “total number of customers involved in the Robodebt Scheme where a DPO was recommended was 23,” and of those only “13 customers had a DPO made where the debt raised as a result of the Robodebt Scheme was included with other outstanding debts from the customer’s Services Australia file.” What was more significant was the threat of DPOs. They were a source of worry and distress to recipients, some of whom told the Commission that the threat of a DPO made them feel as if they had no choice but to repay their debt, and were not in a position to question or dispute it.

Recipients were made aware of the possibility of DPOs being made through:

- media releases
- letters sent to them by the Department
- letters sent to them by debt collectors, and
- debt collectors (see Debt Recovery and Debt Collectors chapter).

Ms Prygodicz gave evidence that she was “particularly worried” about the impact of a DPO on her plans to travel overseas to visit her family.

It was mentioned during one of the phone calls with Centrelink that it was best to comply with repaying the debt, even though I wasn’t sure...how it was calculated, because a departure prohibition order could be, I guess, instigated against me, I wouldn’t be able to leave the country, and that concerned me, that I wouldn’t be able to visit friends or family in New Zealand.

Ms Prygodicz had lodged an application for review of the debt, but subsequently made a partial payment towards the debt to show she was “genuine” about repayment so that she was able to travel.

I felt deeply concerned that Centrelink would continue to take all of the measures against me that they could. I was particularly worried that plans to travel overseas would be halted by Centrelink issuing a Departure Prohibition Order against me...

Ms Prygodicz also described the anxiety caused by the threat of a DPO:

This made me feel anxious and concerned about how the debt would affect my life. I had plans to travel to Wellington, New Zealand, so that I could visit my uncle for his 60th birthday. I eventually decided against making this trip. One of the reasons behind my decision was that it remained in the back of my mind that I could be prevented from leaving Australia.

A number of submissions described how former recipients were affected by DPOs, or the threat of them.

An example is Ms Cho, who needed to travel overseas to look after a sick family member. When she was told that she could be issued with a DPO if she did not pay her debt, Ms Cho felt “threatened and powerless,” with “no choice but to accept the debt.”
Another (anonymous) submitter described their reaction, “After saving for multiple years to finally go on my first overseas trip, I was then convinced that I would be stopped at the airport and not allowed to go.” This submission also described the impact of the government rhetoric in the media about DPOs, which served to “remind us [debt notice recipients] just how criminal we were.”

A third submission detailed the extreme anxiety and significant impacts on the recipient’s mental health and ability to maintain full time work that a threatened DPO caused. Another submission described how a threatened DPO was a “major concern,” as the recipient feared they would not be able to attend their mother’s funeral overseas.

2.8 Distress, trauma, anxiety and mental ill-health

Many social security recipients need income support because they are in situations of vulnerability, distress, trauma or disadvantage. Dr Goldie explained that in the experience of ACOS, people on income support had a higher incidence of poor mental health or social isolation: the financial stress associated with being on a very low, fixed income with few or no assets and low financial security could itself lead to high levels of stress, anxiety and depression.

For some recipients – for example, a student receiving Austudy – the period of potential vulnerability and associated anxiety is short. Many other recipients, though, have a continuing need for support because of financial pressures, persistent unemployment, disability, physical or mental illness, or broader social disadvantage.

While this is not to suggest that all recipients are subject to vulnerability and disadvantage, the reality is that many are. Circumstances of disadvantage can expose recipients to health problems which can be complex and continuing. Dr Goldie is correct in observing that the incidence of poor mental health is higher among income support recipients than in the broader community. The Scheme had the capacity to intensify pre-existing ill-health conditions and to render recipients more vulnerable to their development.

Some witnesses who gave evidence to the Commission spoke about how the Scheme caused them anxiety, depression, distress and trauma.

Mr Aik, who received a debt letter in 2019, gave evidence that the debt affected his mental health to the point where he found it “hard to sleep, hard to concentrate on work;” he was “always thinking about the debt,” and “didn’t feel like eating much.” He “didn’t want to socialise, just didn’t want contact with anybody” and his driving was affected because he was distracted with thoughts about the debt. Mr Aik recalled feeling depressed to a point where he just wanted to be left alone, stating that he “didn’t see any way out of this – out of the debt or how to talk to anyone about it.”

Matthew Thompson, who had experienced mental illness previously, gave evidence that upon receiving a debt notice totalling $11,000 he was in “complete shock,” because it would “set me back years and years.” He explained that “from a generalised anxiety disorder point of view, it’s just… the biggest trigger you can give to somebody.”

Ms Gay referred to the emotional trauma her interactions with Centrelink caused:

...it’s had a huge effect on my emotional and mental wellbeing and did for some time following 2016. It was a good 18 months before I could get over that, and I don’t think you ever do get over it. And every time I tell my story...you relive that whole trauma. It was a trauma I never want to experience again.

LEA observed that while the Scheme “disempowered people, causing significant long-term emotional trauma, stress and shame,” it was not only people who received a debt notice who were affected:

We also know that many people with disability receive the majority of support from family and informal carers who themselves may have disabilities, physical or mental health concerns to deal with, or may be caring for more than one family member. Many mental health carers are over the age of 65 years and many have been
in their caring role for most if not all of the cared for person’s adult life. Family carers may or may not be as IT literate as needed to navigate complex automated online processes in order to get their needs met and that of the people who they provide care to...Robodebt not only adversely impacted the person receiving Centrelink payments; it had many adverse impacts for the families and carers of these individuals, placing undue stress and burden on them too.124

**Ideas of suicide**

Some witnesses reported that the stress of a debt demand actually led them to consider suicide.

I couldn’t sleep because I was going to bed at night and racking my brain trying to figure out what had happened...and what was going to happen. How are they going to get this money from me? And it was these threats of taking money directly out of my pay or out of my bank account, from my tax return. And it was just a weight on my shoulders. But I do remember driving home at night just beside myself with worry about this money and thinking I could just drive my car into a tree and make it stop...125

Felicity Button told the Commission: 126

I felt suicidal for a period of months in 2017 with the “lowest point” being the occasion when ARL (debt collector) debited money from my account.

I felt desperate on that day; it was so upsetting that I could not afford to pay for my daughter’s medical expenses and I felt powerless to improve my situation.

**2.9 Deaths resulting from the Scheme**

The Commission heard evidence from the mothers of two young men caught up in the Scheme. They gave evidence on their sons’ behalf, because their boys had died by suicide. Their stories are told in more detail below. The Commission is also aware of another tragic death which appears to have resulted from a discrepancy letter issued under the Scheme in 2017; it is discussed in the chapter – 2017, part A: A Crescendo of Criticism.

The Commission is confident that these were not the only tragedies of the kind. Services Australia could not provide figures for the numbers of people who committed suicide as a result of the Scheme.127 To be fair, it is difficult to see how such information could be reliably gathered. In any case, it does little for the families of those who have died to speak of their loss in terms of numbers. What is certain is that the Scheme was responsible for heartbreak and harm to family members of those who took their own lives because of the despair the Scheme caused them. It extends from those recipients who felt that their only option was to take their own life, to their family members who must live without them.

Kathryn Campbell, former secretary of DHS, observed in her evidence that “suicide was something that we [at DHS] dealt with frequently.”128 That is no doubt due to the fact that many social security recipients live in situations of disadvantage or vulnerability. Any debt-raising exercise in that context is likely to increase numbers of suicide and self-harm.

That DHS was aware of this likelihood – that it dealt with suicides frequently – makes the implementation of the Scheme all the more egregious, particularly when there was evidence that they were raising inaccurate debts. DHS had a responsibility to deal sensitively with those people relying on its services, and to provide support rather than inflicting distress.

**Jennifer Miller**

Jennifer Miller gave a profoundly moving account of her son Rhys Cauzzo’s experiences with the Scheme, his death, and her advocacy in the years since.
Mr Cauzzo died by suicide on 26 January 2017. His death occurred after debts were raised against him using income averaging in the PAYG Manual Compliance phase of the Scheme. He was 28 years old.

As his mother explained, Mr Cauzzo had suffered from anxiety and depression since he was in high school. Ms Miller had been a constant support to her son in times when he struggled with those conditions.

In May 2016, Mr Cauzzo was sent a letter advising him that DHS was reviewing his employment income for previous financial years, and that he needed to call Centrelink to confirm his income details. He received a phone call about the discrepancy and agreed, when he was asked, with the ATO information. Mr Cauzzo told his mother that Centrelink had not explained how the debt had been raised, and that he was not able to provide historical payslips because he could no longer access them.

Ms Miller told the Commission that she visited her son to provide support to him. He was “extremely stressed and scared of his suicidal thoughts” upon learning about his first Centrelink debt. She went with him to a local Centrelink office to discuss the debt, but they were turned away and told to ring a 1800 number. Mr Cauzzo’s partner had previously told Ms Miller “how he had tried to slice his neck when the Centrelink pressures commenced.”

On 20 May 2016, Mr Cauzzo was sent four letters from Centrelink about debts totalling $10,876.23 that had been raised against him in respect of four financial years, starting from 2011. Soon after, in June 2016, Centrelink commencing witholding money from his Newstart Allowance, because he had not provided any further information. Ms Miller said that Mr Cauzzo could not provide further information because he did not have the necessary documents.

On 23 June 2016, Mr Cauzzo received a letter from Centrelink advising that his Newstart payments had been suspended because he had missed an appointment with his employment services provider. From 10 August 2016, Mr Cauzzo stopped receiving Newstart payments.

DHS had sent debt letters for each financial year that Mr Cauzzo had been in receipt of income support, with the exception of the 2012–13 financial year. For some reason that year was missed, but in September 2016, to add to Mr Cauzzo’s misery, DHS undertook a second review of his income in respect of the 2012–13 financial year. Between May and October 2016, Centrelink sent Mr Cauzzo 12 letters and phoned him at least five times.

On 20 October 2016, Centrelink wrote to Mr Cauzzo, requesting that he enter a repayment arrangement for his outstanding debts within 14 days, failing which any income support payment he was receiving could be reduced, his wages or tax refund could be garnished, the case could be referred for legal action or the debt could be referred to a debt collector.

In November 2016, the last of those threatened steps was taken. Mr Cauzzo’s debts were referred to Dun & Bradstreet, a debt collection agency. After the debts were referred to Dun & Bradstreet, Mr Cauzzo received six letters, two text messages and 13 phone calls from that agency between November 2016 and January 2017.

There is more on DHS’s use of debt collection agencies in the Debt Recovery and Debt Collectors chapter.

Mr Cauzzo took his own life on 26 January 2017. In the days after Mr Cauzzo’s death, Ms Miller went to her son’s apartment in Melbourne and found “debt letters hanging on the fridge along with a drawing of a person shooting a gun in their mouth, with dollar signs coming out of the back of their head.”

Mr Cauzzo’s debts were later reduced to zero and the amounts paid were refunded.

After her son’s death, Ms Miller attempted to obtain more information about her son’s debts by contacting various government entities and ministers.

During the course of the Commission, Ms Miller was able to review documents from Mr Cauzzo’s Centrelink file which showed that he had been assessed in September 2015 as having had a permanent psychiatric disorder, which was identified as anxiety and depression, and that he suffered from anxiety.
and panic attacks. That assessment should have meant that a “vulnerability indicator” was placed on his file, which would have meant that Centrelink needed to follow certain processes when engaging with Mr Cauzzo. However, no vulnerability indicator was placed on his file at the time of that assessment. There is more on vulnerability indicators in the Concept of Vulnerability chapter.

**Kathleen Madgwick**

Kathleen Madgwick told the Commission about the death of her only child, Jarrad Madgwick. He died by suicide on 30 May 2019. He was 22 years of age. He had received notifications under the CUPI phase of the Scheme.

From the end of 2017 into 2018, Mr Madgwick held a traineeship in Victoria and was receiving Newstart Allowance. Bullying forced him to leave the traineeship in late 2018. He found work in hospitality, which he had difficulty maintaining, and was living in his car. In April 2019, he returned to live with Ms Madgwick in Queensland, but she had lost her job, and both were forced to apply for Newstart Allowance. Mr Madgwick was completely without money, with some traffic fines to pay, and his mother was in no position to support him financially.

Mr Madgwick’s initial application for Newstart on 1 May 2019 was rejected after he was said to have missed a telephone call. He re-applied, explaining that his phone was disconnected. His application was again rejected on 30 May 2019 because he had not provided documents. Telephoning DHS that morning, he was told it was because he had not supplied a BSB number, despite DHS already being in possession of all of his bank details. However, with his mother’s help, he was able to have the application reinstated. Immediately after the reinstatement, Mr Madgwick was in a better frame of mind. He understood his claim was being processed and he was hopeful of a priority payment the following week.

Ms Madgwick knew her son was struggling, penniless and reliant on her for the most basic things. What she did not know was that on 27 May 2019, DHS had commenced a review in relation to Mr Madgwick for the 2017–2018 financial year and had informed him through his myGov account that there was a discrepancy between his declared earnings and ATO PAYG income amounts, indicating a potential overpayment.

On 28 May, as directed, Mr Madgwick entered payslip information for his traineeship income online. For some reason, although he had already responded, he was sent a letter through his myGov account the following day telling him he had to “check and update” the same ATO information. The online system advised Mr Madgwick that “the review would be processed” and that “a provisional debt outcome” had been determined in the amount of $1,795.85 for the period 28 April 2018 to 22 June 2018.

Services Australia says that the provisional assessment would have been displayed to Mr Madgwick when he finished entering his income information online, although it cannot say precisely when that was. From what happened later, it seems he either did not see it or did not grasp its contents at that time. Ms Madgwick gave evidence that around 5pm on 30 May 2019, the same day on which they had been in contact with DHS about his Newstart Allowance, Mr Madgwick told her that he would not get paid the allowance, because he owed Centrelink $2,000.

He said, “I will never get out of debt.”

He was distressed and angry, and later that evening left the house. When he was not home by morning, Ms Madgwick went looking for him and found his body in a nearby park.

Ms Madgwick was able, after her son’s death, to listen to the recording of those parts of the call where her son had been speaking to DHS earlier that day about his Newstart application. It appeared that Mr Madgwick thought the review was in some way part of his Newstart application and had not understood what might follow from the provision of his pay information for 2017 and 2018. The Centrelink officer to whom he spoke, though otherwise helpful, did not address that misunderstanding.
Mr Madgwick’s “provisional debt” does not appear to have been raised through income averaging; it seems to have been based on the payslips that he provided. His case exemplifies a different aspect of the Scheme’s brutality: the bald online statement to someone in dire financial straits of a “provisional debt outcome” of $1795.85, with no indication of how it might be repaid (for example, through small deductions if and when he was in receipt of an income).

It is apparent from the content of the 30 May 2019 phone call with DHS that Mr Madgwick did not appreciate what the consequence of the review might be and it came as a shock. The debt came without warning: the request for payslips or bank statements gave no clue as to how those documents might be used to raise a debt. The standard letter in the CUPI phase of the Scheme said that if the information were not supplied, the recipient might have to pay money back.

From what Mr Madgwick said to his mother, the sum of $1795.85 seemed an impossible amount to him, beyond any hope of repayment, and he thought it meant he would not receive any Newstart Allowance.

Ms Madgwick did not think the events of 30 May 2019 were the only cause of her son’s death. There were other difficulties in his life: the severe financial stress he was under, his homelessness, and the break-up of a relationship. What does seem clear, though, is that finding out about the debt in the way he did was a precipitating factor.

Ms Madgwick, like Ms Miller, became an advocate after her son’s death and fought to obtain information about his previous contact with DHS. Ms Madgwick wrote to ministers and DHS on many occasions, but received little in reply.

Further comments

Rhys Cauzzo’s and Jarrad Madgwick’s stories and their mothers’ search for answers attracted publicity, drawing attention to the Scheme and its flaws. What happened to Mr Cauzzo and Mr Madgwick lays bare the question of how government should deal with vulnerable people. The harmful effects of the Scheme were not confined to the raising of inaccurate or non-existent debts. The blunt instrument of automation used to identify and communicate the possibility of overpayment was inept at determining vulnerability. Empathy could not be programmed into the Scheme.

People who are in receipt of government benefits are, by the very nature of the fact that they require social support, a group at a disadvantage. Rhys had struggled with accessing the medical care and support that he needed, struggled to get helpful information about his debt, and struggled with his mental health. When Rhys took his life on 26 January 2017, it was a devastating end to his struggle with a system that is supposed to support its most vulnerable.

It is often difficult to identify vulnerability in recipients. It is also difficult to determine how vulnerabilities, once identified, should be accounted for in the recovery of overpayment. However, this difficulty does not absolve the government of its responsibilities to these recipients. It is clear that there is scope for improvement in the mechanisms used by government to register vulnerability, in administering the social security system, and in the language and information used in communicating with recipients.

2.10 Loss of faith in government

One of the consequences of the Scheme was a loss of trust in the social security system, and in government more broadly. Some recipients resolved not to seek access to social security payments in the future, in reaction to their experiences under the Scheme.

Ms Prygodicz said:

I will never use Centrelink’s services again. I don’t trust Centrelink to treat me properly after my experience with Robodebt. I don’t trust them to have my information and to use that information in an appropriate way. I am quite adamant about this.
Ms Button echoed those sentiments:

Each time I considered making an application I have decided against going ahead with it because I fear that if I am a Centrelink recipient again another debt will be raised against me. If I had been able to access income support since the debt was raised, I may not have struggled financially so badly. I no longer trust that Centrelink will treat me fairly. 163

[...]

I will never apply for Centrelink again - and I hope that this is highlighted in the teleprompter - ever. I will live out of my car. I will live on the street. I will sit outside Southern Cross Station if I have to. But I will never, ever apply for Centrelink ever again. And it's not because I might never need to; it's because I never want to be put in that position again, feeling so vulnerable, feeling like a strain on society, feeling like I'm the problem. I'm never going to put myself in that position again. And if my children need Centrelink, I will do everything I can first before they use it. 164

Ms Bevan’s determination never to apply for benefits again similarly extended to her family, with consequences for her son as well as herself: 165

I will never access Centrelink benefits ever again. My son, when he left school, was eligible for Newstart allowance. And because of this experience - and this affected my kids as well - we didn’t apply. So I then continued to support him until he recently got a job with his brother as a scaffolder, which is a hard job to do...we tried to access some training for him. But in order to access the training, you had to have a Newstart benefit, and we weren’t going to be doing that.

Ms Klieve gave evidence that while it was “probably self-destructive,” she was fearful of ever engaging with Centrelink again: 166

Feelings of betrayal and distrust were also common:

I feel utterly betrayed by the government for this, which sounds dramatic, but it’s true. Myself, and everyone else who turned up to every meeting they had to, jumped through every hoop and tried to do the right thing, were treated like criminals and cheats, when all the while it was the department’s scheme that was illegal. 167

Another submission said:

I didn’t eat, couldn’t go anywhere except work, my relationship with my girlfriend ended. I was ashamed and didn’t tell my family about this. It was a dark time... It was years of stress, harassment and sadness. I can never get those days back. The worst thing is to know I went through all that for nothing...I will not ever trust a government institution or the public service again. 168

The Scheme’s systemic failures, the effects on individuals and the consequences for the broader community have undoubtedly corroded public trust in government and its institutions. The effects of this are lasting; perhaps irreversible.
3 Conclusion

The Scheme was launched in circumstances where little to no regard was had to the individuals and vulnerable cohorts that it would affect. The ill-effects of the Scheme were varied, extensive, devastating and continuing.

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.

Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 10, para 49].


Terms of Reference (j)(i).

Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2023: lines 1-10].

Transcript Ms Eagle, 11 November 2022 [p 992: lines 10-43].

Transcript, Genevieve Bolton and Katherine Boyle, 11 November 2022 [p 1010: lines 40-46; p1011: lines 5-10]; Transcript, ‘Amy’, 31 October 2022 [p 32: line 34 – p 33: line 6]; Exhibit 4-8332 - RCW.0009.0001.0001_R - Statement of Sarah Jane Phil Harvey [para 24 - 25].

Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton - NTG-0045 [p 19: para 54].

Transcript, Colleen Taylor, 13 December 2022 [p 1740: lines 9-35].

Exhibit 4-7486 - CTH.3008.0018.8255 - DHS Population Insights_Final [p 7].

Exhibit 4-8540 - CTH.9999.0001.0149 - [Final] Services Australia - Response to NTG-0135 [p 10: para 4.2].

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Exhibit 4-8332 - RCW.0009.0001.0001_R - Statement of Sarah Jane Phil Harvey [para 23].

Exhibit 2-2809 - RCW.0004.0001.0001_R - 2022.12.12 - Bevan Statement [para 34 - 37].

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Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3443: line 22 – p 3445: line 26].

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Exhibit 3-3321 - RCW.0006.0001.0001_R - Statement of Ricky Aik, 15 January 2023 [para 35].

Transcript, Ricky Aik, 23 January 2023 [p 2168: lines 19 – 24].


See, for example, Exhibit 2-2522 - RBD.9999.0001.0227 - International Conference on Welfare Reform_ Meeting the Policy Challenges of Change _ Former Ministers and Parliamentary Secretaries [p 4: para 5]; Exhibit 2-2602 - RBD.9999.0001.0227 - Sky News - ‘Richo’ _ Former Ministers and Parliamentary Secretaries [p 4: para 8]; Exhibit 2-2601 - RBD.9999.0002.0002 - Strong welfare cop’- Scob Morrison’s new self-proclaimed title [p 1: para 4];
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44 Transcript, Alan Tudge, 1 February 2023 [p 2916: lines 7-11].

45 See Exhibit 4-8342 - RBD.9999.0001.0505 - Robodebt and social security policy_10 March clean, 10 March 2023 [p 3]: “The share of these people with earnings who had stable incomes over the course of the financial year is extremely low, ranging from less than 3% of people receiving Youth Payments to around 5% of those receiving Newstart or Austudy, and between 5 and 10% of those receiving Parenting Payments.”

46 Transcript, Cassandra Goldie, 16 December 2022 [p 2025: lines 38-44].

47 Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 23-45]. Royal Commission into the Robodebt Scheme

48 Transcript, Michael Thompson, 1 March 2023 [p 4116: lines 7-12]; Transcript, Melanie Klieve, 5 December 2022 [p 1141: lines 23-45].

49 Transcript, Cassandra Goldie, 16 December, 2022 [p 2025: line 13]; Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz [para 49]; Transcript, Sandra Bevan, 16 December 2022 [p 2018: line 40].

50 Transcript, Cassandra Goldie, 16 December, 2022, [p 2025: lines 13-20].

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52 Transcript, Cassandra Goldie, 16 December, 2022, [p 2025: lines 25-31].

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55 See the Social Security Act 1991 (Cth) s 1231.
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88 Exhibit 4-5757 - VLA.9999.0001.0095_R - 23 190809 Points of Claim – Applicant [p 4: para 14].
89 Exhibit 4-5773 – DAM.9999.0001.0001_R 18 02 2023 – [SIGNED] Statement of Deanna Amato [p 2: para 14].
91 Exhibit 4-5189 – KP.9999.0001.0002_R – NTG-0184 2000430 Affidavit of Katherine Prygodicz [p6 para:22].
92 Social Security Act 1991 (Cth) s 1240.
94 Exhibit 4-8310 - CTH.9999.0001.0118_R - [REVISED] Services Australia - Response to NTG-0124 (DPOs) [para 3.1].
95 Exhibit 4-8310 - CTH.9999.0001.0118_R - [REVISED] Services Australia - Response to NTG-0124 (DPOs) [para 3.2(a)].
98 Exhibit 4-6155 - MKE.9999.0001.0018 - 79m_Welfare Debt Dodgers to Face Travel Bans
99 See for example: Exhibit 3-3329 - ARL.9999.0001.0033_R -105940561_14857285_17587250_1006415185_20230105_095832 [p 1].
100 See for example: Exhibit 1-0648 - MGR.0004.0001.0339_R - MG Lebers (Consequences) updated 130120;
101 Transcript, Ricky Aik, 23 January 2023 [p 2171: lines 22-46].
102 See for example: Exhibit 1-0573 - MGR.0003.0001.3539_R - Scripts - Centrelink V1 June 2018 [p 9]; Transcript, Mr Wheelan, 4 November 2022 [p 478: line 29 – p 479: line 2; p 482: lines 19-35].
103 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz, 1 May 2020 [para 24]
104 Transcript, Katherine Prygodicz, 20 February 2023 [p3290: lines 16 - 22].
105 Transcript, Katherine Prygodicz, 20 February 2023 [p3291: lines 18 - 30].
106 Exhibit 4-5189 - KPR.9999.0001.0002_R - NTG-0184 200430 Affidavit of Katherine Prygodicz, 1 May 2020 [p10: para 40].
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112 Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 4 para 24].
113 Transcript, Taryn Preston, 10 March 2023 [p 4899: lines 30-44].
116 Transcript, Ricky Aik, 23 January 2023 [p 2167: lines 39 – 41].
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119 Transcript, Mabhew Thompson, 1 March 2023 [p 4106: line 45].
120 Transcript, Mabhew Thompson, 1 March 2023 [p 4106: lines 37-38].
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125 Transcript, Sandra Bevan, 16 December 2022 [p 2018: lines 28 -35].
126 Exhibit 4-5192 - FBU.9999.0001.0002_R - NTG-0185 200429 Affidavit of Felicity Button [p 12: para 54-55].
Chapter 11: The concept of vulnerability
1 Introduction

The concept of “vulnerability” is important in a social security system. The demographic of Australians who need access to income support payments is wide and varied, including those facing barriers to engagement or experiencing physical, psychological, social or cultural disadvantages. Vulnerable people may struggle with accessing, understanding and navigating the social security system and may require additional support. The identification of vulnerable people in need of additional support is complicated by the fact that vulnerability is not a fixed state of being. For example, a person may go through intermittent periods of homelessness or rare episodes of mental illness, but not need help at other times.

This chapter considers the approach of Department of Human Services (DHS) in identifying and dealing with vulnerability in the context of the Robodebt scheme (the Scheme) and the effect that this had on current and former income support recipients. It will also address changes that should be made to Services Australia’s practices in order to ensure that vulnerabilities are properly identified and managed.
The documentary evidence before the Commission does not tell a consistent story in relation to the identification and treatment of vulnerable recipients under the Scheme. The Commission has received a number of documents in response to its requests; however, it remains difficult to precisely identify the manner in which vulnerability was dealt with at different times over the life of the Scheme. The records did not always correspond with the reality.

Some mechanisms used by DHS with respect to vulnerability were built into the IT systems themselves, and can be found in the technical specifications of those systems. Those documents (putting aside any technical errors which may have occurred) are a generally reliable indicator of how the system operated, including with respect to vulnerabilities. There were also operational blueprints, which are a record of the policy or procedure at the time, and which the Commission accepts would generally reflect how DHS staff operated with respect to the remit of those documents.

Other documents, however, describe the ‘technical requirements’ of the Scheme, but are not necessarily a direct reflection of how the system operated. PowerPoint presentations depicting particular filters that were applied to prevent recipients with vulnerabilities from being selected for a compliance review may not be authoritative. IT documents apparently in draft form may not have been finalised. Documents which request a change not apparently confirmed in a final IT specification document may not have been acted on.

An example illustrates these difficulties. The Commonwealth directed the Commission to a series of technical documents, as helping to explain the operation of the program with respect to people with vulnerabilities. However, an analysis of those documents reveals the following:

- In May 2015, a document providing detailed requirements for the build of the IT platform specified that particular cohorts of vulnerable recipients were to be identified as requiring an assisted compliance process.
- A functional specification document dated 11 November 2015 then purported to effect this requirement, and indicated that a letter would be generated for those cohorts of vulnerable recipients. However, that document was only in draft form.
- On 12 July 2016, a Project Change Request document indicated that the business rules of the system were not identifying the correct cohorts of recipients for the assisted compliance process, and sought rectification of this problem.
- The final document is then a table containing the status of outstanding project change requests, which indicates that the changes requested with respect to the identification of recipients for an assisted compliance process were due to be delivered on 30 September 2016.

There is nothing further. What happened next cannot be ascertained from anything provided to the Commission.

The result is that which particular mechanisms may well have been in place with respect to the treatment of vulnerability under the Scheme, it has been difficult to reliably ascertain precisely what those mechanisms were at any given point in time.

Despite these difficulties, the Commission had regard to the documents it does have, including various statements provided by Services Australia and other witnesses, case selection strategies and filters, technical documents, correspondence and briefs to determine how vulnerability was identified and how the Scheme operated with respect to recipients with a range of vulnerabilities.
During the operation of the Scheme, DHS sought to identify and accommodate recipients with vulnerabilities by reference to the following categories:7

- recipients who were to be excluded from the Scheme either permanently,8 indefinitely, or for a defined period of time, and
- recipients who were to be offered a staff-assisted compliance review process.

The selection criteria used to identify recipients within the above categories were adjusted at various points throughout the Scheme.9

2.1 Recipients excluded from the Scheme

A case selection document prepared by DHS in July 2017 listed the filters that were in force at the time to exclude certain cohorts of recipients from the Scheme, either permanently, indefinitely, or temporarily.10

The vulnerable cohorts who were listed as being permanently excluded from the Scheme (i.e. never targeted for a compliance review) were limited to:

- deceased recipients, and
- legally blind recipients.

The vulnerable cohorts who were to be indefinitely excluded from the Scheme (i.e. not targeted for a compliance review unless their circumstances changed) comprised:

- recipients who lived in remote areas
- recipients with no fixed address
- recipients who were in prison, or who received disability support pension and resided in a psychiatric facility
- recipients outside of Australia, and
- recipients whose files had restricted access (e.g. victims of domestic violence).

The vulnerable cohorts who were to be temporarily excluded from the Scheme (i.e. not targeted for a compliance review for a defined period of time) comprised:

- bereaved recipients, and
- recipients residing in a declared disaster zone.11

In addition to these existing filters, the case selection document listed a number of “new” filters that were applicable to vulnerable cohorts, and would be introduced from July 2017:

- the indefinite exclusion of:
  - recipients 65 years old or over
  - recipients in full-time residential care
  - recipients who had been victims of terrorist incidents, and
- the temporary exclusion of:
  - recipients who had received a carer adjustment payment, and
  - recipients who had received a natural disaster relief payment.12

In early 2017, in the context of substantial media scrutiny of the Scheme, DHS developed a “Case Selection Strategy” to use in the staged implementation of the Employment Income Confirmation (EIC) program.13

The Case Selection Strategy identified a number of additional vulnerable cohorts that were to be excluded from the operation of the Scheme for staged periods in the first half of 2017, including:

- culturally or linguistically diverse recipients
- Indigenous recipients
• recipients who lived outside of metropolitan areas
• recipients not currently in receipt of an income support payment
• recipients on a Disability Support Pension, and
• recipients with a “vulnerability indicator.”

2.2 Recipients offered a staff-assisted review

As best as can be ascertained on the evidence before the Commission, the cohorts of vulnerable recipients who were to be offered a staff-assisted review during the OCI phase of the Scheme were:

• Recipients with one of the following vulnerability indicators present on their record:
  o psychiatric problem or illness
  o cognitive or neurological impairment
  o illness or injury requiring frequent treatment
  o drug/alcohol dependency
  o homelessness
  o recent traumatic relationship breakdown
  o significant lack of literacy and language skills
  o nationally approved vulnerability
• Recipients who lived in remote areas, and
• Recipients from culturally and linguistically diverse backgrounds.

Noting the limitations already described in relation to the disconnect between requirements and actual implementation, the initial business rules for the OCI identified additional recipient cohorts who would require an assisted review process including:

• over 80
• have no fixed address
• experiencing a major personal crisis
• vulnerability indicators
• in a disaster affected area
• expectant mothers
• those on a Disability Support Pension, Mobility Allowance or Carers Allowance
• some recipients with overseas addresses
• in a bereavement period, and
• deceased records.

The evidence suggests that recipients with vulnerabilities were intended to be excluded from compliance reviews altogether during the first half of 2017, in what appears to have been a direct response to public concern about the targeting of vulnerable recipients. A case selection document suggests that by July 2017, DHS had returned to conducting manual reviews for these recipients, as well as for recipients with certain nominee indicators on their record. However, other documents in evidence before the Commission suggest that recipients with vulnerability indicators continued to be excluded from the Scheme altogether until at least June 2018. Regardless of when this shift in fact occurred, it is clear that for at least some periods in which the Scheme operated, recipients who had particular identified vulnerabilities were subject to staff-assisted compliance reviews.
3 Deficiencies in the identification and treatment of vulnerable recipients

The evidence before the Commission suggested that there were deficiencies in the identification of vulnerable recipients and the assistance offered to those recipients who were identified as having vulnerabilities.

3.1 Problems arising on the evidence before the Commission

As noted earlier in this chapter, the use of vulnerability indicators by DHS was one means of identifying people who may experience difficulty in the context of compliance reviews. Vulnerability indicators were a tool DHS used to flag particular vulnerabilities that were known to DHS on a recipient’s electronic record. The system was not adequate to identify everyone who might fall within a vulnerability category and need help. An example was that of recipients on non-activity payments.

Primarily, DHS used vulnerability indicators to alert staff to the fact that a recipient was experiencing difficulties that might affect their ability to meet mutual obligation requirements. Mutual obligations are activities that job seekers in receipt of certain income support payments are required to complete in order to maintain their entitlements. As was explained in a brief provided to the Minister for Human Services, the Hon Michael Keenan, in 2018:

The vulnerability indicator is used by [DHS] in the context of customer’s [sic] access to Employment Services and their level of vulnerability in accessing employment opportunities and participating in job search and readiness obligations. It has been used as a proxy for customers [sic] needs to approach with sensitivity in the context of a compliance review.

As they were designed to be used in the context of mutual obligation requirements, vulnerability indicators were only recorded for recipients on certain income support payments (e.g. JobSeeker). The result of this, as highlighted in the evidence of Genevieve Bolton, chair of Economic Justice Australia, was that vulnerable people who were on non-activity tested payments and had not undergone an assessment (because the benefit they received did not give rise to mutual obligations) would not have vulnerability indicators applied to their files, and were caught up in the Scheme.

An example is this: vulnerability indicators were not recorded for recipients on sickness allowance, which was a non-activity payment. It is obvious, however, that people in receipt of sickness allowance may have had relevant vulnerabilities.

This was a problem of the way vulnerability indicators were applied for different payment types, rather than a problem with the vulnerability indicators themselves.

DHS changed its approach to recording vulnerability indicators in mid-2018, moving towards the recognition of a wider range of circumstances affecting a recipient’s capacity to comply with compulsory requirements. These circumstances included additional vulnerabilities such as physical illness, access to technology, educational limitations and financial, behavioural, cultural or legal issues.

Some vulnerability indicators deemed irrelevant to the Scheme

Although DHS used vulnerability indicators as a method of identifying recipients who might require additional support under the Scheme, not all vulnerability indicators were considered to be relevant for
this purpose. For instance, it was decided within DHS that vulnerability indicators for released prisoners and people with significant caring responsibilities were not relevant in the context of compliance reviews.\textsuperscript{34}

It is not clear on what basis those categories of vulnerability were deemed irrelevant to the operation of the Scheme. If a recipient’s vulnerability was such as to affect their ability to comply with their mutual obligations (e.g. to look for work or attend appointments), it seems quite probable that their ability to participate in an unassisted compliance review would also be affected.

**Deficiencies in the currency of vulnerability indicators**

Although a recipient’s record displayed historical vulnerability indicators,\textsuperscript{35} the evidence suggests that at least during some periods of the Scheme’s operation, recipients were only offered a staff-assisted review where they had a current vulnerability indicator.\textsuperscript{36}

Because of the typically transient nature of income support receipt, it was common for people at the time they were notified of a potential retrospective debt to have stopped receiving payments for an extended period.\textsuperscript{37} As a result, DHS had no current information on the vulnerabilities they were experiencing, and would not have been aware of any vulnerabilities that had arisen since they last received income support. Consequently, no accommodation was likely to be made for vulnerable former recipients.

The currency of vulnerability indicators was also affected by systemic issues associated with the review processes for the indicators. In accordance with internal DHS guidance, when recording a vulnerability indicator on a recipient’s file, DHS officers were required to set a review date for the indicator.\textsuperscript{38} For instance, a vulnerability indicator for psychiatric problems or mental illness had to be reviewed a maximum of one year after the indicator was recorded.\textsuperscript{39} Two weeks before the relevant review date, a review would be triggered in the DHS system.\textsuperscript{40} However, if this review were not actioned within those two weeks, the vulnerability indicator expired and was automatically removed from the recipient’s record.\textsuperscript{41}

It appears that by July 2017, DHS was aware of this problem and had shifted its approach so as to capture vulnerability indicators that had not been properly reviewed.\textsuperscript{42} However, before this change, the result of DHS’s approach was that some vulnerable people who had not had their vulnerability indicators properly reviewed and renewed were not recognised under the Scheme as requiring additional assistance.

In the case of Rhys Cauzzo, the internal record within DHS indicates that a “psychiatric problem or mental illness” vulnerability indicator was recorded on Mr Cauzzo’s file from 5 June 2010 to 1 February 2012 in relation to anxiety and panic attacks he had experienced.\textsuperscript{43} The vulnerability indicator on Mr Cauzzo’s record was reviewed and ended on 1 February 2012,\textsuperscript{44} without any evidence of a further review of his mental health. On 18 September 2015, Mr Cauzzo attended a “Job Capacity Assessment” in connection with his claim for a Disability Support Pension.\textsuperscript{45} The Job Capacity Assessment recorded that Mr Cauzzo was diagnosed with anxiety and depression, and that he had reported suicidal ideation. Despite this assessment, no vulnerability indicator was recorded on Mr Cauzzo’s file.\textsuperscript{46} At the time that Mr Cauzzo was selected for a compliance review in May 2016, there was no current vulnerability indicator on his record.\textsuperscript{47} In her evidence to the Commission, Ms Jennifer Miller, Mr Cauzzo’s mother, said that she saw this as a “major fault” in the handling of her son’s case,\textsuperscript{48} and she was right.

Mr Cauzzo’s case is discussed in more detail in the chapter - Effects of Robodebt on individuals.

### 3.2 Inadequacy of the assistance provided to recipients with identified vulnerabilities

During the OCI phase of the Scheme, vulnerable recipients who were offered a staff-assisted review received an initial letter which was different from the standard version issued under the Scheme.\textsuperscript{49}
This alternative letter provided a phone number which recipients could use to contact staff for further assistance. If the recipient chose to engage in the staff-assisted process, a DHS officer would complete the review process with the recipient while they were on the phone, and the recipient would be informed of the outcome verbally (as well as by way of a debt letter, if applicable). If the recipient did not make contact with DHS within 21 days, they were channelled back through the automated debt review process.

During the Employment Income Confirmation (EIC) and Check and Update Past Income (CUPI) phases of the Scheme, recipients who had been identified as requiring a staff-assisted review received the same initial letter as other recipients, as the letter had been updated to include a contact phone number.

If a recipient did not engage by telephone or complete their review through the online platform, a DHS internal policy required staff to make two attempts to contact the recipient by telephone prior to completing a manual review. Where a recipient had identified vulnerabilities, had made what DHS considered to be “genuine and reasonable” but unsuccessful attempts to obtain employment and banking records and did not agree to their income being averaged, staff were able to contact the recipient’s employer and request employment income details on the recipient’s behalf.

The staff-assisted review process offered to recipients with identified vulnerabilities was not an adequate method of ensuring that those recipients were properly supported through the compliance process. Particularly in the OCI phase of the Scheme, where there were no active steps taken by DHS to contact vulnerable recipients, the staff-assisted review process relied heavily on recipients taking the initiative to engage with the process. It was unreasonable for DHS to expect that some cohorts of vulnerable recipients, for instance those with a significant lack of literacy or language skills or those with cognitive impairments, would be adequately assisted by the provision of a telephone contact number in an otherwise unaltered letter.

One example of the difficulties encountered by vulnerable recipients in attempting to engage with DHS was the experience of a recipient with mental health issues, including Asperger’s syndrome, which was recorded in a decision of the Administrative Appeals Tribunal and circulated within DHS in November 2016. This recipient said that he had been granted a pension in respect of his mental health issues, and that he often had difficulty processing information given to him verbally, causing him to become elevated, distressed and aggressive. He had asked Centrelink staff, during the compliance review process, to write to him and provide details of the matter and any questions that Centrelink wanted him to answer, but his request was ignored. The Commission has received numerous submissions from (or on behalf of) other recipients who experienced similar difficulties in engaging with the staff-assisted compliance review process.

The Commission also heard evidence from Craig Simpson (pseudonym), a DHS employee who had worked as a compliance officer during the course of the Scheme. Mr Simpson noted that, in his experience:

…”I certainly knew from my background and my work experience, working with complex individuals with significant barriers, that those individuals had a much more difficult time navigating our welfare system. Our welfare system is complex for the best of us. It was complex for employees. It was complex for my supervisors. It was complex for subject matter experts. And then when you take a highly disadvantaged individual who may have multiple and compounding vulnerability indicators, which is the term we use — and that may include being a single parent, having substance abuse issues, having significant cognitive or mental health barriers — and you are attempting to persuade and motivate and assist these people to [comply] with those — with these very complex welfare requirements, those are two very incompatible factors.

As is highlighted in Mr Simpson’s evidence, engaging with the social security system can be a very complex and challenging process for any recipient, let alone somebody who is suffering severe disadvantages. It is an unfortunate reality that Services Australia must be selective in providing additional assistance to only those recipients who are most in need of it. That makes it all the more important to give careful consideration to determining who will require that additional assistance and what it must entail so that it provides real, practical support.
4 Recommendations

**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 concept of vulnerability

1. Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), [p 11].
2. See, e.g., Exhibit 4-7111 – CTH.3715.0001.7665 – PAYG-WRICEF-03 - Notification - Customer Advice v0.1_CST, 13 April 2016; Exhibit 1-1120 – CTH.3000.0016.6633 – PAYG-WRICEF-03 - Notification - Customer Advice v0.4; Exhibit 10015 – CTH.3792.0001.0375 – OCI-WRICEF-03 - Notification - Recipient Advice v2.2, 3 August 2017.
3. Exhibit 4-6564 – CTH.3715.0001.4066_R – Online Compliance Intervention - Detailed Requirements Document v1.0 [p 32].
4. Exhibit 4-7111 – Exhibit 4-7111 – CTH.3715.0001.7665 – PAYG-WRICEF-03 - Notification - Customer Advice v0.1_CST, 13 April 2016; [p 5].
5. Exhibit 10126 - CTH.3024.0005.1400 - NM Approved_SIWP ICT EIMPCR016 - Staff Assisted Notification Rules V0.2.pdf, 12 July 2016 [p 2-4].
6. Exhibit 10127 - CTH.3030.0023.2821 - Outstanding Project Change Requests [p 3].
7. See, e.g., Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
8. This was done either by way of an initial “case selection filter” or a subsequent “initiation filter” which would remove the recipient’s data from the available data pool.
9. See, Exhibit 1-0914 – CTH.3715.0001.8580_R – SiMS - Selection Management Processing v3.0 (NM signed), 9 May 2016; Exhibit 10013 - CTH.3000.0031.5125 – 170602 Current State Filters v0.11, which is an attachment to CTH.3000.0031.5111 – RE: COB 20 JUNE 2017 Additional Evidence required - Ombudsman Report ***Assistance Required*** [DLM=For-Official-Use-Only], 20 June 2017; Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017; Exhibit 3-3834 – CTH.3000.0038.1527 – Attachment A 171122 Case Selection Filters - PAYG_v4.0, 22 November 2017.
11. These recipients were generally excluded from the Scheme for a period of 12 weeks. See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
12. These recipients were excluded from the Scheme for a period of 6 months. See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017.
14. Either currently recorded on the recipient’s file, or recorded in a period that was the subject of a review.
16. Internal DHS guidance advised that this category of vulnerability indicator was only to be used when the national business team (Compliance Framework Section – Participation Division) specifically directed its use for a vulnerable cohort not covered by an existing category. See, e.g., Exhibit 10093 - CTH.3908.0001.0001 – 001-10050010-V09-03052016, 3 May 2016.
17. Recipients from a culturally and linguistically diverse background were to be identified by reference to any “interpreter language” or “written language” other than English recorded on their file.
18. Exhibit 4-6564 – CTH.3715.0001.4066_R – Online Compliance Interventions_Detailed Requirements Document_v1.0 FINA_1, 18 August 2015 [p 32].
19. Exhibit 1-0012 - CTH.9999.0001.0012 - Response to NTG-0060; Exhibit 1-0013 - CTH.3728.0001.0282_R - EIC review match data.
20. Exhibit 10082 - CTH.3003.0001.0389 – Robodebt and Vulnerable 2.0 (004).
21. Being a “payment”, “court appointed” or “organisation” nominee indicator.
23. Exhibit 10083 - CTH.3004.0008.4784 – Item 7.2 CMP Case selection PAYG Filters; Exhibit 9984 - CTH.3009.0012.7964 – MS18-000325 - Minister signed brief, 7 May 2018 [p 2: para 4].
24. See for example, Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016 [p 1].
26. See for example, Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016 [p 1].
27. See section 42AC of the Social Security (Administration) Act 1999 (Cth) in relation to the circumstances which a person will be considered to have committed a “mutual obligation failure”.
Each version of the “Recording a Vulnerability Indicator” Operational Blueprint in effect during the operation of the Scheme specified that a vulnerability indicator was only to be recorded where the recipient was subject to mutual obligation requirements: See Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016; Exhibit 10096 - CTH.3908.0001.0017 – 001-10050010-V10-19092016, 19 September 2016; Exhibit 10097 - CTH.3908.0001.0030 – 001-10050010-V11-06102016, 6 October 2016; CTH.3908.0001.0043 – 001-10050010-V12-05122017, 5 December 2017; Exhibit 10099 - CTH.3908.0001.0056 – 001-10050010-V13-07022018, 7 February 2018; Exhibit 10100 - CTH.3908.0001.0094 – 001-10050010-V14-23022018, 23 February 2018.

Transcript, Genevieve Bolton, 11 November 2022 [p 1010: lines 40 – 46].


On 13 June 2018, the “Recording a Vulnerability Indicator” Operational Blueprint was decommissioned. Shortly thereafter, on 3 July 2018, the “Vulnerability Indicators” Operational Blueprint was renamed “Circumstances Affecting Capacity to Comply with Compulsory Requirement” and was amended to address a wider range of “circumstances impacting compliance”. See Exhibit 9080 - CTH.9999.0001.0202 – [FINAL] NTG-0245 Services Australia Response (Operational Blueprint) [p 5].

See for example, Exhibit 10095 - CTH.3043.0054.6854_R – 001-10050000_20180703, 3 July 2018.

Exhibit 2-1321 – CTH.1000.0007.0205 – Assisted Compliance, which is an attachment to Exhibit 2-1321 – CTH.1000.0007.0205 – Ombudsman Own Motion – Online Compliance Intervention [DLM=For-Official-Use-Only], 25 January 2017. For a full list of vulnerability indicators, see, for example, Exhibit 10095 - CTH.3043.0054.6854_R – 001-10050000_20180703, 3 July 2018.

Exhibit 1-0004 – RCW.0001.0001.0005_RW01 – Statement of RCW01 (‘Amy’), 28 October 2022 [p 1: para 7; p 2: para 13].

See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016.

See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016.

See, for example, Exhibit 10093 - CTH.3908.0001.0001_R – 001-10050010-V09-03052016, 3 May 2016.

See Exhibit 4-7123 – CTH.1000.0008.9227 – Attachment C - Case Selection Filters (PAYG), 3 July 2017 [p 4].

See for example, Exhibit 10094 - CTH.3043.0054.6801_R – 001-10050000_20160919, 19 September 2016.

Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 6: para 31 – p 7: para 39].

Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 6: para 34].

Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 7: para 39].

Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017 [p 7: para 39].

Exhibit 3-4722 – CTH.3009.0008.0589_R – MB17-000300 Letter at the end of the brief was signed by the Minister, 5 April 2017.

Transcript, Jennifer Miller, 20 February 2023 [p 3272: lines 19-34].
The concept of vulnerability

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54 Exhibit 4-7075 – RBD.9999.0001.0451_R – Use of data and automation in the Robodebt Scheme Final Report_20230303 (1), 3 March 2023 [p 24].


57 Transcript, Craig Simpson, 3 March 2023 [p 4406: lines 2-11].
Chapter 12: The role of advocacy groups and legal services
1 Introduction

We did everything we could to convey to [Minister Tudge] the level of human distress that was being experienced by people...we pleaded with him to suspend the program immediately... – Dr Cassandra Goldie AO, ACOSS

The explicit objective of #NotMyDebt as an advocacy project was always to end the scheme that came to be known as Robodebt. – Lyndsey Jackson, #NotMyDebt

Advocacy groups play an important role in supporting social security recipients to navigate the social security system and providing feedback to the government on behalf of the groups they represent. They were not, however, consulted when the Robodebt Scheme (the Scheme) was designed and implemented.

Once the Scheme was operational, and problems with the Scheme were becoming increasingly apparent, advocacy groups began to direct feedback and complaints about the Scheme to Ministers and senior officers at DHS. Those complaints fell on deaf ears.

The Commission heard from a number of advocacy organisations and groups about how they had tried to be heard and were ignored or dismissed. They included:

- Australian Council of Social Service (ACOSS)
- #NotMyDebt
- Economic Justice Australia (EJA)
- Council of Single Mothers and their Children (CSMC)
- Victoria Legal Aid (VLA)

The submissions and evidence from advocacy groups and organisations provided insight into the experiences of the recipients, and the frustrations felt by the organisations supporting them. The Commission heard that there was a lack of consultation from government regarding the impact of the Scheme and a lack of response from the government when advocates tried to point out the Scheme’s systemic failures. To the dismay of advocates, despite their efforts to highlight the mounting problems it was causing, the Scheme marched on.
2 Advocacy by the Australian Council of Social Service

ACOSS is a national independent not-for-profit organisation with expertise in social security policy and a goal of reducing poverty and inequality in Australia. It acts as a national advocate for disadvantaged members of society, undertakes policy advocacy and research, and makes recommendations to government to inform policy that is socially, economically and environmentally responsible.

On 22 May 2015, ACOSS emailed the office of the Hon Scott Morrison MP, the Minister for Social Services, attaching ACOSS’s draft detailed budget analysis. The email advised that:

... the Government’s projected revenue savings from new systems to detect and deal with overpayments are unrealistically high since benefit fraud is not widespread and the new systems will reveal underpayments as well.

On 26 November 2015, ACOSS released a media statement, Government must release modelling on planned cuts to family payments: ACOSS, which pointed to the implausibility of the government’s figure of $1.7 billion as representing the “overpayments” number.

On 28 June 2016, ACOSS received an email from Mr Morrison’s office, attaching the Coalition’s policy for Better Management of the Social Welfare System. That document stated:

no one who genuinely needs social welfare support and who is already honestly disclosing their employment and non-employment income will be worse-off under our commitment.

On 21 December 2016, after the Online Compliance Intervention (OCI) phase of the Scheme had been rolled out in full, ACOSS sent a letter directly to the Hon Alan Tudge, the Minister for Human Services, raising issues of “serious and systemic problems with the automated debt detection and notification system.” The ACOSS letter cited reports that the system was detecting a debt by averaging out annual income over 26 fortnights and correlating that to receipt of income support, which “would likely be producing large numbers of inaccurate notices.”

The letter also raised a further seven issues:

- the routine imposition of a 10% recovery fee (“we are gravely concerned about the 10% recovery fee that is being applied”)
- the length of time since the debts were incurred (“the Department may seek to retrieve a debt from up to six years ago”)
- the failure to advise people immediately about the process, and the risks of non-engagement and limited engagement options (“there has been a consistent complaint that people cannot use the online system...the first letter people receive from [DHS] provides no phone number to call”)
- the refusal of Centrelink offices to discuss the letters face-to-face (“Centrelink offices are refusing to assist people who have received a debt letter and are instead advising people to go online”)
- the failure to make personal contact prior to commencing debt collection action (“text messages sent to some people do not indicate that a non-response could result in them having a debt against their name and incur a 10% recovery fee”)
- the scale and timing of the automated debt collection process (“It is important to consider the reduced capacity people have to engage with Centrelink at this time of year. There will be limited access available to welfare rights legal centres around the country during this period”)
- the use of external debt collectors (“Centrelink is failing to effectively communicate with people when they are engaging debt collectors to retrieve debts”).
ACOSS urged Mr Tudge to take action by:

- immediately suspending the issuing of [Robodebt] correspondence
- waiving recovery fees in all cases
- placing on hold matters already commenced, and
- convening a stakeholder roundtable to take place in early 2017.

ACOSS noted that “at the time that these measures were announced by the Coalition during the Federal Election, ACOSS urged that any automated data matching system and subsequent action be conducted in a humane and reasonable fashion. It is clear that at the present time, this is not the case.”

ACOSS requested a response from the Minister before Christmas.

Mr Wood, the Mr Tudge’s policy advisor, told the Commission that usual practice was for DHS to prepare a response for the minister that he would review and pass on. Regarding the ACOSS letter, Mr Wood did not recall what response – if any – DHS had drafted, but he would have “read that at the time and drawn to [the minister’s] attention if I thought [it] necessary.” He could not recall the minister being interested in pausing the debt recovery program to permit the stakeholder roundtable to proceed.

On 18 January 2017, ACOSS representatives met with Mr Tudge to express their concerns and again call for the Scheme to be suspended. This was followed by a letter to Mr Tudge on 19 January 2017, in which ACOSS emphasised “the unique power that the Commonwealth Government has over people’s lives…As a result, it is essential that the Commonwealth adhere to the highest of standards with respect to the raising of debts against people, and the kind of debt collection action that may follow.”

The letter included guidance on engaging with non-government stakeholders:

> In relation to the stakeholder engagement we believe should form part of your process to design a fair and humane system of debt recovery, we propose that you include a diverse representation of civil society organisations representing people directly affected, service providers working with people, and experts in social security.

and included a list of organisations to be consulted.

Mr Wood sent an undated letter to Dr Cassandra Goldie AO, the Chief Executive Officer of ACOSS, received by ACOSS on 7 February 2017, referring to their meeting on 18 January 2017 and ACOSS’s correspondence on 21 December 2016 and 19 January 2017, and providing an outline of the current status of the debt recovery program. The letter emphasised that the OCI system did not change how income was assessed or how debts were calculated, and advised that “the Government…will continue to make refinements based on the ongoing feedback we receive from stakeholders and recipients.” It did not otherwise respond to the proposal for stakeholder engagement.

Charmaine Crowe, program director of social security at ACOSS, told the Commission that her understanding from Mr Tudge’s letter was that the government proposed these changes to the debt recovery program: that DHS would use registered post to send the notices out; they would refine the language used in the online portal to make it easier to understand; and would enable people to request a stay on debt recovery if they could show they had not received the initial notice. ACOSS had not been consulted about any of those changes.

Dr Goldie considered (correctly) that Mr Tudge’s letter did not address the big problems with the Scheme: “the income averaging, the raising of a debt against that process and the reversing of the onus of proof.”

After receiving Mr Tudge’s letter, in early 2017 ACOSS convened a meeting with key stakeholders concerned by the Scheme in an attempt to act collectively to stop it. Around 30 groups joined this meeting, which was referred to as the Centrelink Debt Strategy Group. Members included Economic Justice Australia, the National Council of Single Mothers and their Children, Victorian Legal Aid, Get Up! and the Community and Public Sector Union.
On 31 January 2017, ACOSS wrote to the Prime Minister, Malcolm Turnbull, calling for an end to the Scheme. Dr Goldie told the Commission that it was “unusual for [ACOSS] to do so in our advocacy” as normally “we would be dealing with the Minister direct.” However, due to the “seriousness of what we were confronted with, we felt once we did not get the response from Minister Tudge agreeing to suspend the program, we would go straight to the Prime Minister about it.”

It was not until five months later, on 20 June 2017, that ACOSS received a response from the prime minister, which relied on the Ombudsman’s report and advised that the government would continue to implement all of the recommendations set out in that report.

[It showed] no preparedness …to engage with the serious issues that we had raised directly with the Prime Minister, which was affecting hundreds of thousands of people on the lowest incomes in the country.

ACOSS received another letter from Mr Tudge on 13 March 2017. The letter provided an update “on the performance of the Online Compliance system and some of the recent refinements that the Government has made to it.”

On 16 August 2017, ACOSS met with Mr Tudge and Kathryn Campbell, the Secretary of DSS. Ms Crowe told the Commission that there were no notes from the meeting, but to her recollection it was a “tense meeting” where they discussed the Scheme and “the use of the AFP logo on taskforce integrity letters.” ACOSS’s concerns were not resolved in the meeting, and it ended abruptly.

ACOSS told the Commission that historically, when there were social security measures announced, the DSS would convene a meeting with stakeholders to discuss Budget measures in their portfolio, at which meetings ACOSS would provide input. In relation to the Scheme, there was no such consultation.

Dr Goldie’s evidence was that the government did not genuinely consider the concerns ACOSS raised about the Scheme with various departments and the Prime Minister: “…it was either, ‘Well, we’re not doing anything different. That’s always been done before,’ or, ‘We’re dealing with the issues that have been raised, including through the Ombudsman’s report, and there’s no problem now.’”

Ultimately,

...in the face of repeated pleas, bringing through the stories and experiences of people on low incomes, including suicidal ideation...the government proceeded to want to extend Robodebt, not to shut it down.

On 14 October 2019, ACOSS had a meeting with (then) Minister Robert, during which the ACOSS representatives expressed concern about income averaging and the Scheme. ACOSS’s chronology of events recorded that Mr Robert “doesn’t think there is a need to engage or consult with ACOSS or other experts about Robodebt, or anything else in the DHS area for that matter...the outcome of this meeting was that there was no change to the policy until the Federal Court case reported on 19 November 2019.”
3 Advocacy by #NotMyDebt

#NotMyDebt is a community run group that was created between December 2016 and January 2017. Established by volunteers, #NotMyDebt recorded and shared stories from people who were receiving notification from Centrelink about debts which they considered to be incorrect. Over time, #NotMyDebt grew to be a support mechanism for those affected by the Scheme. Lyndsey Jackson, one of the founders of #NotMyDebt, gave evidence to the Commission. The Commission also received a submission from Asher Wolf, another of the first people involved in #NotMyDebt:

my aim from the very start of the campaign was to have Robodebt declared unlawful…our campaign united a loose gathering of people into a networked collective to oppose the government policy of unlawful and unethical debt collection.

Ms Jackson’s evidence was that #NotMyDebt was able to supplement the work of a number of funded non-government organisations and address “a massive unmet need.” “The explicit objective of #NotMyDebt as an advocacy project was always to end the scheme that came to be known as Robodebt.”

Ms Jackson told the Commission that the Scheme “…was a system and a structural issue that was clearly happening within government… that needs a whole of community collective response.” #NotMyDebt engaged with various stakeholder groups, including ACOSS, community legal centres, as well as Legal Aid Victoria.

#NotMyDebt did not deal directly with government. It identified problems in the system and passed the information on to stakeholder groups, who would then communicate the community concerns to government. #NotMyDebt principally communicated with ACOSS:

[ACOSS] organised a number of meetings…about four or five…every fortnight during that initial response time, as organisations were trying to figure out how they were going to respond.

Ms Jackson explained that the role of #NotMyDebt was to provide general advice. While it could not provide legal advice, but would direct people to organisations such as Victoria Legal Aid, which was involved early on in creating support networks and providing information to people: “but [these organisations] funding capacity was an issue, and the sheer volume of people was an issue as well. So we worked to fill a gap of assisting people to self-navigate through this, because we didn’t believe that the legal organisations were going to be able to provide support to everyone affected.”

Individuals with debt letters from Centrelink could use the #NotMyDebt website to learn about: their legal rights and obligations; navigation of the Centrelink system and appeals process; the process of identifying and contacting their Member of Parliament; and how to make a freedom of information (FOI) request. #NotMyDebt also had a Twitter presence, where current events with respect to the Scheme were identified, and a public Facebook page, where individuals could obtain access to generalised assistance and informational webinars.

Members of #NotMyDebt provided voluntary peer support to thousands of people through direct messaging on the Facebook page, and by assisting with the collation of documents for proceedings to the Administrative Appeals Tribune (AAT2) and the interpretation of the results of FOI applications. #NotMyDebt considered it important to provide information regarding FOI applications because people were not getting information from the Department: they were not getting documents showing the calculation of the debt. Although the volume of documentation provided as a result of a Freedom of Information request could be overwhelming, generally that documentation contained the information needed for #NotMyDebt to assist in ascertaining how the debt had been calculated.

#NotMyDebt also had a social advocacy goal. “This was a system and a structural issue that was clearly happening within government, and that needs a whole of community collective response…from a broader advocacy point of view, [that was] stopping the Scheme.”
Economic Justice Australia describes itself as the peak organisation for community legal centres providing specialist advice to people regarding their social security issues and rights.

In 2018, EJA received grant funding that began its work engaging with DSS, which continues today. EJA’s work includes consultation with DSS, Services Australia and the Department of Employment to provide advice and feedback to government.

[EJA’s] role is to utilise the frontline client experience of its member centres to then talk to government in relation to where things are going wrong and where things can be improved, both in terms of social security policy, but also in relation to the implementation and administration of that policy.

Despite its regular engagement with government in the general consultative process that was in place between EJA and the DHS, EJA had received no advance warning of the introduction of the Scheme. EJA became aware of the Scheme following a general budget briefing, where it was described as a “data-matching measure.” The evidence from the chair of EJA, Genevieve Bolton, was that EJA had no understanding of the “mechanics of the scheme” until member centres of EJA began to raise issues.

On 21 December 2016, EJA wrote to the Commonwealth Ombudsman, raising concerns in relation to the Scheme. The first of these concerns was the unreliability of the automated process. EJA also highlighted the difficulties recipients were having with using the online system, particularly the lack of assistance afforded to vulnerable recipients; and the fact that in some circumstances, where Centrelink was using the last known address, recipients were not receiving the letters and were not contacted by the system at all before finding their matter had been referred to debt collectors. EJA also raised concerns in relation to the lawfulness of the system, and the unreliability of averaging in establishing actual income.

On 9 January 2017, EJA met with DHS to raise concerns about averaging and the 10 per cent penalty.

The purpose of the meeting was to obtain a briefing from the Department in terms of the changes to the system… and also to get more detailed information in relation to the workings of the portal itself.

EJA received a response from the Ombudsman on 11 April 2017, advising that the Ombudsman had published its report into Centrelink’s automated debt raising and recovery system, and that, effectively, EJA’s complaint was finalised.

EJA found the response from the Ombudsman to be “disappointing” in that it did not address any of EJA’s points about legality.

We were of the view that the recommendations [of the Ombudsman] didn’t go far enough. They were very much framed in terms of the problem here is…a service delivery issue, and if there are various changes made in relation to the communications and the letters and making the portal more accessible…that would… improve the scheme…In our view, what was really the problem…was the actual design of the system itself.

EJA considered that the Scheme needed to be tested in court, “because we had consistently raised our concerns in relation to aspects of this scheme which we believed to be unlawful, and that consistently fell on deaf ears.”

Throughout the life of the Scheme, EJA provided support to community legal centres, liaised with DHS and other representatives and appeared before Senate inquiries into the Scheme.

In September 2019, EJA met with the Hon Stuart Robert, then Minister for Government Services, and raised its concerns about the Scheme being extended to vulnerable cohorts. Mr Robert advised EJA it was not the government’s intention to do so.

Ms Bolton told the Commission that “…clients were very distressed, very frustrated…It caused a significant amount of harm to them.”
5 Advocacy by the Council of Single Mothers and their Children

The Council of Single Mothers and their Children (CSMC) is a non-profit organisation that offers telephone support, information and referrals; emotional support; and advocacy for single mothers and their children. CSMC also contributes to policy debate and works with organisations, such as the Victorian Council of Social Services, to offer expert advice relevant to single mothers and their families.

CSMC’s submission to the Commission set out the history of its communication with government about the Scheme. On 30 December 2016, CSMC sent a letter to Mr Tudge raising concerns in relation to the Scheme, following an increase in the volume of distressed calls from customers. In the letter, CSMC requested that DHS cease sending letters to customers, undertake manual reviews of those debts already raised to substantiate the debt, and not enter into any debt collection before substantiating debts already raised. CSMC advised that it had also contacted the Ombudsman. According to its submission, CSMC did not receive a response to that letter.

CSMC sent an email on 30 December 2016 to DHS, in which it suggested that DHS take the same steps as those it had outlined in the letter to Mr Tudge. CSMC informed the Commission that it did not receive a substantive response to that letter. CSMC sent a further email to DHS on 11 January 2017, in which it set out a list of questions regarding the debt raising under the Scheme. No response was received to that letter. And finally, like EJA, CSMC asked the Ombudsman to commence an investigation, sending emails for that purpose on 28 December 2016, 3 January 2017 and 20 January 2017.
6 Advocacy by Victoria Legal Aid

Victoria Legal Aid (VLA) is a statutory body, reliant primarily on State and Federal government funding, which provides legal assistance in civil and administrative law matters, criminal law matters and family law matters. In addition to providing legal advice and representation in courts and tribunals, VLA provides assistance through community legal education and the provision of legal information through their website, free legal help phone line and web chat service.

VLA played a significant role in advocating for the discontinuation of the Scheme, most significantly in its representation of Madeleine Masterton and Deanno Amato in the two test cases brought in the Federal Court to challenge the lawfulness of the Scheme.

The Commission heard evidence from two VLA representatives Miles Browne (managing lawyer of the Economic and Social Rights program, Civil Justice) and Rowan McRae (acting chief executive officer).

Ms McRae explained how significantly the Scheme increased the demand for VLA's services:

I think in January 2017, we saw a 500 per cent increase in the number of people accessing our web page on social security information. And I think in the first seven working days of January, we had as many people coming through for advice on social security matters as in the whole of January the previous year.

Despite the increased demand, VLA received no dedicated funding to provide information and advice to people trying to navigate the Scheme.

VLA wrote to Mr Tudge on 24 January 2017 about the influx of complaints it had received following the introduction of the Scheme and the increased demand for its services. In that letter, VLA also sought access to policy documents. Ms McRae explained that VLA did not have much information about the Scheme, and was trying to get more information from the minister about how the Scheme worked.

Having received no reply, VLA wrote to the secretary of DHS, Kathryn Campbell, on 29 March 2017. That letter explained the lengths VLA had gone to in an attempt – unsuccessfully – to obtain a copy of a key policy document, the Program Protocol for the Non Employment Income Data Matching Project (NEIDM Project); which document it was requesting as a result of a “Notice of a Data Matching Project between Department of Human Services and Australian Taxation Office” published in the Australian Government Notices Gazette on 19 August 2016, which spoke only of the NEIDM Project.

On 1 May 2017, Mr Tudge responded to VLA, stating that policy and other internal documents relating to the online compliance system were not publicly available and that the publication of this material may prejudice the effectiveness of the compliance practices.

Ms McRae explained that it was challenging for VLA not to have access to those documents in order to properly advise their clients:

…it’s not unusual for Government Departments to share this type of information with Legal Aid. We are part of government. And it certainly enhances our ability to advise clients, but also often it enhances the administration of a scheme for participants in that scheme to receive accurate legal information and advice that will help them to navigate through the scheme.

A large proportion of VLA's clients had characteristics which entitled them to the protection of the social security system:

A large number of our clients are experiencing a range of forms of disadvantage or marginalisation. So we have a high proportion of clients who are experiencing things like homelessness or mental health issues or family violence. And I think of all of our clients, around half receive some sort of social security benefit and one in three have no income at all.
One of VLA’s objectives is to effect systemic change: “to effect law reform or changes to policy through the work that we do.” In early 2017, VLA quickly formed the view that the Scheme was unlawful and determined that the best way to challenge the lawfulness of the Scheme would be to identify a test case. A significant amount of work was involved in understanding how the Scheme worked, identifying criteria for a suitable test case and seeking legal advice from an eminent counsel, Peter Hanks KC.

VLA has the capacity to indemnify clients who participate in a test case in litigation against a costs order made against them. Ms McRae explained that this is not something done lightly nor does it happen frequently. However, the indemnity removes the threat of a costs order, which would otherwise be a disincentive for clients to involve themselves in a test case.

Launching a test case involves an element of risk for VLA. VLA took on that risk in bringing Ms Masterton and Ms Amato’s cases before the Federal Court: the catalyst for the Scheme’s demise in November 2019. One could have no clearer illustration of the value of legal aid services. The work Victoria Legal Aid did was not only in its clients’ interests, it was for the public good. The Robodebt experience convincingly demonstrates the importance, in the public interest, of properly funded legal aid commissions.

Ms McRae emphasised how important it is for government agencies to engage with legal aid organisations and with social security recipients in the design, development and implementation of social security policy.

The Commission also acknowledges the work of other legal aid bodies around the country, which assisted people to navigate the Scheme and advocated for its cessation.
Community Legal Centres Australia describes itself as the national representative voice for the community legal sector. It is an independent, non-profit organisation set up to support community legal services to provide high-quality, free and accessible legal and related services to members of the community, particularly those experiencing poverty, disadvantage, discrimination or domestic or family violence. Its members are the eight state and territory community legal sector peak bodies.\textsuperscript{116}

In its submission to the Commission, Community Legal Centres Australia endorsed the submissions and recommendations made by EJA. It highlighted the:

... significant risks and human costs of allowing powerful government entities to develop and use an automated system to make and enforce decisions against individual citizens – many of whom faced poverty and disadvantage – without sufficient human or independent oversight.\textsuperscript{117}

The recommendation of Community Legal Centres Australia was that the government increase its investment in specialist social security legal services, and provide increased and ongoing funding to EJA in particular. This increase in funding should ensure equitable access to social security legal services to people in rural, regional, remote, and very remote communities. It recommended that government work to minimise the duplication of administrative burdens and address the communication and other challenges that can arise for organisations required to report to multiple funding bodies.\textsuperscript{118}

In an area of law as complex and specialised as social security, it is critical that the Federal Government directly invests in mechanisms and services, including specialist social security legal services, to help protect individual citizens against the reasonably foreseeable risks and harms inherent in automated decision-making and debt-raising by Centrelink.\textsuperscript{119}

The Commission acknowledges the important role of community legal services, and the public service they provided during the Scheme in the provision of advice and support to people affected by the Scheme. Such support is dependent on ongoing and sufficient funding provided by government. The role of these organisations in enabling access to justice for people who may not have the means to otherwise advocate for themselves is integral in a society that champions the concept of equality before the law.
8 Conclusion

The purpose-built mechanisms of the Scheme harmed economically and socially disadvantaged people in receipt of income support payments. It is likely the Scheme would not have run in the same way, for the length of time that it did, or at all, if there had been proper stakeholder consultation and transparency in its design and implementation.

The Scheme undermined trust in government and confidence in the social security system. It affected members of the community who were or had been reliant on social security payments, imposing tight timelines for responses, requiring technological literacy to engage with the process and employing the services of debt collectors if no response was received, even in circumstances where the recipient did not receive the original letter from Centrelink advising them of the debt. Many people against whom debts were raised under the Scheme were vulnerable members of society, ill-equipped to engage with a system that had not been designed with its users in mind.

Jason Ryman (director, Compliance Risk Branch, DHS) told the Commission that DHS did not engage with non-government organisations in the development of the Scheme. The uniform submission to the Commission of advocacy bodies agrees that there was no consultation with them regarding the design and implementation of the Scheme, which could have provided insight into the difficulties social security recipients would face in engaging with the system. Nor were advocacy groups advised of its implementation prior to it being launched.

If DHS had so engaged, it would have heard:

- that many recipients did not have sufficient digital literacy to effectively access and engage with the online system.
- that averaging would not work because most recipients did not work consistent hours or were not in consistent employment.
- that most recipients would have difficulty in retrieving records of employment from years prior, particularly where they were only obliged to keep records for six months, and particularly if they were itinerant or homeless.
- that the notion that there was a massive amount of overpayments to be recovered was misconceived.

Early on, advocacy bodies highlighted to government their concerns about the legality of the Scheme. Some peak advocacy groups who tried to engage with government about the Scheme, after it was implemented, received no response. When advocacy groups were able to meet with representatives of government, they found their concerns were not listened to or acted upon.

The universal experience of advocacy groups and legal centres was one of being overwhelmed. Large numbers of people sought assistance with debt notices and groups did not have specific funding to enable them to effectively engage with the volume of inquiries. The volunteer organisation, #NotMyDebt, sprang from this unmet need.

The lack of consultation with relevant advocacy groups, before and during the Scheme, exemplifies one of many instances in which a possible safeguard against the catastrophic results of the Scheme was rendered ineffective. It evidently suited the government’s agenda in pursuing the Scheme to not engage with advocacy groups who might – and did – raise the fundamental failings of the Scheme.
8.1 Current state of engagement with advocacy bodies

Accounts from Social Services and Services Australia

The Commission received a statement from Raymond Griggs AO CSC, the current secretary of DSS.

According to Mr Griggs, DSS regularly engages with key stakeholders, including ACOSS, EJA and the Federation of Ethnic Communities’ Councils of Australia (FECCA).\(^\text{132}\) The engagement with EJA, Mr Griggs advised, has led to amendments to the Guide to Social Security Law, which provided “more direction for Services Australia and improv[ed] support for victims and survivors of family and domestic violence in social security law.”\(^\text{133}\)

In a parallel to a recommendation of the Commission, which appears below, Mr Griggs told the Commission that as a result of the engagement with FECCA, a staff member from DSS was seconded to FECCA “to gain a deeper understanding of the issues FECCA deals with so that the needs of [the people they represent] receive the proper recognition in public policy.”\(^\text{134}\)

Mr Griggs told the Commission that the government has established an Economic Inclusion Advisory Committee, of which he is appointed an ex-officio member. The Committee is tasked with providing advice on policy and the “adequacy, effectiveness and sustainability of income support payments” ahead of every Federal Budget. Mr Griggs characterised this as an opportunity to consider how the social security system is supporting the engagement and participation of individuals in need.\(^\text{135}\)

The Commission also received a statement from the Chief Operating Officer of Services Australia, Rebecca Skinner. Ms Skinner assured the Commission that:

> Services Australia has continued to mature its approach to the research and design of our services, embedding the customer voice in the earliest stages of our decision making, working in partnership with our Policy partners and listening to feedback to improve our services.

This means that when we think about changing or improving a service, before any other policy, investment or service delivery decisions are made, we form an evidence based understanding of the needs of our customers, informed by their feedback, and fully explore how the proposed changes may impact them. From this understanding, we implement design standards that guide all decisions relevant to the proposed change... I have put in place an agency Services Design Authority which is embedded into our enterprise governance, establishing strong design standards and also assesses agency initiatives to ensure the needs of our customers are well understood and addressed effectively.\(^\text{136}\)

Ms Skinner advised the Commission that prior to any changes in services, Services Australia engages with customers to “form an evidence based understanding of the needs of our customers, informed by their feedback.”\(^\text{137}\) No clarification is provided on what this entails, and whether it also involves engagement with advocacy bodies who represent many of Services Australia’s customers.

The Commission was told that Services Australia has established a range of forums through which it holds engagement with advocacy bodies, including the Civil Society Advisory Group, a national forum for stakeholders to meet and raise issues regarding social security policy. Both ACOSS and EJA are members of the Civil Society Advisory Group. The Group meets biannually, and targeted operational meetings can be held when required.

Services Australia has recently agreed to trial the re-establishment of a dedicated bi-annual forum with EJA.
8.2 Experiences of advocates

EJA and ACOSS provided supplementary statements to the Commission, in which they responded to specific questions put by the Commission regarding changes they had observed post-Robodebt.

Economic Justice Australia

EJA acknowledged the challenges of the 2019 bushfires, the subsequent floods and the COVID-19 pandemic, but noted that:

... there are ongoing and persistent issues regarding servicing that either cannot be attributed to these challenges; or if they are attributable, require re-direction of resources so as to prioritise equitable access to internal reviews – particularly reviews of decisions to raise and recover debts...

Regarding digitisation, EJA submitted that “it is clear that there have been systemic improvements to Services Australia servicing in terms of digital engagement” and noted that Services Australia’s engagement with members of the Civil Society Advisory Group regarding the rollout of the Single Touch Payroll has been “particularly strong.” However, EJA emphasised that in its experience “vulnerable cohorts without digital skills/access are being left behind.” It said:

Services Australia’s evident commitment to the development and implementation of serving strategies targeting vulnerable cohorts is undermined by overly focusing on digitisation of servicing, and failure to adequately resource specialist servicing.

EJA observed that “it has become increasingly difficult for our member centres to liaise with Centrelink decision-makers”; instead, they are obliged to direct inquiries to local Centrelink teams which do not always have the skills or resources to provide the necessary information. EJA has no direct phone contacts for Centrelink National Office staff, and is required to direct enquiries through the Civil Society Advisory Group: as above, this is a group which meets biannually. A lack of a direct contact option “can frustrate effective engagement.”

To this end, EJA said, it has been:

... attempting to engage Services Australia regarding the need to establish a national advocates line, to enable ready access for our workers to relevant Services Australia staff...the advocates line would be a single point of access for EJA advocates nationally. It would go some way toward overcoming the deep-seated engagement problems outlined [by EJA]...to date, EJA has been unable to convince Services Australia of the need for such a line.

EJA did note that it has seen “significant changes in Services Australia’s engagement and consultation with EJA at the national level over recent months” but that this improved engagement came as a result of the change of government, and not at the end of the Scheme. EJA reiterated that their member centres continue to face challenges in directing enquires to appropriate Centrelink officers.

EJA also found engagement with DSS has been stronger since the change of government, involving biannual face to face meetings with senior DSS staff and occasional engagement by email and phone.

Australian Council of Social Service

ACOSS advised that its contact with Services Australia occurs solely through the Civil Society Advisory Group. ACOSS noted that while the group does enable engagement with Services Australia and has led to some beneficial changes -

...often ACOSS feels like there is a poor understanding of the realities confronting people approaching Services Australia or receiving support from the agency. At times, feedback by [ACOSS] and other stakeholders can often feel obvious but has not been considered by Services Australia.
This reflects, in ACOSS’s view, a hollowing out of expertise among Services Australia staff, with fewer staff who understand social security and the realities facing people on very low incomes.\textsuperscript{151}

ACOSS’s engagement with Services Australia is limited to the Civil Society Advisory Group:

... any queries we have go to a central Civil Society Advisory Group email (there is no telephone number to call)... In our experience, it at times takes a long time to get responses to straightforward questions from Services Australia staff, hindering engagement.\textsuperscript{152}

ACOSS reported that it has regular engagement with DSS, meeting with Mr Griggs at least every two months, with regular informal engagement in between to discuss key issues with legislation, policy development and proposals, the community sector, funding, service delivery, and other matters related to DSS.

ACOSS has observed greater openness by DSS to engagement under Mr Griggs: “there is a willingness by DSS to hear about issues as they arise and engage with ACOSS on policy, as well as encouraging us to provide honest feedback.”\textsuperscript{153}
9 Where to from here?

The Commission notes ACOSS’s statement that engagement with Services Australia remains limited, even with some improvements made since the end of the Scheme. It is plain, however, that had the current level of engagement by government with EJA and ACOSS – two peak advocacy bodies – been in place during the Scheme, it would have provided an extra layer of “check and balance” which could have had an impact on the implementation or longevity of the Scheme. Conversely, the lack of engagement and consultation by the government and the departments during the Scheme inevitably led to a program where the perspective of recipients subject to the Scheme was nowhere to be found in its design and was paid no regard during its continued operation.

Though the Commission acknowledges that regular engagement between Services Australia and peak advocacy bodies, such as EJA and ACOSS, does exist, there is room for improvement in how such consultation is managed: for example, both EJA and ACOSS highlight challenges in dealing with Centrelink directly, with enquiries only able to be filtered through the Civil Society Advisory Group, and then only by email.

The government should consider establishing a customer experience reference group, with membership nominated by national peak bodies representing people in vulnerable cohorts who have had the experience of claiming and receiving social security income support payments.\textsuperscript{154} This group could streamline insight to government regarding the experiences of people seeking access to income support.

Peak advocacy bodies should be consulted prior to the implementation of projects involving the modification of the social security system. Such consultation should be standard and provided for in relevant business documents of DSS and Services Australia.

ACOSS describes what would be involved:

\begin{quote}
There should be a substantial, well-resourced program of engagement and co-design with key stakeholders before the implementation of any such program of automated decision making. The engagement and co-design should be a collaboration with independent community and expert organisations that represent the interests of people on low incomes or who may need income support. Priority should be given to groups who are most directly affected.\textsuperscript{155}
\end{quote}

9.1 Recommendations

**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.
1 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2038: line 7-9].
2 Exhibit 3-3265 - NMD.9999.0001.0003_R Statement of Lyndsey Jackson (NotMyDebt) [p 9: para 4.1(a)].
3 Exhibit 2-2841 - ACS.9999.0001.0308_R Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 2: para 12].
4 Exhibit 2-2841 - ACS.9999.0001.0308_R Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 2: para 13; p 2: para 16-17].
5 Exhibit 2-2841 - ACS.9999.0001.0308_R Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 2: para 15-16].
6 Exhibit 2-2880 - ACS.9999.0001.0037_R 2015.05.22 Email from J Phillips to C Wann re ACOSS drat detailed budget analysis.pdf; Exhibit 2-2879 - ACS.9999.0001.0036, 2015.05.22 Attachment to email dated 22 May - 2015-16 Budget Analysis.docx [p 21].
7 Exhibit 2-2881 - ACS.9999.0001.0038 2015.11.26 media release 'Government must release modelling on planned cuts to family payments ACOSS'.doc.
8 Transcript, Mark Wood, 27 February 2023 [p 3983: lines 20-23].
9 Transcript, Mark Wood, 27 February 2023 [p 3984: lines 15-18].
10 Transcript, Cassandra Goldie, 16 December 2022 [p 2045: lines 32-34].
11 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2045: lines 34-38].
12 Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 10: para 43].
13 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 1].
14 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 1].
15 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 1].
16 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 2].
17 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 2].
18 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 2].
19 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 2].
20 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 3].
21 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 3].
22 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 4].
23 Exhibit 2-3013 - ACS.9999.0001.0177_R, 161221 Letter to Alan Tudge final [p 4].
24 Transcript, Mark Wood, 27 February 2023 [p 3983: lines 20-23].
25 Transcript, Mark Wood, 27 February 2023 [p 3984: lines 4-6].
26 Transcript, Mark Wood, 27 February 2023 [p 3984: lines 15-18].
27 Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 13: para 59].
28 Exhibit 2-3065 - ACS.9999.0001.0230_R Letter from ACOSS to Minister Tudge re meeting [p 1].
29 Exhibit 2-3065 - ACS.9999.0001.0230_R Letter from ACOSS to Minister Tudge re meeting [p 1].
30 Exhibit 2-2873 - ACS.9999.0001.0030_R 2017.02.07 Letter from Minister Tudge to C Goldie in response to letters sent Dec 2016 & Jan 2017 [p 1].
31 Exhibit 2-2873 - ACS.9999.0001.0030_R 2017.02.07 Letter from Minister Tudge to C Goldie in response to letters sent Dec 2016 & Jan 2017 [p 2].
32 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2041: lines 35-46].
33 Transcript, Cassandra Goldie 16 December 2022 [p 2042: lines 4-10].
34 Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022) [p 13: para 59].
35 See chapter 11 for discussion regarding CPSU.
36 Exhibit 2-2931 - ACS.9999.0001.0089_R - 20170131L Prime Minister Centrelink.pdf.
37 Transcript, Cassandra Goldie, 16 December 2022 [p 2045: lines 12-16].
38 Exhibit 2-3105 - ACS.9999.0001.0271_R - 2017.06.20 Letter from Prime Minister to ACOSS.pdf.
40 Exhibit 2-2964 - ACS.9999.0001.0122_R 2017.03.13 Letter from Minister Tudge re CL debt.pdf.
41 Exhibit 2-2964 - ACS.9999.0001.0122_R 2017.03.13 Letter from Minister Tudge re CL debt.pdf [p 1].
42 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2044: lines 20-24].
43 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2044: lines 28-32].
44 Transcript, Dr Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2039: lines 39-41].
45 Transcript, Dr Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2039: lines 29-32].
46 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2045: lines 32-34].
47 Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2045: lines 34-38].
Chapter 13:
Experiences of Human Services employees
1 Introduction

By early 2017 I had reached the point where I felt the scheme was so wrong and so immoral that I felt I could not stay in the job. I would not otherwise have left as I loved the job, but I felt too sad about the [Robodebt] scheme, and too sorry for the customers and the harm being done to them, for me to stay.

— Colleen Taylor

The best way I can think of to describe my experience [working at Centrelink during the operation of the Robodebt Scheme] was that I felt like I suffered a moral injury — doing myself damage by continuing to work within an unfair system of oppression that I thought was designed to get people rather than support them, which was continuing to injure people every day, and which transgressed my own moral and ethical values. — Taren Preston

I was and still am embarrassed by the part of my career that I spent as a Compliance Officer at Services Australia [implementing the Robodebt Scheme]... The job left me psychologically unwell from the tasks we were required to carry out; it was a test of integrity to do it every day to my fullest ability. Each day, I came home feeling depressed. I spent a lot of my time outside of work thinking about how much longer I could do it for, and how I could find another job so I could leave. — Craig Simpson

Employees of the Department of Human Services (DHS) – particularly those who worked in Centrelink – were at the frontline of the Robodebt Scheme (the Scheme), and were uniquely placed to tell a critical part of the story about the Scheme. They witnessed first-hand the individual and collective impact it had.

The Commission received evidence and submissions from DHS employees about employee experiences of the Scheme, providing insight into the pressures staff faced administering a program “which was continuing to injure people every day.”

The current and former employees who gave evidence at the Commission are:

- Colleen Taylor (Compliance Officer, DHS)
- Jeannie Blake (Compliance Officer, DHS)
- Luke Baker (Authorised Review Officer, DHS)
- Taren Preston (Social Worker, DHS)
- ‘Esther Smith’ (pseudonym) (Customer Service Officer, DHS), and
- ‘Craig Simpson’ (pseudonym) (Compliance Officer, DHS).

The Commission also heard and received evidence from representatives of the Community and Public Sector Union (CPSU), which represents federal public sector workers, about the CPSU’s involvement with their members at DHS during the course of the Scheme and the CPSU’s advocacy.

This chapter discusses the impacts of the Scheme on DHS employees, including its effects in:

- increasing staff work load,
- imposing a cultural shift which placed pressure on staff,
- elevating the level of welfare recipient distress,
- requiring specific training, which some staff considered was not provided adequately,
- involving an increase in labour hire arrangements, and
- resulting in a deterioration in staff morale.

The chapter also considers the criticisms of the Scheme raised by staff, and the Department’s reaction to those criticisms.

The Commission does not assume that the evidence it received from staff is indicative of the universal experience of staff during the Scheme, and the findings in this chapter should be viewed through the lens
of this qualification. However, the Commission must base its findings on the evidence before it. The theme of submissions received by, and evidence given to, the Commission is that staff were impacted by the introduction and sustained implementation of the unlawful Scheme.
2 Increased workload

The introduction of the Scheme brought with it an increase in the level of recipient contact with DHS, and consequently a significant increase in the workload of DHS staff who dealt with recipients on a day-to-day basis. The Scheme’s massive increase in income reviews and in the number of letters being sent to recipients generated a corresponding increase in requests for support from Centrelink staff.  

Staff received calls from recipients who did not understand the letter/s they received; did not understand what they were required to do; were having difficulty uploading information into the online system; were disputing the debt; or were simply distraught. All this placed pressure on staff to manage the large number of reviews and requests for assistance. 

Despite the increase in demand for staff intervention, and the significant time required to deal with each recipient’s inquiry, there were “fairly limited staff on the program” allocated to deal with reviewing debts.  

‘Esther Smith’, an employee in a Centrelink centre, told the Commission:  

> Once the OCI process had been introduced, more customers than before started coming into the Centrelink office with problems with their debts. As I had not received adequate training on how to assist customers with their debts, I helped in the only way I knew how to, which was to go to the self-service computer area and try and work through the debt together with the customer, using the knowledge I had previously gained from working in the debt raising team.  

The Scheme was designed to decrease the time staff would need to spend on identifying anomalies: “staff no longer need to carry out these reviews manually, and instead can now focus on helping the public resolve discrepancies more quickly.”  

Luke Baker told the Commission that when he started working at DHS in 2014, he predominantly undertook Disability Support Pension reviews. He described a “drastic change” under the Scheme, where his work became exclusively reviewing debts.  

> MS MARSH: And so does that drastic change in your workload reflect business needs? 
> MR BAKER: Yes. 
> MS MARSH: And was that drastic change towards doing more debt work under the - what we now call the Robodebt Scheme? 
> MR BAKER: Yes. 
> MS MARSH: And when the Robodebt Scheme was in operation, were you doing mostly - would you say you were doing mostly debt work? 
> MR BAKER: That’s all I did for two years. 

The CPSU highlighted that the Scheme did not decrease workload:  

> Robodebt did not decrease workload. It increased as customers attended CSC [a Centrelink office] first to find out what was happening and then return with pages of bank statements and payslips. SOs [Service Officers] often ran appeal scripts as many felt debts were unfair or incorrect.  

Jeannie Blake said that the pressures of reaching productivity goals left her with little time to process documents sent in by recipients. According to another witness, ‘Craig Simpson’, “[t]he fixation on KPIs came at the expense of service delivery to customers and the welfare of colleagues.” In addition to meeting productivity benchmarks, staff were directed to answer additional phone calls once the wait times exceeded a certain level.
Ms Blake summarised the outcome of the program:

We had become a call centre. There was a big screen banged up in the room, and all of a sudden, we could see calls coming in and coming out. And the focus was on getting the calls, not getting it right. The focus was on getting it done, not getting it right. 19

The Scheme did not only affect customer service officers. Taren Preston, a DHS social worker prior to and during the Scheme, 20 said that her workload

...grew with the Robodebt Scheme, requiring me to provide social support, on average, to 10 Centrelink customers per day. It seemed like there was a stream of customers coming through in distress, and a greater proportion of customers seeking social support in relation to debts raised by Centrelink. 21

Although compliance officers could in theory refer recipients to social workers, like Ms Preston, for support, delays 22 and staff shortages 23 limited the effectiveness of this referral process, placing a greater burden on staff who knew that there was not enough assistance for recipients who presented with thoughts of self-harm or suicide. 24

DHS sought to meet the increased workload by way of labour hire and temporary employees. That response to resourcing issues is dealt with below.

2.1 Increased levels of recipient distress

The implementation of the Scheme exacerbated the level of distress experienced by some recipients, many of whom were already in situations of vulnerability or disadvantage: 25 inevitably, the scale of the Scheme also led to greater number of distressed recipients, many of whom were angry and frustrated. 26 They brought these frustrations to frontline staff: “[r]ecipients under the Scheme had ‘rightful anger because it wasn’t clear. They would yell and swear at the team on the phones. It was an immense amount of pressure.” 27

Ms Preston provided social support to recipients face-to-face and over the phone, 28 and ad hoc support to DHS staff who were on the frontline working with recipients. She described a change at DHS on her return from parental leave at the beginning of 2018:

...when I came back, the change was very stark to the DHS that I had left before mat leave. What I noticed was that there was an increase in customers being referred to me. There was an increase in the level of distress that they were experiencing and an increase in people being in that state due to the Robodebts and the debt notice. 30

Ms Preston attributed an increase in requests by DHS staff for social worker support to the increase in recipient distress and aggression over issues with debts that staff could not resolve. 31

A greater proportion of recipients were being referred to social workers as a suicide risk. “Customers would either directly say to me that they were suicidal, [or] would make references...such as ‘well I am going to throw myself in front of a truck’.” 32

Despite the increased need, there were not enough social workers to meet the demand. 33 Ms Preston found that there was a move away from providing a local social work service, and she had to deal with customers more by telephone; she could only speak to about a quarter of those needing help in person. “I felt like I was working in a call centre rather than in my local community.” 34

The teams of social workers at DHS were being depleted, with social workers experiencing burn out or leaving the Department: “[I] thought that our wellbeing and safety were being compromised by the work we were doing.” 35

A number of DHS staff gave evidence to the Commission of particularly disturbing or upsetting recipient interactions in relation to the Scheme: “[I] experienced listening to multiple suicide attempts over the phone and I have been diagnosed with PTSD since I finalised my work with Centrelink.” 36
Experiences of Human Services employees

In a 2020 letter to the Hon Stuart Robert, Minister for Government Services, the CPSU reported receiving similar feedback from DHS employees, and extracted submissions directly from those employees in the letter:

Robodebt has had a huge impact on fellow co-workers and myself. To read the stories of suicides and customers’ distress in the news made a lot of us feel sick. I have had nights where I could not sleep thinking about conversations, I have had with customers regarding their Robodebts. Some have talked about suicide on the call. To hear a grown man crying on the phone, whose wife had died recently, and he is the carer for his young children, is heartbreaking. 37

2.2 Technical training in relation to the Scheme

The Commission received evidence from staff who found that the technical training they received in respect of the Scheme was brief 38 and inadequate, 39 telling of a lack of training in calculating debts; 40 in identifying problems with debts that had been raised; 41 in reviewing debts; 42 and in responding to general Centrelink payment queries. 43

One DHS Compliance Officer told the Commission that her training on the OCI system was by PowerPoint presentation, which provided an overview of the new online system but did not address how the debts were calculated. 44

Mr Simpson immediately identified shortcomings in the training he received as a compliance officer:

within the context of the Robodebt environment, to have two and a half days where we focused in on very serious obligations under privacy law, under taxation law, under social security law and that we - those are matters that we had to get correct. We also had to appraise ourselves of a wide variety of complex documentary evidence, complex earnings scenarios. And to add on to those policy matters, the consideration of the procedures as to how we actually executed those things accurately in the system. 45

One consequence was that advice given to recipients was not always correct: “...I can certainly say anecdotally hearing colleagues telling or advising clients that they had no right to appeal those debts because the data was based on verified information from the ATO...as we all appreciate under social security law, you always have a right to appeal those decisions.” 46

The evidence indicated that these staff members felt they were at risk of making incorrect decisions and providing incorrect advice to clients about their rights and obligations. 47

2.3 Staff training to deal with vulnerable, disadvantaged and at-risk recipients

The experience of some staff was that they felt ill-prepared to support vulnerable, disadvantaged and at-risk recipients, 48 and ill-equipped to deal with recipients who presented with mental health concerns, including the intention to self-harm or suicide. 49

The Commission was told that training provided to staff did not include an explicit focus on the “extensive human element” 50 that was involved in the role, which was “really alarming because...the matters we were working with were extremely sensitive and in many, many cases causing a great deal of psychological distress;” 51 it did not address how staff should handle difficult conversations, nor did it provide guidance on how to support vulnerable recipients who were having debts raised against them. 52 Both staff and recipients were affected as a result: staff were distressed in not knowing how to respond to distraught recipients, and recipients found no support after receiving determinations that significantly impacted their financial circumstances. 53
The workplace at DHS during the Scheme was described as stressful:

Answering the phones was pressure for some people. Knowing that you would have to de-escalate before you could get any sort of understanding to the customer of what was going on was pressure. It was stressful. And then you had this board on the left saying how many was still left in the queue. So you knew that as soon as you got off that one, you had to get back on and take another one. It was an immense amount of pressure.  

2.4 Use of labour hire

Following the implementation of the Scheme, and in response to increased demand for compliance services as a result, labour hire staff were brought in by DHS. Renee Leon (secretary, DHS) told the Commission that those staffing arrangements were adopted because “the government didn’t want to increase Public Service numbers for this role, so the work was to be undertaken by labour hire;” this was in the context of DHS having experienced significant cuts to its permanent workforce over the previous decade. The shift in approach to the workforce could be seen to be a factor in the deterioration of the morale of DHS staff. Ms Leon told the Commission that permanent DHS employees felt that their work was being undermined by labour hire: 

Existing staff felt that it was...a bit insulting to their knowledge and experience that the government thought...their job could so easily be done by someone who had just been brought in with a script. They also felt concerned...whenever there was large-scale engagement of contractors, that this was part of a plan to progressively replace more and more of them. So people felt both anxious for their own jobs but also anxious for what that would mean for service delivery...many of the staff had worked in the Department for sometimes decades...they had a long-standing commitment to the work of the Department, and they felt anxious that that...was being undermined.

The Commonwealth has told the Commission that the government has committed to reducing reliance on contractors, consultants and labour hire staff as part of its APS Reform agenda.

2.5 Staff well-being and morale

Many of the frontline staff who worked at DHS during the Scheme were passionate about their jobs, had a strong sense of vocation and were committed to assisting recipients:

Centrelink's mission and Department of Human Services’ mission was absolutely consistent with my values, which was Australia is fortunate to have a very good social security framework where disadvantaged individuals can access support in their time of need. And I really wanted to be a part of that system where you could directly influence the outcomes of someone to support them in that time of need.

A number of committed employees described suffering trauma, anxiety and distress.

The job left me psychologically unwell from the tasks we were required to carry out. It was a test of integrity to do it every day to my fullest ability. Each day, I came home feeling depressed. I spent a lot of my time outside of work thinking how much longer I could do it for, and how I could find another job so I could leave.

The increasing levels of anxiety described by staff were attributed by some to the knowledge that the work they were doing in relation to the Scheme was wrong, and not fair to recipients. Staff told of feelings of shame in their role in implementing the Scheme.

Some staff left their roles at DHS as a result of their experience with the Scheme; where previously they had found working at Centrelink to be meaningful and fulfilling.

The Commission heard from Colleen Taylor, who had worked at DHS for over thirty years. Ms Taylor said that the work practices imposed during the Scheme challenged her personal beliefs and values as a public servant. She found that she could no longer perform the role and chose to retire.
The CPSU received reports from their members of suffering mental health as a result of increased recipient aggression, an increase in distressed and suicidal recipients, an increased and unsustainable workload, and failure by management to respond to these concerns. CPSU heard from staff that they felt that issues they were raising were being ignored, and that many were fearful of retribution by management if they spoke up. 69 CPSU members reported a drastic decrease in employee well-being. 70 A compounding factor was the negative press surrounding the Scheme: “staff were feeling that they were under siege.” 71 Jason McNamara (general manager, Integrity Modernisation Division, DHS) told the Commission:

...the staff had a terrible time out of the press...in terms of implementing OCI, the staff were severely damaged by all the negative press...compliance officers are a fairly dedicated bunch and so they took it quite hard, the negative press. 72
3 Communication and consultation

3.1 Lack of consultation prior to the implementation of the Scheme

There was a lack of consultation with DHS frontline employees and stakeholder groups prior to the implementation of the Scheme. Staff were in a unique position to identify issues with the design of the Scheme: for example, “a discrepancy can often arise from issues such as differing names being used for the one employer, which can be readily resolved by examining the record, talking to the recipient, and sometimes doing some simple searches.” Staff found that there were “obvious” flaws in the Scheme. The briefings provided to employees regarding the Scheme were described as “woefully inadequate.”

A survey involving CPSU members – which does not disclose the number of members involved in the survey – found that one in ten members, whose work would involve the OCI program, were consulted over its development before it was implemented; and nearly all members who responded to the survey raised concerns within DHS about the legality of the Scheme, but were told that the legal advice was that it could proceed.

3.2 Failure to respond to issues and complaints raised by employees

Employees identified problems with accuracy, legality, fairness and recipient experiences associated with the Scheme, and raised those concerns with management. Concerns ranged from the letters received by recipients being unclear, and vulnerable recipients having less support than was provided previously to comply with Centrelink’s requests; to the issues with averaging, and the online system not explaining to recipients the implications of their responses.

Those concerns “fell on deaf ears.” The Commission was told that “[m]anagers did not care, did not want to hear about it, didn’t want to know about it.”

I raised ongoing concerns within Centrelink regarding the impact and unfairness of the Robodebt Scheme, and said that customers were presenting with an increased risk of suicide. I also raised my concerns that the Scheme was unfair in that people had the burden of proof placed upon them to prove they did not owe a debt, and that the Department had no requirement to prove themselves that the debt was correct. I raised those concerns at Site, Zone and Regional Meetings with my social work colleagues and at Regional Meetings with my customer service colleges, which were attended by Zone Managers and Senior Executives (EL2, SES1)...I was ignored when I raised [this feedback].

Staff movement and attrition

The Commission received submissions from various employees who said that they were disadvantaged in the workplace as a result of raising problems with the Scheme. These were from people who preferred to remain anonymous, so their accounts have not been tested. The Commission can only record them, and cannot make findings in respect of them.

Some said they were fired or were threatened with being fired as a result of voicing their concerns; some said the nature of the work, and the pressure from management to “follow the new process” and ignore employees’ experience led to them leaving their roles, sometimes resigning or retiring early.

“You would be denied opportunities if you spoke up and questioned the process and even if you called the union, there would be payback.”
3.3 Advocacy by the Community and Public Sector Union

The Community and Public Sector Union (CPSU) played a vital role in advocating for their members within DHS and Centrelink. From early 2017 onwards, the CPSU were informed by their members of their serious concerns about the Scheme and the treatment of employees in DHS. The CPSU’s advocacy involved media releases, open letters, and formal correspondence with ministers and DHS executives, with little meaningful response received.

In January 2017, the CPSU sent an email to its members regarding the “Failures of the Online Compliance System,” highlighting the community outcry resulting from the Scheme: concerns which had been raised by employees but ignored by DHS executives. The CPSU advised members that it had written directly to the Secretary, and would share the response with members once it was received.

The CPSU wrote to Kathryn Campbell (secretary, DHS) on 19 January 2017, relaying concerns raised by employees that “debts are being issued where there is no proof that a debt exists.” Neither the Commission nor the CPSU have evidence of any response.

The CPSU had the week prior – on 13 January 2017 – written to the Hon Alan Tudge, Minister for Human Services, raising the issues faced by employees in implementing the Scheme. The CPSU received a call from the minister’s office on 25 January 2017, and were advised that the letter from CPSU “raised some important issues around staffing” which should be raised with the department.
4 Conclusion

The evidence before the Commission suggests that the Scheme had a deleterious impact on the well-being and morale of some of the employees who were involved in its implementation and operation. There may be a number of factors which could have contributed to this, including an increased workload; an increase in recipient distress as a result of the Scheme; inadequate training (both in respect of the technical aspects of the Scheme and in dealing with vulnerable, disadvantaged and at-risk recipients); and a rise in labour hire arrangements. Staff were not consulted on the proposal prior to the inception of the Scheme, and when they did provide feedback, they felt that their feedback was ignored by DHS.

The Commonwealth has told the Commission that since the conclusion of the Scheme, Services Australia has made some improvements, including by looking to focus on customer-centred design; reducing the use of labour hire staff; improving Agency culture and leadership, including by the implementation of leadership sessions and training on escalating issues; and introducing internal mechanisms for making and resolving complaints.

The Commission notes this response from the Commonwealth. These improvements may go some way to avoiding a repetition of the difficulties and distress that employees experienced under the Scheme. However, given the tenor of the evidence received by the Commission from employees, the Commission makes the following recommendations.

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.
Experiences of Human Services employees
ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 16]. See also Transcript, Michael Keenan [p 4062: line 1 – p 4063 line 9].


Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission, 24 November 2022 [p 7: para 6-9].


Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission, 24 November 2022 [p 8: para 24].

ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 16].

Transcript, Kathryn Campbell, 7 March 2023 [p 4606: lines 20-21].

Transcript, Jason McNamara, 5 December 2022 [p 1084: lines 15-18].
Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 3: para 21]; Transcript, Genevieve Bolton, 11 November 2022, [p 996: lines 22-40].


ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 6].

ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 14].

An example can be given by Colleen Taylor: Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 48-49]; Exhibit 4-5269 - JBL.9999.0001.0006_R - 3444-5272-1440_4_2023 01 23 Final Statement of Jeannie Blake [p 2: para 19].

Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3450: lines 25 – 28; p 3445: lines 24 – 26]; See also examples given by Colleen Taylor: Exhibit 2-2528 - RCW.0005.0001.0001_R - 2022 12 08 Colleen Taylor Statement – Signed, 8 December 2022 [pp 4-5: paras 34-45]; Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: para 48-49]. See also ANO.9999.0001.0021 - Submission by Community and Public Sector Union, published 1 March 2023 [p 6].

Transcript, Jeannie-Marie Blake, 21 February 2023 [p 3447: lines 34 – 45].

Exhibit 4-8023 - TPR.9999.0001.0001_R - Signed Statement Taren Preston, 7 March 2023 [p 8: paras 47-48].


Some examples have been included in the CPSU’s letter to Minister Robert on July 2020. Exhibit 2-2466 - CPU.9999.0001.0015_R - Annexure L - Alistair Waters to Stuart Robert.

Transcript, Melissa Donnelly, 12 December 2022 [p 1625: line 10-17]; Exhibit 2-2453 - CPU.9999.0001.0003_R - Statement of Melissa Donnelly CPSU for Robodebt Royal Commission [p 5-7: para 21].

Exhibit 2-2488 - CPU.9999.0001.0037 - Annexure G1 - CPSU media releases re Robodebt.

Exhibit 2-2477 - CPU.9999.0001.0026 - Annexure W - CPSU Open Letter to DHS Customers.

Exhibit 2-2466 - CPU.9999.0001.0015_R - Annexure L - Alistair Waters to Stuart Robert.

For example: Exhibit 2-2469 - CPU.9999.0001.0018_R - Annexure O - 20170502 Template letter HSRs to Agency.

For example: Transcript, Ms Donnelly and Ms Newman, 12 December 2022 [p 1638: line 22-28].


Exhibit 2-1794 - CTH.3001.0034.1319_R, Response to the CPSU re online compliance measures[DLMS=ForOfficial-Use-Only].

Exhibit 2-2462 - CPU.9999.0001.0011_R, Annexure H - Michael Tull to Alan Tudge.pdf.

Exhibit 2-2464 - CPU.9999.0001.0013_R, Annexure J - Email re message from Alan Tudge.pdf.
Chapter 14: Economic costs
1 Introduction

This chapter reviews the economic costs of the Robodebt scheme (the Scheme), as required by the Commission’s terms of reference. This encompasses the intended and actual outcomes of the Scheme, including the approximate costs of implementing, administering, suspending and winding back the Scheme, as well as costs incidental to those matters, such as obtaining external advice and legal costs.

The information presented in the chapter is based upon information provided by the Department of Social Services (DSS), Services Australia, the Attorney-General’s Department (AGD), the Australian Taxation Office (ATO), the Office of the Commonwealth Ombudsman (OCO), the Office of the Australian Information Commissioner (OAIC), the Department of the Senate (Senate), the Australian National Audit Office (ANAO) and the Administrative Appeals Tribunal (AAT) (collectively, the Commonwealth agencies); and contained in publicly available Budget papers. In a limited number of instances, the Commission has had to adjust the information provided by Commonwealth agencies to remove the impact of elements of Budget measures that are not considered to be relevant to the Scheme and to achieve consistency in presentation.

Net cost of the Scheme

Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion, but is estimated to have delivered a saving of $406.196 million. The Commonwealth incurred estimated total costs of $971.391 million in implementing, administering, suspending and winding back the Scheme (including incidental costs).

The net cost of the Scheme is approximately $565.195 million, which represents the net impact of its estimated total costs of $971.391 million offset by the estimated savings of $406.196 million. The Commonwealth accepts that figure as correct, based upon the information and evidence before the Commission.

Total costs of the Scheme

Costs of the scheme include:

• the costs incurred by Commonwealth agencies relating to Budget measures and estimates variations, including funding for this Royal Commission, and

• the costs incurred by Commonwealth agencies that were not directly funded by a Budget measure or estimates variation and thus were incidental to the Scheme, representing the redirection of funds that could otherwise have been used for the delivery of services, where those incidental costs could be identified or estimated.

In these terms:

• for the period of 2014-15 to 2023-24 the estimated actual cost of these Budget measures and estimates variations is approximately $930.110 million, net of $227.058 million in measures that were approved and then later reversed by government.

• for the period of 2014-15 to 2023-24 Commonwealth agencies expect to incur incidental costs, in addition to costs funded through a Budget measure or estimates variation of $41.281 million.

The Scheme’s costs include the settlement of $112 million approved by the Federal Court in Prygodicz v Commonwealth of Australia (No. 2) FCA 634 (Prygodicz case). This settlement sum included the legal costs for Gordan Legal which amounted to $8,413,795.71 at the date of settlement.

These costs are presented in terms of their effect on the fiscal balance and thus represent both accrued expenditure and the purchase of non-financial assets. Further, as these estimates extend into 2023-24, they represent both actual and forecast estimates.
Savings not achieved

The Scheme was expected to generate significant savings to the Federal Budget, through the recovery of social security payments previously paid and a reduction in future welfare payments. Those savings formed a part of the government’s Budget estimates (upon which the decisions of government are premised and new expenditure is approved).

Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion, but is estimated to have delivered a saving of $406.196 million.

In relation to the recovery of social security payments previously paid, approximately 794,000 debts were raised under the Scheme across approximately 526,000 recipients. Of the debts raised under the scheme DSS expects to write off a total of $1.751 billion in debts, including the refund of debt payments received of $746 million.

In relation to the reduction in future social security payments attributable to the Scheme measures, despite the significant size of the estimated Budget savings, DSS advised that actual savings were “not tracked through the finance system for Government financial reporting by year and measure in the format requested by the Royal Commission.” The estimated savings figures provided rely in-part on ad-hoc Agency Management Information reporting.

Wider economic and social costs

The wider costs of the Scheme on the broader economy and on society also represent a cost of the Scheme. Though real, their measurement is more subjective and has not been attempted in this chapter.

Other costs not included

The costs of implementing any recommendations of the Commission are not included in the estimates.
2 Budget funding

2.1 Budget measures

The Scheme comprised of a series of Budget measures and corresponding elements announced in annual Budgets and Mid-Year Economical Fiscal Outlooks (MYEFOs) from 2015 to 2022. Other Budget elements which did not form part of the Scheme for the purposes of this Commission’s terms of reference have been excluded in the calculation of costs. This includes the Non-Employment Income Data Matching (NEIDM) element of the Enhanced Welfare Payment Integrity measure in the 2015-16 MYEFO and its extension in the 2016-17 MYEFO. A chronological map of the income data matching Budget measures and other relevant Budget measures has been captured in the Budget Measures Map in the Appendix.

2015-16 Budget

The Scheme was announced in the 2015-16 Budget as one of a series of proposals under the Strengthening the Integrity of Welfare Payments measure. Debt recovery based on comparing PAYG data obtained from the ATO with employment income fell under the ‘Employment Income Matching’ element of the measure which was set to run from 1 July 2015 until 30 June 2019. This element was to capture 866,857 income support recipients through the identification of income discrepancies for three financial years: 2010-11, 2011-12 and 2012-13. It was expected to achieve $1.514 billion in savings over five years.

The ATO advised the Commission that it received funding related to this proposal, through an estimates variation.

<table>
<thead>
<tr>
<th>2015-16 Budget</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strengthening the integrity of Welfare Payments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employment Income Matching</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AAT</td>
<td>1.40</td>
<td></td>
</tr>
<tr>
<td>DSS</td>
<td>0.51</td>
<td>(1,514.35)</td>
</tr>
<tr>
<td>Services Australia</td>
<td>172.41</td>
<td>0.00</td>
</tr>
<tr>
<td>Estimates variation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ATO</td>
<td>0.67</td>
<td></td>
</tr>
<tr>
<td>Grand Total</td>
<td>174.98</td>
<td>(1,514.35)</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.

2015-16 MYEFO

The government extended the operation of the Scheme through the Enhanced Welfare Payment Integrity - Income Data Matching measure. The measure, which projected activities from 1 July 2016 to 30 June 2019, sought to capture an additional 616,000 individuals by extending the period for identifying income discrepancies to an additional two financial years: 2013-14 and 2014-15. It was expected to achieve $1.303 billion in savings over two years.
Alongside this measure was the Enhanced Welfare Payment Integrity - Expand Debt Recovery measure which increased the number of debt recovery arrangements from March 2016 over a period of four years to cover a wider cohort of individuals, including former income support recipients and recipients on partial support payments due to employment. As part of the initiative to increase debt recovery, the measure also sought to remove the six-year statutory limitation period for debt recovery and introduced sanctions through the use of Departure Prohibition Orders.

<table>
<thead>
<tr>
<th>2015-16 MYEFO</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enhanced Welfare Payment Integrity - Income Data Matching</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Policy Proposal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DSS</td>
<td>0.05</td>
<td>(1,303.01)</td>
</tr>
<tr>
<td>Services Australia</td>
<td>50.48</td>
<td>0.00</td>
</tr>
<tr>
<td>Grand Total</td>
<td>80.00</td>
<td>(1,303.01)</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.

**2016-17 MYEFO**

The Scheme was further extended under the Better Management of the Social Welfare System measure. The first element, Extend Enhanced Welfare Payment Integrity - Income Data Matching, sought to capture a further 924,000 individuals by extending the period for identifying income discrepancies to an additional three financial years: 2015-16, 2016-17 and 2017-18. Commencing from 1 July 2017, the proposal was expected to achieve $1.773 billion in savings over four years. The second element, Expand Tax Garnishee, was designed to enable the recovery of debts by tax garnishing from an estimated 340,000 current and former income support recipients, regardless of whether they were in a repayment arrangement.

<table>
<thead>
<tr>
<th>2016-17 MYEFO</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Better Management of the Social Welfare System</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Extend Enhanced Welfare Payment Integrity - Income Data Matching</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AAT</td>
<td>8.66</td>
<td></td>
</tr>
<tr>
<td>DSS</td>
<td>0.00</td>
<td>(1,772.80)</td>
</tr>
<tr>
<td>Services Australia</td>
<td>138.00</td>
<td>0.00</td>
</tr>
<tr>
<td>Expand Tax Garnishee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AAT</td>
<td>1.53</td>
<td></td>
</tr>
<tr>
<td>Services Australia</td>
<td>10.98</td>
<td></td>
</tr>
<tr>
<td>Grand Total</td>
<td>159.17</td>
<td>(1,772.80)</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.
2017–18 MYEFO

The government reversed the tax garnishing proposal from the previous MYEFO through Reversal of the Expand Tax Garnishee element, a component of the Strengthening the Integrity of Welfare Payments and Better Management of the Social Welfare System - unlegislated components - not proceeding measure.  

<table>
<thead>
<tr>
<th>2017-18 MYEFO</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strengthening the Integrity of Welfare Payments and Better Management of the Social Welfare System – unlegislated components – not proceeding</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reversal of the Expand Tax Garnishee component of the Better Management of the Welfare System</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AAT[35]</td>
<td>(1.47)</td>
<td></td>
</tr>
<tr>
<td>Services Australia[36]</td>
<td>(8.49)</td>
<td>0.00</td>
</tr>
<tr>
<td>Grand Total</td>
<td>(9.97)</td>
<td>0.00</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.

2018-19 Budget

The final extension of the Scheme was the Social Welfare Debt Recovery measure which extended the operation of two existing measures announced in the 2015-16 Budget and 2016-17 MYEFO until 30 June 2022 under the elements: Strengthening the Integrity of Welfare Payments by Extending Income Data Matching and Expanding Social Welfare Debt Recovery.  

The Strengthening the Integrity of Welfare Payments by Extending Income Data Matching element extended income data-matching compliance work for PAYG, income tax returns and assets and investment sources by including the 2018-19 financial year. It was expected to achieve $181.39 million in savings over the 2021-22 financial year. Debt recovery activities under this element ultimately did not proceed due to announcements in the 2020-21 Budget winding back the Scheme.  

The Expanding Social Welfare Debt Recovery element extended the operation of the existing measure in the 2015-16 MYEFO to recover debts from former income support recipients until 30 June 2022. The proposal sought to recover outstanding debts using two strategies: pursuing debts of high value; and negotiating higher repayments where the former recipient had capacity to repay the debt.

<table>
<thead>
<tr>
<th>2018-19 Budget</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social Welfare Debt Recovery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strengthening the Integrity of Welfare System by Extending Income Data Matching</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AAT[35]</td>
<td>1.72</td>
<td></td>
</tr>
<tr>
<td>DSS[44]</td>
<td>0.00</td>
<td>(181.39)</td>
</tr>
<tr>
<td>Services Australia[45]</td>
<td>47.80</td>
<td>0.00</td>
</tr>
<tr>
<td>Expanding Social Welfare Debt Recovery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services Australia[46]</td>
<td>24.64</td>
<td></td>
</tr>
<tr>
<td>Grand Total</td>
<td>74.16</td>
<td>(181.39)</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.
2020-21 Budget

The government outlined the proposal to wind back the Scheme under the Changes to the Income Compliance Program measure. The announcement of the refund of ATO averaged debts element initially estimated that $721 million was in scope for refunds to 428,315 former and current recipients. This was based on a manual review undertaken by Services Australia to identify debts raised under the Income Compliance Programme subject to averaging and fully or partly recovered. Refunds were set to commence from July 2020 and were expected to continue into the 2021-22 financial year, with the bulk of refunds administered within the first three months of commencement. The measure also included a component which provided for the direct cost of providing interest on the refund of debts paid.

The Reversal of PAYG measure elements represented the reversal of the income data-matching measures introduced in the 2015-16 MYEFO, 2016-17 MYEFO and 2018-19 Budget in order to cease the Income Compliance Programme from 30 June 2020.

<table>
<thead>
<tr>
<th>2020-21 Budget</th>
<th>Costs Budget $m</th>
<th>Savings Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changes to the Income Compliance Program</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Policy Proposal (interest payment)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services Australia</td>
<td>88.52</td>
<td></td>
</tr>
<tr>
<td>Refund of ATO averaged debts (including interest)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services Australia</td>
<td>15.45</td>
<td>0.00</td>
</tr>
<tr>
<td>Reversal of PAYG measures</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Services Australia</td>
<td>(205.72)</td>
<td>0.00</td>
</tr>
<tr>
<td>Grand Total</td>
<td>(101.75)</td>
<td>0.00</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.

The Commission asked the Commonwealth to confirm that the AAT had used all funding received through the 2015-16 Budget, 2016-17 MYEFO and 2018-19 Budget, to which the Commonwealth advised that $11.38 million in funding had been reversed through various budget variations in unspecified budget rounds.

<table>
<thead>
<tr>
<th>Unknown Budget Round</th>
<th>Costs Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changes to the Income Compliance Program</td>
<td></td>
</tr>
<tr>
<td>Reversal of PAYG measures</td>
<td></td>
</tr>
<tr>
<td>AAT</td>
<td>(11.38)</td>
</tr>
<tr>
<td>Grand Total</td>
<td>(11.38)</td>
</tr>
</tbody>
</table>

Negative figures represent a reduction in costs.

2020-21 MYEFO

The government reprofiled funding for interest payments on the refund of debts paid and provided further funding to continue its program to refund debts.
### 2020-21 MYEFO

<table>
<thead>
<tr>
<th>Economic costs</th>
<th>Costs Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Changes to the Income Compliance Program*</td>
<td></td>
</tr>
<tr>
<td>New Policy Proposal (interest payment)</td>
<td></td>
</tr>
<tr>
<td>Services Australia$^{57}$</td>
<td>0.00</td>
</tr>
<tr>
<td>Income Compliance Program Settlement</td>
<td></td>
</tr>
<tr>
<td>New Policy Proposal</td>
<td></td>
</tr>
<tr>
<td>Services Australia$^{58}$</td>
<td>23.50</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>23.50</strong></td>
</tr>
</tbody>
</table>

*Negative figures represent a reduction in costs.

*This figure represents the net sum of funding changes over the budget and forward estimates.

### 2022-23 October Budget

The government provided funding of $30 million to establish the Royal Commission into the Robodebt Scheme. This included funding of $22.04 million for the operations of the Commission, with the remaining funding provided to AGD for the Commonwealth’s representation, financial assistance to witnesses appearing and for records management.

<table>
<thead>
<tr>
<th>Economic costs</th>
<th>Costs Budget $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Commission into the Robodebt Scheme</td>
<td></td>
</tr>
<tr>
<td>New Policy Proposal</td>
<td></td>
</tr>
<tr>
<td>AGD$^{60}$</td>
<td>7.96</td>
</tr>
<tr>
<td>Commission</td>
<td>22.04</td>
</tr>
<tr>
<td><strong>Grand Total</strong></td>
<td><strong>30.00</strong></td>
</tr>
</tbody>
</table>

*Negative figures represent a reduction in costs.

### 2023-24 Budget

The government announced a further $3.6 million in 2022-23 for AGD to fund Commonwealth representation in regard to the Royal Commission.$^{61}$

### Estimates variations

As well as the above measures, the government provided additional funding to Services Australia for income compliance through two estimates variations. These variations adjusted expenditure under previous Budget measures to reflect revised assumptions about the operation of the Scheme.

The first variation was in the 2017-18 MYEFO which provided a net increase in funding of $116.425 million.$^{62}$ This reflected revisions in the rate of debt recovery that were being achieved and the need for increased staffing due to the lack of uptake of use of the online portal.$^{63}$
### 2017-18 MYEFO

<table>
<thead>
<tr>
<th>Income</th>
<th>Compliance</th>
<th>Re-Profiling</th>
<th>Estimates Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Services Australia</td>
</tr>
</tbody>
</table>
|        |            |              | 116.43              | 0.00  
| Grand Total | |              |                     | 116.43 0.00  

Negative figures represent a reduction in costs.

A further Estimates variation was made in the 2018-19 MYEFO which provided a net increase in funding of $391.920 million across the forward estimates. This variation accounted for a higher proportion of manual and partially online reviews.

### 2018-19 MYEFO

<table>
<thead>
<tr>
<th>Income</th>
<th>Compliance</th>
<th>Re-Profiling</th>
<th>Estimates Variation</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Services Australia</td>
</tr>
</tbody>
</table>
|        |            |              | 391.92              | 0.00  
| Grand Total | |              |                     | 391.92 0.00  

Negative figures represent a reduction in costs.
Actual costs of Budget measures and Estimates variations

Over the period of 2014-15 to 2023-24 the estimated total cost of these Budget measures and Estimates variations is approximately $930.110 million.

The estimated costs do not include the write-off of debts raised by Services Australia.

The AAT received Budget funding but it was not able to provide actual costs in relation to the Scheme and thus its actual costs are assumed to be equal to the funding provided.

The pattern of actual costs is set out below.
3 Savings

The Scheme was expected to generate significant savings to the Budget, through the recovery of social security payments previously paid and the reduction in future payments. Over the period of 2014-15 to 2021-22 the Scheme was budgeted to generate savings of $4.772 billion.

The estimated Budget savings were provided by DSS, as agreed with the Department of Finance, and reflect the cumulative Budget savings of all Budget measures related to the Scheme at the time those measures were approved by government.

Services Australia noted that the savings:66

... were calculated by DSS using a DSS-owned methodology, and based on assumptions provided by DHS [Services Australia] in relation to:

a) Anticipated value and rate of debts raised; and
b) Social security payments reduced or cancelled through the delivery of compliance activities within each relevant new policy proposal

These savings formed a part of the Budget estimates upon which the decisions of government are premised and on which new expenditure is approved.

In relation to the recovery of welfare payments previously paid, approximately 794,000 debts were raised under the Scheme across approximately 526,000 recipients. Of the debts raised under the Scheme, DSS expects to write off a total of $1.751 billion in debts including the refund of $746 million.

In relation to the reduction in future welfare payments attributable to the Scheme measures, despite the significant size of the estimated Budget savings, DSS advised that actual savings were “not tracked through the finance system for Government financial reporting by year and measure in the format requested by the Royal Commission”. DSS did identify that some ad hoc reporting of savings achieved was prepared during the operation of the Scheme. However, no such reporting has been identified that would assist in robustly completing the templates provided by the Commission.

Services Australia provided the Commission with its understanding of the actual savings (including annualised savings and zeroed/refunded debts) achieved for each year of the program, which it advised was sourced from internal Agency Management Information reporting. It noted that the “actual savings are derived from an annualised savings calculation that extrapolates payment reductions and cancellations resulting from compliance interventions over 26 fortnights” and that this “enables indicative reporting against Budgeted Savings targets internally and to Ministers and other agencies, including DSS and [the Department of] Finance”. Using this methodology, Services Australia advised that the estimated saving from 2015-16 to 2023-24 is $406.196 million.
The **year-by-year** profile of the budgeted and actual savings is presented below. Savings or reductions in estimated welfare payments are presented as negative figures.

### Savings by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>$m</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014-15</td>
<td></td>
</tr>
<tr>
<td>2015-16</td>
<td></td>
</tr>
<tr>
<td>2016-17</td>
<td></td>
</tr>
<tr>
<td>2017-18</td>
<td></td>
</tr>
<tr>
<td>2018-19</td>
<td></td>
</tr>
<tr>
<td>2019-20</td>
<td></td>
</tr>
<tr>
<td>2020-21</td>
<td></td>
</tr>
<tr>
<td>2021-22</td>
<td></td>
</tr>
<tr>
<td>2022-23</td>
<td></td>
</tr>
<tr>
<td>2023-24</td>
<td></td>
</tr>
</tbody>
</table>

The **cumulative profile** of the budgeted and actual savings is presented below. Savings or reductions in estimated social security payments are presented as negative figures.

### Cumulative Savings by Year

<table>
<thead>
<tr>
<th>Year</th>
<th>$m</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014-15</td>
<td></td>
</tr>
<tr>
<td>2015-16</td>
<td></td>
</tr>
<tr>
<td>2016-17</td>
<td></td>
</tr>
<tr>
<td>2017-18</td>
<td></td>
</tr>
<tr>
<td>2018-19</td>
<td></td>
</tr>
<tr>
<td>2019-20</td>
<td></td>
</tr>
<tr>
<td>2020-21</td>
<td></td>
</tr>
<tr>
<td>2021-22</td>
<td></td>
</tr>
<tr>
<td>2022-23</td>
<td></td>
</tr>
<tr>
<td>2023-24</td>
<td></td>
</tr>
</tbody>
</table>
4 Incidental costs

For the period of 2014-15 to 2023-24 Commonwealth agencies expect to incur incidental costs of $41.281 million. This represents expenditure that was not directly funded by a Budget measure or estimates variation. The majority of this expenditure is funded from within an agency’s existing annual appropriation and does not represent additional expenditure to the Budget. However, this does represent the redirection of funding that would otherwise be used by agencies to deliver services and thus represents an opportunity cost.

Some agencies have only identified those direct external costs, such as the procurement of services from outside the agency (e.g. legal advice), but some have also identified both the direct and indirect (i.e. allocated) internal costs associated with the Scheme. The identification of incidental costs was not possible in all cases, resulting in the total incidental costs estimate being understated.

The Senate and agencies such as the OCO and ANAO did not receive funding through any Scheme measures so all of their costs are incidental.

The agencies with the largest reported incidental expenditure were Services Australia at $17.11 million,\(^75\) the ATO at $10.35 million,\(^76\) and DSS at $6.30 million. None of these agencies received funding for the Scheme in the 2022-23 Budget. DSS advised that it had set aside funding of $5.8 million in 2022-23 to establish a Robodebt Royal Commission Taskforce and for other staffing costs.\(^77\)

The incidental costs of the OAIC are not included in the table. The OAIC advised that it was unable to “generate a full, complete and accurate account of its expenditure on Robodebt related work.”\(^78\)

The incidental expenditure reported by agencies is set out below.

<table>
<thead>
<tr>
<th>Incidental Costs by Agency $m</th>
</tr>
</thead>
<tbody>
<tr>
<td>AGD</td>
</tr>
<tr>
<td>DSS</td>
</tr>
<tr>
<td>Services</td>
</tr>
<tr>
<td>OCO</td>
</tr>
<tr>
<td>Robodebt RC</td>
</tr>
<tr>
<td>ATO</td>
</tr>
<tr>
<td>ANAO - fin statements</td>
</tr>
<tr>
<td>Senate</td>
</tr>
<tr>
<td>2014-15</td>
</tr>
<tr>
<td>2015-16</td>
</tr>
<tr>
<td>2016-17</td>
</tr>
<tr>
<td>2017-18</td>
</tr>
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<td>2018-19</td>
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<td>2019-20</td>
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<td>2020-21</td>
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<td>2021-22</td>
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<td>2023-24</td>
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<tr>
<td>2024-25</td>
</tr>
<tr>
<td>3.21</td>
</tr>
<tr>
<td>0.18</td>
</tr>
<tr>
<td>0.55</td>
</tr>
<tr>
<td>2.46</td>
</tr>
<tr>
<td>0.08</td>
</tr>
<tr>
<td>0.41</td>
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<td>0.35</td>
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<td>0.32</td>
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<td>0.13</td>
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<td>0.28</td>
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<td>0.50</td>
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<td>0.35</td>
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<td>0.31</td>
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<td>0.06</td>
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<td>0.32</td>
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<td>0.41</td>
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<tr>
<td>0.18</td>
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<tr>
<td>0.42</td>
</tr>
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<td>0.41</td>
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<tr>
<td>0.18</td>
</tr>
<tr>
<td>0.55</td>
</tr>
<tr>
<td>0.96</td>
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<td>0.97</td>
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<tr>
<td>0.97</td>
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<tr>
<td>0.35</td>
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<td>0.37</td>
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<td>0.32</td>
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<td>0.35</td>
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<td>0.37</td>
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<td>0.32</td>
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<td>0.35</td>
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<td>0.37</td>
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<td>0.32</td>
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<td>0.32</td>
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<td>0.32</td>
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<td>2022-23</td>
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<td>12.58</td>
</tr>
<tr>
<td>7.57</td>
</tr>
<tr>
<td>0.03</td>
</tr>
<tr>
<td>0.03</td>
</tr>
<tr>
<td>0.03</td>
</tr>
</tbody>
</table>
### 5 Categories of expenditure

This section presents the estimated actual reported expenditure that was either funded from a Budget measure, estimates variation or was reported as incidental expenditure by an agency.

The estimated actual expenditure is broken down into various categories based upon definitions provided by the Commission to the agencies to achieve consistency in the reporting. However, agencies internal reporting systems do not necessarily capture information in this manner and so there remains some inconsistency in reporting, specifically regarding the costs reported against “consulting and contracting costs” and “labour hire costs.”

These categories of expenditure do not include the refund of debt payments received and the write-off of debts raised by Services Australia.

The **total costs** reported by agencies were $971.391 million.

#### Total Costs by Category

<table>
<thead>
<tr>
<th>Category</th>
<th>$m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collection Costs</td>
<td>424.45</td>
</tr>
<tr>
<td>Consulting and Contractor Costs</td>
<td>224.69</td>
</tr>
<tr>
<td>Employee Costs</td>
<td>47.92</td>
</tr>
<tr>
<td>Labour Hire Costs</td>
<td>150.15</td>
</tr>
<tr>
<td>Legal Costs</td>
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<tr>
<td>Other Costs</td>
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<tr>
<td>Investigation and Reporting</td>
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<tr>
<td>Third Party Payment Costs</td>
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</tr>
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</table>

#### Distribution of these costs over the period 2014-15 to 2024-25:

<table>
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<tr>
<th>Year</th>
<th>Consulting &amp; Contractor Costs</th>
<th>Employee Costs</th>
<th>Legal Costs</th>
<th>Other Costs</th>
<th>Investigation &amp; Reporting</th>
<th>Third Party Payment Costs</th>
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<td>2024-25</td>
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<td>10.67</td>
<td>0.13</td>
<td>0.13</td>
<td>0.41</td>
<td>0.03</td>
</tr>
</tbody>
</table>
5.1 Collection costs

Collection costs includes costs arising in connection with the engagement of individuals or entities not otherwise employed by the agency to perform debt collection or like services.

No agency reported a cost against this category despite the engagement of debt collection agencies to recover debts raised under the Scheme.

Services Australia noted that they are “unable to distinguish between amounts paid to External Debt Collectors for the purpose of Debt Collection related to social welfare debts and amounts paid to External Debt Collectors for the purpose of Debt Collection related to Robodebt Debts.”

DSS noted that it has an internal debt function that had operating costs of $9.9 million from 2014-15 to 2021-22, primarily in staffing costs. Further, it noted that the function existed prior to the Scheme and that it was unable to split the costs between the Scheme and other tasks.

DHS separately provided an estimate of $11.610 million in debt collection costs associated with the Scheme. This cost is not included in the figures presented in this chapter. Further information is provided in the Failures of the budget process chapter.

5.2 Consulting and contracting

Consulting and contracting are all costs in connection with the engagement of professional consultants or contractors not otherwise employed by the agency, including for the purpose of:

- providing advice, guidance or recommendations, or
- undertaking any review, audit, investigation or inquiry.

This represents a significant component of expenditure of the Scheme, representing $542.45 million over the period 2014-15 to 2023-24.

Services Australia makes up the majority of the expenditure against this category, reporting $540.9 million. However, the total expenditure against this category appears to be overstated. Services Australia advised it included labour hire costs within the consulting and contracting cost category because it was unable to separately report this type of expenditure.

5.3 Employee expenses

Employee expenses are all costs in connection with the engagement of individuals employed by the agency.

This represents a significant component of expenditure on the Scheme, representing $224.69 million over the 2014-15 to 2023-24, the major contributor being Services Australia at $210.56 million.

5.4 Labour hire costs

Labour hire costs are all costs in connection with the engagement of individuals employed by a firm which primarily exists to provide labour hire workers.

No agency reported expenditure against this category. Services Australia advised that it had included “labour hire” in the consulting and contractor category, because it was unable to separately report this type of expenditure.
5.5 Legal costs

Legal costs are all costs in connection with the engagement of legal professionals not otherwise employed by the agency, including for the purpose of:

- providing advice, guidance or representation,
- conducting, participating in, responding to, or settling litigation,
- participating in any external review, audit or inquiry, or
- participating in, responding to, or otherwise engaging with this Commission.

Expenditure on legal expenses, including those associated with this Commission, totalled $47.92 million from 2014-15 to 2023-24, the most significant contributor to this cost category being Services Australia at $20.19 million. The majority of legal costs were incurred in 2022-23 by Services Australia.

In addition, there are legal costs incurred by the Commonwealth that are reported under the category of third party costs.

5.6 Investigations and reporting

Investigations and reports costs are all costs directly associated with any investigation, audit, review or report undertaken or prepared by an agency in connection with the Scheme. This represents $4.16 million over the 2014-15 to 2023-24. Expenditure was reported against this category by OCO, ANAO and the Senate.

AAT said its Case Management Systems do not track or link cases to measures and it therefore cannot track the actual case numbers and expenditure incurred in relation to the Scheme. As such, the Commission has assumed the net funding provided to AAT through Budget measures in relation to the Scheme has been fully expensed and is reported against this category.

The OCO accounted for $2.55 million of the cost in this category, which included its own motion investigations into the Scheme and the investigation of 2959 complaints relating to the Scheme. The own motion investigations included:

- the 2017 report, Centrelink’s Automated Debt Raising and Recovery system – A report about the Department of Human Services’s Online Compliance Intervention System for Debt Raising and Recovery
- the 2019 report, Centrelink’s Automated Debt Raising and Recovery System – Implementation Report, and
- the 2021 report, Services Australia’s Income Compliance Program: A report about Services Australia’s implementation of changes to the program in 2019 and 2020.

5.7 Third party costs

Third party costs are the legal assistance provided to current and former ministers, as provided by s 42 of the Parliamentary Business Resources Regulations 2017 (Cth) (the Regulations). Under the Regulations the government can provide financial assistance to applicants for, amongst other things, an inquiry into matters involving the applicant or the conduct of the applicant.

As at 20 April 2022 AGD reported that $2.024 million (GST exclusive) had been expended against 10 approvals granted under the Regulations.
5.8 Other costs

Other costs are costs arising in connection with the engagement of individuals or entities not otherwise employed by the agency, including any costs associated with:

- overheads (for example, corporate services), and
- costs not otherwise specified.

This represents a significant component of expenditure under the Scheme: $150.15 million over the 2014-15 to 2023-24 period. The most significant contributor was Services Australia, which reported $139.93 million. This includes the settlement of $112 million approved by the Federal Court in the Prygodicz case.88
The Commonwealth confirmed these budget figures on 1 July 2023.

Exhibit 1 - ATO.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 2 - ATO.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 7 - DSS.9999.0001.0051_R, Signed Response NTG-0232 and Exhibit 9375 - ATO.9999.0001.0013 – Data Collection Sheet.

Exhibit 9 - DSS.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 10 - DSS.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 11 - DSS.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 12 - DSS.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

Exhibit 13 - DSS.9999.0001.0001, BP2_consolidated, 12 May 2015 [p169].

The Commonwealth confirmed these budget figures on 1 July 2023.

In the 2020 - 2021 Budget, the Government announced the winding back of the scheme through the budget measure ‘Changes to the Income Compliance Program’.

Exhibit 2-2677 - PMC.001.0013.004_R - Attachment A1.2 Expanding Social Welfare Debt Recovery.

Exhibit 9854 - RBD.9999.0001.0534* – 2021 – 2022 MYEFO [p 174]; Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.

Exhibit 9852 - RBD.9999.0001.0533* - 2022 - 2023 October Budget Paper No. 2 [p 60].


Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Exhibit 9854 - RBD.9999.0001.0534* – Budget Paper 2021 – 2022 No. 2 [p 269].

Exhibit 2 - 2682, PMC.001.0027.005_R - Attachment A2 Refund of ATO averaged debts.

Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Exhibit 9853 - RBD.9999.0001.0532* - 2023 – 2024 Budget [p 60].


Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.

Exhibit 9853 - RBD.9999.0001.0533* - 2023 – 2024 Budget [p 60].

76 Exhibit 9374 - ATO.9999.0001.0011_R - Signed Statement in response to NTG-0250 and Exhibit 9375 - ATO.9999.0001.0013 – Data Collection Sheet.
77 Exhibit 9021 - DSS.9999.0001.0069 - Supplementary Statement NTG-0232.
78 Exhibit 9869 – RBD.9999.0001.0530 – Response to draft NTG-0251.
79 Exhibit 9492 - CTH.9999.0001.0221, Response to NTG-0259 [p 3: para 1.3].
80 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 4: para 24(a)].
81 Exhibit 9476 - DSS.9999.0001.0051_R, Signed Response NTG -0232 [p 4: para 24(b)].
82 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 7: para 4.3].
83 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
84 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 [p 7: para 4.3].
85 Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
86 Exhibit 4-7133 - IAN.9999.0001.0002_R - 20230222 _NTG-0203 - Signed statement of Iain Anderson(47221401.1)_0
88 Exhibit 4 – 5200 - RBD.9999.0001.0395, Exhibit 9070 - CTH.9999.0001.0204, Services Australia - Response to NTG-0231 and Exhibit 9071 - CTH.9999.0001.0205, Data Collection Sheet.
Chapter 15: Failures in the Budget process
1 Overview of the Budget process

The Budget process is the framework through which the Australian Government’s spending on policy priorities is considered and authorised by Cabinet and Parliament.

As government activities are funded by taxpayers, it is appropriate that there is proper oversight of, and accountability for, spending.

The Budget is the government’s annual statement of how it plans to collect and spend public money. During the Budget process, ministers can bring forward new policy proposals (NPPs) for the government’s consideration. Each year, the government publishes Budget papers that identify new or amended policies, and how public money will be allocated across the departments involved in the delivery of those policies.

Outside of the preparation and delivery of the annual Budget, there are two other significant budget reporting documents delivered by the government each year:

- The Mid-Year Economic and Fiscal Outlook (MYEFO) – Delivered in around December, MYEFO provides an update on the performance of the Budget and the economic outlook midway through the financial year. Ministers are able to bring forward NPPs for consideration and inclusion in MYEFO, in a similar manner as in the Budget process.

- The Final Budget Outcome (FBO) – Delivered shortly after the end of the financial year, the FBO reports on the fiscal outcomes for the government over the previous financial year. The FBO shows how much the government actually spent or received, as against the amount that was projected in the Budget and MYEFO.

The annual Budget cycle, revolving around the three main annual budget reporting processes (being the Budget, MYEFO and the FBO) is depicted in Figure 1 below.

Figure 1: Illustration of the annual Budget cycle

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Royal Commission into the Robodebt Scheme

Failure in the Budget process
The Budget process is governed by a set of rules endorsed annually by Cabinet, referred to as the Budget Process Operational Rules (BPORs). \(^{10}\) The BPORs set out the major administrative and operational requirements that underpin the management of the Budget process, including rules relating to the development and costing of NPPs. \(^{11}\) The Department of Finance (Finance) issues further guidance and instructions in the form of Estimates Memoranda, \(^{12}\) including a timetable for each Budget cycle. \(^{13}\)

Although the Budget timetable can vary from year to year, the Budget process typically commences in November or December each year and culminates in May of the following year, with the Treasurer delivering the Budget to the Parliament and the public. \(^{14}\) The Budget process begins with the Cabinet Minister responsible for each government portfolio sending Budget letters to the Prime Minister outlining the draft policy proposals that they intend to bring forward in the upcoming Budget. \(^{15}\) The Expenditure Review Committee (ERC), a committee of Cabinet, then considers the Budget letters and any anticipated economic pressures and decides the government’s Budget priorities which are communicated to Cabinet ministers. \(^{16}\)

From around January to March each year, in response to the government’s Budget priorities, departments in each portfolio prepare a Portfolio Budget Submission, a collection of NPPs to be considered by the ERC for inclusion in the Budget. \(^{17}\) The Cabinet Minister for each portfolio is responsible for bringing forward their Portfolio Budget Submission to the ERC. \(^{18}\) Proposals that involve a significant service delivery component are often prepared by the Department and Minister responsible for the delivering the proposal. However, it is the responsibility of the Cabinet Minister bringing the submission to the ERC to ensure that it provides sufficient detail on risk and implementation challenges, allowing Cabinet to make an informed decision on the proposal. \(^{19}\) This process can only operate effectively where Portfolio Budget Submissions are subject to and reflect the outcome of appropriate consultation with agencies affected by the proposals (to identify any implementation risks) and Finance (to identify any financial risks). Ministers bringing forward submissions to Cabinet are responsible for ensuring that the consultation necessary to allow Cabinet to make a properly informed decision occurs at both ministerial and departmental levels. \(^{20}\)

The Budget process incorporates a mandatory two-stage consultation process during the development of Portfolio Budget Submissions. \(^{21}\) The process comprises: \(^{22}\)

- The circulation of an exposure draft of the Portfolio Budget Submission to the central agencies (the Department of Prime Minister and Cabinet, Finance and the Treasury), the Attorney-General’s Department \(^{23}\) and any other agencies that will be affected by the proposed policies. In response, each agency provides exposure draft comments, suggesting any amendments to the Portfolio Budget Submission that they consider necessary.

- The circulation of a finalised draft submission to the central agencies and affected agencies for coordination comments which are incorporated into the final version of the submission. The coordination comments advise Cabinet as to whether each agency supports the proposals put forward in the submission.

Finance performs an important function within the Budget process by providing policy and costings advice on expenditure to the ERC. \(^{24}\) During the preparation of Portfolio Budget Submissions, agencies that will be affected by the proposals are required to consult with Finance in relation to the estimated expenses associated with each NPP. Finance then negotiates with each agency to reach an agreed position on the projected costs or savings expected to result from the proposal. \(^{25}\) This process is designed to test the parameters of the proposal and the assumptions underlying the calculation of projected costs or savings. Agreement by Finance to a costing does not constitute support for the proposal itself. \(^{26}\)

Finance communicates its substantive position on each proposal within a Portfolio Budget Submission by providing a Green Brief to be considered by the ERC alongside each Portfolio Budget Submission. The Green Brief summarises the key elements of the proposals contained in the Portfolio Budget Submission, the associated financial implications, and Finance and central agency views on each proposal. \(^{27}\) The Green Brief is designed to provide a succinct and accurate summary, and independent assessment of, proposals being considered by the ERC. \(^{28}\)
Failure in the Budget process

Equipped with the Green Brief, the ERC meets to consider Portfolio Budget Submissions in around March to April each year. To ensure that the ERC is properly informed as to the details of the proposals under consideration, junior ministers (for instance, the Minister for Human Services) and senior public servants may be co-opted to attend an ERC meeting if they have a particular interest or involvement in a proposal under consideration. Having considered the Portfolio Budget Submission and the Green Brief, the ERC will decide which NPPs will be included in the upcoming Budget. Following the ERC meetings, the Cabinet meets to consider the ERC’s approval of particular NPPs for inclusion in the Budget.

The Budget is typically presented to the Parliament and the public in May each year, with the Budget papers setting out the NPPs approved by the ERC and Cabinet and the associated costings for each policy over the coming financial year and the forward estimates (the following three financial years).

1.1 Assessment of legal risks in the Budget process

The BPORs stipulate that certain legal risks should be assessed when developing new government policies. In particular, the Australian Government Solicitor (AGS) is to advise on:

- the Constitutional risk associated with the proposal, and
- the proposed source of legislative authority for the expenditure involved in the proposal.

There is no equivalent requirement under the BPORs for legal advice to be given by AGS or by departmental lawyers on the question of legality more broadly and whether any change to legislation would be required to carry out the proposal.

Kathryn Graham (national leader, Office of General Counsel, AGS) gave evidence as to the role of AGS in the Budget process and the scope of the advice ordinarily given by AGS. As Ms Graham explained, AGS ordinarily considers NPPs at two distinct stages in the Budget process, identified below.

Stage one: Constitutional and legislative authority risk advice

In the first instance, all NPPs involving proposed expenditure are reviewed by AGS for the purpose of providing a constitutional and legislative authority risk assessment in respect of expenditure. Ms Graham describes that assessment as being:

...a narrow and specific one relating to constitutional risk; it is not directed to broader questions of lawfulness and legal risk.

The assessment provided by AGS at this first stage addresses the following issues:

- whether a court would conclude that the Commonwealth’s legislative powers would support legislation authorising the proposed expenditure, or whether it is within the Commonwealth’s non-statutory executive power, and
- whether a court would conclude that legislation is required to authorise the expenditure, and if so, whether there is existing legislation which would support the expenditure.

AGS may identify potential legal issues concerning the substance of the proposal if they are “very obvious” on the face of the NPP. However, even the identification of obvious legal issues is rare in practice, given the confined scope of the assessment, the complexity and volume of NPPs presented to AGS and the short timeframes in which the advice is sought.

Stage two: Advice on Portfolio Budget submissions

The second stage of AGS’s involvement in the Budget process is the review of Portfolio Budget Submissions that are circulated to the AGD for comment during the exposure draft and coordination comment processes. As a matter of practice, the AGD sends all submissions that involve expenditure to AGS for consideration. When reviewing a Portfolio Budget Submission, AGS will typically:
• identify any previous AGS advice of relevance to the submission and check that the constitutional and legislative authority risk ratings previously given by AGS have been accurately reflected in each NPP

• provide a legislation certificate that states whether legislation will be necessary to implement any of the proposals in the Portfolio Budget Submission, without identifying which particular NPPs would require legislative change, and

• if time permits, identify (without providing advice on) legal or constitutional issues raised by the Portfolio Budget Submission. If time does not permit a thorough consideration of whether these issues arise, this is noted by AGS.

The functions performed by AGS at this stage are necessarily limited by the level of detail contained in the NPPs and the time available to review the Portfolio Budget Submission. Ms Graham explained that the time available for AGS to review a Portfolio Budget Submission is usually around one to two business days, but is regularly shorter than this, and can be as little as one to two hours. Given that Portfolio Budget Submissions, particularly for the Social Services portfolio, often contain dozens of NPPs and run for hundreds of pages, there are obvious practical limitations to the legal issues that can be identified by AGS in this time. As is noted by Ms Graham:

Practically speaking, when we are reviewing a portfolio budget submission there is rarely time to do more than confirm that our constitutional and legislative authority risk assessment in respect of expenditure has been accurately reflected in each NPP attached to the cabinet submission.

The new policy proposal checklist

Each NPP included in a Portfolio Budget Submission is accompanied by an NPP Due Diligence Checklist (Checklist). The Checklist is a standard form completed by the department preparing the NPP to ensure that certain matters have been dealt with by the time the NPP reaches the ERC. The NPP Checklist includes a section titled Legislation, which comprises the following three questions:

2.0 Has the Australian Government Solicitor assessed the constitutional and legislative authority risk?
2.1 If yes, has the advice been provided to Finance?
2.2 Is legislation required?

The Commission heard conflicting evidence on the meaning of the question “is legislation required” in the Checklist. The ambiguity of that question and the way in which it was variously understood is further considered later in this chapter.
2 Development of the Robodebt measure

The Robodebt Scheme (the Scheme) was first introduced in the 2015–16 Budget as a component of the Strengthening the Integrity of Welfare Payments Budget measure (the SIWP measure). The operation of the Scheme was extended over the following years through measures introduced in the 2015–16 MYEFO, 2016–17 MYEFO and 2018–19 Budget. This chapter focuses on the development of the SIWP measure within the 2015–16 Budget process, as this was the period in which the Scheme was initially considered and approved by government. The development and costing of the SIWP measure and subsequent measures is detailed in the Economic Costs chapter.

2.1 Tight timeframes

In the context of the 2015–16 Budget timetable, the development of the SIWP measure took place within an accelerated timeframe. The Hon Scott Morrison MP (as Minister for Social Services) instructed the Department of Human Services (DHS) to pursue the proposal on 20 February 2015 and the final NPP was presented to the ERC little more than four weeks later, on 25 March 2015. The standard timetable for the 2015–16 Budget process specified that by 20 February 2015, the costings for all NPPs should have been agreed by Finance and the NPPs should have been circulated to agencies affected by the proposals as part of the exposure draft and coordination comment process.

A number of people involved in the creation of the SIWP measure accepted that the measure was developed within tight timeframes, and email exchanges in the period in which the measure was developed confirm as much. However, the evidence before the Commission also indicates that this was not unusual in the development of new government policies. For instance, Senator the Hon Marise Payne acknowledged that the SIWP proposal was brought forward later than is usual but considered that it was not “extremely late” and noted that she had, in her experience, “seen much later”. Catherine Dalton (acting director, Payment Integrity and Debt Strategy Section, DSS) Anthony Barford (policy manager, Debt Policy, Social Security Performance and Analysis Branch, DSS), Kathryn Campbell (secretary, DHS) and Scott Britton (national manager, Compliance Risk Branch, DHS), who all had experience in preparing Budget measures, said they often dealt with quick turnaround periods in the preparation of Budget proposals.

The Commission accepts that constrained timeframes may not be unusual in the Budget process. However, it is clear that the interval during which the SIWP measure was developed and approved was too compressed, given its scale and complexity. Mark Withnell (general manager, Business Integrity, DHS) gave evidence that the SIWP proposal came forward “much later” than was normal and that the progression of the proposal was “very quick” given the size of the measure. On the size of the measure, he said:

In terms of scale, significantly larger. And the transformative nature of it was significantly larger. We had done another two sort of more transformational Measures that were much smaller than this, and we had much more lead time before we even put the measure forward.

Mr Britton similarly acknowledged that the SIWP measure was a “significant measure” which comprised “a number of complex components.” When asked how remarkable the SIWP was as a Budget measure, Mr Britton said that “[i]t was the biggest set of measures I think I’ve ever seen in my 30-odd years.”

2.2 Influence of Human Services in the development of the measure

Ministers ordinarily engage with their own department in the development of new government policies, receiving briefs from and giving direction to their department where necessary. However, this is not always the case and, in some circumstances, ministers may work with other departments in the development of proposals. At the time the SIWP proposal was developed, there was an arrangement in place between DSS
and DHS which contemplated NPPs being developed by DHS within the Budget process. Serena Wilson (deputy secretary, DSS) acknowledged in her evidence that some proposals would come directly from DHS to be included in the overarching Portfolio Budget Submission.

Although the Minister for Social Services took the SIWP measure to the ERC as part of the Social Services Portfolio Budget Submission, the evidence before the Commission indicates that the measure was one of the few designed and developed by DHS. DHS’s involvement and influence in the development of the SIWP measure is demonstrated by the following matters:

- DHS drafted the June 2014 Minute in which the PAYG data matching proposal that became the core element of the SIWP measure was first proposed.
- DHS drafted the Executive Minute in which the core elements of the SIWP proposal were first presented to the Social Services Minister as options for strengthening the integrity of the welfare system.
- Ms Campbell accepted it as being one of the proposals that DHS was responsible for drafting.
- The Human Services Minister and DHS Secretary attended the ERC meeting on 25 March 2015 where the SIWP measure was approved for inclusion in the 2015–16 Budget.
- The SIWP measure was one of four expenditure measures listed under the heading Human Services in the 2015-16 Budget papers, as distinct from the 47 other measures listed under the heading Social Services. Ms Campbell acknowledged that another measure listed under Human Services, the Welfare Payment Infrastructure Transformation measure, was a measure that DHS “took forward.” The SIWP measure falls under the same category as that measure and should be similarly regarded as having been advanced by DHS.

2.3 Scale and significance of the measure

Not only was the SIWP measure one of the few measures taken forward by DHS in the 2015-16 Budget, it was also, as a matter of historical fact, one of the most significant savings measures in that Budget.

The SIWP measure was expected to achieve overall government savings of $1.7 billion over five years.

The Employment Income Matching element of the measure (also referred to as the PAYG proposal, and the element that introduced the Scheme) accounted for the vast majority of these savings and was projected to save the government approximately $1.5 billion.

Of the four Budget measures under Human Services in the 2015-16 Budget, the SIWP measure was by far the most financially significant. The savings associated with the SIWP measure were more than 30 times greater than those of the only other savings measure put forward by DHS in the 2015-16 Budget. The next largest savings measure listed under the Human Services was projected to achieve savings of $55.1 million over four years.

The savings associated with the SIWP measure were projected to be accrued by DSS by way of a reduction in its administered appropriations, with the majority of the implementation expenses associated with the measure to be incurred by DHS. For DHS, the SIWP measure involved expenses of $204.8 million and related capital of $2.3 million over five years. Although there were approximately 50 other measures in the 2015-16 Budget that affected DHS’s net expenditure, the SIWP measure involved the largest expenditure for DHS of all of those measures.

In terms of the magnitude of the projected government savings, the SIWP measure was second in the 2015-16 Budget only to the Social Security Assets Test – Rebalance asset test thresholds and taper rate measure, which involved projected savings of $2.4 billion. The overall impact of the 2015-16 Budget on DSS expenditure was a net saving of $661.8 million. Without the inclusion of the SIWP measure, the overall impact of the 2015-16 Budget on DSS expenditure would have been an increase in expenditure of $1.3 billion.
The “one of many” fallacy

Some DHS employees sought to minimise the significance of the SIWP measure by reference to the breadth of the 2015–16 Budget and the number of other measures that were put forward by the Social Services Portfolio in that Budget. 73

For instance, when asked if it was obvious to her that there would have to be a legislative change to the basis of social security entitlements in order for the SIWP proposal to work, Ms Campbell responded: 74

I don’t recall whether or not I focused on that…I accept in hindsight, this should have been a key focal point for me, but there were many other Measures being implemented in [the 2015-16 Budget].

When it was put to Ms Campbell that she was taking a risk as secretary by not satisfying herself of the lawfulness of the implementation of the proposal, she responded: 75

So if there are many new policy proposals – and there are some 40 – I didn’t have sufficient time to go through every single one and work with every other portfolio we delivered programs for to determine what those issues were.

Similarly, when Ms Campbell was asked whether she noticed the inconsistency between the description of the proposal in the Executive Minute and the NPP, she responded: 76

No, because this was one of the 58 measures that were finally agreed in the Budget which DHS was involved in. And I expect there were many more measures which were not finally agreed. So I am concerned, Counsel, that you indicate that this is the only thing we were doing at the time. And so, therefore, I should have – and I wish I had picked up that there were changes. But there were many such proposals at that time, and I necessarily relied on others to run some of these processes.

Ms Campbell gave evidence that, on the face of the 2015–2016 Budget papers, there was “a number of other very big measures with a number of recipients that [she] was probably focused on as well”. 77 In the context of her preparation to attend the ERC meeting on 25 March 2015, it was put to Ms Campbell that there was in fact only four DHS Budget measures in the 2015-16 Budget, and approximately 40 DSS Budget measures. 78 In response to this proposition, Ms Campbell argued that there was “a large number of proposals” for which DHS would receive funding in the 2015-16 Budget. 79 As much is clear on the face of Budget Paper No. 2. 80 What this does not recognise, though, is that the SIWP measure was initiated, designed and developed predominantly by DHS, and although DHS received funding for a significant number of measures in the 2015-16 Budget, those measures would not necessarily have required the same level of attention from DHS.

It is true that the development of the SIWP measure was not the only thing that DHS or DSS were doing at the time. However, adopting the “one of many” attitude diluted the true scale and significance of the SIWP measure in comparison to the other measures that DHS and DSS were involved with at the time.
3 Ambiguity and missed opportunities

The Budget process is designed to safeguard Cabinet decision-making by ensuring the rigorous assessment of new government proposals and the identification of associated risks and impacts. Mr Morrison characterised the Cabinet process as being “very exhaustive” and said: 81

...the Cabinet process is 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 APS]...

The Hon Alan Tudge gave comparable evidence in relation to his understanding of the Cabinet process, describing it as “a rigorous process which always has a legal overlay through it.” 82

In the case of the SIWP measure, it is clear that the Cabinet process did not meet these expectations. There were several failures in the process that meant that Cabinet was not in a position to properly understand the nature of the proposal and the legal, financial and policy risks associated with it.

3.1 The identification of legal risks

With respect to the identification of legal risks associated with the SIWP proposal, the Budget process fell down in two interrelated respects.

1. The SIWP proposal was able to proceed to the ERC without the NPP indicating that legislative change would be required to implement the proposal, despite the existence of legal advice to that effect.

2. The question “is legislation required” within the Checklist was relied upon as meaning that legal advice had been obtained and was to the effect that the implementation of the proposal would not require legislative change.

Sidestepping legal advice

The 2014 DSS legal advice concluded that the proposal to use income averaging to determine and raise debts would not be consistent with the existing legislative scheme. 84 Murray Kimber (branch manager, DSS) agreed that the advice “strongly recommended” that the proposal did not fit within the existing legislative framework. 85 Ms Pulford similarly agreed that the “gist of the DSS view [in relation to the proposal the subject of the 2014 DSS legal advice] was a very strong no”. 86 The events surrounding the provision of the 2014 DSS legal advice are detailed in chapter 2014: Conceptual Development.

In the process of developing the NPP in early 2015, DSS sought further advice on the extent of the legislative changes required to implement the proposal. 87 The further advice provided by David Hertzberg (principal legal officer, DSS) on 4 March 2015 raised new issues in relation to the legality of the data-matching process, and referred back to the previous legal advice provided by DSS. 88 Mr Hertzberg’s advice noted: 89

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 on the detail of what is proposed.

This advice did not provide any support for the proposal to proceed without legislative change. However, despite the seriousness of the conclusions reached in the 2014 DSS legal advice and the absence of any countervailing advice, there was no mention of the need for legislative change in the NPP that was ultimately considered by the ERC on 25 March 2015. 90 There was nothing in the Portfolio Budget Submission to alert other agencies (including AGS) and Cabinet to the fact that legal advice had been given that legislative change was required. Further, due to the deficient description of the proposal in the NPP, it was not possible for either AGS or Cabinet to even appreciate that the proposal fundamentally relied upon the use of income averaging. Although NPPs are inherently and necessarily a high-level overview of proposals, they must describe the proposal and changes in procedures in enough detail so as to be meaningfully understood by other agencies and by Cabinet.
Had DSS been required to include the relevant legal advices in the Portfolio Budget Submission alongside the NPP, this may have prompted questions as to whether the advice still applied and if not, what had changed in the mechanics of the proposal. This would have required DSS and DHS to explain the departure from the legal advice, and it may well have become obvious at that time that there had been no material change to what was proposed and legislative change was in fact still required. If DSS had instead procured advice of the quality of the 2017 DSS legal advice and sought to rely on it, it is unlikely that it would have withstood scrutiny by AGS, other agencies and Cabinet.

Evidence given to the Commission suggests that there were reservations within DSS about circulating the 2014 DSS legal advice outside of the Department. It was common practice within DSS not to share legal advice unless it was asked for, which stemmed from a general view about the need to maintain legal professional privilege over the advice. The legal soundness of this position seems doubtful, as the privilege over advice provided to a department is held by the Commonwealth, and advice can therefore be shared between departments without any waiver of privilege. It follows that there is no reason that legal advice given to a department could not be provided to other departments as part of the Budget process.

Ambiguity of the checklist

There was considerable focus in the course of the Commission on the questions which appeared under the heading “Legislation” in the Checklist, and in particular, the third of those questions – “Is legislation required?” The significance of that question and its answer – “No” for the SIWP measure – were ambiguous in at least two respects. First, it was unclear whether the question was directed only to legislation which was required to authorise expenditure for a particular measure or, instead, contemplated whether any legislation whatsoever was required to implement the measure. Second, it was not apparent who had provided the answer, or if it had been independently verified in any way.

That ambiguity was fuelled by several factors, some of which have already been mentioned. For example, the BPORs contained a requirement to obtain legal advice about constitutional and legislative authority for expenditure, but no corresponding requirement for advice on the legality of a measure in general. Similarly, the two questions which preceded the question “Is legislation required?” were interdependent, and all three questions were contained under a single heading, without further explanation.

Mr Morrison described the answer “No” to the question “Is legislation required” as providing “clear advice from the Department...that no legislation was required” The Hon Malcolm Turnbull AC likewise considered that the question and its answer were directed to whether legislation was required to implement the measure in question. However, unlike Mr Morrison, Mr Turnbull believed that the answer represented the advice of AGS, rather than the Department. Like Mr Morrison and Mr Turnbull, Mr Tudge understood the question to be directed to legislation required to implement a measure generally; however, he believed that the advice was that of the Attorney-General’s Department.

As explained in chapter 2014: Conceptual Development, the Commission accepts that the question “Is legislation required?” could extend beyond the issue of whether authorisation was needed for expenditure. The evidence demonstrates, at least in some instances, when the question was answered in the affirmative, it related to the need for legislation to implement the proposal, not to authorise expenditure. However, the evidence also demonstrates that such advice was that of the relevant department, and was unlikely to have been checked by AGS.

Notwithstanding the Commission’s findings on that point, the ambiguity of the Checklist and seriousness of the matter with which the question is concerned – the legality of a proposal – necessitates that any identifiable uncertainty is resolved. That is particularly so where, as here, subsequent ministers may assume that a high degree of rigor attended the Cabinet process when it otherwise did not. In the circumstances, the language used in Cabinet submissions, especially with respect to the communication of legal risks to Cabinet, ought to be carefully considered.
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 New Policy Proposals

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 statement in NPP has reviewed and agreed with the advice.

Recommendation 15.4: Standard, specific language on legal risks in the New Policy Proposals

The Standard, specific language on legal risks 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.

3.2 Flaws in design

The data underlying the Budget assumptions

On 12 December 2014, Tenille Collins (Assistant Director, Customer Compliance Branch, DHS) emailed one of the first drafts of the SIWP NPP to Jason Ryman (Director, Customer Compliance Branch, DHS). She also attached to that email a document entitled PAYG High Level Assumptions.

That document was based upon an analysis of recipients’ records that had undergone the process of “matching” between the amount of income reported by employers to the ATO and recorded on a PAYG Summary, and the amount of income reported by recipients to DHS. Records that had undergone this matching process were stored in DHS’s computer system. The records analysed for the purposes of the high-level assumptions were those relating to the 2010-11, 2011-12 and 2012-13 financial years. In total, there were 866,857 customers with records containing “matches”. Some of those customers had matches for more than one year, with the total number of matches recorded as being 1,080,028.

The document stated that “[t]he analysis identified that debts were increased by 13.06% when income smoothing was applied.” The methodology for calculating that percentage is not stated on the face of the document. Mr Ryman’s understanding of how that figure was derived was that it was based on a review of actual files of welfare recipients. He described a process of comparison between the actual debt that had been raised through a manual compliance review, and a hypothetical debt calculated using income averaging. Debts calculated using income averaging resulted in debts that were, on average, 13 per cent higher than those calculated using a manual compliance review process.

The only debts that had been previously calculated using a manual compliance review process were those that were in the highest risk categories, so this analysis had only been undertaken with respect to those highest risk categories. No manual calculations had been performed with respect to potential debts in the lower risk categories, so there could be no comparison between debts calculated manually and debts
calculated using averaging. Mr Ryman’s evidence was that DHS “had not done any previous sort of work on these risk categories”.

The document contained tables entitled PAYG file – Volumes and Risk Ratings by financial year. Those tables set out assigned Risk Categories, which were assigned based on two factors:

1. The length of time a person was on a social security payment during the financial year
2. The size of any discrepancy between how much income was reported on a person’s PAYG summary and how much income they had reported to DHS.

The exception to this was the 2010-11 financial year, for which the only factor informing the risk category was time on payment. For each of the financial years 2010-11, 2011-12 and 2012-13, the total number of matches contained in each risk category was listed.

The document then set out a Debt Analysis that was undertaken by using a hypothetical debt testing process. This process involved averaging the PAYG income data received from the Australian Taxation Office (ATO). For all risk categories, the hypothetical debt was calculated solely using averaging. A blanket reduction of 13 per cent was applied to the hypothetical debt amounts, to account for the commensurate increase of 13 per cent that was assumed to have resulted by using averaging to calculate the debt. Despite the fact that the 13 per cent increase had only been derived from analysis of a sample of the highest risk debts, it was applied to each of the average debt amounts across all of the risk categories.

A sample of match records from each financial year was subject to this process, from which two pieces of information were derived: firstly, an “average debt value”; and secondly, the “debt percentage” which was the total number of debts, as a percentage of the total number of matches. The average debt value was multiplied by the number of records in each category, and then each result was totalled. Finally, that total was multiplied by the debt percentage, which resulted in the “total estimated debt based on volume.”

The PAYG High Level Assumptions document was amended and further developed throughout early 2015.

On 18 February 2015, Mr Ryman received an email indicating that, to date, an analysis of 886 records had been completed. The email stated “Taking into account Debt % 85 and a 13% smoothing allowance for the debts we have only had minor movement on our initial assumptions.” The debt percentage estimate mentioned in this email correspondence was 85 per cent, which was less than the 90 to 95 per cent contained in earlier versions of the assumptions document. The point at which this changed is unclear. There is reference, in the version of the assumptions document later provided to DSS, to the debt percentage having been determined “with consideration to historical outcomes regarding the percentage of cases that result in a debt.” However, it is unclear what these “historical outcomes” were or how they impacted the calculation of the estimated debt percentage.

This analysis was the basis upon which the assumptions underlying the NPP were developed, and upon which it was estimated that the measure would return over a billion dollars in savings to the government.

**Flaws in the assumptions**

There was a number of underlying flaws in these assumptions which can be readily identified.

Firstly, the analysis was conducted on a total of 886 customer records, out of a total of 866,857. The assumptions upon which the levels of recoverable debt were founded were therefore based on a sample representing approximately 0.1 per cent of the total number of records. It could not be said, with any confidence, that this was a representative sample from which data could reliably be extrapolated.

Secondly, the analysis was undertaken by calculating an average hypothetical debt amount for each risk level, which was then reduced by 13 per cent across the entire sample. This was in circumstances where no analysis had been undertaken with respect to the actual detail of any of the cases below the higher risk
levels. As a consequence, it was unknown whether the estimated average debt had any relationship at all to the actual average debt for lower risk categories, or how any inaccuracy in those figures impacted the ultimate calculation of the average debt across the entire population.

Thirdly, the lack of analysis of the lower risk level cases meant that it was unknown whether the estimated percentage of cases that would result in a debt could be ascertained with any degree of accuracy. Despite the reference to the use of “historical outcomes” to inform the calculation, it was unlikely that the use of any such historical data would remedy this defect, because historical data would necessarily be based upon cases previously dealt with by DHS. It would therefore suffer from the same shortcoming as the analysis itself; that is, it would only reflect data based upon cases in the higher risk categories.

There was a further, crucially important assumption that underpinned the PAYG proposal, and the estimation of the savings it could provide to government. That assumption was that once the online platform was operational, the majority of interventions would use an automated process to determine the existence of a debt, and to calculate and raise any such debt. ¹¹³

The assumption of automation also depended upon the automated platform being completed and operational by 1 July 2016.

Although the development of Budget assumptions is a predictive exercise, the development of these assumptions was a flawed process, for the reasons outlined above.

Flawed assumptions go undetected in the costings process

To an extent, the flawed assumptions underlying the SIWP measure were the result of systemic shortcomings in the costings process for compliance Budget measures. A core part of Finance’s role in the costings process is to test the assumptions and inputs underlying the costings prepared by each agency. The evidence before the Commission points to a common perception that the agreement of costings with Finance was a “robust process,” ¹¹⁴ where the figures would be closely examined and the reliability of savings projections would be tested. ¹¹⁵ However, without access to documentation recording the basis of the assumptions and inputs informing the costings, Finance was unable to meaningfully challenge the assumptions underlying the SIWP proposal. Instead, Finance relied on ad hoc responses from DHS and DSS to questions posed by them in the costings process. ¹¹⁶ In these circumstances, the SIWP proposal made it through the costings process without the deficiencies in the underlying assumptions being exposed.

The failure to expose and resolve the flaws in the underlying assumptions for the SIWP measure contributed to the measure’s ultimately failing to deliver the level of savings originally projected. The failure to deliver the savings projected under the SIWP measure and later measures extending the Scheme is considered more extensively in the Economic Costs chapter.

The Budget process, despite its intended function of facilitating the identification of risks associated with policy proposals, failed to bring to the surface the legal, economic and ethical flaws underlying the SIWP measure.

The failure of the Budget process in this respect can be traced back, at least in part, to the broader context in which the SIWP measure was brought forward; in particular, the undercurrent of pressure to deliver savings within the Social Services portfolio at the time, and consequently, the compressed period of time in which the measure moved from inception to implementation.

Pressure to deliver Budget savings

The SIWP measure represented significant savings to government, with the Employment Income Matching component of that measure promising to improve the Budget bottom line by approximately $1.5 billion. What has become clear on the evidence before the Commission is that those projected savings to government were a fundamental driver in the inclusion of the measure in the 2015-16 Budget, although the proposal was in an embryonic stage of development and had not been the subject of adequate testing or consultation.
Finn Pratt, DSS secretary when the measure was introduced, said that one of his core priorities was “supporting the then government’s Budget repair agenda.” His evidence was that because the Social Services Portfolio accounted for a large proportion of government spending, it was one of the “biggest targets” in the government’s efforts to find savings to reduce the deficit and bring the budget into surplus.

The government’s emphasis on debt control and balancing the Budget was reflected in the 2015-16 Budget, with a key focus of the Budget being to promote budget repair in accordance with the government’s commitment to returning the budget to surplus. One aspect of the repair agenda was a requirement that all spending be offset by appropriate savings. This was highlighted by the Treasurer in the 2015-16 Budget speech:

Everything we spend in this Budget is being paid for by prudent savings in other areas.

This expectation was formalised under the BPORs, which required that all NPPs which had a negative impact on the Budget were to be fully offset by savings proposals. Ms Campbell said that she considered the SIWP measure to be necessary to realise savings in accordance with the BPORs. The description of the SIWP measure in the 2015-16 Budget stated that:

The savings from this measure will be redirected by the Government to repair the Budget and fund policy priorities.

The SIWP measure was an attractive measure not only because of the scale of the expenditure offset that it offered, but also because it was a voter-friendly policy that did not involve reducing income support payments across a cohort or cutting government resources. Mr Pratt acknowledged that savings measures typically involved taking money from someone and are generally not popular. The SIWP measure was pitched as a policy that would ensure the integrity of the social security system and protect taxpayer dollars so that the government could continue to support those in genuine need.

Mr Pratt said that the selection of which savings proposals to pursue would involve a degree of “political consideration” as to which measures would be likely to pass the Senate and the extent to which the projected savings from the measure would be “worth the political pain associated with them.” These considerations were particularly pertinent where, as in 2015, the government did not hold the balance of power in the Senate and had been unable to pass Social Services savings measures from the previous Budget through the Senate. Mr Pratt recalled that at the time of the 2015-16 Budget, the government was reliant on a number of cross-benchers in the Senate whom he described as “independent-minded” and as having “different agendas to the government.”

In this context, it is clear that the SIWP measure would have been less attractive to government if it required legislative change, especially if that change were likely to be controversial (as a retrospective change to the basis of benefit entitlement would be). If the legislative change were unlikely to be supported by the Senate, the SIWP measure could not have been considered a genuine saving and thus the measure could not be considered by Cabinet without specific authority from the Prime Minister.

In the context of the difficulty associated with the need for legislative change, the pressure from Mr Morrison and government more broadly to provide savings in the Social Services portfolio contributed to the failure by the public service to raise the need for legislative change with Mr Morrison in the preparation of the NPP for consideration by the ERC.

Mr Morrison brought forward the SIWP proposal to be considered for inclusion in the 2015-16 Budget despite what Anne Pulford (principal legal officer, social security and families, DSS) agreed was “the clear no from [DSS] on policy and legal grounds.” Ms Pulford also agreed, in relation to the provision of further DSS legal advice in relation to the proposal, that “it appeared that the very tight timeframe and the pressure was coming from clearance by Minister Morrison to have [an NPP] developed to the point where it might be submitted to Finance.” Once Mr Morrison signalled an intention to pursue the proposal further, there was a greater impetus for the public service to get the proposal up and running.
The pressure to deliver savings was felt across DHS and DSS. From the DHS perspective, Mr Britton gave evidence that the compliance team was often asked what savings options they had and when they could be delivered. In Mr Britton’s words, “the imperative was the dollars, often.” In the leadup to the 2015-16 Budget, Mr Britton recalled being pressed by his superiors in relation to savings that could be delivered by the compliance team. In describing the environment within DHS in the years preceding the 2015-16 Budget, Mr Britton said that there was “certainly an increasing level of pressure” and “a significant shift in the expectation around the generation of savings.”

**The fast-track from idea to implementation**

The pressure to deliver savings offsets in the 2015-16 Budget dictated the course of the Budget process in respect of the SIWP measure and ultimately resulted in the measure being brought forward when those involved in its design did not consider it to be ready.

When discussions began around putting the proposal forward as a potential Budget measure, Mr Ryman said, the concept had not progressed much further than the initial ideas set out in the Executive Minute he had prepared for Mr Britton in June 2014, which he described as being “very, very preliminary”. Ms Collins described the way in which the NPP was developed as “highly unusual” and said that in hindsight, it may have been the result of what she described as “a strong push at this time in the department more broadly to find efficiencies.” She had been very surprised that the proposal was being developed into an NPP in circumstances where the final process for the proposal had not been decided on or tested with policy, legal or external stakeholders. Ms Collins explained that testing of the proposal with these stakeholders, as well as with social security recipients, would ordinarily take place before a proposal was developed into an NPP.

Mr Ryman recalled there being a stakeholder engagement plan in relation to the SIWP proposal, but he could not recall any engagement with the Digital Transformation Office or non-government stakeholders such as the Australian Council of Social Services (ACOSS) taking place. He acknowledged that the method used to calculate how much debt might be raised by the proposal was not “perfect”, but he and his team were working within a tight timeframe. Essentially, shortcuts had to be taken.

When asked about the preliminary work that would ordinarily be done before bringing forward a Budget measure, Mr Ryman said that the SIWP proposal “was such a new idea” and in terms of the online engagement, they only had a broad concept of wanting customers to be able to engage online but had not mapped out what that would look like. The trusted data assessments were “very much in preliminary stages” and they were researching a lot of different data sources, PAYG being one of them.

Mr Ryman agreed that if the measure had not been brought forward as quickly as it was, they would have obtained legal advice in the ordinary course, had they thought there was a need to do so. His team always had regular engagement with DSS; he considered that if the measure had not been brought forward as quickly as it was, DSS would have been informed of the outcome of the researching and testing of concepts.

Although Mr Ryman recognised that it would have been difficult to test the online platform before progressing the proposal through the Budget process, because of the need for funding, he explained that DHS would have done some level of testing and customer engagement and put more thought into how the online engagement would be achieved. Mr Ryman described this as being “many steps further than just saying ‘we want a digital solution’.”

Mr Ryman and Ms Collins both recalled having reservations about the proposal being taken forward as a Budget measure. Mr Ryman indicated that they had not done the preliminary work they would normally do to be able to “bring together something that we would have significant confidence in.” Notwithstanding this, he said, others, including Mr Britton, indicated that the proposal was to be brought forward as a measure.
Mr Britton’s evidence was that he also had a perception in late 2014 that the SIWP proposal needed more work before it could be brought forward as a Budget measure. He recalled there being a lot of “early thinking,” but the concept had only been “thought through to a point” and he knew that there was more work to be done to validate the proposal, especially given its scale. Mr Britton’s evidence was that he had concerns in that period about the pressure that was being applied and the complexity of the proposal. Despite the reservations held by those responsible for the design of the proposal, he recalled the messaging around the development of the measure being to “get on with it”; in response, they “collectively got on with it.”

Ms Pulford gave evidence to the effect that the time constraints in the development of the SIWP measure limited the extent of the legal advice that could be provided. Detailed legal advice could not be given on all of the possible legal issues identified with the proposal.

The consequence was that the need to achieve savings and provide Budget offsets was prioritised over the need to ensure accuracy in the design of the proposal and the fair and lawful treatment of social security recipients.

**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.

2 This is reflected in the constitutional requirement that all public spending be authorised by the Parliament through appropriation legislation: see Australian Constitution s 83.


9 See, e.g., Exhibit 4-8161; Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014.

10 See, e.g., Exhibit 4-8161; Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, [p 2].

11 See, e.g., Exhibit 4-8161; Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, [p 2].

12 See, e.g., Exhibit 4-8161; Exhibit 2-2527A – CDF.0001.0001.0001 – 2015-16 Budget Process Operational Rules, 30 September 2014, [p 2].


19 See, e.g., Exhibit 2-2597 – RBD.9999.0001.0033, Cabinet Handbook (8th edition) – 2015, April 2015, p 9 [23(f)].


The next largest savings measure listed under Human Services was the “Department of Human Services Efficiencies” measure, which was projected to achieve savings of $55.1 million over four years. See Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 116].

Exhibit 3-5081 – PMC.0001.0011.0266_R2 – PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet - ABBOTT - Transcript, Kathryn Campbell, 7 March 2023 [p 4564: lines 10-40].

Exhibit 3-5081 – PMC.0001.0011.0266_R2 – PMC.001.0054.001 - 15-03-25 - ERC - Attendance Sheet - ABBOTT - Transcript, Kathryn Campbell, 7 March 2023 [p 4564: lines 10-40].


71 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 41 – p 43]
72 Exhibit 1-1234 – RBD.9999.0001.0001 – BP2_consolidated, 12 May 2015 [p 169].
74 Transcript, Kathryn Campbell, 11 November 2022 [p 970: line 36 – p 971: line 13].
75 Transcript, Kathryn Campbell, 7 December 2022 [p 1317: lines 5-15].
76 Transcript, Kathryn Campbell, 7 December 2022 [p 1318: lines 30-32].
77 Transcript, Kathryn Campbell, 7 December 2022 [p 1298: lines 2-9].
78 Transcript, Kathryn Campbell, 7 December 2022 [p 1298: lines 8-27].
80 Transcript, Scott Morrison, 14 December 2022 [p 1785: lines 8-10].
81 Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 2-13].
83 Refer to glossary.
84 Exhibit 1-0002 – DSS.5006.0003.1833_R – Email from Jordan Simon to Mark Jones copying Anne Pulford and preceding chain, 18 December 2014. 
85 Transcript, Murray Kimber, 8 December 2022 [p 1400: lines 26-32].
86 Transcript, Anne Pulford, 2 November 2022 [p 179: lines 38-41].
87 Exhibit 1-0077 – DSS.8002.0001.0002_R – FW: New version of draft brief on fraud and compliance, 4 March 2015. 
89 Exhibit 2-3232 – DSS.5083.0001.0004_R – RE: New version of draft brief on fraud and compliance [DLM=Sensitive], 4 March 2015. 
90 Exhibit 2-2022 – PMC.001.0002.017_R – PMC-001-0002-017_Redacted.
91 Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M)(46393028.1), 11 November 2022 [p 10: para 55].
92 Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 2-13].
93 Refer to glossary.
94 Exhibit 4-6720 – AGS.9999.0001.0001_R, Response to NTG-0213, 22 February 2023 [page 2: para 14; page 3: para 19].
95 Cf Transcript, Alan Tudge, 1 February 2023 [p 2899: lines 8-9]; Transcript, Michael Keenan, 28 February 2023 [p 4079: lines 12-24]; Transcript, Michael Keenan, 28 February 2023 [p 4091: lines 22-41].
96 Exhibit 4-6596 – CTH.3002.0006.5491_R, PAYG measure [DLM=Sensitive], 12 December 2014. 
97 Exhibit 4-5622 – CTH.3030.0010.1327, PAYG High Level Assumptions Savings. 
98 Exhibit 4-5622 – CTH.3030.0010.1327, PAYG High Level Assumptions Savings [p 1]. 
99 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 11-30].
100 Transcript, Jason Ryman, 22 February 2023 [p 3554: lines 32-45].
101 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 24-27].
102 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 24-42; p 3555: lines 18-31].
103 Transcript, Jason Ryman, 22 February 2023 [p 3552: lines 37-39].
104 This was due to a change in systems, prior to which the risk categories were described as less “granular”: Exhibit 9002 – CTH.3000.0001.7156_R, PAYG Stats [DLM=For-Official-Use-Only], 20 October 2014. 
105 Transcript, Jason Ryman, 22 February 2023 [p 3553: lines 44-47].
106 Transcript, Jason Ryman, 22 February 2023 [p 3556: lines 29-35].
107 See, e.g., Exhibit 4-5619 – CTH.3002.0007.0200, PAYG High Level Assumptions V1 0; Exhibit 4-5621 – CTH.3030.0010.1326_R, FW- Updated Assumptions [DLM=For-Official-Use-Only], 15 January 2015; Exhibit

112 Exhibit 4-5529 – DSS.5121.0001.0002, PAYG High Level Assumptions.

113 Exhibit 9957 – CTH.3031.0004.5125, FYI: PAYG OCI - Volume Overview [DLM=For-Official-Use-Only], 20 March 2015; Exhibit 9958 – CTH.3031.0004.5127, PAYG Customer Volume Overview.

114 Transcript, Tenille Collins, 3 March 2023 [p 4313: lines 6-14].


118 Exhibit 1-1223 – FPR.9999.0001.0001_R – 20221018 Statement of Finn Pratt dated 18 October 2022[46125371.1], 18 October 2022 [p 4: para 18].

119 Transcript, Finn Pratt, 10 November 2022 [p 852: lines 4-9].


123 Exhibit 1-1234 – RBD.9999.0001.0002_R – BP2 consolidated, 12 May 2015 [p 116].

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Section 4: Automation and Data Matching
Chapter 16: Data matching and exchanges
1 Introduction

People expect government agencies to act transparently when handling their personal information, and these expectations are heightened when information has been collected on a compulsory basis, or in exchange for access to essential payments and services - Timothy Pilgrim, former Privacy Commissioner

The Robodebt Scheme (the Scheme) was underpinned by a data-matching program involving the Australian Taxation Office (ATO) and the Department of Human Services (DHS). The program was designed to identify former and current income support recipients with alleged discrepancies between their earnings as reported to DHS and their employment income annually reported by employers to the ATO.

In this chapter, the Commission considers the data-matching processes which underpinned the Scheme. The chapter - Automated Decision making, considers the use of automation under the Scheme.
2 The data-matching framework

The following laws, guidelines and other framework documents are relevant to consideration of the data-matching program that was conducted under the Scheme:

- the Data-matching Program (Assistance and Tax) Act 1990 (Cth) (DMP Act)
- the Guidelines on data matching in Australian Government administration (voluntary Data-matching Guidelines and associated protocols)
- the arrangements in place between DHS and the ATO
- the secrecy provisions in the Taxation Administration Act 1953 (Cth) (TAA53) and the Social Security (Administration) Act 1999 (Cth) (SSA Act)
- the Australian Privacy Principles (APPs) in the Privacy Act 1988 (Cth) (Privacy Act) which regulated the handling of information by the ATO and DHS
- the Privacy (Tax File Number) Rule 2015 (TFN Rule)

2.1 Data-matching under the Data-matching Program Act

It should be noted at the outset that the data-matching that occurred under the Scheme was not undertaken under the DMP Act. However, some consideration of that Act is necessary to contextualise the framework outside of which the data-matching under the Scheme was administered.

The Government’s legislative data-matching program was announced in the 1990-91 Budget and was enshrined in Commonwealth legislation enacted in 1990. The Data-matching Program (Assistance and Tax) Act 1990 (Cth) (DMP Act) established a highly regulated process for the large-scale comparison of data from five Commonwealth agencies for compliance purposes. This included the Department of Social Services (DSS) and the ATO. Data matches which occur under the DMP Act are authorised by law and thus comply with any secrecy provisions, as well as the APPs (see further below).

The data-matching program which occurs under the DMP Act restricts the number of data-matching cycles permitted each year, requires a data-matching cycle to be completed within a period of time after data was received, and requires action to be taken by an agency (on any inconsistencies disclosed by the data-matching program) within three months of the data match. Participating agencies are required to destroy all unused information within a certain period of time. Mandatory guidelines in respect of the DMP Act include a requirement for participating agencies to report to Parliament.

The legislation is still in force today, but the ATO and Services Australia (formerly DHS) no longer conduct any of their data-matching programs under the DMP Act.

Historically, the ATO and DHS participated in a data-matching program authorised under the DMP Act on a bi-annual basis. However, as noted above, the data-matching that occurred under the Scheme was not undertaken under the DMP Act. Since 2004, the data-matching the ATO and DHS had undertaken with respect to PAYG data had been conducted under a framework including the voluntary Data-matching Guidelines, associated protocols, and heads of agreement between the ATO and DHS.

2.2 The voluntary Data-matching Guidelines

The Voluntary Data-matching Guidelines were developed by the Office of the Australian Information Commissioner (OAIC) to ‘assist all Australian Government agencies to use data matching as an
administrative tool in a way that complies with the Australian Privacy Principles (APPs) and the Privacy Act, and is consistent with good privacy practice. 7

The Guidelines are issued under the Privacy Act. 8 Compliance with the Guidelines is voluntary, and represent the OAIC’s view on best practice with respect to undertaking data-matching activities. 9

The Australian Information Commissioner and Privacy Commissioner described the role of the voluntary Data-matching Guidelines as follows:

The voluntary Data Matching Guidelines aim to assist Australian Government agencies who are not conducting statutory data matching, to use data matching as an administrative tool in a way that complies with the APPs and the Privacy Act more broadly, and is consistent with good privacy practice. The voluntary Data Matching Guidelines are not binding but represent the OAIC’s view on best practice with respect to agencies undertaking data matching activities. 10

A failure to comply with the Guidelines does not mean an agency has acted unlawfully, unless the acts or practices of the agency constitute a breach of the Privacy Act. 11 Rather, compliance with the Guidelines supports good privacy practice, reflects a commitment to the protection of individual privacy and promotes an Australian society where privacy is respected. 12 In the context of the consideration, design or implementation of a process such as that used under the Scheme, compliance with the Guidelines represents an additional layer of control to assist agencies to consider, and take into account, privacy related issues.

The Voluntary Data-matching Guidelines were first introduced by the Privacy Commissioner in 1992. 13 The current version of the Guidelines (2014) is relevant to the data-matching program which operated under the Scheme.

Under the Voluntary Data-matching Guidelines, DHS was the ‘primary user agency’ of the data matching program. 14 As the primary user agency, DHS was required to undertake a number of actions in order to comply with the Guidelines. These relevantly included:

- preparing and distributing a program protocol (Guideline 3) 15
- ensuring that its participation in the data matching program complied with that protocol (Guideline 3.2) 16
- destroying or de-identifying personal information (Guideline 7) 17 and
- updating the protocol in particular circumstances (Guideline 9)

The 2004 Protocol

The 2004 Protocol applied to the data-matching under the Scheme up to May 2017. It was prepared by Centrelink in 2003 and was lodged with the Office of the Privacy Commissioner in May 2004. 18

The 2004 Protocol was designed to comply with the Guidelines. It described, in detail, the PAYG data-matching program which it covered 19 and established standards for the conduct of the program.

This was the description of the data-matching program in the 2004 Protocol:

As part of an increased focus on the detection of customers failing to declare or underdeclaring income, an initiative has been introduced to match Centrelink customers with those identified by the ATO as having a PAYG Payment Summary. The data used in the project is sourced from the ATO Pay-As-You-Go Data, which is from the PAYG payment summaries electronically lodged by employers with the ATO...

...The customer’s Centrelink income details are compared with the income details in their PAYG Payment Summary and, where anomalies are identified between the income declared to Centrelink and ATO, the customer is selected for review... 20

The “source agencies,” who supplied data for the purposes of the program, were Centrelink and the ATO. The “matching agency” was Centrelink, which had responsibility for receiving the data from the ATO, matching the data, ensuring its security, destroying particular data at the end of each matching process,
and distributing the matched cases to the Centrelink system for review. In particular, the 2004 Protocol provided for:

- destruction, by Centrelink, of personal information collected from the ATO which did not lead to a match
- all remaining ATO data to be destroyed within 12 months
- requests from DHS to the ATO, for the PAYG data, to be authorised by statutory notices issued by DHS and
- manual checks by DHS staff of any discrepancies identified from a comparison of the ATO PAYG and DHS records before any review commenced “to determine if the discrepancy can be explained.”

The 2017 Protocol

The 2017 Protocol replaced the 2004 Protocol in May 2017, and applied under the Scheme from that date. The 2017 Protocol retained the characterisations in the 2004 Protocol of the ATO and DHS as “source agencies,” and confirmed that DHS remained the primary user of the data.

Confusingly, the 2017 Protocol described the ATO as the “matching agency,” rather than retaining its previous characterisation as the “source agency.” However, a subsequent paragraph referred to “DHS, as the matching agency…” The ATO subsequently clarified its role, in correspondence to the OAIC in 2019, as that of a “source agency.”

The document retention limits in the 2017 Protocol differed from those in the 2004 Protocol, but the reference to adherence to the voluntary Data-Matching Guidelines remained in both.

The 2017 Protocol also recorded that the ATO was required by law to disclose PAYG data to DHS under the Scheme in response to compulsory statutory notices issued by DHS.

2.3 The Services Schedule and abridged arrangement

A Services Schedule between the ATO and DHS existed from April 2014, as well as an abridged arrangement for the transfer of information between the ATO and DHS. The abridged arrangement was treated as being in effect from April 2014 but was not formally executed until 11 August 2017. The aim of The Schedule and arrangement was to “better document the arrangements in place between the ATO and DHS.”

The Services Schedule established the broad principles that applied to all data-sharing arrangements between Services Australia and the ATO.

2.4 Secrecy

The purpose of Commonwealth secrecy laws is to regulate the handling of “sensitive” information collected and used by the Australian Government (confidential information).

Officers working for both the ATO and DHS are subject to secrecy provisions which strictly regulate the collection, use and disclosure of categories of information about a person’s “affairs” (in the case of the ATO) and a person’s “protected information” (in the case of DHS).

There are additional restrictions in the taxation laws which regulate the conduct of third parties to whom confidential information is disclosed by the ATO (for example DHS).

Secrecy provisions are offence provisions, which means that a breach of a secrecy provision may have serious consequences for an Australian Public Service (APS) employee, including a term of imprisonment.
Consequently, secrecy provisions are “taken extremely seriously.” Information which is subject to a secrecy provision cannot be collected, used or disclosed, absent some legislative exception or obligation.

Section 355-25 of TAA53 provides that it is an offence for an ATO officer to disclose information about a taxpayer’s affairs unless that disclosure is permitted by one or more of the exceptions in Division 355 of TAA53. Disclosure for the purpose of administering the social security law is one of those exceptions. Section 202(1) of the SSA Act permits access to protected social security information, while sections 192 and 195 of SSA Act permit the Secretary to issue notices requiring information to be provided.

In addition to the offence provisions, a breach of a secrecy provision by a current or former APS employee may constitute a breach of the APS Code of Conduct.

2.5 Privacy

Breaches of secrecy may also constitute interferences with privacy by the relevant agency. A person’s right to privacy is regarded as a human right.

The Privacy Act regulates how government agencies handle personal information in records. It codifies Australia’s obligations under Article 17 of the International Covenant on Civil and Political Rights and its commitment to enact legislation to enshrine principles adopted by the Organisation for Economic Cooperation and Development (OECD) for the protection of privacy.

Secrecy provisions and the Australian Privacy Principles (APPs) in the Privacy Act are designed to operate in a co-ordinated way. The APPs are designed to apply flexibly; the strict operation of secrecy provisions also protects personal information. In practical terms, where APS employees comply with the secrecy provisions in terms of their use and disclosure of personal information, their agency can normally be assured that the use and disclosure of that information will comply with the Privacy Act.

As the Australian Information Commissioner said in her submission to the Commission:

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practice to their diverse needs and business models, and to the diverse needs of individuals. Accordingly, the steps entities must take to comply with their obligations under the APPs will depend on their particular circumstances, including size, resources and business model.

A breach by a government agency of an APP in the Privacy Act is actionable by a complaint to the Office of the Privacy Commissioner which sits within the Office of the Australian Information Commissioner (OAIC). A complaint to the Privacy Commissioner about an interference with privacy arising from a breach or breaches of the APPs will be a complaint against the agency concerned. The Privacy Commissioner has the power to investigate complaints and make a determination, and can also award compensation.

Additionally, the Privacy Commissioner may conduct an own motion investigation into an agency’s practices. Following such an investigation, the Privacy Commissioner may recommend payment of compensation to a person who has suffered loss or damage, or the taking of action to remediate or reduce any loss or damage suffered.

In the case of a serious or repeated interference with privacy, the Privacy Commissioner may bring an application in the Federal Court for contravention of section 13G of the Privacy Act.

2.6 The Tax File Number Rule

Tax file numbers (TFN) are identifiers and are considered to be extremely sensitive. As the Office of the Australian Information Commissioner (OAIC) observed, TFNs are “unique identifiers” which increases the “risk of serious breaches of personal privacy if data is lost or misused.”

The ATO’s use and disclosure of TFNs is subject to more restrictive secrecy provisions than other types of confidential information.
The Privacy (Tax File Number) Rule 2025 (TFN Rule) is designed to protect the TFN information of individuals. It works in tandem with the TFN secrecy provision in TAA53. The TFN Rule operates to ensure TFN recipients observe strict requirements in their handling of TFNs. It is administered by the OAIC.

As the Australian Information Commissioner observed:

> The TFN Rule applies to both the use and disclosure of TFN information and provides that an individual’s TFN information can only be used or disclosed for the purpose of facilitating the effective administration of taxation law, certain aspects of personal assistance and superannuation law and to assist with the identification of individuals for other purposes. A use of TFN information, without disclosure, may constitute an interference with privacy under the Privacy Act if the TFN information is not used in accordance with the TFN Rule. 47

The obligations in the TFN Rule are additional to the secrecy provisions and the APPs. 48 A breach of the TFN Rule is an interference with privacy under the Privacy Act. 49
3 Mapping the Scheme’s data-matching program

In order to understand the data-matching process under the Scheme, the Commission engaged Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte). Dr Wurth was asked to:

- produce for the Commission a detailed process map showing the way data was transmitted between DHS and the ATO as well as the way the data was used by DHS to raise debts under the Scheme, and
- report to the Commission on the adequacy of the technical process supporting the Scheme.

References in this section to Dr Wurth’s opinions refer to this report. 50

Figure 1 outlines the four stages which comprise the data-matching program that operated during the Scheme. Dr Wurth’s report 51 and the supporting process maps 52 describe and critique the steps taken both prior to and under each stage of the Scheme. The process outlined in this Chapter is that which occurred at stages 1, 2 and 3 of Figure 1 below. The automated process in stage 4 "Income data verification and debt notification" is addressed in the chapter - Automated Decision Making.

Dr Wurth relied on primary records obtained from the ATO and DHS but also considered statements and other records which were relevant to the data-matching program to create the process maps.

The draft process maps were shared with both DHS and the ATO and both agencies were afforded an opportunity to advise the Commission of any omissions and errors in the maps before they were finalised. 53 Dr Wurth made changes to the process maps following feedback from DHS and the ATO. 54

3.1 Stage 1 – Population identification

Each year, DHS created a file that contained details of all DHS recipients who, in a specified year, had received a welfare payment, had an outstanding debt to DHS, or were the partner of a recipient that met one of those two criteria. 55

That file contained details of each recipient’s Customer Reference Number (a unique DHS identifier) (CRN), and personal information including their name, date of birth, address and gender. 56

3.2 Stage 2 – Identity and PAYG data matching

The file was provided to the ATO, which would then match each DHS recipient with their corresponding PAYG data held by the ATO. 57 That process involved finding potential identity matches between DHS recipients and ATO taxpayers using their name, address details and date of birth. Only the highest confidence match was retained for the next step. As further detailed below, until 2019, the highest confidence match included matches with either “high” or “medium” confidence levels. After mid-2019, the highest confidence matches only included those with “high” confidence levels.

A file was then created for each DHS recipient which contained the highest confidence identity match, their CRN and their TFN. The PAYG data associated with that TFN was appended on to the record, and the TFN was then removed.
The matched records were then returned to DHS.

Upon receipt of the files, DHS validated the ATO identity match. From the OCI iteration of the Scheme onwards, this was a three-step process. Firstly, the validity of the CRN was checked against DHS records. Secondly, the ATO identity match was checked through “fuzzy matching” of information linked with each of the PAYG and CRN data. This is discussed further below at 6.4. Thirdly, if the ATO identity match did not pass the fuzzy matching step, it was then tested against all other DHS records to see if a match could be found against “tight matching” criteria.

A file was then created which contained PAYG data for all of the matched records that had been successfully validated.

3.3 Stage 3 – Income data matching

This stage was where the ATO PAYG data and the employment income reported to DHS was matched, and any potential income discrepancy identified.

From the OCI iteration of the Scheme onwards, the technical documents demonstrate the following: 58

a. the name of the application in which PAYG data was matched was changed under the Scheme from the “Business Integrity Compliance Engine” to an application called “Fraud Management.”

b. the processes that occurred in the Fraud Management application were known as “Fraud Management processes,” and

c. one such Fraud Management process was the PAYG Customer Risk (Mass Detection) strategy, which operated to identify the risk of a possible incorrect payment on a person’s Centrelink record.

Therefore, for each person subject to the Scheme, the process of identifying discrepancies that resulted in their being selected for a review under the Scheme involved a “Fraud Management process” known as the PAYG Customer Risk Mass Detection Strategy, which occurred in the “Fraud Management” application.

(Perhaps reflecting a certain perspective, this nomenclature was adopted despite the fact that the overwhelming majority of discrepancy cases had nothing to do with fraud, and there was no evidence to suggest otherwise.)

Under this process, a recipient’s matched PAYG record was excluded if they satisfied certain criteria, including being legally blind, deceased or having received less than a minimum DHS payment amount.

If the records were not excluded, a compliance risk rating was calculated based on the discrepancy between DHS employment income and the ATO PAYG income data. A series of risk identification criteria was then applied, and a “case” was raised for each recipient who had a discrepancy and met a risk identification threshold.

A final check was then conducted to determine if there had been any new ATO or DHS data which needed to be incorporated into a recipient’s data. If there was not, the case was passed through to stage 4 of the process, the income data verification and debt notification stage, which is dealt with further in Chapter x Automated Decision Making.

The best source of information provided to the Commission as to the number of records included in the PAYG program over the time in which the Scheme operated is contained in an extract of count of records located in ATO footer files, produced to the Commission by the ATO and examined by Dr Elea Wurth. Dr Wurth noted that in the years 2014–16 almost nine million unique records per year were disclosed by DHS to the ATO for the purposes of data matching. 59 This number increased to just over 16 million per year for 2017–19. 60

Although the exact timing is unclear, at some point in late 2016, DHS and the ATO engaged in a data-match round which saw a one-off bulk transfer of five years of data from the ATO’s PAYG database to DHS, covering the years 2011-15. 61
4 Data-matching and data exchanges under the Scheme

4.1 The ATO seeks better information from DHS about the Scheme

In late 2016, following a spike in media stories and complaints about the Scheme, the ATO started asking for information about how DHS was handling the data that the ATO had disclosed to it under the Scheme.

The ATO met with DHS on 14 December 2016 to discuss its concerns about the use of the data, and then wrote to DHS on 22 December 2016 seeking confirmation that requested changes had been implemented. The ATO did not receive a response to this correspondence.

The ATO met again with DHS on 9 January 2017 and sought a “briefing pack” from DHS on the Scheme. The requested information was never provided.

The ATO sought a further meeting with DHS in an attempt to better understand how DHS was using the data disclosed by the ATO under the Scheme. At a meeting on 7 February 2017, an ATO officer’s notes record that Malisa Golightly, DHS Deputy Secretary, made the following assertions about the way DHS was using the ATO data under the Scheme:

- nothing had changed in terms of the way data-matching was done,
- how DHS is using the information had not changed, there was just an increase in numbers,
- averaging was not being routinely used, it was only where the customer did not provide a response, and
- the “system” was not fully automated.

Toward the end of February 2017, the ATO sent an email to DHS urgently seeking clarification as to whether information provided to DHS was to be “on-disclosed” and what was DHS’s legal authority for such disclosures. The email sought a “catch up” with DHS to discuss “a way forward on this.”

On 10 July 2017, Tyson Fawcett, ATO Senior Director Smarter Data Group, wrote to an officer in Data Strategy and Analytics at DHS in these terms:

Secondly the ATO is seeking an assurance on the use of its exchanged data provided to DHS, on how it is being used, with any future bulk compliance approaches (lessons well documented). I am seeking an urgent discussion (next week at the latest) on this, otherwise I ask that you cease and desist, the usage of the data, until we have your assurance around the data use.

The DHS response did not directly address Mr Fawcett’s query, and instead referred him to a range of measures being undertaken by DHS. Mr Fawcett responded, “the Australian Taxation Office continues to support the DHS initiatives, but does so ensuring that the data that is shared is done so in accordance to the law.” That seems to be a reference to the ATO’s provision of the information pursuant to section 355-65.

Despite these events and the concerns raised by the ATO, the data-matching program continued.

Open and transparent communication between Commonwealth entities engaging in data-matching programs is necessary to ensure that each participating entity understands, and undertakes proper scrutiny and evaluation of, the legal and administrative framework in which it is operating with respect to data-matching activities. There were, as Services Australia acknowledged, limitations to the inter-agency
collaboration in relation to the data-matching under the Scheme; and, as it also accepted, better lines of communication and transparency between DSS, DHS and the ATO would have aided DHS's understanding of its legislative obligations in relation to its processes.  

4.2 The 2017 Protocol is prepared

In late 2016 and early 2017, DHS received repeated media requests to disclose or publish the 2004 Protocol. 72 This prompted DHS officers to review the 2004 Protocol, at which point it was realised that it had not been updated to reflect the OCI program and consequently was not compliant with the Information Commissioner’s Guidelines. 70

By way of example, the 2004 Protocol contained an out of date and inaccurate description of the data-matching program being conducted under the Scheme, 74 suggesting that DHS was required, before commencing any review, to “check the customer’s record to determine if the discrepancy can be explained.” This was not happening under the OCI phase of the Scheme. 75

The 2017 Protocol was drafted by DHS, as the primary user of the data-matching program under the Scheme. 76 DHS received internal legal advice to the effect that there was no legal obligation to publish the 2004 or the 2017 protocols, but it would be appropriate to publish both. 77

The ATO was not consulted about or informed of the publication of the 2017 Protocol. 78

Similarly to the 2004 Protocol, the 2017 Protocol said that information would be disclosed by the ATO to DHS in response to formal notices issued under the SSA Act. 79

A brief to the Minister for Human Services, the Hon Alan Tudge, seeking endorsement of the 2017 Protocol did not refer to any prior lack of compliance with the 2004 Protocol. Instead, it stated:

Given the length of time since the introduction of PAYG matching the department has revised the 2004 protocol to reflect the changes in names of the various agencies, updated the technological aspects of the process, reflected the current approach to actions the department now takes and tidies the document up more generally. This does not change the data matching process. 80

In May 2017, the 2017 Protocol was approved by the Minister and was published on the DHS website.
5  Key issues associated with the data-matching program under the Scheme

5.1 Destruction of historic PAYG matched data

DHS employee, Ben Lumley, said in evidence that in 2012 DHS changed its view on document retention, and from that point forward did not destroy PAYG matched data it received from the ATO. He referred to an email which explained the reason for this change: 81

As discussed, we reviewed the “Guidelines on Data Matching in Australian Government Administration” as part of the ENHANCED CAPABILITY FOR CENTRELINK TO DETECT AND RESPOND TO EMERGING FRAUD RISKS budget measure announced in the 2010-11 Budget. This measure included an Intelligence Store capability which provided the capability to store much larger volumes of data than previously possible for the purposes of enhanced analytics.

This review determined that data could be retained while there was an intent to use it.

I believe that this measure led to the department changing its view on the destruction of PAYG data, however the Program Protocol was not updated.

Mr Lumley conceded that this meant that DHS had in its possession “gold mines” of data from years prior to the Scheme which were available to be used under the Scheme: 82

MR LUMLEY: Yes, there was - yes, there was, I guess, information that showed the amount of potential cases and over those years, yes. It was used as a source to inform the measures.

COMMISSIONER: But if you had complied with the protocol, you wouldn’t have had them the first place.

MR LUMLEY: Correct.

Mr Lumley was unable to say precisely how much ATO data was warehoused by DHS but did note that when the online part of the measure was to commence “the Department went and re-requested data for those years again from the ATO.” 83 Nonetheless, the warehoused data was available to inform DHS’ plans and to support the proposal for the Scheme, on the basis that there were over a million historical matches, relating to approximately 860,000 recipients. 84

Dr Wurth found that historical data was migrated by DHS. 85 A detailed Requirements Document for the process states: 86

This project aims to migrate the PAYG data holdings, selection business rules and data refinement processing from the Business Integrity Intelligence Store and Compliance Engine into SAP HANA (HANA) and Fraud Management System (FMS). These changes support the Employment Income Matching initiative announced as part of the May 2015 budget measure ‘Strengthening the Integrity of Welfare Payments’ (SIWP).

Dr Wurth also identified the following instruction for all existing PAYG match data to be retained: 87

Migrate existing PAYG match data into HANA for the following financial years: 2009/10, 2010/11, 2011/12, 2012/13, 2013/14. 88

DHS also used historic data (or at least a subset of the original matched data) which, according to the 2004 Protocol, it should have destroyed, to form the basis of its proposal to “clean up” 860,000 discrepancies under the Scheme. 89

...the legacy system was migrated to System Application Products (SAP) Data Services and HANA Stored Procedures were used for data extraction. It became known as the Annual Compliance Extract (ACE) process.

The Commission accepts Dr Wurth’s findings and infers from this evidence that DHS warehoused the PAYG matched data it collected from the ATO to use under the Scheme instead of destroying it.
5.2 DHS failure to comply with the 2004 Protocol

Section 7 of the 2004 Protocol required PAYG matched data collected from the ATO to be destroyed in a timely manner if not used: 91

Data is destroyed in accordance with the Privacy Commissioner’s guidelines on The Use of the Data-matching in Commonwealth Administration. ATO data deemed unsuitable for matching is destroyed within 14 days of receipt from the ATO. ATO data used in the matching run but not matched is destroyed within 90 days; and all remaining ATO data is destroyed within 12 months.

A change in the data storage capacity measures used by DHS from 2012, prior to the commencement of the Scheme, meant that PAYG matched data was no longer destroyed as the 2004 Protocol required.

Services Australia told the Commission that with improved technology options, DHS was able to store greater volumes of data and consider how a greater volume of discrepancies could be addressed. Because DHS had made no decision to take action on the available data matches, and as such, it continued to hold the data pending action. 92

As the Commonwealth conceded, as a matter of best practice, the 2004 Protocol should have been revisited and updated in 2012, to account for the development in storage capability in or around 2012, and at any later points in time where the data match and exchange process were altered. 93

DHS was also not complying with the 2004 Protocol because under the Scheme, it was no longer undertaking manual review of discrepancies resulting from the data-matches. 94

5.3 DHS failure to comply with the 2017 Protocol

The 2017 Protocol amended the document retention clause to read:

All external data received from the ATO that is no longer required is destroyed in line with Guideline 7 of the Information Commissioner’s Guidelines on Data-matching in Australian Government Administration. 95

The Voluntary Data-matching Guidelines do not permit retention and storage of data for undefined periods of time on the basis that no decision has made to take further action. Guideline 7.5 provides that where a match occurs in the data matching cycle, a decision as to further action should be taken within 90 days of the data matching cycle. That makes it clear that an entity cannot, consistently with that Guideline, hold data “awaiting action.” 96

5.4 Mistaken identity matches

The Commission has evidence before it of cases of mistaken identity that occurred during the Scheme, where the system mixed up people with some of the same Personal Identifiable Information. Dr Wurth identified two features of the processes in place under the Scheme which could provide some explanation for an error of that sort.

The first was DHS’s use of “fuzzy” and “tight” matching rules, 98 in addition to recipient CRNs to identify recipients of interest under the Scheme. 99 The introduction of these rules was intended as an “uplift”: the previous process only used CRNs as the method of identification with no checking or confirmation against the matches that had been provided by the ATO beyond the CRN. The fuzzy and tight matching rules were an improvement on the previous system. 100

However, these rules were ineffective in preventing mistaken identity matches. The risk of mistaken identity matches was referred to as the “twins problem”: two people with the same last name and date of birth but different first names would still have passed through the top sets of the “fuzzy” rules with a tight match on surname, a tight match on date of birth and a fuzzy match on first name. As a result the wrong
sibling could have received a debt notice. Because medium confidence codes (explained below) were being passed to DHS, even when the fuzzy and tight matching rules were introduced, the “twins problem” would not have been prevented. 101

The second issue was the ATO’s passing of matches with medium confidence match codes to DHS under the Scheme. 102

Mr Hirschhorn described the levels of confidence which attached to each ratings level under the Scheme: 103

Confidence ratings in identify matching in the provision of income data

10.1 The ATO’s identity matching process for the purposes of income data during the Robodebt Period (referred to in questions 2, 3 and 5 above) generated five confidence levels, namely [ATO.002.075.0038]:

(a) high - Indicates a high quality match with a low chance of mismatch
(b) medium - Indicates a medium quality of match with a moderate chance of mismatch
(c) low - Indicates a low quality of match with a fair chance of mismatch
(d) unresolved - Indicates a non useable match outcome was generated
(e) multimatches - where more than one client registration matches with a single transaction.

(The ATO generated the above confidence levels for all identity matching processes that used the CIDC system).

The evidence before the Commission established that although the system was intended to operate such that only identity matches of a “high” confidence rating were provided to DHS, 104 for a period, some medium confidence matches had been inadvertently provided under the Scheme. 105 Those matches should have been excluded from the data extraction process. It should be noted that this problem pre-dated the Scheme, in that it appeared to have been occurring since at least 2013.

The passing of medium confidence identity match data carried “a moderate chance of mismatch.” 106 That had obvious application in the case of twins, and it appears that the potential for mismatch manifested itself in some examples of persons receiving correspondence in relation to an “Earnings Intervention Review,” in circumstances where it was actually their twin who was the subject of the information upon which the review was commenced. 107

The passing of medium confidence matches continued until the problem was identified in mid-2019, in circumstances where it was realised that the ATO had disclosed two sets of match data, one high confidence and one medium confidence, for a single CRN.

The specific coding of this particular match involved a 100 per cent match on surname and birth date (day, month and year). 108 This meant that in order for a mismatch to occur with respect to this particular match code, the two persons involved had to have the same surname and the same date of birth. At this point, the defect was rectified, and no further medium confidence matches were passed between the agencies. 109
5.5 Lack of governance and controls

Dr Wurth reported that there was a lack of proper governance, controls and risk management measures in place under the Scheme. She found the governance, controls and risk management instruments were inadequate to ensure PAYG program compliance with the Framework Documents: 110

The governance, risk management and controls of the PAYG program’s data matching did not appear to be sufficient to ensure compliance with the Framework Documents. This includes insufficient policies and procedures to protect the integrity of the PAYG program and the customers that were involved. Further, policies that were in place, such as issues resolution, were not effectively implemented by the responsible governing bodies. 111

In addition, Dr Wurth found:

• there were inadequate governance documents to support the processes in place under the Scheme (including the failure to review and update the 2004 Protocol until 2017 and DHS’s failure to consult the ATO on the 2017 Protocol), 112 and

• there were failures in process and problem resolution through the Forums which had been established to identify and resolve problems with the Scheme. 113

The OAIC also reported on shortcomings in this area in its report in 2019:

The two agencies have a number of high-level arrangements in place, including a general head agreement to manage their relationship, as well as a specific data exchange service schedule and a related arrangement to manage the exchange of data between the two agencies, which include references to the data exchanged for the PAYG program. These written agreements are complemented by a governance committee and a data management forum.

However, when asked about any specific arrangements in place to manage the PAYG data matching program, DHS advised that the program operates on an implied level of trust between the two agencies.

During fieldwork, DHS staff advised that in situations where DHS identifies an error in the ATO data, the error is corrected for DHS’s purposes, but is not communicated to the ATO. Data errors are only communicated to the ATO in situations where an individual alerts DHS to a potential error and DHS is unable to resolve it. 114

There was insufficient governance associated with the Scheme. Proper governance, controls and risk measures would have increased the level of scrutiny and oversight of the data-matching component of the Scheme. In circumstances where both DHS and the ATO were dealing with recipients’ personal information, it was important to have an effective level of checks and balances in place to monitor what was occurring. The difficulties with inter-agency collaboration, outlined above, may have been somewhat improved had there been an effective governance framework between the two agencies.

The Commission was advised that since the Scheme, the ATO has introduced an operational risk management framework for data sharing, including a data ethics framework. The Commission has not received that framework into evidence and makes no findings as to its adequacy. However, given that Services Australia and the ATO continue to engage in a data exchange programs (see below), the Commission considers that it is incumbent on Services Australia and the ATO to ensure that that program has in place adequate governance, risk management and controls.

5.6 Possible non-compliances with secrecy law

Section 355-25 of TAA53 provides that it is an offence for an ATO officer to disclose information about a taxpayer’s affairs unless that disclosure is permitted by one or more of the exceptions in Division 355 of TAA53. Consequently, an ATO officer responsible for a disclosure is required to assure themselves that a proposed disclosure is lawful (i.e. supported by an exception in Division 355 of TAA53).
The ATO has argued that its use of the data collected from DHS, the matching and disclosure of matched data back to DHS under the Scheme were all lawful because of the general exception in section 355-65 of TAA53. That section permits disclosure to an Agency Head dealing with matters relating to the social security law “for the purposes of administering...the social security law.” In submissions, the Commonwealth’s approach in relation to this provision was that:

The ATO was not obliged to be certain as to the precise manner in which DHS subsequently used data provided by the ATO and whether all the activities conducted by DHS with the data were compliant with social security law (being legislation which DSS administers, not the ATO).

The Commission has doubts as to the correctness of that proposition. Given the protective object of section 355-25 of TAA53, it seems strongly arguable that an ATO officer could not be lawfully satisfied that the use of the information disclosed to DHS was “for the purposes of administering...the social security law” without being informed by DHS of how the information was to be used. It is open to doubt that the ATO was so informed with respect to the Scheme. Mr Hirschhorn of the ATO told the Commission that:

...the ATO had not taken any specific steps to assure itself that every use of the information was lawful under social security law...

And, as already detailed, the ATO’s attempts to better inform itself about the Scheme were frustrated by a lack of transparency from DHS, and the 2004 Protocol did not, at that time, accurately describe the use by DHS of the information disclosed by ATO.

In these circumstances, the Commission considers that there is a serious question as to whether information was lawfully disclosed by the ATO to DHS for the purpose of data matching under the Scheme.

### 5.7 Possible privacy breaches

The evidence before the Commission also suggests that there may have been breaches of the APPs under the Privacy Act, in relation to disclosures/collections by the ATO and DHS for the purpose of data matching in the Scheme.

APPs 3 and 6 prohibit unlawful collection and disclosure of personal information. In circumstances where the collection and disclosure of that information may not have been authorised by law, the provisions of those APPs require the consent of the person to whom the information relates in order to collect or disclose the information. An agency would need to demonstrate it either had such consent, or that it was unreasonable or impracticable to collect the required information directly from individuals. If, as seems possible, the various disclosures and collections of information between the ATO and DHS contravened TAA53, those APPs may have also been breached.

APP 5 requires reasonable steps to be taken to notify persons of the collection of their personal information. Given that neither the 2004 Protocol, nor the letters that were provided to recipients, accurately described the use of the information disclosed by the ATO to DHS under the Scheme, there appears to be a real question as to whether DHS took reasonable steps to notify recipients of the collection of their personal information from the ATO.

APP 10 requires an agency to take reasonable steps to ensure that the personal information it collects is accurate, up-to-date and complete.

The OAIC investigation into the Scheme considered DHS’s compliance with APP 10. The report noted in particular that:

Before the introduction of the OCI system, only customers with the highest risk rating were selected for compliance action. The OCI/EIC system has expanded the compliance program to include customers with lower risk ratings.
The OAIC found that: 119 DHS’s current practices in relation to the ATO’s personal information raise concerns about the steps DHS is taking to ensure the personal information is accurate and fit for purpose, as well as the processes DHS employs to correct personal information.

The OAIC’s report on DHS’s management of the Scheme identified a “medium risk” that:

- personal information quality issues are not being identified, or if they are, that mechanisms do not exist to ensure personal information quality issues are being addressed in a timely and comprehensive manner. 120

APP 13 requires an agency to take reasonable steps to correct “incorrect” personal information it holds to ensure it is accurate, up to date, complete, relevant and not misleading having regard to the purpose for which it is held. The APP Guidelines state:

The requirement to take reasonable steps applies in two circumstances:

- where an APP entity is satisfied, independently of any request, that personal information it holds is incorrect, or
- where an individual requests an APP entity to correct their personal information. 121

The OAIC’s investigation into DHS’s handling of personal information under the Scheme 122 considered DHS’s compliance with APP 13.

The OAIC identified a possible problem with the fact that DHS held approximately 250,000 duplicate CRNs, increasing the risk (identified as medium risk) that “DHS is conducting compliance activities against customers with duplicate or multiple CRNs, and in doing so, could be using inaccurate, out of date, or incomplete information to determine possible debts.” 123

5.8 The current process for receiving ATO PAYG information

PAYG data matching between the ATO and Services Australia no longer occurs as it did under the Scheme. In July 2019, the STP (Single Touch Payroll) Interim Solution commenced.

The STP process enables the provision of data to the ATO at the point where an employer pays their employee, replacing the annual 124 reporting requirement under the Payment Summary Annual Report system that was in place during the Scheme (and under which the PAYG reporting was received from payers). 125 The STP proposal commenced in 2018 and was implemented in stages. 126

Further information on the STP process can be found in the chapter - Automated Decision Making.
6 Conclusion

The Commission notes the Commonwealth’s submissions accepting the importance of taking steps to ensure that identity matching, data-matching and data exchange processes comply with applicable privacy and secrecy laws.

The Robodebt Scheme manifested many flaws across the period in which it operated, and the examples outlined above demonstrate that the data-matching process was no exception. Some of those problems were confined to processes which were in place at the time of the operation of the Scheme. Some of those processes still operate today. In that context, the Commission makes the following recommendations.

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.
1. Exhibit 3-4958 - CPO.9999.0001.0005 - Henry Belot and Ashlynne McGhee, ‘Centrelink debt recovery- FOI documents show lack of communication between Social Services Minister and key agencies’ (ABC News) (CP013).22 Refer to the chapter - Legal and Historical Context of the Scheme.

2. Refer to the chapter - Legal and Historical Context of the Scheme.


5. Exhibit 4-6719 - RBD.9999.0001.0454, Response to request for information from AIC to Royal Commission - 16 January 2023 [p 16: para 2.65]; “The OAIC found that only DVA continued to conduct statutory data matching activities under the Data-matching Act.”

6. Exhibit 2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [paras 3.3-3.5].


10. Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.7].


13. The Guidelines were revised and reissued in 1995 and 1998 and then were substantively revised and reissued by the OAIC in 2014.


20. Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB.


22. Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 35: section 7].

23. Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 35: section 7].


27. Exhibit 293 - ATO.001.933.6001_R - OAIC Review Response [p 1].

28. Exhibit 4754 - CTH.0009.0001.1995_R - MS17-000504 MSB [p 11: section 7; p 35: section 7].


30. Exhibit 1-0459 - ATO.001.957.4068_R - Data Services Schedule.


32. Exhibit 1-0459 - ATO.001.957.4068_R - Data Services Schedule.

33. The Attorney-General’s Department is undertaking a review of secrecy provisions and is due to report by 30 June - Review of Secrecy Laws, Australian Law Reform Commission Discussion Paper 74 at Attachment A – Terms of Reference.

34. Clause 355-30 in Schedule 1 to the Taxation Administration Act 1953 (TAA53) defines ‘protected information’. See also s 8XA TAA53 (which prohibits unauthorised access to taxation records and s 8WB which prohibits the unauthorised use or disclosure of TFNs).


36. SSA Act pt 5 div 3.

37. Transcript, Jeremy Hirschhorn, 3 November 2022 [p 358: line 12].

38. Transcript, Jeremy Hirschhorn, 3 November 2022 [p 355: line 39-42].

39. Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 1.10].
Privacy Act, s 52. For further information about the role of the Privacy Commissioner see the chapter - Office of the Australian Information Commissioner.

Privacy Act, s 30.

Privacy Act, s 30(3).

Privacy Act, s 13G.

Privacy Act, s 52. For further information about the role of the Privacy Commissioner see the chapter - Office of the Australian Information Commissioner.

Privacy Act, s 30.

Privacy Act, s 30(3).

Privacy Act, s 13G.

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.87].

TAA53 pt 3 div 2 sub-div BA and most relevantly s 8WB(1A). See also Exhibit 1-0228 – ATO.9999.0001.0001_R - Response to NTG-0016 - Statement of Jeremy Hirschhorn, 19 October 2022 and Transcript, Jeremy Hirschhorn, 3 November 2022 [p 355: lines 29-31].

Only specified people, agencies or organisations are authorised to collect a person’s TFN. Services Australia is an authorised TFN recipient.

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.90].

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.86].

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [para 2.85].


Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’, dated 3 March 2023, [section 2.6]. See Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023 [para 1.10 and following].

Exhibit 8468 - ATO.9999.0001.0009_R - 2023 02 14 - NTG-0199; Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023; Exhibit 8434 - CTH.9999.0001.0166_R - 2023 02 14 - NTG-0201 (1); Exhibit 8435 - CTH.9999.0001.0165 - Services Australia - Response to NTG-0201 - Q 1 and 3 - 09.03.2023; Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’ [p 12: para 6.3].

Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’ [p 12-14: para 6.3.2].

Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’ [p 13-14: para 6.3.2.2].

Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’ [p 15-17: para 6.3.3].

Exhibit 7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’ [para 6.3.4].

Exhibit 4-7075 - RBD.9999.0001.0451 - Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’, dated 3 March 2023 [para 6.3.4].


Exhibit 2-2398 - MBR.9999.0001.0001_R - MKB Witness Statement Final [para 3.7]; Exhibit 1-0272 - ATO.001.572.3540_R - Email from Michael Brown (ATO) to George Holton (ATO) and Greg Williams (ATO) re OCI debrief.

Exhibit 2-2438 - ATO.001.636.4245_R - FW- Things DHS.

Exhibit 1-0272 - ATO.001.572.3540_R - Email from Michael Brown (ATO) to George Holton (ATO) and Greg Williams (ATO) re OCI debrief.

Exhibit 2-2432 - ATO.001.573.0148_R - FW- Media Article This Morning.

Exhibit 2-2433 - ATO.001.644.3070_R - FW- Copy of documents as discussed during PHU on 21 June 2017.
Data matching and exchanges

Exhibit 8469 - ATO.9999.0001.0008_R - NTG-0199 - issued to the Proper Officer of the ATO - signed witness statement of M Hay dated 17 February 2023 [para 4.1-4.3]; Transcript Michael Kerr-Brown, 9 March 2023 [p 4863: line 3-5].

Exhibit 228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 – Statement of Jeremy Hirschhorn [p 4: para 10.5].

Exhibit 4-5547 - CTH.3000.0009.5841_R - RE- For clearance please - LEXID 9721 - Privacy incident - Further information required.

Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [para 10.8].

Exhibit 8469 - ATO.9999.0001.0001_R - NTG-0016 - Statement of Jeremy Hirschhorn, [para 10.8].


Exhibit 4-7075 – RBD.9999.0001.0451 – Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’, dated 3 March 2023, section, figure 1, [section 8.3.2].

Exhibit 4-7075 – RBD.9999.0001.0451 – Deloitte Final Report ‘The use of data and automation in the Robodebt scheme’, dated 3 March 2023, section, figure 1, [section 8.3.2].

OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019) [paras 3.16 to 3.18].

witness statement of M Hay dated 17 February 2023 [paras 3.7-3.10].


OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019) [para 3.15].

OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019) [para 3.22].

OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019) [para 3.26].


OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019).

OAIC Report ‘Handling of personal information: Department of Human Services PAYG data matching program’ (30 September 2019).

Sometimes biannual: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [p 3: para 2.3].

The PSAR system continues for payments that are outside the scope of STP: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn, [p 2:para 2.2(a)].

Transcript, Jeremy Hirschhorn, 3 November 2022 [p 353: lines 38-47; p 354: lines 1-4].
1 Introduction

In the past, staff manually checked recipient records against data provided by other government agencies such as the Australian Taxation Office. Discrepancies were then followed up with recipients via letter and phone, taking considerable time to identify anomalies.

The new online compliance system automates part of this process, and encourages people to take part in correcting their records. – Hon Alan Tudge MP, Minister for Human Services

Within six months of the Robodebt scheme (the Scheme) being launched, it was being heralded as a technological triumph. The Hon Alan Tudge MP, Minister for Human Services, issued a media release on 23 November 2016 titled New technology helps raise $4.5 million in welfare debts a day. The release praised a “new online system” that “is now initiating 20,000 compliance interventions a week – a jump from 20,000 a year... this is a great example of the Government using technology to strengthen our compliance activities with faster and more effective review systems.”

The Strengthening the Integrity of Welfare Payments Budget measure, from which the Scheme was created, was originally designed to create savings of $1.7 billion over its first five years of operation. It did the opposite, costing the government almost half a billion dollars and causing distress to hundreds of thousands of income support recipients.

Over the life of the Scheme, different activities were automated.

The Commission engaged Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte), to provide expert analysis on the technical structure of the Scheme. Dr Wurth based her findings on documents provided by the Commonwealth at the request of the Commission.

Dr Wurth’s process maps were provided to the Commonwealth for comment, and updated where appropriate. Accordingly, they represent the best achievable understanding of how the Scheme operated on a technical level. The Commission acknowledges that the process maps and report are based on the technical documentation the Commission received in response to a number of specific requests made to the Commonwealth. There may be inaccuracies in the process maps and report leading to the possibility of inaccurate conclusions. If so, they are likely to be the product of DHS’s haphazard and inconsistent documentation of its processes.

Dr Wurth told the Commission that automation has the potential to increase productivity, efficiency, accuracy, and the cost-effectiveness of service delivery. A trustworthy automated system is a system containing automation that is ethical, lawful and technically robust, coupled with good governance and risk management. To achieve trustworthiness, the system must be designed with human agency at its centre.


2 Automation under the Scheme

The terms “automated decision making” (or “automation”) and “artificial intelligence” (AI) are often used interchangeably, and certainly have been in commentary about the Scheme, though they are distinct concepts.

AI describes systems that are self learning and have a level of autonomy. Data61 was engaged by DHS, at the request of Mr Tudge in or around January 2017 to “undertake an assessment of the data-matching functionality [in the Scheme] to determine if further refinements can be made.” An Executive Minute to Minister Tudge dated 23 March 2017 noted that Data61 recommended the introduction of a “complex machine learning methodology” which would “take some months to build” and that “there are some risks that such a methodology may not be possible given the data quality.” This type of AI was not, in the event, developed for or used in the Scheme.

While the Scheme did not use AI, it did use automation. It involved a system of business rules with no ability to move outside of specific and defined action on the basis of the data received. It was extremely rigid; once the rules had been coded and set in place, the system itself would stay in place until the rules were changed by way of human intervention.

Dr Wurth produced process maps and a report to the Commission, which were based on the following stages comprising the end-to-end Scheme:

![Figure 1. PAYG program stages](image)

The first three of these stages are discussed in the Data-matching and Exchanges chapter.

Regarding automation, Dr Wurth was asked to identify the steps in the Scheme which were automated.

Dr Wurth’s report found that automation was present in the Income data verification and debt notification stage of the Scheme (see figure later in this chapter). In this stage, once the income support recipient had either verified their income, or failed to respond so that averaged data was used, a calculation was automatically made of any debt and the recipient was notified. It was at this point that the recipient’s interaction with DHS was automated in the Scheme.

Any amendments made in the Online Compliance Intervention (OCI) phase are considered to have carried through for the Employment Income Confirmation (EIC) and Check and Update Past Income (CUPI) phases, except where noted otherwise.

The Income data verification and debt notification stage during the OCI phase consisted of the following key stages:

**Initiation**

Recipient records which were identified with an income discrepancy through Income data matching were created as a case for compliance intervention.

The case was assessed against criteria to determine a recipient’s eligibility for an offer of staff assisted intervention.

**Notification**

An intervention activity was created in Centrelink’s Online Services for the income support recipient.
Recipients that met the threshold for assistance were sent a notice which offered assistance and a phone number to call. If they did not call within 21 days, they were moved onto the “standard pathway.”

Recipients on the standard pathway – that is, not qualifying for assistance – were sent a notice advising them that they needed to log on to Centrelink Online Services within 21 days to provide evidence of income to resolve the income discrepancy.

**Response pathways**

Recipients on the standard pathway either:

- accessed Centrelink Online Services within 21 days and:
  - updated their employment data, or
  - did not update their employment data (and were then treated as if they accepted the PAYG information provided by Centrelink regarding their employment); or
  - indicated that they did not work for the matched employer, in which case the matter was referred to a staff member to further investigate the mismatch or anomaly.
- did not access the Centrelink Online Services within 21 days.

**Risk assessment**

If the recipient updated their employment data in Centrelink’s Online Services, the system applied risk rules to validate the updated data (further explanation of risk rules is provided under Updating recipient records at below). This produced one of two outcomes:

- the recipient’s update of employment data passed the risk rules, and the recipient record was updated with the new data, or
- the recipient’s update of employment data did not pass the risk rules, and a request was made for additional supporting documents.

Further supporting documents could be requested at this stage by DHS, and the case could be referred to a compliance officer for manual assessment.

**Finalisation**

The recipient pathways converged to an automated entitlement and debt calculation process (except for those who received a manual assessment).

The automated entitlement calculation was based on the most up-to-date data DHS had available as a result of the previous steps (that is, the information the recipient had entered, or the PAYG data).

Based on the automated entitlement calculation, debt was automatically calculated and raised (this could include a no debt result).

A 10 per cent penalty was automatically applied for those customers who did not make contact or who indicated that there were no personal factors that affected their ability to correctly declare their income.

A debt notice was automatically generated and issued to the recipient.
The following figure represents the steps that were automated under the Scheme.22

Figure 7: PAYG program steps that were automated under the Scheme

2.1 Changes during the Scheme

Deloitte produced process maps for each of the pre-Robodebt,23 PAYG Manual,24 OCI,25 and EIC and CUPI26 programs under the Income data verification and debt notification stage of the Scheme. The pilot program (April – June 2015) was not included in Deloitte’s review.

The process maps include notations that indicate where the Scheme changed between each of these programs.

Notification of a compliance intervention

Prior to the Scheme

Before the Scheme,27 when a discrepancy between the income reported to DHS and the ATO data arose, prior to commencing a review, a compliance officer would check a recipient’s record to determine if the discrepancy could be explained.28 For example, a recipient might have declared their employer as Big W where the PAYG data matched from the ATO listed their employer as Woolworths, so a discrepancy was raised; but this discrepancy could be rectified by a compliance officer who was aware that the entity name for Big W is Woolworths, and that it was one and the same employer.29

If the discrepancy could be explained, the compliance officer would manually update the information.

If the discrepancy was not easily explicable, the compliance officer would attempt to contact the recipient and request that they explain the discrepancy.

If the recipient did not respond, the compliance officer would contact the recipient’s listed employer/s to request information, including pay slips:30 “we had normally looked to try and get the information from employers, and [the Scheme] had removed that layer at all where that was our first process prior.”31

The compliance officer would manually update the recipient’s record with new information if provided.
PAYG Manual

In the PAYG Manual phase of the Scheme, all recipients, including some vulnerable recipients, automatically received a letter when a discrepancy was identified, requesting that they contact DHS. In this phase, the initial intervention by the compliance officer was removed — that is, the assessment of the debt to see if it could be explained — but the compliance officer still contacted the recipient and, if necessary, the recipient’s employer, to request further information.

OCI phase

From the OCI phase of the Scheme, and on, there was no intervention by a compliance officer prior to the discrepancy being raised with the recipient: “there was no investigation role.”

In the OCI phase of the Scheme, the automatic issuing of letters when a discrepancy arose continued, but some recipients with vulnerabilities were identified for a “staff assisted process,” which meant that they received an initial letter with a telephone number to call and request assistance (see ‘The concept of vulnerability’ chapter). That assistance involved a compliance officer assisting the recipient to use the online portal, or using the portal on the recipient’s behalf to make updates.

EIC and CUPI phases

In the EIC phase of the Scheme, the initiation letters were updated to advise recipients that there was a possibility of a debt and that they could request an extension of time to respond, and included the phone number for a helpline. All online letters were sent through Centrelink Online Services. The standard response time became 28 days, up from 21 days.

There was no further change under the CUPI phase of the Scheme.

Updating recipient records

Prior to the Scheme and the PAYG Manual phase

Before the Scheme and during the PAYG Manual phase, a compliance officer manually assessed any new information provided by the recipient, and could request clarification or more information from the recipient.

OCI phase

Automated validation risk rules were applied to any new information provided by the recipient. There was no intervention by a compliance officer.

An automated assessment will be made based on the match data and/or the customer input including any documentary evidence. The system will auto assess the match data, the projected outcome as well as any updates from the customer. Validation rules will determine if any changes made by the customer to the data is within acceptable tolerances ...This proposal implements a self-assessment model for compliance interventions. Customers will be able to self-assess many aspects of their entitlement online and only when this has occurred have to go through the more intensive intervention where the risk level indicates the need.

An example of where a risk was identified was where the recipient’s changes to their income information resulted in its not being within one per cent of the ATO total provided. Where they did not make any updates to the income details recorded, and indicated that they were correct, a risk was identified. Where a risk was triggered, the recipient was notified, and advised how to complete the intervention, including whether they would need evidence such as bank account details.
It is worth noting that despite the ‘Online Compliance Intervention: Detailed Requirements Document’ specifying that the notification must include “what information the customer may need to assist in [sic] them to completing [sic] the intervention e.g. bank account details,” the Commission heard that at the start of the OCI program, recipients could not use bank statements as evidence.48

**EIC phase**

There were no changes under the EIC phase.

**CUPI phase**

Enhancements were made to the validation risk rules.49 This included an increase to 5 per cent of the allowable variance between the recipient’s total income as indicated by them and the data from the ATO,50 up from a 1 per cent allowable variance.51

**Calculation and notification of a debt**

**Prior to the Scheme and the PAYG Manual phase**

A compliance officer manually calculated debt. Averaged data was used only where “every possible means of obtaining the actual income information has been attempted”: where this was the case, “it is possible to use any evidence you have to raise a debt including an annual figure.”52 In the PAYG Manual phase, averaging could be used where there was no contact from the recipient,53 or where the recipient consented to the use of averaging.54

The application of a 10 per cent penalty was at the discretion of the compliance officer.

**OCI phase**

During the Scheme, debt was automatically calculated via the online system and recipients were automatically issued a debt notification.55

In the OCI period, a 10 per cent penalty was automatically applied for those recipients who did not make contact or who indicated that there were no personal factors that affected their ability to correctly declare their income.56

The Commonwealth Ombudsman, in his 2017 investigation into Centrelink’s automated debt raising and recovery system, highlighted that in the Administrative Review Council’s (ARC’s) report *Automated Assistance in Administrative Decision Making*, “a key question in the design of automated decision-making systems in administrative law is whether the system is designed ‘so that the decision-maker is not fettered in the exercise of any discretion or judgement they may have’.” The Ombudsman’s observation was that a recipient may have indicated that there were no personal factors that affected their ability to correctly declare their income, and so the penalty was automatically applied “in situations where a human decision maker, able to review the person’s Centrelink record, ask relevant questions and consider all the relevant circumstances of the case, may have decided the penalty fee should not apply, or the discretion not to apply the fee should be exercised.”58

The Ombudsman made no further comment on the ramifications of the automatic imposition of the 10 per cent penalty.

**EIC phase**

The automatic application of averaged ATO data to finalise reviews, where the due date for response by the recipient had passed, was removed:59 where the recipient failed to contact in response to the notification of a compliance intervention, the compliance officer was to make two “genuine” attempts
to contact the recipient on all available numbers for five consecutive days. If the contact was successful, the compliance officer would undertake the intervention with the recipient over the telephone. If the contact was unsuccessful, the compliance officer would finalise the review using the averaged ATO income information.60

The Commission was told that by the end of 2017, virtually all social security recipients who received a notification completed the review process manually.

It’s not until CUPI comes along the year after that we start to see an uptick in people completing online… EIC hadn’t been built with an ability to put [recipients] back [on]line…every time someone had an issue, we essentially stopped the online process and essentially forced them to ring us instead…we had to do more coding, more changes, to be able to allow people to go back online.61

Also in the EIC phase, an update was made to allow specific intervention by a compliance officer if a recipient was ‘vulnerable’ (due to their personal circumstances, they are especially susceptible to disadvantage) and was:

• unable to contact their employer to obtain payslips;
• unable to go online or contact their bank to obtain bank statements; and
• not agreeable to the averaging of the ATO data.

If the recipient met all three of these criteria, the compliance officer could contact the employer and request employment income details on the recipient’s behalf. This intervention was only permitted in “extenuating circumstances.”62 It is unclear, in this circumstance, how it was determined whether a recipient was “vulnerable.” The concept of vulnerability chapter speaks further on vulnerability.

The automated debt calculation step was updated to apply a 10 per cent penalty only where the recipient had received the initial letter but failed to make contact regarding their debt.63

**CUPI phase**

There were no changes under the CUPI phase.

### 2.2 The effects of automation

Colleen Taylor, a former employee of DHS, who worked for a period in the Online Compliance team, told the Commission that the first three cases she reviewed when she was employed by that team involved an inadvertent duplication of employer details, so that the same income was counted twice. Ms Taylor said that when her team raised the fact that the debts were incorrect, they were told that their job was to just check that the way the system calculated the debt was correct, not whether the existence of the debt was correct.64

There was no meaningful human intervention in the calculation and notification of debts under the OCI phase of the Scheme. This meant that debts being raised on incorrect data – or incorrectly applied data – were issued with no review.

Evidence before the Commission shows the degree to which income support recipients found themselves bewildered by, and unable to navigate, DHS processes relating to debt raising.65 At times it was impenetrable. One of the lead applicants in the Federal Court class action *Prygodicz v Commonwealth of Australia (No 2)*,66 Felicity Button, told the Commission that,

I knew that there was a possibility that I had a debt. So I never wanted to dispute the fact that it existed. I did want to kind of - I wanted them to answer how they came to that amount. Because the original amount was $11,000. And when I asked - when I called up to, one, set up a payment plan and, two, ask for a review... the person on the other end just basically told me it is what it is. And when I asked how did they come to that, they said, “We averaged out - we looked at your income.” And I’m like, “Okay,” ... but when I asked for a review, they came back with a figure that was then higher than the initial one. And I asked why that was the case, and they didn’t give me an answer to
that either. They just said that they recalculated it. And at no point in that process did I feel like I had the right to fight them about that because they were the professionals, and I was the civilian who has incurred a debt. So - yes, I - I basically - I knew that there was a debt. I don’t know how it got calculated. I don’t know how they came up with whatever figures they did. However, it was recalculated three times to three different figures. And I just wanted to cooperate as much as I could to repay it.67
3 AI and automation frameworks

In Australia, the principles governing automated systems are the Australian AI Ethics principles. These were published in 2019 and, on a macro level, dictate the ways in which AI systems (encompassing automation) should operate to meet ethical standards.68

**Australian AI Ethics Principles**

**Human, societal and environmental wellbeing:** AI systems should benefit individuals, society and the environment.

**Human-centred values:** AI systems should respect human rights, diversity, and the autonomy of individuals.

**Fairness:** AI systems should be inclusive and accessible, and should not involve or result in unfair discrimination against individuals, communities or groups.

**Privacy protection and security:** AI systems should respect and uphold privacy rights and data protection, and ensure the security of data.

**Reliability and safety:** AI systems should reliably operate in accordance with their intended purpose.

**Transparency and explainability:** There should be transparency and responsible disclosure so people can understand when they are being significantly impacted by AI, and can find out when an AI system is engaging with them.

**Contestability:** When an AI system significantly impacts a person, community, group or environment, there should be a timely process to allow people to challenge the use or outcomes of the AI system.

**Accountability:** People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.

These principles are part of Australia’s Artificial Intelligence Ethics Framework, which was adopted in 2019: making Australia one of the first countries to endorse such principles.69

The Commonwealth Ombudsman published the Automated Decision-making Better Practice Guide (the Guide) in 2007,70 which was later updated in 2019 and again in 2020, and which built on the 2004 report from the ARC Automated Assistance in Administrative Decision-making,71 the insights in which “remain fresh because they are grounded on a clear conception of good government.”72

The five values identified by the ARC that should be observed in the design and operation of administrative decision-making processes — lawfulness; fairness; rationality; openness or transparency; and efficiency73
were in turn informed by “concepts of administrative justice which include the ‘four basic requirements for just decision making in a society governed by the rule of law’ identified by French J (as he then was) in 2001: lawfulness, fairness, rationality and intelligibility.”

The Scheme fell short of Principles 7 and 10 outlined in the ARC report:

Principle 7 is that the construction of an expert system must comply with the administrative law standards if decisions made in accordance with the rule base are to be lawful, while decisions made by or with the assistance of expert systems must comply with administrative law standards in order to be legally valid.

Principle 10 is that expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.

The ARC Report defined “expert systems” as follows:

computing systems that, when provided with basic information and a general set of rules for reasoning and drawing conclusions, can mimic the thought processes of a human expert...expert systems are distinct from decision-support systems, which provide information to enable a human to make a decision without actually indicating what the outcome should be...Rule-based systems are the main type of legal expert system that use constructed knowledge. They involve the modelling of rules accompanied by an ‘engine’ that automates the process of investigating those rules by interacting with users to establish client details.

On this definition, the system underpinning the Scheme was an expert system.

The Guide is the most current set of principles on best practice in automated decision making.

It provides that administrative law, privacy requirements and human rights obligations should be integrated into the design of an automated system through appropriate planning and assessment.

In May 2019, the Australian Government became an adherent to the Organisation for Economic Co-Operation and Development Principles on Artificial Intelligence (the OECD AI principles). The current Australian industry standard defines automated decision making as an application of AI; consequently, in an Australian context, the OECD AI principles should be applied to systems using automation and automated decision making.

Those principles posit that AI systems (and, per the Australian definition, systems using automated decision making) should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and include appropriate safeguards; for example, enabling human intervention where necessary. Transparency and responsible disclosure should be features of AI systems; people should be informed when they are the subject of automated decision making and told how they can challenge its outcomes. AI and automated decision-making systems should function in a robust, secure and safe way, with potential risks continually assessed and managed. The principles call for accountability for organisations and individuals developing, deploying or operating AI systems for their proper functioning.

The Guide highlights the OECD AI principles as the “guiding principles for automated systems.” It concludes that automation of any part of a process is not suitable where it would:

- Contravene administrative law requirements of legality, fairness, rationality and transparency.
- Contravene privacy, data security or other legal requirements (including human rights obligations).
- Compromise accuracy in decision making.
- Significantly undermine public confidence in government administration.

The Commonwealth Ombudsman, in his 2017 Investigation Report into Centrelink’s automated debt raising and recovery system, highlighted the principles from the ARC’s 2004 Report *Automated...
Assistance in Administrative Decision-Making: “good public administration requires that administrative decision making is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency.”  

He found that, in the context of the Scheme, “risks could have been mitigated through better planning and risk management arrangements at the outset” and that “DHS did not clearly communicate aspects of the system to its recipients and staff which led to confusion and misunderstanding.”

The landscape of regulation and principles which inform current thinking on AI and automation provides the basis upon which future reform should be contemplated.
4 Where to now?

The digital welfare state is either already a reality or emerging in many countries across the globe. In these states, systems of social protection and assistance are increasingly driven by digital data and technologies that are used to automate, predict, identify, surveil, detect, target and punish. There are irresistible attractions for Governments to move in this direction, which must be balanced against the grave risk of stumbling, zombie-like, into a digital welfare dystopia.87

4.1 Questions of legality

Single touch payroll and the advice from the Australian Government Solicitor

The use of emerging technologies is rarely unproblematic. The utilisation of automated decision-making raises a range of rule of law issues, in particular regarding procedural fairness, the transparency of decision-making, the protection of personal privacy, and the right to equality.88 – Yee-Fui Ng

On 19 July 2019 Services Australia, DSS and the ATO received draft advice from AGS concerning the use of Single Touch Payroll (STP) data.89 A final advice was provided on 24 October 2019.90

The STP process enables the provision of data to the ATO at the point where an employer pays their employee, replacing the annual91 reporting requirement under the Payment Summary Annual Report system that was in place during the Scheme (and under which the PAYG reporting was received from payers).92 The STP proposal commenced in 2018 and was implemented in stages.93

AGS considered whether legislative authority would be needed to facilitate a “near real-time, automated transactional process that automatically applies STP data to a customer record”:

There is at least an argument that s 6A [of the Social Security (Administration) Act 1999] (SSA Act) is capable of underpinning the automation of actions taken by Services Australia for the Data Exchange Process. The word ‘decision’ in s 6A includes doing or refusing to do any act or thing...On its terms, this definition would seem capable of encompassing actions involved in assessing and disclosing information under s 202 of the SS (Admin) Act, where taken by the Secretary.95

The advice defined the Data Exchange Process as involving five steps:96

1. Step 1 – ATO to collect STP data
2. Step 2 – Services Australia to disclose customer data to the ATO
3. Step 3 – ATO to match STP data and customer data
4. Step 4 – ATO to disclose matched STP data to Services Australia
5. Step 5 – Services Australia to apply matched STP data against a customer record for customer verification.

The Commission has not undertaken a comparative analysis of the STP process as compared to the process that existed under the Scheme, and accordingly draws no conclusions as to the extent of the applicability of the findings in the AGS STP advice to that process. However, there are similarities in the data exchange process under the Scheme, and the data exchange process as defined above, that raise the possibility that the issues identified in the AGS STP advice may have been present prior to the introduction of the STP. The Commission makes no findings on this point.
Section 6A of the SSA Act, pre-2020, provided that:

1. The Secretary may arrange for the use, under the Secretary’s control, of computer programs for any purposes for which the Secretary or any other officer may make decisions under the social security law.

2. A decision made by the operation of a computer program under an arrangement made under subsection (1) is taken to be a decision made by the Secretary.

The AGS advice acknowledged that there were “several deficiencies” with the view that s 6A was capable of underpinning the automation of actions taken by Services Australia for the Data Exchange Process. These concerns centred around potential issues with the legislation as drafted at the time as authority for an automated ‘decision’ being made by a computer program.97

These deficiencies indicate that s 6A of the SS (Admin) Act may not be well adapted to an automated, near real-time Data Exchange Process. It seems to us that in the absence of alternative legislative underpinning, this could lead to uncertainty about how other provisions of the social security law (eg, confidentiality provisions) apply in the context of automation.98

AGS recommended that consideration be given to expressly legislating Service Australia’s use of computer programs to automate a process such as the Data Exchange Process.99

The draft STP advice highlighted uncertainty about whether the confidentiality provisions in Division 355 of Schedule 1 to the Taxation (Administration) Act 1953 would apply in relation to an automated Data Exchange Process.100 The instructions for the 2019 final STP advice only request advice regarding Service Australia’s involvement: reference to the confidentiality provisions in the Taxation (Administration) Act 1953 no longer appears.101

In 2020, s 6A of the SSA Act was amended102 to include the following:

Note: The definition of decision in the 1991 Act [the Social Security Act 1991] applies for the purposes of this section: see subsection 3(2) of this Act. That definition covers the doing of any act or thing. This means, for example, that the doing of things under subsection 202(1) or (2) of this Act are decisions for the purposes of this section.

Section 202A of the SSA Act was introduced at the same time through the same Bill. It provides for the obtaining of, making a record of, disclosure of or use of protected information relating to taxation information. The section specifically addresses collection of protected information from the ATO, but it is not retrospective; it did not apply to the disclosures and collections of this information under the Scheme.

The Explanatory Memorandum to the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 provides that:

The Australian Government will use taxation information (primarily Single Touch Payroll data) to administer the social security law, including for the purpose of assessing employment income when it is paid, rather than when it is earned...To engage in these information exchanges, Services Australia will obtain, make a record of, disclose and use protected information, as that term is defined in subsection 23(1) of the Social Security Act (referred to in this Explanatory Memorandum as ‘protected social security information’). These information exchanges may be automated using computer programs. The amendments to the Social Security Administration Act in this Part remove any doubt that these things can be done.103

Notably, the Explanatory Memorandum also provides that “the amendments made by these items also do not provide for the automation of debt recovery under the social security law.”104

However, uncertainty may still exist as to whether a fully automated decision under the SSA Act would be a “decision” for the purposes of the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) or even s 75(v) of the Constitution105 on the basis of the majority decision in Pintarich v Deputy Commissioner of Taxation (Pintarich).106
Pintarich v Deputy Commissioner of Taxation

In the Pintarich case\textsuperscript{107} a majority of the Full Court of the Federal Court held that an automatically generated letter sent out by the ATO, which purported to accept that the amount of a tax debt to be repaid to the ATO was inclusive of a general interest charge, was not a “decision” for the purposes of the ADJR Act, because the letter did not demonstrate that a mental process of deliberation had occurred.\textsuperscript{108}

The majority framed their judgment as narrowly addressing what constitutes a decision under section 8AAG of the \textit{Taxation Administration Act 1953}.\textsuperscript{109} The court applied the test in \textit{Semunigus v Minister for Immigration and Multicultural Affairs}\textsuperscript{110} where it was held that a valid decision requires two elements to be satisfied: (1) a mental process of reaching a conclusion; and (2) an objective manifestation of that conclusion.\textsuperscript{111} In applying that test to a situation involving an automated system, the majority set a precedent with possible implications beyond the circumstances in Pintarich.\textsuperscript{112}

In dissent, Kerr J argued that the legal conception of what constitutes a decision should not remain static:\textsuperscript{113}

\begin{quote}
the hitherto expectation that a ‘decision’ will usually involve human mental processes of reaching a conclusion prior to an outcome being expressed by an overt act is being challenged by automated ‘intelligent’ decision-making systems that rely on algorithms to process applications and make decisions.\textsuperscript{114}
\end{quote}

Commentators have made the point that Pintarich is premised on an expectation of human input into decision making, which disregards the reality of automated decision making;\textsuperscript{115} and that it also makes uncertain whether government determinations made using automated decision making are decisions for the purposes of the ADJR Act; if not, they could not be challenged by application for judicial review under that Act.\textsuperscript{116}

Conclusions

The Australian legislature has introduced deeming provisions into a number of statutes to enable automated decision making, such as the amendment to s 6A of the SSA Act. However, the piecemeal nature of the approach has produced a legislative framework which lacks cohesion: “Ad hoc judicial consideration of individual cases is arguably unsuited to addressing systemic issues, underlining the need for regulatory reform.”\textsuperscript{117}

Justice Perry of the Federal Court of Australia, in extrajudicial writing, pointed out that deeming provisions [such as that in s 6A of the \textit{Social Security (Administration) Act 1999}] require acceptance of highly artificial constructs of decision-making processes. More sophisticated approaches may need to be developed as these issues come to be litigated in the courts and these provisions fall to be construed and applied.\textsuperscript{118}

4.2 The need for oversight

The complexity and incohesiveness of the legislative landscape in respect of automated decision making indicates that oversight is warranted, and the Robodebt experience demonstrates the need beyond argument. This was a massive systemic failure, on which the availability of individual recourse to review could make no impression.

One possibility to fill the void is the re-activation of the ARC. Professor Terry Carney has written that “the most effective initial extra-legal measure [to ensure accountability in automated decision making] may well be to revive the operation of the Administrative Review Council.”\textsuperscript{119}

The ARC’s reinstatement is recommended in the Administrative Appeals Tribunal chapter] because of the ARC’s statutory capacity to inquire into departmental administrative decision-making procedures and the administrative law system more generally: which could have played an important role in exposing the deficiencies of the Scheme. The ARC could also have a significant role in monitoring automated decision making. It has experience in the field; as outlined above, its report, \textit{Automated Assistance in...}
Administrative Decision Making, contained best practice principles for the development and operation of expert computer systems used to make or assist in the making of administrative decisions. It reminded government agencies and system designers of the need to be mindful of administrative law values and to ensure that the process by which a system is constructed, and its continuing operation, reflect those values. The ARC’s functions under section 51 of the Administrative Appeals Tribunal Act 1975 would appear sufficiently broad to encompass the continuing oversight of automated decision making from a justice and equity perspective.

It is unlikely that the ARC would wish or be equipped to have any role in auditing the technical aspects of automated decision making. A different body, more generally focused on automation, and possibly AI, outside of an administrative law lens, could complement the work of the ARC. One possibility is an expansion of the assessment and investigative role of the Office of the Australian Information Commissioner (OAIC), with a corresponding increase in resources.

Another, suggested by the Australian Human Rights Commission, is the creation of an AI Safety Commissioner; a recommendation which was echoed in submissions to the Commission. It was suggested that this role would involve improving “the use of automation and information technology (including artificial intelligence) in public administration.” The evidence before the Commission about the development and implementation of Robodebt, it was submitted, indicates the need for an office with broad remit to improve the use of automation and AI in public administration.

The Commission considers that there should be an independent oversight entity capable of reviewing both the technical aspects and human impacts of government automated decision making. That might involve expansion of the role of the OAIC; it might entail the creation of a new role, because of the broader need for oversight of AI processes generally, commentary on which is beyond the remit of the Commission.

4.3 Legislative reform

It is possible for an automated system to make decisions by using pre-programmed decision-making criteria without the use of human judgment at the point of decision. The authority for making such decisions will only be beyond doubt if specifically enabled by legislation. – Commonwealth Ombudsman, 2020

Many of the submissions received by the Commission on the topic of automation urged legislative reform. To date, there has been inconsistency in the legal status of automated decision making in Australian government agencies. Numerous Commonwealth laws have been amended to establish a basis for automated decision making, but these amendments have been piecemeal, across a wide body of legislation, and without the necessary further amendments establishing standards for which decisions should be automated and which should not; and appropriately designed systems for transparency, review and appeal.

A cohesive and accessible legislative legal framework, aimed at ensuring that algorithms and automated critical decision systems are fit for purpose, lawful, fair, and do not adversely affect human and legal rights, is particularly important where the interests of vulnerable people are concerned. Such legislative reform would involve amendment to existing legislation, and could involve the introduction of new legislation. For example, government could look to amending the Freedom of Information Act 1982 and the Privacy Act 1988 to enhance the ability of the OAIC to provide transparency in relation to automated decision making; and to provide specific protections in light of automated decision making.

Aspects of the Australian AI Ethics principles could be included in legislative reform by way of a requirement that where automated decision making is used by a government agency, this is documented in a publicly-accessible format (for example, on the agency’s website).

In the United Kingdom, the Data Protection Act 2018 provides that where a controller makes a significant decision (that is, a decision that produces legal effects upon a person) based solely on automated processing, they must as soon as reasonably practicable notify that person of this fact. The affected person may request the controller to reconsider the decision or make a new decision not based
solely on automated processing. The proposal considered by the Commission is less onerous than the requirements under the UK legislation.

The Commission does consider that the availability of review pathways should be communicated to the person affected by the decision. The Commission considers that transparency regarding the use of automation in decision making, and the ability of affected persons to review such decisions, are vital safeguards in the use of automated decision making.

As discussed above, the availability of review based on the majority verdict in Pintarich may be uncertain. Government must consider Pintarich when considering legislative reform concerning automated decision making. The Monash University Faculty of Law submission pointed to the need for amendment to major pieces of legislation giving access to review processes, which amendment should confirm that a decision is made where a statutory power is exercised or purportedly exercised by way of a wholly or partly automated process.

Section 23 of New Zealand’s Official Information Act 1982 provides a person with a right of access to reasons for a decision made by a public service agency or Minister, including a written statement of the findings on material issues of fact; a reference to the information on which the findings were based; and the reasons for the decision or recommendation. The introduction of a legal “right to an explanation” in Australian law, in similar terms to s 23 of the Official Information Act 1982 (NZ), could facilitate the creation of a legislative requirement to design explainable systems. Consideration of such legislation should be in concert with consideration of possible amendments to the Freedom of Information Act 1982 and the Privacy Act 1988, discussed above.

The Commission notes that the government is currently seeking comment on governance and regulatory review in relation to AI and, as an incident of that, automated decision making. Uniform regulation would certainly be desirable in the interests of consistency in the design and implementation of systems using AI and automation.

Regulation and supervision of automated decision making and algorithm use would not necessarily have prevented or curtailed the Scheme, which involved numerous systemic and process failures. However, administrative law reform and implementation of a regulatory framework would provide a level of protection against a similar disaster.

4.4 System design

It is outside the purview of this Commission to propose a set of “rules” to be followed when designing systems using automation and AI, and there are various bodies and decision-makers better placed to make such proposals. The Commonwealth Ombudsman has identified a number of considerations which should be applied when undertaking the design of an automated system. The Commission does propose, however, to make some comments regarding the design of such systems, and general recommendations regarding system design that incorporate best practice principles discussed in this chapter.

The software used in any such system must not only ensure accuracy, but also ensure that persons subject to decisions made by an automated process can know or understand the reasons behind those decisions. A clear path for review of decisions is important in designing a system which adheres to the OECD AI principles: “a person affected by a decision should understand why the decision was made, and there should be pathways for review of these decisions that are accessible to them.” This goes hand in hand with aspects of possible legislative reform discussed above.

Consultation with a variety of stakeholders – including relevant advocacy organisations, administrative law experts, social security lawyers, human rights experts and academics – where programs involving decision making are being considered for automation should be standard and provided for in business documents of the relevant government entities.
In the social security context, human oversight of the system is needed to mitigate the risk of error: “in some cases partial automation with the final decision made by a human arbiter is the ideal outcome.”

It is a context in which human discretion and judgment is a vital component. As systems containing automation, and artificial intelligence, become more common, it is still the case that human intervention appears to be one of the most effective safeguards against the system failing. “Human decision-makers, for all their faults, can reason from a rule to deal with new, unusual or nuanced circumstances.” And one way to preserve accountability is to ensure a human is responsible for independently justifying the decision produced by an automated system. As discussed above, the legal status of automated decisions made without human input may be unclear.

In the design of an automated system, regard should be had to the most current version of best practice principles regarding automation in government decision making. By adhering to these principles, an agency will ensure that decisions made using automation – and indeed, the design of the systems enabling such automation – are defensible, and that the systems being deployed to ease the burden on government through automation are not in turn creating further barriers for marginalised people to access help.

Government should act with transparency in automating systems which have the ability to affect people’s rights.

People should know how decisions are made, periodic independent audits should supplement the accountability of decision making, and safeguards ought be entrenched in the architecture of decision making. The use of algorithms needs to be consistent with these principles and the rule of law.

Information should be readily available on departmental websites to advise that automated decision making is used and also to explain in plain language how the process works. In the absence of compelling reasons against, business rules and algorithms should also be made available, to enable independent expert scrutiny.
5 Conclusions

‘Good government’ is not an empty slogan. The reality and perception of good government is a key to civic order and prosperity. Automated decision-making processes have a role to play in enhancing good government, but they need to be watched carefully to ensure they are wrought for the public good. The stakes are high: every serious misadventure in the implementation of automated decision-making processes will diminish the credit society extends to government.146 – Bernard McCabe

The automation used in the Scheme at its outset, removing the human element, was a key factor in the harm it did. The Scheme serves as an example of what can go wrong when adequate care and skill are not employed in the design of a project; where frameworks for design are missing or not followed; where concerns are suppressed;147 and where the ramifications of the use of the technology are ignored.

The current practice of amending individual pieces of legislation when needs arise – when a new program is implemented, for example148 – is an exercise in patching over problems rather than addressing the fundamental need for a consistent approach. Government is currently considering questions of regulation and governance to mitigate potential risks from AI and automated decision-making149 and enable trust in AI and automation;150 which is in turn “needed for our economy and society to reap the full benefits of these productivity-enhancing technologies.”151

A strong theme in submissions received by the Commission – more explicitly put by some submitters, and implicit in the submission of others – is that the rule of law must not be derogated from in the pursuit of efficacy through automation.152 In designing and operating systems using automation, government must conform with the legal framework in place at the time. The not very startling proposition is that government programs must be lawful and lawfully administered.

While the fallout from the Robodebt scheme was described as a “massive failure of public administration,”153 the prospect of future programs, using increasingly complex and more sophisticated AI and automation, having even more disastrous effects will be magnified by the “speed and scale at which AI can be deployed”154 and the increased difficulty of understanding where and how the failures have arisen.155 It is not all doom and gloom: when done well, AI and automation can enable government to provide services in a way that is “faster, cheaper, quicker and more accessible.”156 Automated systems can provide improved consistency, accuracy and transparency of administrative decision-making.157 The concept of “when done well” is what government must grapple with as increasingly powerful technology becomes more ubiquitous.

**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.
ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2023 [p 18]; see also Exhibit 1-1288 - EJA.9999.0001.0002_R - Statement of Genevieve Bolton (Economic Justice Australia) [p 19: para 54]; Exhibit 2-2841 - ACS.9999.0001.0308_R - Witness statement of Dr Cassandra Goldie (signed 14 December 2022).PDF [p 6, para 29(e)]; Transcript, Genevieve Bolton, 11 November 2022 [p 1011: lines 41-47].

[2021] FCA 634.

Transcript, Felicity Button, 20 February 2023 [p 3294: lines 20-37].


Australian Government Department of Industry, Science and Resources, Safe and Responsible AI in Australia (Discussion paper, June 2023) p 5, 6.


Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink’s automated debt raising and recovery system containing letters [p 39: para 2.10].

Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink’s automated debt raising and recovery system containing letters [p 26: para 4.1].

Exhibit 3-4744 - CTH.3044.0003.7539 - Ombudsman Report – Centrelink’s automated debt raising and recovery system containing letters [p 26: para 4.2].


Exhibit 4-6211 - DSS.5102.0001.0857_R - ADVC 19004087 STP and income reporting.DOCX.

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf.

Sometimes biannual: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn [p 3: para 2.3].

The PSAR system continues for payments that are outside the scope of STP: Exhibit 1-0228 - ATO.9999.0001.0001_R - Response to Notice NTG-0016 - Statement of Jeremy Hirschhorn [p 2: para 2.2(a)].

Transcript, Jeremy Hirschhorn, 3 November 2022 [p353: lines 38-47; p354: lines 1-4].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 18].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 19: para 79].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 10: para 38].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 19: para 80-81 – p 20: para 82].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 20: para 83].

Exhibit 4-6212 - DSS.5102.0001.4168_R - ADVC 19004087 STP and income reporting.pdf [p 20: para 83].
By way of the Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth).

Explanatory Memorandum, Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth) p 32-33.

Explanatory Memorandum, Social Services and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Bill 2020 (Cth) p 33.


ANON-24KG-9S2N-4 and ANO.9999.0001.0089, Submission by Dr Mark Brogan and Mark Arratoon, published 1 March 2023 [p 22].


Professor Penny Crofts and Dr Honni van Rijswijk, Technology: New trajectories in Law (Taylor & Francis Group, 2021) p 62; see also ANON-24KG-9BTN-N, Submission by Economic Justice Australia, published 1 March 2023 [p 36-37].


153 Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634 [5].


155 See further discussion in ANON-24KG-9SRU-B, Submission by Dr David Lloyd Brown, published 1 March 2023 [p 8].


Section 5: Debts
Chapter 18: Debt recovery and debt collectors
1 Introduction

[T]he first time people knew that there was any problem was when they had a debt collector pursuing them - Dr Cassandra Goldie AO

Without telling me Centrelink sent my debt to debt collectors where I was intimidated into making a payment plan. I was worried about this impacting my credit score, and the debt collectors said they could not send the debt back to Centrelink, so I agreed to a payment plan. I continued to pay in total approximately $1000 to these debt collectors. - Anonymous submission

The Commission’s terms of reference require it to inquire into the use of third party debt collectors under the Robodebt scheme (the Scheme). DHS routinely engaged the services of the external debt collectors to recover debts raised under the Scheme.

The Australian Government recently announcement that it would cease using external debt collectors following lessons learned from the Scheme. This is a welcome announcement. For any person, contact from a debt collector can be stressful. When DHS engaged external debt collectors under the Online Compliance Intervention (OCI) phase of the Scheme, debts were referred to debt collectors without DHS having first confirmed that they had received prior notice of the debt. The result of this was that many people found out about their debt for the first time from a debt collector without first having the opportunity to engage with DHS and to seek a review of their debt.

The Commission acknowledges that where a debt has been properly raised against an individual, outsourcing its recovery to a debt collection agency may sometimes be necessary and appropriate. Indeed, DHS has used debt collection agencies to manage recovery of social security debts since 1996. External debt collectors are required to operate lawfully, and perform in accordance with their contractual obligations to the creditors. The Commission does not suggest they did otherwise. However, DHS was closely involved with the external debt collectors that it engaged, and some of the practices that it encouraged were insensitive and ill considered (for example, mandating that recipients be warned of the severe measures that could be taken against them if they failed to pay), particularly for the cohort of people that it affected.
2 Referrals to debt collectors

Over the course of the Scheme, DHS engaged the services of the following debt collectors under deeds of agreement:6

- Illion Australia Pty Ltd trading as Milton Graham, formerly trading as Dun and Bradstreet (Milton Graham)7
- Probe Operations, formerly trading as Probe Group (Probe),8 and
- Australian Receivables Limited (ARL).9

Under the Scheme, referred debts were not “sold” to the debt collectors.10 Debts would be assessed by a rules engine within the Debt Management and Information System for referral to a debt collection agency 42 days after an account payable notice was sent.11

The debt collectors were contracted under the deeds to manage the debt on behalf of DHS by providing the following services:12

- recovery of outstanding debts with a value of $20.00 or more
- provision of a service management operation
- business management reporting
- quarterly performance management review meetings
- money management of recovered debts in accordance with all applicable legislation, guidelines and regulations
- meeting of security and privacy requirements.

Only debts owed by former recipients were referred to debt collectors. Current recipients might instead have the amount owing withheld from their social security payment.13

Prior to February 2017, debts raised under the Scheme could be referred to a debt collection agency even where a person was seeking review or challenging their debt.14 This meant that debts moved quickly into the debt recovery phase.

Once a debt was referred, the collection agencies were given six months to recover it.15 If the debt were not repaid within six months and the collection agency was not granted an extension, the debt would be returned to DHS where recovery action would continue.16 Where a debt collector managed to secure a partial repayment of the debt, it would be allowed additional time to attempt further recovery.17

The debt collectors’ recovery actions were taken on behalf of DHS and the deeds stated the expectation that the debt collectors would “have the same values in providing exceptional service customers.”18 The deeds specifically required the collection agencies to comply with:19

- their obligations to operate in accordance with the Competition and Consumer Act 2010 (which include those mandating that service suppliers must not engage in misleading or deceptive conduct, unconscionable conduct or engage in undue harassment or coercion)20
- the Guideline for Collectors and Creditors’ issued by the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) (which gives practical advice debt collectors on what creditors and collectors should and should not do to minimise their risk of breaching the Commonwealth consumer protection laws).21

Under the deeds, debt collectors were required to engage with people sensitively and have regard to their individual circumstances, specifically noting:
The Department’s customers come from a diverse range of backgrounds. The customers' employment situation, age, cultural and education backgrounds are treated with respect and sensitivity when they are contacted. The Department expects all its customers will be treated in this way.\textsuperscript{22}

The deeds provided that the debt collectors may be required to use different techniques to respectfully and sensitively manage and deal with a diverse range of people and their needs.\textsuperscript{23} The debt collection agencies were required to develop training packages approved by DHS.\textsuperscript{24}
3 Human Services involvement

DHS were closely involved in the debt collectors’ practices.25 For example:

- DHS approved the training packages for call operators,26 the debt collectors’ internal workflows, the letters sent to alleged debtors,27 and the call scripts call operators used when they telephoned people.28 This material addressed the need to establish the circumstances of an individual and whether any financial or other hardship indicators existed by asking basic expense questions, and actively listening for trigger words which might indicate vulnerability.29

- The debt collectors and DHS had quarterly performance management review meetings,30 as well as quarterly operational meetings.31

- The debt collectors were required to provide regular reports on a range of topics to DHS, including:32
  - a monthly report about complaints
  - a quarterly report about complaints and escalations
  - a quarterly report about staff training and confidentiality agreement compliance.

- Some debt collectors’ calls were also reviewed by DHS for quality assurance.33

Debt collectors operated under a number of internal procedures which were approved and managed by DHS. Probe’s debt collection practices were guided by standard operating procedures containing conversation task cards concerning the approach to people in discussing a debt, and scripting prompts to explain dispute and review rights, including allowing for hardship and vulnerability factors.34 ARL and Milton Graham were guided by a number of internal workbooks, training guides and policy documents.35

In 2018, DHS started to measure the performance of each collection agency against a “balanced scorecard.”36 Despite these controls, DHS said it could only identify one instance where a contractual penalty was applied to a collection agency and that was for not meeting its collection performance targets for two consecutive quarters.37 This is despite DHS acknowledging that it had identified other non-compliance issues during the Scheme’s operation.38

Debt collectors could contact people in writing, by phone or by electronic communication (e.g. SMS).39 Mr Kagan (Probe) told the Commission they were generally permitted up to two contacts or attempted contacts with a debtor each week.40 This meant that a person could potentially receive up to 48 contacts or attempted contacts from a debt collector over a six-month period.

3.1 Consequences for non-payment

One of the ways debt collectors attempted to convince people to pay their debts was by telling them of the consequences that might arise if they did not pay. These included that DHS could issue a departure prohibition order (DPO), take legal action, charge interest on their debt or have the ATO garnish their tax return. The effects of departure prohibition orders and garnishees orders are discussed further in chapter Effects of Robodebt on individuals.

These potential “consequences” were relayed to recipients by the debt collectors on instruction from DHS. The call scripts, which DHS approved,41 directed the debt collectors to walk the person through the consequences of non-payment. For example, ARL listed the following as possible consequences for non-payment:42

- Collections activity such as continued phone calls or letters
- DHS may undertake further recovery actions such as garnishee action where money can be withheld from wages, or other assets and income
- DHS may refer your case for possible legal action for the recovery of the debt
• DHS may issue a Departure Prohibition Order, which will prevent customers from travelling overseas — *only use in the case when triggers have been identified the customer intends to travel overseas*

• DHS may also apply an interest charge if you do not repay the amount in full or make an acceptable payment arrangement. [emphasis in original]

They were also listed in written correspondence. Ricky Aik received a letter from ARL in respect of a debt (which was later wiped) that stated:

> We have been appointed to assist with the recovery of your outstanding debt of $5254.53 owed to the Australian Government arising from Centrelink payments. We would like to work with you to resolve this matter.

> **Fail to Act**

> You should be aware that the Department of Human Services may *garnishee* your wages, tax refund or other assets and income (including bank account) or refer this matter to their solicitors for **Legal Action**. They may also issue a **Departure Prohibition Order**, which will prevent you from travelling overseas. An interest charge may also be applied to your debt if you do not repay the amount in full or make an acceptable payment arrangement. [emphasis in original]

Mr Aik told the Commission that this letter upset him and that he was worried about having his wages or tax refund garnisheed because he relied on that money to survive in between seasons of work.44
4 Effects on recipients

4.1 Learning about the debt for the first time

The Commission heard evidence about people who had debts raised against them under the OCI phase of the Scheme and learned about their alleged debt for the first time from a debt collector. Dr Cassandra Goldie AO and Melanie Crowe from the Australian Council for Social Service (ACOSS) told the Commission about these sorts of incidents:

MS BERRY: So you - did you have reports of people who hadn’t even received their initial letters or debt letters?

DR GOLDIE: Yes, we did. It was – the first time people knew that there was any problem was when they had a debt collector pursuing them. I mean, of course, because this Scheme was going back so far, you could really safely assume that many people would not - would have moved, would have changed address. And so the need to make personal contact was even more important. And, of course, if a debt collector can locate you, then surely the Department could have instead.

MS CROWE: It was absurd that Centrelink was using the last-known address of people no longer in the income support system as the sole means of sending them a letter. And obviously a lot of people would have moved address in that time. And so that’s why many people first found out about the Robodebt was via a debt collector.

Ms Prygodicz recalls a debt collector telling her in this initial call that it was very serious, that she had “been a bit naughty” that she hadn’t reported her information correctly.

Many people targeted during the Scheme, and all those referred to collection agencies, were no longer in receipt of social security benefits. It was reasonable that they would not regularly access their myGov accounts to read correspondence from DHS and many people had since changed address and so did not receive correspondence through the post.

By early 2017, complaints from ACOSS, the Community and Public Sector Union (CPSU), community groups and the media focussed attention on a range of problems associated with the Scheme, including people’s experiences with debt collection agencies. Changes to the Scheme in February 2017 provided for initial letters to be sent by registered mail, and DHS started to use third party sources (for example, an electoral roll) to find a recipient’s current address. DHS told the Ombudsman that “it will now not refer OCI debts to a debt collector where the person has not responded until it is satisfied the person has received the notice but is ignoring it.”

4.2 Continuing recovery while review under way

Prior to February 2017, debt collectors would continue to contact recipients whose debts had been referred to them, and attempt to recover the debts or enter in a repayment plan, while DHS was in the process of investigating the accuracy of those debts. Recipients who wished to question or challenge their debt were required to engage with both DHS and the debt collector at the same time about the same debt. As Victoria Legal Aid submitted:

While [debt collection agencies] had been used previously by Centrelink, the pressure and intimidating contact from these private debt collectors for unexplained debts, including during periods when people were seeking review, was a clear systemic flaw in the Robodebt scheme that contributed to the distress experienced by individuals with robodebts.

In February 2017 changes were brought in for debt recovery action to be paused while a debt was under review. In circumstances where the debt was already referred, the collection agency was to cease or pause collection activities if the person advised them that the debt was being reassessed or reviewed by...
DHS. A new dispute resolution process was also introduced, where debt collectors would put a recipient wishing to dispute a debt in contact with the DHS Support team, or, if the recipient did not want to contact DHS, the debt collector would communicate the dispute to DHS through an online register.\textsuperscript{56}

### 4.3 Unauthorised debit of a recipient’s account

Felicity Button, who was one of the lead applicants in the Federal Court class action, gave evidence about how the entirety of her alleged debt ($11,571.16) was debited from her bank account in a single transaction by a debt collection agency, in circumstances where she had already entered into a repayment plan with that same collection agency.\textsuperscript{57} This was done without warning and without her authority, leaving her account overdrawn.\textsuperscript{58} She had given verbal agreement to a direct debit arrangement for an amount of $20 per fortnight, but the full amount of the debt was mistakenly entered when the debt collector gave the instruction to the bank. When Ms Button contacted the debt collection agency, ARL admitted it had made a manual error, apologised to Ms Button and recredited her account with the full amount of the funds that had been mistakenly withdrawn.\textsuperscript{59}

What is particularly concerning about this incident is not only the proportions of the error but the fact that that amount could be taken without Ms Button’s written authority.\textsuperscript{50} DHS was informed of this incident in 2019,\textsuperscript{61} and on the evidence received, DHS never penalised ARL or issued an apology or other correspondence to Ms Button.
5 Fees and value of debts

5.1 Fees earned by debt collectors

DHS engaged each debt collector on a commission basis under the deeds. This meant that they earned more money the more debt they recovered. DHS also afforded the collection agencies additional time to try to recover the balance of a referred debt in circumstances where they managed to secure partial recovery. Mr Kagan gave evidence to the Commission on the remuneration of the Probe Group for debt collection services by DHS.

The collection agencies’ recruitment and remuneration processes for their own staff were not prescribed by the deeds. Milton Graham and Probe told the Commission their operators were remunerated based on a mix of base salary and incentive which was based on meeting performance indicators, one of which, not surprisingly, was a target amount for collections. A call operator’s eligibility for additional remuneration was dependent on their compliance with the internal procedures applicable to DHS debt collection. For example, Milton Graham’s call operators would be ineligible for a commission if they committed a breach, such as one identified by a complaint or by a quality assurance review undertaken internally by Milton Graham team leaders or by DHS.

The Commission is satisfied that DHS engaged collection agencies on a commission fee basis with the intention of giving them a strong financial incentive to recover as much of each referred debt as possible. This incentive conflicted with the obligation under the deeds to “have the same values in providing exceptional service to customers, which achieve positive outcomes,” given the potential revenue to be earned on a commissioned basis.

THE COMMISSIONER: ‘So the financial imperative, presumably, is to recover as much as possible as fast as possible?’.

MR ROSS (Milton Graham) ‘Yes, but doing so in a compliant manner.’

In submissions, Probe took issue with the proposition that there was a conflict, pointing out that the arrangements between DHS and debt collectors contained requirements to meet non-financial metrics, ensuring a balance between those considerations and incentives to earn commissions. This submission, however, does not deal with whether there was a conflict. On the contrary, it points to a conflict between incentives to earn commissions and other “non-financial metrics” such as customer service requirements.

5.2 Value of debts referred to collection agencies

In a response to a notice to the Commission, Services Australia said it “...is unable to distinguish between amounts paid to External Debt Collectors for the purpose of Debt Collection related to social welfare debts and amounts paid to External Debt Collectors for the purpose related to Robodebt Debts.” However, the Commonwealth estimated that debt collection agencies were paid approximately $11,609,795 between 2015 and 2021 for the recovery of debts raised under the Scheme.
DHS supplied data about the social security debts referred to collection agencies, which is reproduced in the tables below.

**Table 1**

The total number of Robodebts referred to collection agencies by DHS, amounts recovered by collection agencies, and amounts paid by DHS to collection agencies for collections related to the Scheme.

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Total number of Robodebts referred to External Debt Collectors</th>
<th>Total amount of Robodebts referred to External Debt Collectors</th>
<th>Total amount of Robodebts recovered by External Debt Collectors</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014 - 2015</td>
<td>4</td>
<td>$11,099.76</td>
<td>$0</td>
</tr>
<tr>
<td>2015 - 2016</td>
<td>38,105</td>
<td>$156,343,252.49</td>
<td>$114,872,284.86</td>
</tr>
<tr>
<td>2016 - 2017</td>
<td>79,839</td>
<td>$208,756,089.28</td>
<td>$16,280,595.39</td>
</tr>
<tr>
<td>2017 - 2018</td>
<td>47,750</td>
<td>$140,282,953.82</td>
<td>$15,973,698.12</td>
</tr>
<tr>
<td>2018 - 2019</td>
<td>105,186</td>
<td>$330,562,965.04</td>
<td>$36,485,066.06</td>
</tr>
<tr>
<td>2019 - 2020</td>
<td>35,000</td>
<td>$119,563,151.83</td>
<td>$25,414,543.01</td>
</tr>
<tr>
<td>2020 - 2021</td>
<td>93</td>
<td>$228,495.18</td>
<td>$1,582,025.89</td>
</tr>
</tbody>
</table>

**Table 2**

The total number of debts referred to collection agencies by DHS, amounts recovered by collection agencies and amounts paid by DHS to collection agencies for related debt collection for the financial years covering the Scheme’s operation, including the years before and after.

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Total number of social security debts referred to External Debt Collectors</th>
<th>Total number of social security debts referred to External Debt Collectors</th>
<th>Total number of social security debts recovered by External Debt Collectors</th>
<th>Total amount paid by Agency to the External Debt Collector (GST Inc)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012 - 2013</td>
<td>145,038</td>
<td>$192,671,909.24</td>
<td>$38,478,059.32</td>
<td>$13,867,510</td>
</tr>
<tr>
<td>2013 - 2014</td>
<td>177,332</td>
<td>$230,355,331.71</td>
<td>$48,332,005.43</td>
<td>$14,996,959</td>
</tr>
<tr>
<td>2014 - 2015</td>
<td>172,041</td>
<td>$257,874,863.80</td>
<td>$53,960,358.93</td>
<td>$15,706,363</td>
</tr>
<tr>
<td>2015 - 2016</td>
<td>210,235</td>
<td>$451,127,692.19</td>
<td>$63,013,788.64</td>
<td>$17,199,488</td>
</tr>
<tr>
<td>2017 - 2018</td>
<td>223,816</td>
<td>$444,228,502.42</td>
<td>$54,419,928.90</td>
<td>$14,803,896</td>
</tr>
<tr>
<td>2018 - 2019</td>
<td>227,119</td>
<td>$534,325,146.11</td>
<td>$66,204,801.78</td>
<td>$14,920,142</td>
</tr>
<tr>
<td>2019 - 2020</td>
<td>101,750</td>
<td>$231,299,755.47</td>
<td>$47,111,719.74</td>
<td>$12,281,415</td>
</tr>
<tr>
<td>2020 - 2021</td>
<td>55,795</td>
<td>$48,924,397.35</td>
<td>$9,875,046.88</td>
<td>$3,954,408</td>
</tr>
</tbody>
</table>

DHS data shows that a large volume of debts was referred to the collection agencies in the years spanning 2015–2016 and 2017–2018 (Table 2). These periods partially overlap the initial OCI phase of the Scheme. The collection agencies were not informed which of the referred debts were raised under the Scheme and they had no way of distinguishing them from other debts.70
Private collection agencies are primarily motivated by the desire to maximise their revenue. The attributes of social security recipients and the circumstances in which their debts arise are not the same as those of commercial debtors. It is appropriate that debt recovery of social security payments be handled by properly trained government officers.

On 13 April 2023, the government announced that from 1 July 2023, all debt recovery work will be managed in house at Services Australia, and that engagement with external debt collection services will cease. The Commission welcomes this announcement, with reservations.

The Commission has found that it was DHS which designed and managed the Scheme’s debt recovery process and it was DHS which closely managed every aspect of the collection agencies’ engagement with people under the Scheme.

It is now proposed that the same agency conduct that process in house. It would be understandable, given what transpired under the Scheme, if people found it difficult to trust that Services Australia will sensitively and lawfully manage its debt recovery processes.

The Commission expects that Services Australia will deliver training to its debt recovery staff which is appropriately adapted to the circumstances and vulnerabilities of the population it serves, and which will not use training material and call scripts that place too much emphasis on the consequences for non-compliance.

**Recommendation 18.1: Comprehensive debt recovery policy for Services Australia**

Services Australia 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.

**6.1 Removal of 6-year limit on debt recovery**

From 1 January 2017, legislative amendments to the *Social Security Act 1991* (Cth) (Social Security Act) commenced. These amendments permitted interest charges to be applied to social security debts, allowed departure prohibition orders (DPO) to be issued, and removed the limitation period for debt recovery of social security debts. On 2 March 2016, the Hon Christian Porter (then Minister for Social Services), and the Hon Alan Tudge (then Minister for Human Services) issued a joint media release signalling the government’s intention to remove the previous limitation on the recovery of debt where recovery action had not been undertaken.
in the preceding six years. Their media release identified no pressing need for the change. It seemed to stem from the Government’s broader approach to social security recipients:

One percent of Australia’s population has received money they are not entitled to and owe a debt to the other 99% of Australians, a debt that in too many instances they are making no effort to pay back.

The new provision, which commenced on 1 January 2017, removed the previous six-year time limit for the recovery of a debt or overpayment. Debt recovery was subsequently able to commence at any time.

There is no obvious reason that social security recipients with debts to the Commonwealth should be on any different footing from other debtors. To the contrary, as a cohort more likely to be in financial difficulty, there is every reason not to pursue ancient debts against them.

**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.
Transcript, Cassandra Goldie and Charmaine Crowe, 16 December 2022 [p 2033: line 16-17].


DHS also engaged the services of Recoveries Corporation Pty Ltd from 1 February 2015 to 1 July 2016 prior to the roll out of OCI - Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005, 7 November 2022 [p 18: para 14.1].


Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016;
Exhibit 1-0799 - CTH.3721.0001.0853_R - 23. RC16 - Deed of Novation signed.

Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016.


Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p:4: para 2.13].


Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13: cl 3.1].

Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 4: para 2.13].

Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink’s automated debt raising and recovery system - April 2017 copy [p 38]; Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 6: para 2.24].

Transcript Jarrod Kagan, 16 December 2022 [p 2065: lines 6-8]; Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 5: cl 2.14(d)]

Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p2: para 2.18].


Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 15: cl 7.2(a),(b)]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 16: cl 7.2(a),(b)]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 15: cl 7.2(a) and (b)].

Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 13: cl 1.5]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) – signed, 5 February 2016 [p 14: cl 1.5]; Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 13: cl 1.5].


Exhibit 1-0525 - MGR.0001.0001.0052_R - Signed Contract 2016, 9 February 2016 [p 8: cl 11.4]; Exhibit 1-0801 - CTH.3721.0001.0860_R - 23. RC16 - Probe Deed (D261017618) - signed 5 February 2016 [p 18: para 11.4];
Debt recovery and debt collectors

Exhibit 1-0797 - CTH.3721.0001.0753_R - 23. RC16 - Australian Receivables Ltd Deed of Agreement – signed, 8 February 2016 [p 17: cl 11.4].


Exhibit 1-0514 - ARL.9999.0001.0009_R - Services Australia - Royal Commission Robodebt - Appendix 1 & 2; Exhibit 1-0513 - ARL.9999.0001.0008_R - Services Australia - Royal Commission Robodebt - Appendix 3; Exhibit 1-0508 - ARL.9999.0001.001_R - Services Australia - Royal Commission Robodebt - Appendix 4 & 5; Exhibit 1-0553 - MGR.0003.0001.2959 - Centrelink Training Guide January 2017 V1; Exhibit 1-0551 - MGR.0003.0001.2947_R - Scripts – Centrelink V2 March 2017; Exhibit 1-0573 - MGR.0003.0001.3539_R - Scripts – Centrelink V1 June 2018.


Exhibit 1-0712; Exhibit 1-0845 - CTH.9999.0001.0004 - [FINAL] RRC - Services Australia - Response to NTG-0005 [p 21: para 17.9].
Section 6: Checks & balances
1 Introduction

Upholding the principles and values of a government lawyer in a time of crisis requires courage and conviction – The Hon Justice Stephen Gageler

Often the advice of the government lawyer defines the law as understood by the government and, in many instances will determine the rights of citizens dealing with the government. – The Hon Justice Bradley Selway QC

...there’s a tension in the in-house legal space of an independent legal adviser but also an advocate once a position has been accepted. – Annette Musolino, former DHS chief counsel

It is trite but true to say that the government should, in all its legal endeavours, be seen to uphold the law.

One of the fundamental ethical duties owed by a lawyer is the avoidance of any compromise to their integrity and professional independence. A lawyer must not act as the mere mouthpiece of their client. The actions of government lawyers take on extra significance because the government is a client which has powers and obligations that far exceed those of the normal citizen.

In-house legal areas should have structures and systems in place to support the professional independence of in-house lawyers. This is also important for the maintenance of legal professional privilege. A lawyer will lack the necessary independence to claim privilege if it is found that their personal loyalties, duties and interests have influenced the professional legal advice given to their clients.

Both the Department of Human Services (DHS) and the Department of Social Services (DSS) had large in-house legal teams throughout the duration of the Robodebt scheme (the Scheme), led by a general counsel or chief counsel. The Commission heard evidence about structure and culture of those legal teams. It is apparent that the professional independence of both agencies in-house lawyers was compromised in relation to the Scheme.

The Report of the Review of Commonwealth Legal Services Procurement 2009 (the Blunn Kreiger Report) commented that:

The lack of a clear role and purpose for in-house lawyers in some agencies has hampered the development of a professional ethos. By professional ethos we mean a recognition on the part of in-house lawyers that, in addition to being employees of an agency and owing the agency loyalty, they are also professionals. Professionalism brings with it obligations to be objective and independent, and to recognise obligations to uphold the rule of law and the interests of the Commonwealth as a whole.

In 2017, in a review of Commonwealth legal services, secretary of the Attorney-General’s Department (AGD), Chris Moraitis PSM, observed that despite the recommendations of the Blunn Krieger Report:

... little progress has been made to develop a single unifying professional ethos and this has undermined the efforts that in-house legal areas have taken to support their lawyers.

The Commission agrees with that assessment in relation to DHS and DSS. The in-house lawyers involved in the provision of advice in relation to the Scheme did not uniformly display a professional ethos.

This chapter also considers the many failures of DSS and DHS to disclose significant legal advices to each other and to report the question of the legality of some averaging in the Scheme as a “significant issue” to the Office of Legal Services Coordination (OLSC) in 2017.
These are requirements set out in the *Legal Services Directions 2017* (Cth) (the Directions) - a set of binding rules issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903* (Cth) providing obligations that non-corporate Commonwealth entities (departments and agencies) must comply with in the performance of legal work.\textsuperscript{11}

The OLSC plays an important role in administering the Directions. It engaged with DHS about reporting the legality issue arising from the Scheme as a significant issue in January 2017. That engagement did not result in the Scheme issue being reported which meant that the OLSC, and, in consequence, the Attorney-General, had no oversight of the legal aspects of the Scheme and the controversies associated with it for much of its duration.
2 The culture at Human Services

DHS lawyers gave evidence of their perception that, even where they sought to act independently, they were constrained by the culture of the department which discouraged this behaviour.

Anna Fredericks (former lawyer, DHS) gave evidence that she felt there was an imperative to stick to the DHS talking points, which was prohibitive of lawyers forming any independent views about the accuracy of the talking points as a matter of law or fact, and that it could be difficult for lawyers to gain access to the leadership team at DHS. Ms Fredericks did not feel there was an open-door policy. This fostered a “culture that was more devolved” in terms of giving advice contrary to a program area’s objectives.

Tim Ffrench (former acting chief counsel, DHS) said that in 2017 the culture and leadership at DHS:

... were not conducive to a proper examination of issues relating to this particular program ... many people were determined to achieve a particular outcome for government, once they had reached that state of mind, I think that the inquiry – the honest inquiry into issues like the ones you are raising was not something that ... was fostered by that culture.

The position that income averaging was a long-standing lawful practice was so entrenched within DHS that lawyers at all levels were unable to question it in accordance with their professional obligations. This is evidenced by the following examples:

Failure to advise of the weak legal position in January 2017

Annette Musolino, in her role as chief counsel, DHS, failed to advise DHS executives of the weakness of the DHS position on averaging and the extent of the legal risk that it faced. The evidence to support that finding is detailed in chapter 2017, part A: A crescendo of criticism.

Australian Institute of Administrative Law conference

A number of DHS lawyers were at the presentation of Peter Hanks KC at the AIAL conference on 20 July 2017, at which Mr Hanks clearly identified an issue of consequence as to whether or not it was lawful to raise debts using income averaging on the basis that doing so was not consistent with the social security law. The failure of the chief counsel of DHS to genuinely assess the merits of Mr Hanks’ arguments and to recommend that independent legal advice be obtained is detailed in chapter 2017, part B: Inquiries and Investigations. The Commission’s view is that this was because the chief counsel knew that the secretary of DHS did not want such advice.

Carney article

On 18 May 2018, Maris Stipnieks (general counsel, Program Advice and Privacy, DHS) forwarded a document to Ms Musolino providing a summary of an article by Professor Terry Carney called The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority. That summary document expressed disagreement with Professor Carney’s view that income averaging provided insufficient evidence of income to raise a debt but made no attempt at analysis of his argument. Instead it recited the standard (and specious) DHS view that it was entitled to make a decision based on the best evidence available to it. Mr Stipnieks did not form his own view as to the correctness of what was said in the document, which expressed a level of confidence in the lawfulness of the use of income averaging which he did not himself hold. See chapter 2018: The Scheme rolls on.

Advice to the secretary in 2018

On 6 March 2018, the DHS chief counsel provided advice to the secretary, Renée Leon, about whether DHS had made an error in relation to a matter that the Administrative Appeals Tribunal (AAT) decided on
7 September 2017 and whether the decision to raise a debt on the basis of averaging was defensible and reasonable. That advice is best characterised as advocacy for DHS’s position rather than objective advice as to whether the its position had a proper foundation in law. (See chapter 2018: The Scheme rolls on).

The Commission agrees with Andrew Podger AO that the strict hierarchical control in DHS seems to have presented serious obstacles to the provision of independent legal advice.

### 2.2 The role of chief counsel

As the chief counsel of DHS, Ms Musolino, who was involved in each of the examples above, demonstrated a tendency to accommodate DHS’s policy position in the face of conflicting advice and to advocate for the department’s position rather than independently considering it.

In describing her role as chief counsel, Ms Musolino said:

> ... I would describe my role more as a manager of the legal team, managing the resources and the training and the systems and the processes, rather than the day-to-day supervision. So it would have been about having systems in place to make sure that they were conducted ethically and appropriately - systems and training and escalation where required.

Ms Musolino described her role as chief counsel as:

> ...actually very, very broad. So there were some areas that I had more experience in than others.

> But the role of chief counsel was not to be the... eminent silk in the room; it was actually to rely on the services provided by very, very experienced lawyers across the practice areas.

Ms Musolino’s own description of her role downplays her professional obligation to be independent and the need to independently form her own view about matters where she was providing advice.

In a submission, Ms Musolino referred to the role of the chief counsel as entailing acting on instructions, which she offered as a reason for her not giving DHS senior executives advice as to the weakness of DHS’s legal position. She pointed out that Mr Ffrench had also referred in his evidence to the need for instructions (although, in fact, he was speaking of needing instructions in order to obtain external legal advice).

Any attempt to limit or downplay the role of chief counsel is, in the Commission’s view, problematic. It is the Commission’s view – which Mr Ffrench who subsequently held the position also agreed – that the role of chief counsel includes the capacity to recommend the department obtain legal advice, particularly if a significant legal issue has been identified. There is no need for instruction to make that recommendation. This is consistent with Ms Leon’s evidence that the chief counsel’s role included advising her about legal risk or emerging legal issues that were of sufficient significance that the secretary should be aware of them.
The culture at Social Services

There was some evidence about the culture of DSS.

Anna Fredericks (former principal legal officer, DSS) said the DSS legal team was:

...a very siloed .... type of culture. You were responsible for what you were responsible for and stayed within those bounds. There was a strong view that...our role as legal, as a service provider to the Department was to provide advice on specific statutory interpretation, not to comment on - or not to necessarily explicitly not comment on, but perhaps not - it wasn’t our role to turn our mind to broader risks than what was being explicitly asked.

Melanie Metz (former principal government lawyer, DSS) said she found the culture at DSS to be a very difficult one where some senior officers were favoured by the leadership over others, which affected who was appointed to the role of chief counsel.

This culture as perceived by lawyers at DSS had an effect on the ability of those in-house lawyers to maintain their professional independence when advising on the Scheme.

The most significant manifestation of this was the provision of the 2017 DSS legal advice. The 2017 DSS legal advice was sought in order to provide a justification for income averaging as it was being used in the Scheme, in circumstances where its lawfulness was being questioned. That advice positively asserted the legality of using income averaging “as a last resort” without citing any legislative provisions or case law to support that position and was obviously inconsistent with a previous advice given in 2014 on the same question.

The Commission had found (in chapter 2017, part B: Inquiries and Investigations) that the conduct of the principal legal officer who provided that advice was influenced by pressure to meet “the departmental business need” for a legal justification for what it was doing, placed upon her by Ms McGuirk (acting group manager, Payments Policy Group, DSS).

The 2017 DSS legal advice was relied upon in representations to the Ombudsman that the Scheme was lawful. Having received that advice, the Ombudsman chose not to deal with the lawfulness of income averaging in its April 2017 report into “Centrelink’s automated debt raising and recovery system” (the 2017 Investigation Report). The subsequent reliance on this advice by ministers and departmental officers to justify income averaging as used in the Scheme demonstrates the significant consequences that can result from the advice of an in-house lawyer.
4 Achieving the necessary independence

In 2017, the Secretary’s Review considered how legal services could be delivered most effectively and efficiently to the Commonwealth to support government action and manage Commonwealth legal risk and made a number of relevant recommendations.37 Part of the solution recommended by the Secretary’s Review was to establish an overarching Australian Government Legal Service (AGLS) – a formal professional network that would provide information sharing, collaboration, guidance, professional standards and training.38 The AGLS has since been established.

In the Commission’s view, the AGLS is an encouraging development. Since its establishment, the AGLS has published a Statement of expectations of Australian Government lawyers.39 The statement includes the following expectations:

- We conduct ourselves with integrity, objectivity and independence
- Recognising that generally our client is the Commonwealth, when we provide our advice to, or identify and manage legal risk for, our agency we do so with a whole-of-government focus
- We understand that our role requires us to balance managing legal risk with assisting our agency to achieve the government’s objectives
- Because we are part of one Australian Government Legal Service, we collaborate and consult with each other to provide high quality work
- We recognise that sometimes government lawyers have competing obligations (such as when working for corporate Commonwealth entities). However, as much as possible, we work together with a whole-of-government focus.

The AGLS has also published a General Counsel Charter which establishes a set of common expectations for Commonwealth officers who are responsible for the delivery of legal services and the management of legal risk in their respective entity.40 According to that charter, the role includes sharing information and legal knowledge across teams and between entities, identifying legal risks and issues that might require or benefit from a whole-of-government approach, taking steps to engage relevant stakeholders, and actively engaging with clients to incorporate the identification and management of legal risk into all stages of policy and program decision making.

Notably, the General Counsel Charter says nothing about professional independence.

At Services Australia, the chief counsel is now included as a member of the Executive Committee, thus reinforcing the office holder’s role as the legal adviser to the Executive.41 Rebecca Skinner, Services Australia CEO, said that this ensured that the chief counsel had an equal and direct voice at the Executive table and that she had “made clear that the chief counsel is aware that they have direct access to me if they feel they should exercise that avenue to escalate any issues for my attention.”42

At DSS, the chief counsel has been upgraded to an SES Band 2, supported by two deputy chief counsels. Ray Griggs, DSS secretary, said: 43

> Experienced senior government lawyers who have direct access to policy and program SES, Deputy Secretaries and me are now leading the legal team. This arrangement creates capacity to have greater technical oversight of legal work and more timely escalation of legal risk.

The Commission is concerned that these developments do not guarantee there is sufficient separation between the head of the agency and the chief counsel to ensure there is no expectation of loyalty by the chief counsel to the agency head.

It is important that the chief counsel of an agency is appointed by an independent and robust process, to guard against the possibility that the secretary favours the appointment of someone who will be compliant and protect their (the secretary’s) position.
The Commission recognises that the chief counsel for both of the agencies is currently appointed by a merit-based process which includes a selection process involving the Australian Public Service Commissioner or their representative (who must be from a different portfolio agency). In the Commission’s view, further expertise is required throughout the selection process to ensure the candidate for chief counsel has the right skills and attributes for the job and will staunchly display the professional independence required of the role. Currently, where an agency is recruiting to SES roles that require Human Resources, Digital, Data or Accounting and Finance expertise, agencies should include a specialist panellist as a member of the selection panel. The Commission recommends that a similar specialist panel member should be enlisted for the selection panel choosing chief counsel; in this case, the specialist panel member being the Australian Government Solicitor.

**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.
5 Legal advice

The advice of government lawyers “in many instances will determine the rights of citizens dealing with the government.”

In-house lawyers took a remarkably passive approach to the provision of legal advice in relation to the Scheme. What is truly striking about the advices and legal commentary the Commission has seen is that for all the many DHS and DSS lawyers involved, so little attention was paid to the provisions of the social security legislation which actually governs entitlement, payment, authority to require information, debt recovery and imposition of penalties.

Another alarming feature is the practice of leaving advices in draft form rather than finalising them and ensuring that senior departmental officers saw them. As agencies with the high volume of intersecting work, you would think that advice prepared by DSS and DHS on common topics would be disclosed between the two agencies, at the very least to avoid duplication of work. Indeed, it was required to be disclosed under the Directions. The multiple failures are discussed later in this chapter.

5.1 Failure of legal advices

Legal advices and commentary prepared by in-house lawyers in DHS and DSS throughout the Scheme seldom referred to legislative and judicial authority in support of positions and arguments and generally failed to undertake the critical analysis that would be expected of a qualified lawyer. Resort was often had to the assertion “the department is entitled to make a decision based on the best evidence available to it at the time,” which ignored the fundamental requirement that administrative decisions be based on probative evidence, and its converse, that a decision not based on probative evidence is illogical and liable to be set aside (the “no evidence” principle).

The lack of proper legal analysis is demonstrated in the following advices that had significance for the Scheme:

- The 2017 DSS legal advice which disregarded the “no evidence” principle and relied on irrelevant legal provisions.48
- The advice to the secretary, following Mr Hanks’ presentation and paper at the AIAL conference, which conveyed that there were no legal issues of concern and did not genuinely assess the merits of Mr Hanks’ arguments.49
- The document analysing AAT decisions in relation to the Scheme which did not refer to relevant social security legislative provisions.50
- The advice about a decision of the AAT made on 8 March 2017 which did not properly consider whether there was a legitimate basis to disagree with the conclusion reached in the AAT decision that income averaging without more could not be used to calculate debts against social security recipients.51
- The advice to the secretary regarding the 7 September 2017 AAT decision which did not contain any analysis of the reasoning of the 7 September 2017 decision, or attempt any explanation of why the use of income averaging did not contravene the “no evidence” principle.52
- The advice following the publication of the commentary prepared on Professor Carney’s paper, called The New Digital Future for Welfare: Debts Without Legal Proofs or Moral Authority, which, again, did not attempt any explanation of why the use of income averaging did not contravene the no evidence principle.53

Further detail about these legal advices is in chapter 2017, part A: A crescendo of criticism, chapter 2017, part B: Inquiries and Investigations and chapter 2018: The Scheme rolls on.
Ms Skinner pointed to recent steps taken by Services Australia to update its Legal Practice Standards, which set out the core duties and responsibilities of all legal officers working at Services Australia.\textsuperscript{54}

Legal Practice Standard 1 – Core Duties of Legal Officers sets out minimum requirements for lawyers in fulfilling these duties, including to avoid any compromise to their integrity and professional independence.\textsuperscript{55} It provides that litigated matters will be conducted in accordance with written instructions and instructions should be documented appropriately at all times.\textsuperscript{56}

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

Advices provided and left in draft

Throughout the Scheme, there were instances where legal advice from AGS or an external law firm was provided in draft form and not finalised. The Commission heard that it was common practice in both DHS and DSS in respect of external legal advice,\textsuperscript{57} although two witnesses said that while it was not uncommon to obtain advice in draft, failing to finalise the advice was not common and should not occur.\textsuperscript{58}

The most prominent example of this was the Clayton Utz advice, which was provided as a draft advice to DSS and never finalised.\textsuperscript{59} Nor was it provided to DSS secretary, Kathryn Campbell (who did not become aware the advice existed until November 2019).\textsuperscript{60} Despite the advice never being finalised, the invoice was approved and paid for by the DSS legal team.\textsuperscript{61} There is no record of how the decision to pay the invoice without finalising the advice was made.

The Commission recognises that there may be circumstances where it is reasonable to obtain advice in draft to allow further clarification of facts, issues and instructions. However, unless there is very good reason, the advice should always be finalised, and if it is not, that very good reason should be documented.
After hearing the evidence presented at the Commission about the treatment of draft legal advice, Mr Griggs issued a direction to DSS about when to seek legal advice, how staff must act on that legal advice once received, and the finalisation of advice. The direction provides that legal advice will 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. Services Australia should issue a similar direction.

**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.
6 The role of the Office of Legal Services Coordination

The Attorney-General has overarching responsibility for all Commonwealth legal work as First Law Officer. The Office of Legal Services Coordination (OLSC) sits within the Attorney-General’s Department (AGD) and supports the Attorney-General to discharge this function, including by administering the Legal Services Directions. The OLSC is responsible for:

- monitoring and supporting compliance with the Directions
- advising the Attorney-General on the delivery of legal services to and by government
- providing policy guidance to agencies and their legal service providers on the operation of the Directions, and
- advising the Attorney-General on the operation of the Directions.

Michael Johnson, assistant secretary of the OLSC, said that the OLSC’s core function was to:

'[...][work] closely with entities to gain an understanding of the key aspects of their legal work, convey to entities the expectations of the Attorney-General regarding management of that legal work, support entities to comply with those expectations, and advise the Attorney-General of key developments as and when necessary.

The establishment of the OLSC and the creation of the Directions stemmed from recommendations made by Basil Logan in the Review of the Attorney-General’s Legal Practice in March 1997 (the Logan Review). The Logan Review recommended that the OLSC:

- have responsibility for the assurance of quality in the provision of legal services to the Commonwealth and have oversight of the implementation of, and compliance with, the Directions.
- be fully accountable for any decisions regulating the provision of legal services
- be required to develop a range of mechanisms to manage consistency, co-ordination and whole-of-government and public interest issues, and the mechanisms give effect to this should reflect the risk involved.

The OLSC monitors agency compliance with the Directions in order to address emerging, systemic or significant issues across the Commonwealth. It takes a facilitative approach which aims to encourage and support compliance with the Directions through education and by publishing guidance notes, rather than find non-compliance and punish agencies.

The evidence before the Commission demonstrated a number of failures by DSS and DHS to comply with the requirements set out in the Directions, particularly in relation to:

- The requirement for agencies to report as soon as possible significant issues that arise in the provision of legal services, especially in conducting litigation, to the Attorney-General or the OLSC and to regularly update the OLSC on any developments involving that significant issue.
- The requirement for agencies in particular circumstances to consult with each other on advice, and disclose it once received.

Much of the conduct described in this chapter is governed by the earlier version of the Directions, the Legal Services Directions 2005 (Cth).

The OLSC has other tools available to discharge its functions such as other legislative instruments, the publication of key guidance notes, and the use of forums and networks, including the Significant Legal Issues Committee (SLIC), the Legal Risk Committee and the Australian Government Legal Service.
SLIC is a forum of five of the most senior government lawyers and supporting advisers, whose functions are to consider significant legal issues involving the Commonwealth, discuss high profile and complex legal issues, and make recommendations to ensure a coordinated, whole-of-government approach is taken to manage the significant legal issues involving the Commonwealth.\(^7\)

### 6.1 Significant issue reporting

The purpose of significant issues reporting is to ensure that the Attorney-General is appropriately informed of the most important legal issues affecting the Commonwealth.\(^7\) An issue that arises in the provision of legal services will be considered ‘significant’ in a range of circumstances, including any one of the following:

- it has, or potentially has, whole-of-government implications, or may have future implications for another agency and/or the Commonwealth
- it raises legal, political or policy issues that receive or are likely to receive media attention or cause a significant adverse reaction in the community
- it involves a test case or requires the Commonwealth to intervene in private litigation
- it affects more than one Commonwealth agency, requiring a significant level of coordination or high-level consultation between Commonwealth agencies, or
- it has the potential to establish a significant precedent for the Commonwealth or other Commonwealth agencies, either on a point of law, or because of its potential significance for the Commonwealth or other Commonwealth agencies.\(^7\)

The information collected through significant issues reporting is valued by the Attorney-General in order to discharge his or her responsibility for litigation as the First Law Officer.\(^8\) To support the Attorney-General, the OLSC relies on accurate and timely reporting by agencies, who are best placed to identify and explain the significance of the legal matters of which they have conduct.\(^8\) According to Mr Michael Johnson, Assistant Secretary, OLSC, early identification of significant issues is desirable in order to maximise the ability of the OLSC and the Attorney General to discharge their functions.\(^8\)

### 6.2 Consulting on and disclosing advice between Commonwealth agencies

In accordance with clause 10.1 of the Directions, if an agency wishes to obtain legal advice on the interpretation of legislation administered by another agency, it must provide the administering agency with:

- a reasonable opportunity to consult on the proposal to seek advice
- a copy of the request for advice
- a reasonable opportunity to consult on the matter prior to the advice being finalised, and
- a copy of the advice.\(^8\)

DSS was at all relevant times the agency which administered the *Social Security Act 1991* (Cth) and *Social Security (Administration) Act 1999* (Cth).\(^8\) Under the Directions, if DHS wished to obtain legal advice on the interpretation of that legislation, it was required to consult with DSS.\(^8\)

Paragraph 10.8 of the Directions requires an agency which receives legal advice that it considers likely to be significant to another agency to take reasonable steps to make that legal advice available to that agency.\(^8\)
The purpose of the requirements in the Directions to disclose and consult on advice is to promote consultation between Commonwealth agencies on the interpretation of legislation with the aim of reaching consistency in statutory interpretation across the Commonwealth, and to facilitate a whole-of-government approach.\textsuperscript{88}

There is no published guidance on these obligations. The Secretary’s Review described the requirements for the sharing of advice within Government as one of the most common areas for non-compliance\textsuperscript{89} and noted that agencies obtain legal advice on the basis that they need that information for their own purposes and there is no particular imperative to share the advice.\textsuperscript{90} According to the Secretary’s Review, this entity-focused approach undermines the fact that the information pertains to the Commonwealth. When it comes to sharing information, government lawyers should share a common understanding of their obligations and should have regard to protecting the Commonwealth’s interests.\textsuperscript{91}

This is not a new problem. The Blunn Kreiger Report also noted that there is evidence of agencies withholding information and advice from other agencies, regardless of any wider Commonwealth interest, where they perceive sharing it may not be in the particular interest of the agency.\textsuperscript{92}

This kind of disconnect persisted between DHS and DSS throughout the Scheme. The Commission heard that there had been historic difficulties about which agency had control or ownership of information that was shared between DHS and DSS\textsuperscript{93} and that there was frequently tension between the two departments around advice concerning the social security law.\textsuperscript{94} This lack of cooperation had significant consequences for the Scheme.
7 Failure to comply with the Directions

7.1 The 2014 Social Services legal advice

In the period June 2014 to December 2014, DHS had developed a proposed compliance intervention measure for the 2015-16 Budget which involved automated debt calculation based upon apportioning or averaging a social security recipient’s employer-reported PAYG income data over the reported period of employment, without further verification (the DHS proposal).95

On Friday, 31 October 2014, Mark Jones (assistant director, Payment Review and Debt Strategy Team, Social Security Performance and Analysis Branch, DSS), in consultation with Cameron Brown (director, Payment Integrity and Debt Management, DSS), sought policy advice and legal advice in respect of the DHS proposal.96 On 18 December 2014, Simon Jordon (senior legal officer, DSS) provided legal advice in response to that request (the 2014 DSS legal advice).97

The 2014 DSS legal advice concluded that a debt amount, derived from annual averaging or averaging over a defined period of time, may not be derived consistently with the legislative framework.98

In January 2015, briefs were prepared for the Minister for Human Services, Senator the Hon Marise Payne, and the Minister for Social Services, the Hon Scott Morrison MP, on the DHS proposal.

DSS informed DHS of its view that the suggested calculation method did not accord with social security legislation.99 Drafts of the Executive Minute to Ms Payne and Mr Morrison prepared by DHS contained comments consistent with the 2014 DSS legal advice that legislative change would be required.100 These references were later removed from the final New Policy Proposal which was considered and approved by Cabinet.101

The 2014 DSS legal advice was clearly significant to DHS because:

• it related to the DHS proposal which was to be delivered by DHS, a description of which was provided in the instructions for the preparation of the advice102
• the instructions provided with the advice included the policy advice provided by David Mason (acting director, Rates and Means Testing Policy Branch, DSS) which did not support the proposal for the reason that averaging employment income over an extended period did not accord with legislation,103 and
• it concluded that the way DHS proposed to use ATO information was not lawful and was likely to produce inaccurate debts.104

Given the significance of the 2014 DSS legal advice to DHS and to the DHS proposal, it was imperative that DHS took reasonable steps to promptly make the 2014 DSS legal advice available to DHS in accordance with para 10.8 of the Directions.105 It did not do so.106

Had the full 2014 DSS legal advice been disclosed to DHS in January 2015 in accordance with the Directions it would have been more difficult for DHS to justify the removal of any reference to the need for legislative change to allow the use of averaging and correspondingly less likely that Cabinet would be misled about the legitimacy of the DHS proposal.

Instead, the measure was introduced and the Scheme was implemented.

The 2014 DSS legal advice resurfaced within DSS in 2017 when the Commonwealth Ombudsman commenced its own-motion investigation. The legal advice was circulated among DSS staff in advance of a meeting with DHS in January 2017 to discuss the investigation.107 Again, the advice was not provided to DHS at this time.
A full copy of the 2014 DSS legal advice, including the instructions for it, was first provided to DHS five years later, in November 2019.108

The Commission heard that it was “common practice” between agencies not to share legal advice in order to maintain confidentiality and legal privilege.109 That reflects a misconception among Commonwealth officers. Legal advice provided within the Commonwealth in accordance with the obligations under the Directions does not involve the waiver of legal professional privilege.110

7.2 Failure to report a significant issue

DSS was obliged to “report as soon as possible to the Attorney-General or OLSC on significant issues that [arose] in the provision of legal services, especially in handling claims and conducting litigation.”111 For the purposes of para. 3.1, “significant issues” were said to include matters where “the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues.”112

The language of para. 3.1 of the Directions makes clear that the “provision of legal services” is not confined to services provided in the conduct of litigation; it is also expressed to include the handling of “claims.” The OLSC’s Guidance material makes clear that reporting should not be confined to litigated matters and should include the early reporting of significant legal issues and trends.113 Entities should report significant legal issues as soon as they emerge, even if a claim has not yet been made.114 The provision of advice, despite the absence of litigation, could raise a significant issue that requires reporting.115

From December 2016, the Scheme was the subject of sustained public and political criticism.116 This included questioning in the media of the accuracy of, and legal basis for, the use of averaging to determine social security entitlement.

In January 2017, several DSS staff understood that income averaging was being used by DHS and that the law did not allow income averaging to allege a debt.117

DSS was engaged in “the provision of legal services” by procuring internal advice (the DSS 2017 legal advice) which supported the lawfulness of income averaging as a last resort. DHS was also in the process of obtaining internal advice.

The controversy about the accuracy of, and legal basis for, the use of averaging to determine social security entitlement under the Scheme constituted a “significant issue” in the provision of the aforementioned legal services for the purposes of para. 3.1 of the Legal Services Directions. The Commonwealth agreed in its submissions that DHS and DSS should have collaborated in or about January 2017 to ensure that a significant issue report was submitted to OLSC about the Scheme.

7.3 Failure to consult and disclose

On 6 January 2017, Barry Jackson (acting secretary, DHS) sought advice about the legality of using income averaging to determine social security entitlement.118 Ms Golightly responded that the DHS legal branch had advised that “it is a very complex job to get the answer to.”119 On the same date, this request for advice was communicated by Sue Kruse (acting deputy Secretary, DHS) to Paul Menzies-McVey (acting chief counsel) for his consideration.

In an email on 6 January 2017, Mr Menzies-McVey asked Mark Gladman (deputy general counsel) to prepare advice in response to Mr Jackson’s request.120 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.

This email shows that there was an understanding within DHS on that date that a real controversy existed
as to the lawfulness of the use of averaging to determine social security entitlement. Additionally, the
tone of Mr Menzies-McVey’s email and his description of the procurement of the advice as “a top priority”
reflected his understanding that the resolution of this controversy was of significant importance to DHS.

A draft advice was subsequently prepared by DHS lawyers about whether it was open to DHS to rely on
information received from the ATO about annual income amounts to calculate a customer’s entitlement
to income support, and whether the department should use its information gathering powers to obtain
detailed information about when income was earned, rather than relying upon averaging (the DHS draft
advice).121

The DHS draft advice noted that there were reasonable arguments that could be made to support the
use of information received from the ATO about annual income amounts to calculate a customer’s entitlement
to income support but noted that the Social Security Act 1991 (Cth) was complex. The advice
recommended that external legal advice be sought on whether it was open to DHS to rely on information
received from the ATO to calculate a customer’s entitlement to income support.122

Draft instructions to AGS were prepared.123 An AGS lawyer was contacted about the advice and DHS
confirmed internally that he was available, and had the appropriate expertise, to advise on averaging.124

The draft advice was never finalised and AGS was not retained to provide advice on the lawfulness of
income averaging as proposed.

The documentary evidence suggests that it was decided that the work Mr Jackson had requested about
the legality of averaging to determine social security entitlement was not to proceed. There is no record of
this decision.

Another advice was prepared on 11 January 2017 by Glyn Fiveash (deputy general counsel, DHS).125 That
advice (the Fiveash advice) explained that where no income averaging mechanism was provided for in
determining the rate of payment of a person’s social security entitlement in the first place, it could not
later be used to calculate and raise a debt.126 The department was not entitled to use income averaged
over a longer period for that purpose; instead it was necessary to apportion the earnings between
fortnights at the rate they were actually earned derived or received.

Under the Directions, consultation and disclosure are not required for advice on a routine matter which
does no more than advise on the application of the law to particular facts by relying on the settled
interpretation of the legislation.127 However, consultation and disclosure would be required where:

- advice relates to legislative provisions that have not been considered by the courts and is contrary
to existing policy or could raise new policy issues in respect of the legislation
- the matter could create a precedent, or
- the requesting entity has identified a potential weakness in the legislation.128

The requirement to consult on obtaining legal advice applies whether it is from an in-house or external
source.129

The advice requested by Mr Jackson on 6 January 2017, and the advice prepared by Mr Fiveash on 11
January 2017 clearly related to the interpretation of legislation administered by DSS. The requested advice
was not routine. Indeed, as noted above, the DHS legal branch considered the answer to Mr Jackson’s
question to be “complex.”130 It was evident that there existed a real controversy as to the lawfulness of
the use of averaging to determine social security entitlement. The requested advice related to legislative
provisions that had not been considered by the courts.
When the advice was requested by Mr Jackson, pursuant to para 10.1 of the Directions, DHS was required to provide DSS with:

- a reasonable opportunity to consult on the proposal to seek advice;
- a copy of the request for advice;
- a reasonable opportunity to consult on the matter prior to the advice being finalised; and
- a copy of the advice.\(^{131}\)

There is no evidence of DSS being provided a copy of or consulted on these advices prepared by DHS in January 2017. Had this occurred, DSS might have identified an inconsistency between the Fiveash advice and the advice that would be eventually prepared by DSS later in January 2017 namely, the 2017 DSS legal advice, and/or one of the departments might have obtained external legal advice at this stage.

It follows that the Fiveash advice and the DHS draft advice should have been considered by DSS to be significant to DSS. Both advices related to legislation administered by DSS (which it noted was “complex”) and the DHS draft advice recommended seeking external legal advice on that legislation and questioned the legality of the Scheme. The Fiveash advice and the DHS draft advice were required to be disclosed to DSS in accordance with para 10.8 of the Directions.\(^{132}\)

### 7.4 Human Services and the Office of Legal Services Coordination

In January 2017, OLSC contacted DHS and requested an initial discussion regarding the Scheme and the public criticism it had sustained. Mr Menzies-McVey (acting chief counsel, DHS) was notified of OLSC’s contact on 5 January 2017.\(^{133}\) On the same day, Mr Menzies-McVey notified Ms Kruse and Malisa Golightly (deputy secretary, DHS) of this matter.\(^{134}\) There is evidence that Mr Menzies-McVey subsequently had a conversation with Ms Kruse and Ms Golightly about the OLSC’s contact.\(^{135}\)

On 6 January 2017, Mr Menzies-McVey had a telephone conversation with Rebecca Vonthethoff, an officer at the OLSC. By email dated 6 January 2017, Ms Vonthethoff provided an account of the conversation to Sara Samios (acting assistant secretary, OLSC).\(^{136}\) That account was framed as follows:

- Mr Menzies-McVey conveyed that there was some concern as to why OLSC had made contact with DHS “given OLSC’s regulatory role” and that any “initial/general discussion” between OLSC and DHS regarding the Scheme would be difficult “without briefing up to the a/g Secretary.”
- Ms Vonthethoff explained that OLSC had contacted DHS to, amongst other things, “speak about whether OLSC should expect/request significant issues reporting on this matter, ie. is DHS Legal of the view that any significant legal issues arise at this stage.”
- Mr Menzies-McVey replied:

DHS Legal is of the view that no significant legal (as opposed to business/operational) issues arise at this stage, hence significant issues reporting is not required. There have been a number of FOI requests, but those do not raise any particular legal issues. DHS is very aware of its obligations under the Directions and will inform OLSC as soon as any significant legal issues do emerge.
Human Services failure to report the Scheme

In the Commission’s view, the controversy about the accuracy of, and legal basis for, the use of averaging to determine social security entitlement under the Scheme constituted “significant issue” in the provision of the aforementioned legal services for the purposes of para. 3.1 of the Directions. That controversy had crystallised at the following points in time:

- when Mr Jackson made his request for advice on 6 January 2017
- when the DHS draft advice was prepared, and
- when the Fiveash advice was prepared.

DHS was engaged in “the provision of legal services” at the time by:

- its involvement in responding to questions from the Ombudsman about adherence of the Scheme to legislative requirements,137
- its involvement in AAT proceedings concerning debts raised under the Scheme, and
- its procurement of internal advice regarding the lawfulness of the use of averaging to determine social security entitlement; and
- the preparation of instructions to AGS for advice on the use of averaging to determine social security entitlement.

The obligation to report significant issues is a continuing one and requires the agency to regularly update the Attorney-General or OLSC on any developments involving the significant issue.138 The fact that the controversy crystallised after the OLSC made its initial contact with DHS did not obviate the need to report once it became aware of these issues.

Under the Scheme, income averaging had been used to determine social security entitlement and overpayment in the absence of other evidence. This was a practice that affected hundreds of thousands of income support recipients.

That controversy was manifest in the public scrutiny of the Scheme. Resolution of the controversy had the potential to have a significant impact on the operations of DHS, DSS and the Government at large. On any view, it raised “sensitive legal, political and policy issues” in the sense contemplated by para. 3.1(a) of the Directions.

Consequently, DHS was required to report that issue to the OLSC. Contrary to that obligation, DHS failed to report a significant issue to OLSC in relation to the use of income averaging. The effect of this failure was that the OLSC was unable to properly provide oversight of the legal aspects of the Scheme and the controversies associated with it.

Extent of engagement with Human Services

Ms Samios was not involved in the call to Mr Menzies-McVey on 6 January 2017, but noted in an internal email that she was concerned by DHS’s analysis of whether there was a significant legal issue and that she got “the impression...that DHS was focusing on whether any specific legal issues that have crystallised in this space are significant from a technical perspective, which is, of course, too narrow.”139

On 10 January 2017 OLSC staff including Ms Samios became aware of:

- an article in the Canberra Times titled ‘Commonwealth Ombudsman launches Centrelink investigation;’ and
- an article in The Guardian titled ‘Centrelink crisis people targeted with inaccurate debts may be able to sue.’ The article identified a potential cause of action deriving from obligations under the Public Governance, Performance and Accountability Act 2013.140
On 13 January 2017, staff at the OLSC drafted an email for Ms Samios to send to DHS requesting that DHS submit a draft ‘significant issues’ report, based on a preliminary view that the Scheme may be significant under clause 3.1 of the Directions, because:

1. Emerging issues associated with automated decision-making may have implications for other departments and agencies.
2. The matter raises sensitive legal, political and policy issues and is receiving significant attention from parliamentary representatives, the media and the general public.
3. The matter appears to give rise to the possibility of a number of emerging significant legal issues, including in light of the inquiries being conducted by the Information Commissioner and the Commonwealth Ombudsman, and public comments from legal professionals about possible causes of action against the Commonwealth.

The draft email noted that OLSC was of the view that the draft significant issue report should focus on the “high-level emerging issues associated with the automated debt recovery system.”

On 20 January 2017, an OLSC staff member sent another media article about the Scheme to Ms Samios and noted “Get-Up is looking at legal options (my paraphrasing).” Ms Samios noted that she was planning to send DHS the email request for the draft significant issues report that day, but the email was ultimately not sent. Instead, Ms Samios had a telephone conversation with Ms Musolino at some time after 20 January 2017.

Ms Samios told the Commission that she had instigated this call with Ms Musolino due to her continuing concern about the issues and awareness that there was “significant nervousness” within DHS about the issues, as indicated by the fact that the acting secretary had been notified that the OLSC had made inquiries. She had a very specific memory of Ms Musolino telling her that there were no legal issues and, as such, nothing to report to the OLSC. She was surprised by this and pressed Ms Musolino on the question of whether any advice existed or any report ought to be sent.

Ms Musolino’s response made it clear to Ms Samios that sending a request for a draft report would not lead to provision of specific material, but rather an advice in the form that there were no legal issues. Ms Samios did not make a contemporaneous record of this call.

The OLSC did not pursue DHS for a significant issue report and instead undertook to keep a “watching brief” to “monitor the media coverage”. The OLSC did not engage with DHS again about the Scheme for more than two years, when the application filed by Ms Masterton was reported as a significant issue.

Ms Samios, in her submissions to the Commission, contended that the OLSC was “concerned” in January 2017 that there might be a significant issue but there was not enough to form a conclusive preliminary view that the matter involved any legal issue, or that any legal issue was “significant” as that term is used in the Directions.

However, the Commission’s view is that there was a preliminary view formed within the OLSC that the Scheme involved a relevant significant issue. That was despite the fact that the OLSC had not been informed of any specific provision of legal services. There was ample basis for such a view because of:

- media articles concerning the Scheme which identified possible causes of action from legal professionals and advocacy groups
- inquiries being conducted by the Information Commissioner and the Commonwealth Ombudsman into the Scheme
- emerging issues associated with automated decision-making, with potential implications for other Commonwealth departments and agencies.

Given those circumstances, it was likely that legal advice was being sought on the lawfulness of the Scheme – and indeed it was. The Fiveash advice and the draft DHS legal advice and instructions to AGS had been prepared in early January 2017.
In light of this, there was cause for alarm within OLSC that DHS considered there were no legal issues and that there was no legal advice pertaining to the Scheme.

This was a major missed opportunity. Both DHS and DSS had taken steps to obtain legal advice about the lawfulness of averaging in January 2017. Work done in relation to those advices was certainly done in the provision of legal services and the question of the lawfulness of income averaging was a significant issue at the time.

At the very least, DHS’s response warranted further inquiry by OLSC of DHS, particularly given OLSC had previously recorded a concern that DHS’ analysis of whether there was a significant issue had too narrow a focus.

However, the Commission acknowledges that had the OLSC pursued the matter further, the answer may have remained the same. In any event, the OLSC is not a regulator with investigative functions or the power to compel the production of a significant issues report.\textsuperscript{152}

The decision not to pursue DHS for a significant issues report was made following a conversation Ms Samios recalls having with Ms Musolino. This was in keeping with OLSC’s facilitative approach to supporting agency compliance.\textsuperscript{153} The conversation was not recorded in an email or file note. As Ms Samios agreed when asked, it would have taken two minutes to type an email to confirm what was discussed.\textsuperscript{154} Such an email would at least have required Ms Musolino to confirm her view in writing.

Ultimately, the secretary of an agency has responsibility for ensuring compliance with the Legal Services Directions,\textsuperscript{155} yet the chief counsel of an agency is the person with oversight of the legal practice and more knowledge of the legal issues the agency is dealing with. Services Australia have put in place a Legal Practice Standard, which sets out that all legal officers are to be aware of and assist in ensuring that Services Australia complies with the Directions, and places additional responsibility on senior legal officers to identify and assess continuing compliance with the Directions.\textsuperscript{156}

The Commission considers a further obligation should be imposed on the chief counsel to ensure the Directions are complied with and to document significant interactions with OLSC about inquiries made, and responses given, concerning reporting obligations under the Directions.

The General Counsel Charter, published by the AGLS, provides that general counsel are accountable, including through the \textit{Legal Services Directions 2017}, to the AGD secretary, who is the head of the profession for the AGLS.\textsuperscript{157} The Charter should be amended to provide for the imposition of an obligation on the chief counsel to ensure compliance with the Directions and to document interactions with the OLSC.

\subsection*{7.5 Lack of questions for Social Services}

The OLSC did not seek to ask questions of DSS as the agency responsible for social security policy and legislation. Had DSS been engaged, it would have been difficult for lawyers from that department to assert that ‘there were no legal issues’ and no legal advice, given the existence of the 2014 DSS legal advice and the understanding of some DSS staff that income averaging as it was being used in the Scheme, was unlawful.\textsuperscript{158} The Commission appreciates, however, that the OLSC may not have been familiar with the relationship between the agencies and the division of responsibility between them.\textsuperscript{159}
7.6 Consequences of not reporting a significant issue

Had the high-level emerging issues associated with the Scheme been reported to the OLSC as a significant issue in early 2017, further obligations under the Directions may have been engaged, which may have led to:

- the reporting of subsequent litigation relating to the Scheme to the OLSC, including Administrative Appeals Tribunal (AAT) proceedings
- the agencies’ being required to seek approval from the Attorney-General or a delegate of the OLSC to resolve any future proceedings involving the Scheme, including AAT proceedings
- OLSC oversight of the legal aspects of the Scheme and the controversies associated with it
- the OLSC being informed about the questions being raised by various AAT members about the legality of the Scheme, and
- the OLSC considering whether to put the issue on the agenda of the Significant Legal Issues Committee (SLIC) for consideration by the most senior government lawyers in the Commonwealth.

Had that occurred, the Scheme may have ended earlier than it did. Unfortunately, nothing happened. The ability of the Attorney-General to discharge the responsibility for litigation involving the Commonwealth effectively depends on reliable notification systems. The Blunn Kreiger Report noted that in-house lawyers do not invariably recognise this special role. The evidence before the Commission supports this view. It is apparent that lawyers within DHS and DSS did not sufficiently understand when an issue was required to be reported to the OLSC as significant.

One explanation for the failure to understand when an issue requires reporting is that the obligations set out under the Directions are not clear enough. There has been previous recognition that the Directions would benefit from more direct language.

The Secretary’s Review recommended that the Directions be reviewed and simplified, and noted that there is an opportunity to provide greater certainty of the OLSC’s authority to enforce compliance with the Directions, with clearer consequences for non-compliance.

The Secretary’s Review recommended that the OLSC focus on the following priorities:

- facilitating collaboration between entities in order to deliver high quality and joined-up legal services across the Commonwealth
- promoting and coordinating information sharing to make effective use of the combined legal knowledge held by the Commonwealth
- supporting the Attorney-General and Solicitor-General in dealing with high priority and whole-of-government legal issues

In the context of these priorities, the Secretary’s Review recommended that the OLSC’s key functions should include assisting agencies with the significant legal issues processes and administering the Directions with comprehensive guidance material and a risk-management based approach to compliance. To the extent the secretary envisaged that this would involve the OLSC providing more extensive information and feedback to assist agencies with the significant legal issues process, the Commission endorses that recommendation.
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.
8 More significant advices not disclosed

8.1 The Clayton Utz advice

In May 2018 DHS referred an AAT decision to DSS that concluded that the legislation “did not authorise the calculation of youth allowance by reference to averaging of income in this case.”168 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 DSS to obtain an advice from solicitors, Clayton Utz, to provide legal advice on the lawfulness of using income averaging as a method to determine a person’s social security debt.169

On 14 August 2018, Clayton Utz provided a draft advice to DSS (the Clayton Utz advice).170 The Clayton Utz advice was consistent with the 2014 DSS legal advice and stated that the Social Security Act did not allow determination of a youth allowance or Newstart recipient’s fortnightly income by taking an amount reported to the ATO and averaging that amount fortnightly.171

There is no evidence that the Clayton Utz advice was at any time disclosed to DHS.

The Clayton Utz advice was significant to DHS because:

- DHS had responsibility for administering the Scheme.
- It was clear that the Clayton Utz advice had broader application to the Scheme and if the advice were correct, the Commonwealth was unlawfully taking money from social security recipients on a massive scale.172
- DHS had responsibility for social security litigation and was not appealing AAT decisions that found income averaging to be unlawful.

The Commonwealth agreed that DSS should have made the Clayton Utz advice available to DHS as soon as practicable after its receipt, pursuant to para 10.8 of the Directions.173

Had DSS disclosed the Clayton Utz advice with DHS in August 2018, given the significance of the advice to the Scheme, it should have caused DHS to seek advice from the Solicitor-General earlier.

8.2 The draft AGS advice

On 4 February 2019, proceedings in Masterton v the Commonwealth commenced in the Federal Court.174 DHS reported the matter as significant to OLSC in accordance with paragraph 3.1 of the Directions on 13 March 2019.175

On 27 March 2019, AGS provided DHS with a detailed prospects advice in draft in relation to Ms Masterton’s proceedings (the draft AGS advice) which concluded that Ms Masterton had good prospects of succeeding in a challenge to the debts based on apportionment.176 It pointed to the limitations of using income averaging, including that there was no statutory basis for it and that it provided weak evidence of the existence of a debt.177 The advice noted that these conclusions had wider implications and recommended that consideration be given to seeking further advice from senior counsel, and possibly the Solicitor-General.178

The draft AGS advice was not at all a routine matter such that consultation with and disclosure to DSS would not be required. The advice was clearly significant to DSS as the administering agency of the legislation because it noted that there was no statutory basis in the Social Security Act 1991 (Cth) or related legislation for deeming income averaging to be accurate or sufficient basis on which to raise and pursue a debt,179 and recommended that further advice be sought on the issue.180
When the advice was sought from AGS, pursuant to para 10.1 of the Directions, DHS was required to provide DSS with:

- a reasonable opportunity to consult on the proposal to seek advice,
- a copy of the request for advice, and
- a reasonable opportunity to consult on the matter prior to the advice being finalised.

Once the advice was received, 10.8 of the Directions required DHS to disclose it to DSS as soon as practicable.

There is no evidence that DHS consulted with DSS on the proposal to seek advice from AGS and the advice itself was not provided to DSS until three months later, in late June 2019. The advice was also not provided to the OLSC.

### 8.3 The Solicitor-General’s Opinion

On 27 August 2019, DHS briefed the Solicitor-General to advise. DSS was consulted on that brief and was involved in the development of the questions for the Solicitor-General.

On 24 September 2019, DHS received the Solicitor-General’s Opinion. The Solicitor-General’s Opinion constituted 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 current and former income support recipients.

The Solicitor-General’s Opinion was not disclosed to DSS until 7 November 2019, more than six weeks after it was received. In the Commission’s view, DHS was required to disclose that advice to DSS as a matter of urgency. It did not do so.
9 Conclusion

Mr Griggs has acknowledged that the work arrangements between the legal areas in DHS and DSS during the Scheme were not functioning properly. Both DSS and Services Australia drew the Commission’s attention to changes under way following the recommendations of a review conducted by the Australian Government Solicitor (AGS) into the legal functions of DSS and Services Australia. That review made 38 recommendations, the implementation of which is continuing.

The AGS Review noted that given the interdependence of the two agencies in relation to social security advice, the aspiration should be higher than mere compliance with the Directions. The Commission agrees.

The AGS Review recommended that DSS and Services Australia work together to adopt a model of operational integration between their legal practices involving close coordination in areas of intersection in social security advice and litigation, cooperation in areas or overlap and investment in the institutional relationship. This would include lawyers in common areas operating in a more connected way, the provision of joint training and sharing of information through access to a joint advice database. The extent of any changes made in this regard are unclear. The Commission endorses increased collaboration between the agencies.

The Commission was also informed of the introduction of a chief counsel’s forum, a regular forum led by the chief counsel in which legal issues between Services Australia and DSS are discussed:

- to encourage a professional collegiate approach to the development and implementation of sound legal advice on matters that impact on both agencies and to improve the agencies’ understanding of each other’s perspectives.

The Bilateral Management Agreement, between DSS and Services Australia, which sets out oversight and reporting functions, is currently being renewed. The Commission recommends that any amendments embed the aspiration to consult and disclose advice between the two agencies.

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.
1. Stephen Gageler, ‘What it is to be a government lawyer’ (Speech, Attorney-General’s Department and AGS, April 2016) 6.
3. Transcript, Annette Musolino, 1 March 2023 [p 4166: lines 5-7].
10. Much of the conduct described in this chapter is governed by the earlier version of the Directions, the Legal Services Directions 2005 (Cth).
11. Attendees at the AIAL conference from DHS’ legal team included Mr Maris Stipnieks, Mr Matthew Roser, Mr Mark Gladman, Mr Tim Ffrench, and Ms Anna Fredericks amongst others. See Exhibit 3-4830 – CTH.3005.0005.6029_R - RE:- RESPONSE REQ’D REQ’D BY 4PM TODAY - AIAL conference [DLM=For-Official-Use-Only], 10 July 2017; Exhibit 3-4832 - CTH.3007.0006.7199_R - AIAL Conference - OCI sessions [DLM=For-Official-Use-Only].pdf.
12. Exhibit 3-5100 - MAS.0001.0013.2263_R - RE- Ombo, 18 May 2018; Exhibit 3-5101 - MAS.0001.0013.2264 - Note re Terry Carney article.
13. Exhibit 3-5100 - MAS.0001.0013.2263_R - RE- Ombo, 18 May 2018; Exhibit 3-5101 - MAS.0001.0013.2264 - Note re Terry Carney article; Transcript, Maris Stipnieks, 3 February 2023 [p 3240: line 13 – line 3241: line 16].
15. Exhibit 4-6019 - RBD.9999.0001.0431_R - REPORT TO THE ROBODEBT ROYAL COMMISSION [p 23].
17. Transcript, Tim Ffrench, 22 February 2023 [p 3498: lines 12-25].
18. Transcript, Renee Leon, 28 February 2023 [p 4013: lines 36-44].
20. Transcript, Melanie Metz, 10 March 2023 [p 4982: lines 22-31].
22. Exhibit 1-0084 – DSS.8001.0001.1736_R - FW- Advice please [DLM=Sensitive-Legal].
25. Exhibit 1-0067 - APU.9999.0001.0001_R, FW- Advice please [DLM=Sensitive-Legal].
27. Exhibit 2-1395 - DSS.5005.0001.0534_R - Request for information-documents [SEC=UNCLASSIFIED].
Lawyers and legal services


Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 25 (para 3.33).

Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 25 (para 3.33).

Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363., [p 19: para 115].

Exhibit 5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p4: para 19].


73 Legal Services Directions 2017 (Cth) cl 3.1, note 2; Legal Services Directions 2005 (Cth) sch cl 3.1, note 2
74 Legal Services Directions 2017 (Cth) cl 10; Legal Services Directions 2005 (Cth) sch cl 10.
76 Exhibit 4-5300, Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [p3: para 18].
77 Statement of Michael Johnson, 27 October 2022, OLS.9999.0001.0001 [18]; Chris Moriatis, Secretary’s Review of Commonwealth Legal Services (Report, 2016) 69.
78 ‘Guidance Note 7’, Attorney-General’s Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [7].
79 ‘Guidance Note 7’, Attorney-General’s Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [9]-[10].
81 Guidance Note 7’, Attorney-General’s Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [8].
82 Transcript, Michael Johnson, 21 February 2023, [page 3423: line 15-22].
83 Legal Services Directions 2017 (Cth) cl 10.1; Legal Services Directions 2005 (Cth) cl 10.1.
85 Legal Services Directions 2017 (Cth) cl 10.1; Legal Services Directions 2005 (Cth) cl 10.1.
86 Legal Services Directions 2017 (Cth) cl 10.8; Legal Services Directions 2005 (Cth) cl 10.8.
87 Legal Services Directions 2017 (Cth) cl 10.8 note 1; Legal Services Directions 2005 (Cth) cl 10.8 note 1.
88 Chris Moriatis, Secretary’s Review of Commonwealth Legal Services (Report, 2016) 53.
89 Chris Moriatis, Secretary’s Review of Commonwealth Legal Services (Report, 2016) 53.
90 Chris Moriatis, Secretary’s Review of Commonwealth Legal Services (Report, 2016) 54.
91 Chris Moriatis, Secretary’s Review of Commonwealth Legal Services (Report, 2016) 54.
93 Transcript, Mark Withnell, 24 February 2023 [p3747: line 25-35].
96 Exhibit 1-0061, DSS.5002.0001.0001_R - PR25629819_2014 - November - Department Org Chart.
97 Exhibit 1-0087 - DSS.8000.0001.0607_R, RE- Legal Advice - Data matching- notifications and debt raising.
98 Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.
Exhibit 4-5212 - CTH.3008.0008.1599_R, Fwd: Urgent: Brief on opportunities to strengthen compliance; Exhibit 4-5213 - CTH.4000.0399.0109_R, B15 92, Compliance processes and options - Mr Morrison cover brief.docx; Exhibit 1-1257 - CTH.3008.0008.3968_R, RE: URGENT: Compliance brief [DLM=Sensitive]; Exhibit 1-1258 - CTH.3008.0008.3970_R, new version of the compliance brief [DLM=Sensitive]; Exhibit 1-1259 -CTH.3008.0008.3971_R, 09022015155728-0001.pdf.

Exhibit 4-5231 - CTH.4000.0399.0127_R, Strengthening the Integrity of Welfare Payments NPP (8); Exhibit 4-5257 - CTH.3094.0001.9242_R, Revised NPPs have been signed off by Minister and are now with DSS [SEC=UNCLASSIFIED].pdf; Exhibit 2-2022 - PMC.001.0002.017_R, PMC-001-0002-017_redacted.

Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.

Exhibit 1-0071 - DSS.8000.0001.1007_R, FW- Legal Advice - Data matching- notifications and debt raising; Exhibit 1-0076;Exhibit 2-2193 - DSS.8002.0001.0259_R, Request for clarification on income testing rules. [DLM=For-Official-Use-Only].

Exhibit 1-0087 - DSS.8000.0001.0607_R - RE- Legal Advice - Data matching- notifications and debt raising.

Legal Services Directions 2005 (Cth) cl 10.8; Ms Wilson agreed that the final legal advice ought to have been provided to DHS given the significance and shared responsibilities raised under the proposal. Transcript, Serena Wilson, 9 November 2022 [p773: line 5 – p774: line 16].

Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M), [p10: para 55]; Exhibit 1-0170 - CTH.3035.0021.0385_R - RE- Internal DSS legal advice.

Exhibit 4-6353, DSS.5063.0001.0003_R, RE- Teleconference detail; Exhibit 2-2105 - DSS.5023.0002.2163_R, Background to issue; Exhibit 2-2106 - DSS.5023.0002.2164_R, 2.0170159054175E+1

Exhibit 1-0170 - CTH.3035.0021.0385_R, RE- Internal DSS legal advice [SEC=OFFICIAL-Sensitive, ACCESS=Legal-Privilege].

Transcript, Murray Kimber, 8 December 2022 [p1401: line 19 – 36]. Exhibit 2-2114 - MKI.9999.0001.0002_R - 20221111 NTG-0062 Response (Kimber, M) [p10: para 56].


Legal Services Directions 2005 (Cth) para 3.1. Legal Services Directions 2005 (Cth) para 3.1. Guidance Note 7; Attorney-General’s Department (Web Page) <Guidance note 7 - Reporting and settlement of significant issues (ag.gov.au)> [3].


Transcript, Sara Samios, 6 March 2023 [page 4431: line 40-42].

Ms Wilson gave evidence that before and when she returned from leave for the meeting on Sunday, 15 January 2017, she knew the law did not allow income averaging to allege a debt (Transcript, Serena Wilson, 9 November 2022 [p800 lines: 35-46]); Mr McBride gave evidence that by the time of the meeting on Sunday, 15 January 2017 he knew that DHS were using averaging to assess income and calculate debts and that this was unlawful (Transcript, Paul McBride, 9 March 2023 [p4840: line 43 - p4841: line 14; p4847: lines 28-35]); When Ms McGuirk received the 2014 DSS legal advice she understood that the DHS proposal of the Robodebt Scheme to DSS in 2014 did not fit within the legislative requirements for raising debts (Transcript, Emma Kate McGuirk, Transcript, 2 November 2022, [p4245 lines 25-29]).

Exhibit 4-5830 - SKR.0001.0001.5028_R - RE- Centrelink debt-recovery, 4 January 2017.

Ms Wilson gave evidence that before and when she returned from leave for the meeting on Sunday, 15 January 2017, she knew the law did not allow income averaging to allege a debt (Transcript, Serena Wilson, 9 November 2022 [p800 lines: 35-46]); Mr McBride gave evidence that by the time of the meeting on Sunday, 15 January 2017 he knew that DHS were using averaging to assess income and calculate debts and that this was unlawful (Transcript, Paul McBride, 9 March 2023 [p4840: line 43 - p4841: line 14; p4847: lines 28-35]); When Ms McGuirk received the 2014 DSS legal advice she understood that the DHS proposal of the Robodebt Scheme to DSS in 2014 did not fit within the legislative requirements for raising debts (Transcript, Emma Kate McGuirk, Transcript, 2 November 2022, [p4245 lines 25-29]).

Exhibit 4-5830 - SKR.0001.0001.5028_R, Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January.

Exhibit 4-5830 - SKR.0001.0001.5028_R, Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January.
The legal services provided by the Australian Government Legal Service (AGLS) are governed by the General Counsel Charter. The AGLS is responsible for administering the Royal Commission into the Robodebt Scheme, which investigated the scheme's implementation from 2014 to 2024. The Commission's findings highlighted issues related to the calculation of income and the assessment of debts, indicating that the Department of Social Services (DSS) had used an incorrect method for calculating income, known as 'income averaging' or 'apportioned fortnightly income'.

The AGLS is required to report significant issues to the Attorney-General or the Office of Legal Services Commissioner (OLSC). This includes regularly updating them on any developments involving significant issues. Legal Services Directions 2005 (Cth) cl 10.8 outlines these obligations. The AGLS is also required to align with the Public Governance, Performance and Public Accountability Act 2013 (Cth) ss 8, 12(2) definitions of accountable authority.

The AGLS has been involved in legal advice and representation for individuals involved in the Robodebt Scheme, including Ms Wilson, Mr McBride, Ms McGuirk, and Ms Samios. These individuals have provided evidence regarding their knowledge of the law and the actions of the DSS.

Legal Services Directions 2005 (Cth) cl 11.1, 15 define accountable authority. The AGLS is responsible for ensuring compliance with these regulations to maintain accountability.

Transcript, Renee Leon, 28 February 2023, Brisbane [p 4044: lines 10 to 32]; Exhibit 4-6088 - CTH.4000.0006.7450_R, Update on timing for next steps brief- income compliance [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6089 - CTH.4000.0006.7451_R, MS19-000365 - Minute - Income Compliance Programme Redesign_V23 ROS [SEC=PROTECTED, SH=CABINET]; Exhibit 4-6090 - CTH.4000.0006.7452, DSS one pager.

Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 8 [para 46].

Exhibit 4-8202A - CTH.9999.0001.0155_R - Response to NTG-0177 (Rebecca Skinner)_Redacted, page 26 [para 3.24(b)]; Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 19 [para 116].

Exhibit 4-8202B - DSS.9999.0001.0042_R - 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, page 15 [86].
1 Introduction

The AAT was intended not only to give better administrative justice in individual cases but also to secure an improvement in primary administrative decision-making. This had to be achieved by the quality of the AAT’s reasoning. Departments, like any organised human activity, tend to have an inward focus and the corporate culture tends to be the most powerful influence on the conduct of individuals engaged in that activity. External review is only as effective if it infuses the corporate culture and transforms it.

– Hon Sir Gerard Brennan

The Commonwealth treated adverse decisions as no more than pin-pricks – Peter Hanks KC

The financial hardship and distress caused to so many people could have been avoided had the Commonwealth paid heed to the AAT decisions, or if it disagreed with them appealed them to a court so the question as to the legality of raising debts based on income averaging from ATO data could be finally decided – Hon Justice Murphy in the Robodebt class action judgement

The Commission’s terms of reference require it to inquire into how the Australian Government responded to adverse decisions made by the Administrative Appeals Tribunal (the AAT), how the government responded to legal challenges or threatened legal challenges and whether the government sought to prevent, inhibit or discourage scrutiny of the Robodebt scheme (the Scheme), whether by moving departmental or other officials or otherwise.

The AAT, which will soon be abolished and replaced by a new body, is the Commonwealth body responsible for the merits review of administrative decisions made by government, including DHS decisions about social security debts. Effective merits review is an essential part of the legal framework that protects the rights and interests of individuals; it also promotes government accountability and plays a broader important role in improving the quality and consistency of government decisions.

From 2016, the AAT made a series of decisions that questioned the legal basis for DHS’s use of income averaging to calculate social security debts. While DHS and DSS had some processes in place to consider whether AAT decisions should be appealed, those processes were aimed at managing individual AAT decisions. There was no mechanism for ensuring AAT decisions were reviewed in any systematic way. The result was that adverse decisions of the AAT about the use of income averaging were not sufficiently examined by either department; indeed, they were effectively ignored.

On 8 March 2017, Professor Terry Carney (in his position as AAT1 member) handed down the first decision giving reasons for concluding that income averaging was unlawful. DHS did not appeal the 8 March 2017 decision, or other similar decisions that followed it. Nor did it provide AAT members with those decisions, in breach of its duty as a model litigant to assist the AAT. It also did not report those decisions as a significant issue to the Office of Legal Services Coordination (OLSC). Instead, DHS felt free to reject the reasoning in those decisions, and continued its use of income averaging under the Scheme.
2 Review of social security decisions

Decisions about social security during the Scheme were made by DHS officers exercising the delegation of the secretary of DSS. Such decisions can be subject to several levels of review if a social security recipient wishes to challenge them. An internal review is first carried out by an authorised review officer (ARO) within DHS and external review is carried out by the AAT.

The AAT currently comprises two “ tiers” of merits review, AAT1 (the first level) and AAT2 (the second level, to which application can be made for review of AAT1 decisions). While the vast majority of cases can be resolved expeditiously at AAT1, a smaller proportion of more complex and contested matters are properly resolved at the AAT2 level.

2.1 Non-publication of decisions

The majority of decisions concerning the Scheme, and all those which considered income averaging, were made at AAT1 level where there is a high volume of matters, hearings are held in private and decisions are not published. This meant that AAT1 social security decisions were not published and DHS was able to ignore any adverse decisions in relation to its use of income averaging without any public scrutiny or criticism.

At the AAT2 level, decisions are published and a DHS legal officer generally appears and presents arguments. The AAT at both levels is required to give written reasons for decisions in social security cases where the initial decision is not affirmed, or, if it is affirmed, where it is requested to do so. It is not clear why AAT1 reasons for decision are not published and if there is a cogent legal or policy justification for this. It may be that the AAT has regarded the requirement for privacy of AAT1 hearings as militating against publication. (The justification for holding AAT1 hearings in private is that the AAT1 requirements of informality and speed and the need to protect the privacy of social security claimants are more likely to be met if hearings are conducted this way).

There, is, however, no obvious reason that AAT1 decisions involving significant points of law or policy in social security matters should not have been published, anonymised to preserve the privacy of applicants. Publishing reasons in such cases would promote uniformity in decision-making, and allow public scrutiny and wider community understanding of how the AAT was applying law and policy.

2.2 Division of responsibility between the departments

DHS was responsible for the management of litigation arising out of decisions made by its officers. It did not normally take an active role in AAT1 hearings. The DHS Appeals Branch, an “administrative operational branch,” was responsible for the collation of documents for AAT1 reviews and relied on lawyers in its Legal Services Division to review AAT1 decisions and provide legal advice.

As the agency responsible for the Social Security Act 1991 (Social Security Act) and Social Security (Administration) Act 1999 (the Social Security (Administration) Act) under the Administrative Arrangement Orders, DSS had an interest in social security litigation in the AAT. Indeed, the secretary of DSS was required to have regard to relevant decisions of the AAT in administering the social security law.

DHS was required to provide information to and seek instructions from DSS in circumstances set out in the Standing Operational Statements – Social Security Litigation (SOS). DHS was also required to refer AAT1 decisions to DSS where they were less favourable to the secretary than the decision reviewed and one or more of the following applied:
• DHS recommended an appeal
• there was a significant error of law
• there was a significant issue of policy or administrative practice
• the matter had attracted, or was likely to attract, media or parliamentary attention, or
• the matter was of a kind specified by DSS (with the approval of the General Counsel FOI and Litigation Branch).

“Appeal” was defined in the SOS as extending to administrative review. It is the term used in DHS and DSS documents to mean the process of applying to AAT2 for review of an AAT1 decision, and will be used in this chapter in the same way. (An appeal to AAT2 is undertaken on behalf of the secretary of DSS).

The Administrative Appeals Tribunal Act 1975 (the AAT Act) empowers the AAT to affirm, vary or set aside a decision under review. All AAT1 decisions setting aside or varying a DHS decision on terms less favourable to DHS were required to be scrutinised by a DHS lawyer who prepared an Advice for Further Administrative Review (AFAR). The AFAR would consider whether the AAT decision should be implemented (i.e. accepted) or referred to DSS if one of the SOS criteria were met, either for information or with a recommendation for appeal to AAT2. DHS relied heavily on the AFAR process, which Annette Musolino (General Counsel, DHS) described as “very transactional”; by which she meant, focused on individual decisions, with no wider frame of reference in mind.

Under DHS’s own Advocacy Procedures, the AFAR was to be forwarded to the relevant program area of DHS (which one assumes was, for Robodebt decisions, the Integrity and Information Branch) as well as to DSS where it identified that there was:
• a conflict between policy and legislation
• a systemic issue in the administration of social security law
• inadequacies or unintended outcomes in law or policy, or
• an issue impacting on the normative effect of AAT decisions.

In considering whether an appeal to AAT2 should be recommended, DHS lawyers were required to assess the importance of the decision and whether there was a reasonable prospect of success if it were to be appealed.

DSS was to respond with information, comments and clear and timely instructions to DHS on whether to proceed with an appeal. DSS’s decisions in relation to appeals were required to be made according to the key principles set out in the Social Security Appeals and Litigation Arrangements (Litigation Principles), to which DHS was also to have regard. In general, DSS would not seek to appeal unless there was an error of law or an important issue of principle. A guiding principle was to “provide for honest, transparent and fair appeal processes and practices which balance[d] all relevant considerations and promoted confidence in the system for all stakeholders.”

2.3 Failure to systematically review Tribunal decisions

The SOS document described a process that was largely aimed at managing individual AAT decisions between the two departments. In her submissions to the Commission, Kathryn Campbell, former secretary of both DHS and DSS, said the process described in the SOS and its attachments was both comprehensive and precise, and that any failures on the part of particular DHS officers to comply with the SOS were not due to the lack of a system of referring relevant decisions. The Commission disagrees, as did the Commonwealth in its submission.

The SOS process was inadequate to monitor AAT decisions for referral in any effective way. Moreover, there was no system or policy in place to allow DHS or DSS to systematically review AAT decisions; monitor statements of legal principle emerging from AAT decisions; consider how any guidance the AAT gave could
improve decision-making; raise significant cases with senior officers in DHS or DSS; or generally exchange information about AAT decisions with each other.  

Such a system would have been valuable. It would have enabled an approach to appeals which could have resolved the issues of law and policy which the Robodebt decisions raised and, at the least, had the beneficial effect of improving the quality and consistency of decisions made by DHS officers.

Had DHS had a system in place to properly review AAT1 decisions, it would have seen that the number of decisions where the AAT was not satisfied that the applicant’s debt was accurately calculated, because income averaging had been used, far exceeded the number of decisions where the AAT accepted that income averaging was appropriate in the circumstances. This is made clear by the document at appendix - AAT Tier 1 reviews which contains the Commission’s review of 558 AAT1 decisions (produced to it by DHS) where income averaging was a key issue, a summary of which is set out in the following table.

<table>
<thead>
<tr>
<th>Year</th>
<th>Category of decisions</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Decisions where the AAT was not satisfied that the department’s calculations were</td>
</tr>
<tr>
<td></td>
<td>accurate because income averaging was used to calculate the debt</td>
</tr>
<tr>
<td></td>
<td>Decisions where the AAT accepted that income averaging was appropriate in the</td>
</tr>
<tr>
<td></td>
<td>circumstances</td>
</tr>
<tr>
<td></td>
<td>Decisions that did not consider the merits of income averaging because the Applicant</td>
</tr>
<tr>
<td></td>
<td>conceded the debt</td>
</tr>
<tr>
<td>2015</td>
<td>0</td>
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<tr>
<td>2016</td>
<td>39</td>
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<td>2017</td>
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<td>2020</td>
<td>97</td>
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<td>2021</td>
<td>6</td>
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<td>2022</td>
<td>1</td>
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</tbody>
</table>

Additionally, what was noteworthy about decisions where the AAT accepted that income averaging was appropriate in the circumstances was that they did not embark upon any considered analysis of the relevant statutory provisions and legal principles that might impact on the lawfulness of averaging. This was in contrast to the decisions made by Professor Carney, starting with the 8 March 2017 decision which contained a considered and thoughtful analysis of those provisions and principles.
3 Initial response to criticism of the Scheme

Criticisms of the Scheme in AAT1 decisions emerged as early as 2016 when AAT members started to express the view that calculating social security debts relying solely on income averaging was unlawful.\(^{40}\) DHS employees became aware of these decisions in an ad hoc way, and exchanged emails acknowledging there was an issue, without properly examining the trends.\(^{41}\) The evidence shows:

- DHS first noted the AAT’s “strident” criticisms of the use of income averaging to calculate a social security recipient’s income on 8 November 2016.\(^ {42}\)
- In late 2016 and early 2017, senior DHS employees were in touch on an “almost” daily basis in relation to the AAT decisions.\(^ {43}\)
- In late March 2017, DHS became aware of further decisions setting aside income-averaged debts. This was a subject of discussion among staff in the Appeals Branch.\(^ {44}\)
- In April and May 2017, emails circulated about AAT decisions relevant to the Scheme, this time including members of the Legal Services Division.\(^ {45}\)
- On 19 April 2017 Elizabeth Bundy (Manager, Appeals Branch, DHS) provided Ms Musolino with a list of “10 set aside decisions relating to OCI” which listed 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.”\(^ {46}\)
- In July 2017, an email between DHS lawyers noted that there were “clear trends on the AAT1 decisions” that “the averaging of income is inconsistent with the legislation which requires that income be taken into account on fortnightly rests.”\(^ {47}\)

Despite these observations about trends and criticism, no resulting change was made in process to achieve systematic review of AAT decisions. Whether the decisions referred to in these emails should have been referred to DSS required consideration of the following criteria in the SOS:\(^ {48}\)

- There is a significant error of law.
- There is a significant issue of policy or administrative practice.
- The matter has attracted, or is likely to attract, media or parliamentary attention.

On the first point, DHS’s position was that income averaging as used in the Scheme was lawful, so it must also have been its position that decisions asserting that income averaging was inconsistent with the legislation were wrong in law.

On the second point, the cases raised a very significant issue in relation to whether DHS should, as a matter of practice and policy, be using the income-averaging method.

In relation to the third point, by January 2017 there was significant media attention on the Scheme and the prospect of a Senate Committee inquiry.

Despite each of those criteria clearly applying to the AAT decisions setting aside income-averaged debts, none of them was referred to DSS.
Failure to appeal Tribunal decisions

In March 2017, Professor Carney had before him a case in which an overpayment and debt had been raised solely on the basis of averaged PAYG data. Before determining the matter, Professor Carney exercised the power of the AAT to require DHS to make written submissions in response to particular questions of law,\textsuperscript{49} and also invited it to appear and make oral submissions. DHS made written submissions in accordance with the request but did not address two of the questions asked by Professor Carney,\textsuperscript{50} who observed that the submissions “did not delve deeply into the [the law about determining whether there is an overpayment].”\textsuperscript{51} DHS did not take up the invitation to provide oral submissions.\textsuperscript{52}

On 8 March 2017, Professor Carney handed down his decision, in which he set aside the DHS decision, having reached a reasoned conclusion that income averaging based on PAYG data could not provide a sufficient evidentiary basis to prove an overpayment or give rise in law to a debt.\textsuperscript{53} DHS did not appeal the decision.

In the AFAR concerning it, a DHS lawyer concluded that there was no error of law that affected the decision and that there were no grounds for appeal.\textsuperscript{54} A DHS principal government lawyer agreed with that assessment.\textsuperscript{55}

Remarkably, they also concluded that the decision did not involve any “important legal or policy principle.”\textsuperscript{56} That is difficult to understand, particularly when the relevant general counsel, whose team was responsible for advising on whether to appeal AAT1 decisions, accepted in evidence before the Commission that he had formed the view that the legal reasoning in the 8 March 2017 decision was correct.\textsuperscript{57} Accordingly, from that point on he should have understood that income averaging, in the manner in which it was used in the Scheme, was unlawful.

Professor Carney made another four decisions in which he took the same approach to averaging as in his original decision. None were appealed by DHS or referred to DSS, though this was a requirement of the SOS.\textsuperscript{58}

Other AAT members made decisions that applied the same reasoning as the 8 March 2017 decision.\textsuperscript{59} In each case, the decision was not appealed because of legal advice, in the form of the AFAR, that there were no grounds for appeal.\textsuperscript{60} For example, in a decision made on 4 May 2018, the AAT found that the legislation “did not authorise the calculation of youth allowance by reference to averaging of income in this case” and referred to the academic commentary by Professor Carney (by that stage no longer an AAT1 member) impugning the validity of averaging.\textsuperscript{61} The AFAR for the 4 May 2018 decision did not cavil with that reasoning and did not recommend an appeal, noting that an appeal would put the income averaging methodology “squarely into the public arena” and there was “a risk that the whole approach of the OCI would be undermined.”\textsuperscript{62} However, the decision was referred to DSS for information; a “protective appeal” was filed and then withdrawn on instruction from DSS.\textsuperscript{63}

The Commission has identified no appeals on behalf of the secretary which went directly to the lawfulness of income averaging.\textsuperscript{64}

Ms Musolino sought to justify the failure to appeal the 8 March 2017 decision, and others applying similar reasoning, on the basis that the circumstances of the recipient and the impact an appeal would have on them and their family was a paramount consideration;\textsuperscript{65} DHS would not, she said, lightly put a recipient through an appeal.\textsuperscript{66} The Commission accepts, as submitted by the Commonwealth, that this was consistent with DHS’s obligation to act as a model litigant which requires endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible.\textsuperscript{67}

However, that approach paid no regard to the Litigation Principles (which both DSS and DHS were required to consider), which required the decision maker to consider the beneficial nature of the social security law and the impact of an appeal on the recipient \textit{against the broader principles of social security administration} (emphasis added).\textsuperscript{68} That included:
• considering “whether there [was] a significant point of law or stated Government policy which needed to be clarified or defended”\textsuperscript{69} and “a realistic assessment of the broader effect of leaving an inconsistent decision of a ... tribunal undisturbed and the potential for other decision makers to follow it”\textsuperscript{70} and
• recognising that while AAT decisions were not binding, in practice they might be followed in similar factual circumstances.\textsuperscript{71}

One is entitled to be cynical about the proposition that the failure to appeal sprang from concern for the wellbeing of applicant recipients. It does not, for example, really seem to have been foremost in the mind of the legal officer who prepared the AFAR on the 4 May 2018 decision. But assuming it was genuinely a factor in decision making, it could not be a “paramount” consideration; the Litigation Principles required that it be weighed against the wider concerns identified above. Here the legality of a government program was at stake, but DHS appears to have disregarded that aspect altogether.

### 3.2 Failure to bring relevant information to the attention of the Tribunal

Consistent with DHS’s obligation to act as model litigant in proceedings before the AAT,\textsuperscript{72} officers of the Commonwealth must use their best endeavours to assist the AAT to make its decision in relation to the proceeding.\textsuperscript{73} That includes ensuring that the AAT has all relevant information and bringing the AAT’s attention to arguments of the other side where it appears the AAT has overlooked them.\textsuperscript{74}

The reasoning in the 8 March 2017 decision, the decisions which followed it, and the fact that DHS did not pursue appeals of those decisions were matters relevant to other cases in which the AAT had to consider the use, and lawfulness, of income averaging. AAT members showed an increased awareness and interest in the Scheme, as demonstrated by a request from the AAT to DHS for a presentation about the process.\textsuperscript{75} (Professor Carney gave evidence about one of these presentations.)\textsuperscript{76} It would have assisted the AAT for those decisions to be drawn to its attention in other cases involving income averaging, as the Commonwealth accepts. The fact that DHS did not pursue appeals of those decisions was also relevant information for AAT members; it would have provided a strong indication of DHS’s level of confidence in the lawfulness of income averaging. It was a fact that would not generally be known to AAT members.

DHS’s failure to inform the AAT of the decisions, and that it had not pursued appeals of them, deprived AAT members of information relevant to the discharge of their function and undermined consistency in AAT decision-making. It also advantaged DHS by rendering members of the AAT and the public, including social security recipients, less likely to be aware of the reasoning in the decisions and of the fact (from the absence of appeal) that DHS lawyers likely considered that reasoning to be legally correct.

The Commission put to the Commonwealth that DHS’s failure to inform the AAT of the decisions was a breach of the model litigant obligation. The Commonwealth denied that was so. The role of DHS in AAT1 proceedings, it submitted, was “extremely limited” and did not carry with it a duty to inform the AAT of the 8 March 2017 decision, the decisions which followed it or the fact that DHS did not pursue appeals of those decisions. It contended that DHS’s role as the “agency party” in AAT1 proceedings was confined to giving the AAT and the other party the documents required by s 37(1) of the AAT Act and responding to requests or orders from the AAT for submissions on a specific issue. The AAT’s General Practice Direction did not specify that decisions such as the 8 March 2017 decision should be lodged as part of the s 37 documents.\textsuperscript{77}

The Commission does not accept this submission. The respondent to an AAT1 application for review was the secretary of DSS or the chief executive of Centrelink (where the decision was made by a DHS employee).\textsuperscript{78} As litigants, complying with the General Practice Direction was the bare minimum of what was required of them; they were bound by the much larger obligation to use their best endeavours to assist the AAT. DHS had a particular advantage as the repository of specialist knowledge about social
security law and practice with access to all written AAT decisions. The respondent secretary or chief executive should have been informing AAT members and applicants of highly relevant decisions on a new and controversial program. The 8 March 2017 decision was a considered and thoughtful decision that other AAT members deciding similar cases unquestionably had an interest in knowing about.

### 3.3 Failure to report income averaging decisions to the Office of Legal Services Coordination

The lawyer who prepared the AFAR in relation to the 8 March 2017 decision was wrong to conclude that the decision did not involve any “important legal or policy principle.” The 8 March 2017 decision, and those which followed it, raised serious questions about the legal basis for the use of income averaging to give rise to a debt; a practice that affected many thousands of social security recipients.

The 8 March 2017 decision constituted a “significant issue” in the provision of legal services for the purposes of para. 3.1 of the Legal Services Directions.⁷⁹

As the agency responsible for managing social security litigation, DHS was engaged in “the provision of legal services” by its involvement in AAT proceedings concerning debts raised under the Scheme and its preparation of legal advice in the form of AFARs following AAT decisions. Consequently, DHS was required to report to the Office of Legal Services Coordination (OLSC) proceedings concerning debts raised under the Scheme and its preparation of legal advice in the form of AFARs following AAT decisions.

In evidence, Michael Johnson (Assistant Secretary, OLSC) agreed that a significant legal issue would exist where the AAT, whether it be Tier 1 or Tier 2, concluded that averaged income was insufficient to ground an allegation of debt in circumstances where the government had a program to raise hundreds of thousands of debts on that basis.⁸⁰

DHS did not report any of the AAT decisions concerning the Scheme to the OLSC. Had it done so, the Attorney-General and the OLSC may have been informed about the questions being raised by various AAT members about the legality of the Scheme in 2017.
4 The continuing use of income averaging in the calculation of debts

4.1 Ignoring the reasoning in Tribunal cases

Rather than appeal AAT1 decisions rejecting the use of income averaging as a basis for raising debts, DHS generally implemented the directions given by the AAT (for example, that the debt be recalculated based on actual income information). However (and notwithstanding the views of some of its lawyers), Ms Musolino explained in evidence before the Commission, DHS felt free to reject the reasoning in those decisions because it was not uniformly adopted by all AAT members, and DHS considered itself entitled to continue its practice of income averaging under the Scheme.81

Ms Musolino’s argument, that because some AAT1 decisions endorsed averaging, DHS could continue with it in disregard of the 8 March 2017 decision and those following it, does not bear scrutiny. The Commission was referred by DHS officers to some AAT1 decisions which upheld debts raised solely through income averaging.82 None of those decisions, nor any of the 558 decisions reviewed by the Commission, contained any statement of legal principle or references to legislation justifying the use of income averaging in the absence of other evidence to support that calculation.83

More importantly, the Social Security (Administration) Act requires the secretary of DSS, whose powers DHS officers exercised pursuant to delegation, in “administering the social security law” to have regard to “the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal”.84 There is no question that the 8 March 2017 decision and those following it were relevant decisions, because they contained considered and detailed legal reasoning about the lawfulness of income averaging. Consequently, the secretary and DHS officers exercising the secretary’s powers were obliged by statute to have regard to them.

As a general proposition, where the secretary (or their delegates) are of the view that a considered decision of the AAT1 is wrong, so that having regard to it will create problems in administering the law, DSS should appeal that decision to AAT2.85 If it is not willing to appeal, DHS and DSS should accept the principles laid down by the decision,86 and allow them to guide future decision-making. If DHS notices inconsistencies in AAT decision-making, it should recommend that DSS undertake an appeal of the inconsistent decision in order to clarify the issues.

In relation to the AAT1 cases setting aside debts raised through income averaging, DHS’s recourse, if it thought them wrong, was to recommend to DSS that it challenge them by appeal. But instead of taking that step (which would have exposed the illegal basis on which the Scheme was operating), DHS in the main ignored them. In one instance, the 4 May 2018 decision, where it did refer a matter (without recommending an appeal), an appeal was commenced but discontinued.87 In the absence of any appeal, s 8 of the Social Security (Administration) Act required regard to be had to those decisions, which would necessarily have entailed acceptance that income averaging as used in the Scheme could not lawfully continue.

4.2 Implementing decisions contrary to the direction of the Tribunal

S 43(1)(c)(ii) of the AAT Act empowers the AAT to set aside the decision under review and remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.88 The intent of the provision is plainly that the department or agency concerned will undertake any reconsideration in the way the AAT proposes.
The 8 March 2017 decision directed DHS not to recalculate the social security recipient’s debt with income averaging but to recalculate it using fortnightly salary records obtainable in the exercise of DHS’s statutory powers. When it went to implement this decision, DHS was unable to obtain salary records from one of the recipient’s four employers because it had gone out of business. DHS then proceeded to use income averaging to recalculate the recipient’s debt. In effect, DHS ignored both the legal reasoning and the directions of the AAT and reconsidered the matter in accordance with its own view of the law.

DHS used income averaging to recalculate the debt on the advice of Brian Sparkes’ (Principal Legal Officer, DHS) that the decision “should be based on the best available evidence obtainable”, so that if all avenues had been explored DHS was able to use income averaging to raise the debt “regardless of what the AAT said”. Mr Sparkes expressed the same view in relation to a similar direction in the 7 September 2017 decision:

….as long as our evidence gathering power are exhausted then it is still open to raise a debt based on averaging. In this respect the AAT’s direction is wrong in law and can be ignored...

Mr Sparkes argued that was permissible by reference to s 126 and s 182 of the Administration Act. That view was misconceived.

The secretary has a broad power in s 126 of the Social Security (Administration) Act to review the “decision of an officer,” even if an application to the AAT is on foot “if the Secretary is satisfied that there is sufficient reason to review the decision.” There are obvious policy reasons for the existence of this power. It allows for a proceeding to resolve in advance of a full hearing or, if the matter does proceed to hearing, to clarify the issues in dispute. It is in keeping with the objective that the AAT is informal, cost effective and quick. It would be an extraordinary reading of the provision to regard the power as extending to review of the AAT’s decisions; it is plain on its face and in context that it does not contemplate the exercise of the review power once the decision has been made. Apart from the express reference to the power being exercisable even if an application to the AAT has been made (as opposed to determined), it appears in Part 4 of the Social Security (Administration) Act under “Internal Review”, an indication that it has no application to decisions made externally.

The secretary is required to give notice of the review decision to the Registrar of the AAT, another indication that it can be made only while the AAT proceedings are live.

S 182, the second provision on which Mr Sparkes relied, does not create any power of review but concerns the situation where an officer varies or substitutes a decision after an application for AAT1 review or after an application for AAT2 review. The first situation would arise with the exercise of the s 126 power; in that instance the application (to AAT1) is taken to be for review of the new or varied decision. In the second situation (application to AAT2) the varied or substituted decision is treated as having been made by AAT1, and the application is taken to be for review of that decision. Such a situation might arise where a decision is upheld by AAT1 or a decision is set aside and the matter is remitted for a new decision to be made, or an application for AAT2 review is made and an officer then varies the decision upheld by AAT1 or substitutes another decision in accordance with the AAT’s directions.

Whatever Mr Sparkes’ view of the secretary’s powers of review, the secretary remained bound by any directions given by AAT 1 unless and until those directions were set aside.

The directions of the AAT prohibited the use of averaging. That prohibition was clear and unqualified. Beyond those directions, it was clear from the reasoning of the decision, which found the practice of averaging to be unlawful.
5 Conclusion

5.1 The disregard of Tribunal decisions

The Scheme was launched in circumstances where the DSS legal advice was that income averaging, as it was used in the Scheme, was not in accordance with the legislation, and DHS had not obtained any relevant legal advice. The AAT1 decisions confirming that averaged PAYG data alone did not constitute evidence of fortnightly income earned, derived or received, as the Social Security Act required, should have reinforced that original advice and caused DHS and DSS to reconsider the legality of the Scheme.

Instead, DHS chose not to recommend any challenge to those decisions, explicitly or tacitly accepting them as legally correct, but implementing them only as far as was convenient and disregarding their effect for the purposes of the Scheme as a whole.

DSS took no active role, apart from discontinuing an appeal in the 4 May 2018 decision, which, as the AFAR astutely noted, would have brought the illegality issue into the public arena and undermined the “whole approach” of the OCI phase of the Scheme.

Because the adverse decisions were not published, they were not publicly accessible. DHS was able to take advantage of that situation; in the narrower sense, by not bringing them to the attention of applicants or AAT members, and in the wider sense by continuing with a Scheme based on unlawful debt raising. DSS was shielded from the adverse publicity which would certainly have followed a public understanding of what these decisions were saying and how many of them there were.

Clearly, to avoid repetition of that situation, publication of significant decisions in an accessible form is desirable. Professor Carney suggests that AAT1 be empowered, of its own volition, to publish de-identified rulings on key issues as it has done in the child support context. Economic Justice Australia supports a recommendation to that effect, as does the Commonwealth.

There was no systematic means of identifying AAT1 decisions significant to DHS’s application of law or policy, which was a serious failing; however, there is reason to doubt that, had one existed, it would have changed DHS’s view that it was entitled to disregard the AAT1 decisions. The SOS should have, in theory, caused referral of all the decisions which identified the legal issue in relation to income averaging to DSS, but they too seem to have been disregarded. Again, there is reason to doubt that even if they had been observed, DSS would have responded appropriately, given its conduct in relation to the 4 May 2018 decision.

As noted earlier in this chapter, it is the obligation of the secretary of DSS under s 8 of the Social Security (Administration) Act to pay due regard to relevant decisions of the AAT. Presumably, the referral requirements in the SOS are designed to bring relevant decisions to the attention of the secretary. Indeed, Ms Musolino’s evidence was that the AFAR process was about meeting those requirements. That did not happen; in fact, there is no evidence that the secretary was ever made aware of the effect of any relevant AAT decision by those who were responsible for informing the secretary about those matters. To the contrary, Finn Pratt AO (DSS Secretary) said that he did not recall any AAT cases about the illegitimacy of debt-raising on the basis of averaging.

It is impossible to see how the secretary could have met their obligations under section 8 without an effective system in place for referring relevant decisions. It is clear that the system that was in place was not effective; DHS was not referring relevant decisions to DSS, and DSS was doing nothing to ensure that it was.
5.2 Steps taken since the Robodebt scheme

The Commission is aware of steps undertaken since to strengthen the processes for identification of, and responses to, significant AAT1 decisions.

Services Australia says its Legal Services Division launched a strategy in March 2022 that entails regular liaison meetings about AAT and court outcomes with “internal business areas and external policy clients” and the circulation of a quarterly newsletter containing updates on topical issues and litigation trends, including recent AAT and Federal Court decisions.104

DSS says it has strengthened its litigation management processes to include monthly litigation reports provided to the secretary which cover all merits and judicial review matters managed by Services Australia, significant litigation and secretary-initiated applications for review or appeal and prosecutions. The secretary is, the Commission is told, made aware of adverse comments made by a court or tribunal about the conduct of a matter or decisions made in the secretary’s name and the secretary has meetings with the president of the AAT to discuss improvements in DSS’s general dealings with the AAT.105 These are encouraging developments.

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.
5.3 Re-establishing the Administrative Review Council

The Administrative Review Council (ARC) was established as “an effective body, providing useful and timely advice on administrative review matters” whose role was to “ensure that our system of administrative review is as effective and significant in its protection of the citizen as it can be.”\(^{106}\) It performed a unique role in that it was the only entity charged with the function of advising the Attorney-General on the operation and integrity of the administrative law system as a whole.\(^{107}\)

The ARC “is not simply concerned to promote administrative justice, although justice is of central importance. The ARC is concerned with good government and sound public administration.”\(^{108}\) Its functions and powers include keeping the Commonwealth administrative law system under review; monitoring developments in administrative law; inquiring into the adequacy of the procedures used by those, including Commonwealth authorities, who exercise administrative discretions or make administrative decisions, and consulting with and advising them about their procedures, to make sure that they exercise their discretions and make decisions in a just and equitable manner; and recommending to the Minister improvements that might be made to the administrative law system.\(^{109}\)

The ARC is required to give the Minister a copy of any findings,\(^{110}\) and the Minister is also able to refer matters to the ARC for inquiry and report.\(^{111}\)

The AAT Act provides that membership of the ARC is to include the President of the AAT, the Commonwealth Ombudsman, the President of the Australian Human Rights Commission, the President of the Australian Law Reform Commission, the Australian Information Commissioner, and at least three other members of extensive experience in industry, government service, administrative law, professional practice or other prescribed areas.\(^{112}\)

The ARC was defunded and effectively discontinued in the 2015-16 Budget (the same Budget that brought Robodebt into being) as part of the Smaller Government initiative of the Abbott Government.\(^{113}\) However, the provisions concerning it in Part V of the AAT Act have never been repealed.\(^{114}\)

The Scheme was within the remit of the ARC’s functions. In particular, the ARC could have monitored developments at AAT1 level and noted the rejection of income averaging by reference to legal principle and its inconsistency with the legislation; inquired into DSS’ failure to seek review of any of the AAT1 decisions relating to the Scheme; inquired into whether DHS was adequately assisting the AAT in matters coming before it in relation to the Scheme;\(^{115}\) inquired into the equity and justice of the procedures used by DHS to make debt-raising decisions during Robodebt; and informed the Minister of its findings.

There is support for the re-establishment of the ARC. The Hon Ian Callinan AC KC called the decision to terminate the operation of the ARC “imprudent,” and recommended that it be re-funded.\(^{116}\) The Law Council of Australia supported its resurrection: “not only would that be consistent with the rule of law given the terms of the AAT Act require it to exist and operate, but it would serve a great deal of good for Australia’s administrative review system.”\(^{117}\)

Monash University’s Faculty of Law in its submission to the Commission also recommended the ARC’s reinstatement:

> … improved monitoring...might help to ensure that the tribunal exercises its functions appropriately...the Ombudsman is a body which could take up this role. However, a more specifically adapted body is already provided for in Australian law: the Administrative Review Council.'\(^{118}\) The submission goes on to say, ‘it is hard to imagine a clearer example than robodebt of the inadequacies of government self-scrutiny. Insofar as Robodebt shows the need for measures to ensure that merits review decisions have a normative effect on government decision making, there is no reason to think that the Attorney-General’s Department is an adequate substitute for the Administrative Review Council...The government’s recent announcement that the AAT will be replaced with a new administrative review tribunal reinforces the need for robust monitoring of the treatment of merits review decisions.\(^{119}\)
The Attorney-General has recently said that “as part of our commitment to reforming the administrative review system, the Government is giving careful consideration to the re-creation of the Administrative Review Council or similar body.”

**Recommendation - 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.
2. Exhibit 4-5786, Statement of Peter Hanks, 14 February 2023 [p 7: para 52].
7. Transcript, Elizabeth Bundy, 24 January 2023 [p 2288: lines 1 - 10].
10. The existence of the two tiers is a legacy of the absorption of the Social Security Appeals Tribunal by the AAT. See Ian Callinan, Review: Section 4 of the Tribunals Amalgamation Act 2015 (CTh) (Report, 19 December 2018) [13].
14. Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL [p 2: para 14].
16. S 66B(1) of the Administrative Appeals Tribunal Act 1975 (Cth) allows the AAT to publish its decisions and the reasons for them. S 66B(2) provides that the AAT is not authorised to publish information the disclosure of which is prohibited or restricted by or under the AAT Act or any other enactment conferring jurisdiction on the AAT. The publication of AAT1 decisions is not restricted by the Administrative Appeals Tribunal Act 1975 (Cth) or the Social Security (Administration) Act 1999 (Cth). Sections 35(3)-(4) of the Administrative Appeals Tribunal Act 1975 (Cth) allow the Tribunal to make orders prohibiting or restricting the disclosure of information.
18. The AAT is required to provide detailed reasons for its decisions and has the power to make non-publication and non-disclosure orders: see Administrative Appeals Tribunal Act 1975 (Cth) ss 43(2), 35(3)-(4). There does not appear to be a general restriction on the non-publication of first-review decisions relating to social security matters.
21. Exhibit 3-3504 – DSS.5037.0001.0670, D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [para 1]. See also Transcript, Annette Musolino, 30 January 2023 [p2623: lines 8–29]; Transcript, Kathryn Campbell, 11 December 2022 [p962: lines 1–9].
22. Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL [p 2: para 13]; Transcript, Annette Musolino, 30 January 2023 [p2623: line 24-30].
27. Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 1: para 1]; Exhibit 3-4204 - DSS.5037.0001.0666 - Copy of D16 8696198 DHS DSS SOS - Flowchart of AAT1 Appeals Process [p 3].
28. Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 2: para 9].
30. Administrative Appeals Tribunal Act 1975 (Cth) s 43.
31 AFARs were conducted by lawyers in DHS’ Freedom of Information and Litigation branch: Transcript, Damien Brazel, 25 January 2023 [p 2368: lines 6-40]. The Commission’s review of the AFARs shows that seecondee lawyers (eg Exhibit 3-3487 – CTH.0010.0002.0312_R, AFAR.pdf, 20 September 2017), and paralegals (eg Exhibit 9474 - CTH.3067.0003.8744, [REDACTED]- AAT1 General AFAR - streamlined.docm) were also tasked with completing the AFARs.


33 Transcript, Annette Musolino, 30 January 2023 [p 2657: line 18 - p 2658: line 23].


36 Exhibit 3-3504 – DSS.5037.0001.0670 - Standing Operational Statements – D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 1: para 2].

37 Exhibit 9498 - CTH.3007.0052.3976 - SOS mark 2 - review June 2016.docx [p 2].

38 Exhibit 9498 - CTH.3007.0052.3976 - SOS mark 2 - review June 2016.docx [p 8].

39 See Transcript, Elizabeth Bundy, 25 January 2023 [p 2342: lines 35-41]; Transcript, Annette Musolino, 30 January 2023 [p 2740: lines 20-35]; Also note that the AGS Review ‘Department of Social Services/Services Australia Legal Function Review’, 11 February 2020 pointed to deficiencies in the standing operational statements and recommended their revision (Exhibit 9495 - DSS.5125.0001.1029, Report (Final - 11 February).pdf [p 104-106]).

40 Exhibit 3-3493A - TCA.9999.0001.0062_R - 20230120 Review of AAT decisions - (Carney) (without Applicant names).pdf, [row 2], [row 78], [row 80], [row 98].

41 Transcript, Elizabeth Bundy, 25 January 2023 [p 2361: lines 40-45].


44 Exhibit 3-4245 - CTH.3039.0021.4507_R - FW: A third ‘Set Aside’ OCI case at AAT1 Level (now there’s a fourth!) [DLM=Sensitive].


47 Exhibit 4-6682 - CTH.4750.0025.0123_R - FW: OCI AAT Case Summaries [DLM=Sensitive-Legal].

48 Exhibit 3-3540 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 2: para 9].

49 Administrative Appeals Tribunal Act 1975 (Cth) s 39AA(5); Exhibit 3-3482 - CTH.3761.0001.0223_R, 8 March 2017 [p14: para 24].

50 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p 4: para 25].


52 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p9: para 49].

53 Exhibit 3-3482 - CTH.3761.0001.0223_R, 1569 [REDACTED], 8 March 2017 [p 14: para 24].

54 Exhibit 3-3483 - CTH.0010.0001.0020_R - 17.03.23-[REDACTED]-AAT1 GeneralAFAR, 24 March 2017.


56 Transcript, Damien Brazel, 25 January 2023 [p 2380: lines 10-45].

57 Exhibit 3-3504 – DSS.5037.0001.0670 - D16 8696188 Social Security Litigation DHS-DSS (Standing Operational Statements) SOS - October 2016(3) [p 2: para 9]. None of the five decisions made by Professor Carney that rejected income averaging were referred to DSS. See email confirming this Exhibit 9463 - CTH.0010.0002.0243_R For review: Question on notice re certain Centrelink debt decisions[SEC=OFFICIAL:Sensitive]

58 Exhibit 3-3493A - TCA.9999.0001.0062_R - 20230120 Review of AAT decisions - (Carney) (without Applicant names).pdf, [row 78], [row 243], [row 257], [row 258], [row 278].


60 Exhibit 3-4176 - DSS.5036.0001.0163_R - AAT Decision 2018-AA119369, 4 May 2018 [p3: para 15 and 17].
62 Exhibit 3-4179; Exhibit 3-4836 - DSS.5036.0001.0008_R - DSS.5036.0001.0008_R - [REDACTED] – AFARm, 29 May 2018 [para 10].
64 Mr Sparkes confirmed this was the position as at July 2017. See Exhibit 4-6682 - CTH.4750.0025.0123_R - FW- OCI AAT Case Summaries [DLM=Sensitive:Legal].
65 Transcript, Annette Musolino, 30 January 2023 [p 2657: line 44 - 45; p 2662: lines 1-9].
66 Transcript, Annette Musolino, 30 January 2023 [p 2655: lines 40-45].
67 Legal Services Directions 2005 (Cth) app B cl 2(d).
68 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 - Litigation Principles, [para 1(f)].
69 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 - Litigation Principles, [para 4(b)].
70 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 - Litigation Principles [para 4(d)].
71 Exhibit 3-3505 - DSS.5037.0001.0667 - D16 7007795 Litigation Principles [p3: footnote 3]; John Basten, ‘Disputes Involving the Commonwealth: Observations from the Outside’ (1999) 92 Canberra Bulletin of Judicial Administration 38, 38; Minister for Immigration and Ethnic Affairs v Pochi (1980) ALD 130, 154 (Deane J); Re Niola Nominees Pty Ltd and Minister for Health (1986) 9 ALN N200, [10]; Re Ganchov and Comcare [1990] AATA 419, [41]; Garry Downes, ‘Structure, Power and Duties of the Administrative Appeals Tribunal of Australia’ (Speech, Administrative Court of Thailand and Central Administrative Court of Thailand, 21 February 2006) [48] (Note: at the time of his delivery, Garry Downes AM was the President of the AAT); Exhibit 3-3489 – TCA.9999.0001.0059_R, Statement of Terry Carney, 19 January 2023 [p3: para 16].
72 Legal Services Directions 2017 (Cth) sch 1 cl 4.
73 Administrative Appeals Tribunal Act 1975 s 33(1AA); Legal Services Directions 2017 (Cth) app B cls 3 - 4.
75 Exhibit 2-1666 - CTH.3027.0015.5572_R - Presentation for AAT meeting- Departmental representative to discuss OCI at AAT members’ meetings [DLM=For-Official-Use-Only].
76 Transcript, Terry Carney, 25 January 2023 [p 2253: line 15 – p 2254: line 5].
77 Administrative Appeals Tribunal, General Practice Direction, 28 February 2019; Administrative Appeals Tribunal, Practice Direction: Lodgement of Documents under Sections 37 and 38AA of the AAT Act, 30 June 2015.
78 Social Security (Administration Act) 1999 (Cth) s 142A.
79 Legal Services Directions 2005 (Cth) sch 1 cl 3.1.
80 Transcript, Michael Johnson, 21 February 2023 [p 3435: line 44 - p 3436: line 1].
81 Transcript, Annette Musolino, 30 January 2023 [p 2746: lines 5–40).
82 Transcript, Damien Brazel, 25 January 2023 [p 2377: lines 30-31]; Exhibit 3-3530 – EBU.9999.0001.0001_R - NTG-0098 L Bundy Statement, 29 November 2022 [page 30: para 161(d) and (e)]; Exhibit 4-6672 – BSP.9999.0001.0002_R - 20230220 Statement of Brian Sparkes (updated Doc IDs) NTG-0196(4726358.1) [p 4: para 27-30]; Exhibit 4-6709 - BSP.9999.0001.0004_R - 2-20230227 Supplementary Statement of Brian Sparkes, 27 February 2023 [p1: para 5]; Exhibit 4-6714 - CTH.4750.0026.0018_R, PAYG PROJECT - APPEAL PROCESS AND TRIBUNAL FEEDBACK [p 3]; Transcript, Annette Musolino, 30 January 2023 [p 2739: lines 45-46].
84 Social Security (Administration) Act 1999 (Cth) s 8(f).
87 Exhibit 9470 - CTH.3039.0031.1430 [REDACTED] - OCI - Documents re AAT2 Sec Appeal [SEC=OFFICIAL:Sensitive, ACCESS=Legal-Privilege];
88 Administrative Appeals Tribunal Act 1975 (Cth) s 43(1)(c)(ii).
89 Exhibit 3-3482 - CTH.3761.0001.0223_R - CTH.3761.0001.0223_R - 1569 [REDACTED], 8 March 2017 [p 1].

Exhibit 9471 - CTH.0010.0001.0085_R - FW_ LEX 36464 - [REDACTED] - DSS - Newstar...


Administrative Appeals Tribunal Act 1975 (Cth) s 2A.

Minister for Immigration and Border Protection v Makasa [2021] HCA 1 at [50]-[51].

Social Security (Administration Act) 1999 (Cth) s 51.

Exhibit 1-0002; Exhibit 1-0062; Exhibit 1-0086 - DSS.5006.0003.1833_R, DSS.5006.0003.1833_R - FW- Legal Advice - Data matching- notifications and debt raising [DLM=Sensitive-Legal], 18 December 2014. 100 Exhibit 3-3489 - TCA.9999.0001.0059_R - Statement of Emeritus Professor Terry Carney AO FAAL, 19 January 2023 [p 19: para 81].


 Transcript, Annette Musolino, 30 January 2023 [p 2656: lines 30-40].

Transcript, Finn Pratt, 10 November 2022 [p 895: lines 28-41].

Exhibit 4-8202A - CTH.9999.0001.0001 [p 65-66].

Administrative Appeals Tribunal Act 1975 (Cth) s 48. 110 Administrative Appeals Tribunal Act 1975 (Cth) s 33(1AA); Legal Services Directions 2017 (Cth) app B cl 3 –4.


109 Administrative Appeals Tribunal Act 1975 (Cth) s 51.

110 Administrative Appeals Tribunal Act 1975 (Cth) s 51(3).

111 Administrative Appeals Tribunal Act 1975 (Cth) s 51B.

112 Administrative Appeals Tribunal Act 1975 s 49.

113 Exhibit 1-1234 - RBD.9999.0001.0001 - BP2_consolidated [p 65-66].

114 Administrative Appeals Tribunal Act 1975 (Cth) s 48.

115 Administrative Appeals Tribunal Act 1975 s 33(1AA); Legal Services Directions 2017 (Cth) app B cl 3 –4.


ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2013 [p 13].

ANON-24KG-9BNS-M, Submission by Monash University Faculty of Law, published 1 March 2013 [p 13].

ATTORNEY-GENERAL MARK DREYFUS - SPEECH - 2023 COUNCIL OF AUSTRALASIAN TRIBUNALS NATIONAL CONFERENCE - THURSDAY, 8 JUNE 2023; see also Attorney-General's Department, Administrative Review Reform: Issues Paper (Issues Paper, April 2023) p 22.
Chapter 21:
The Commonwealth Ombudsman
1 Introduction

In January 2017 complaints about the Robodebt Scheme (the Scheme) were on the rise. This was the time when effective scrutiny by the Commonwealth Ombudsman might have made the continuation of the Scheme untenable, or at least thrown it into serious question.

The Commonwealth Ombudsman is empowered under the Ombudsman Act 1976 (Cth) (Ombudsman Act) to investigate the administrative actions of Australian Government agencies and officers. The Ombudsman, the Deputy Ombudsman and their staff make up the Office of the Ombudsman which carries out the functions of the Ombudsman. (The terms “Ombudsman,” “Ombudsman’s Office” and “Office” are used interchangeably in this chapter.)

Complaints about the Scheme were made to the Ombudsman’s Office, which undertook two investigations into the Scheme.

In January 2017, the Ombudsman commenced an “own motion” investigation into the Online Compliance Intervention program (the OCI program: the first online phase of the Scheme) pursuant to s 5(1)(b) of the Ombudsman Act (the 2017 own motion investigation). The investigation culminated in the Ombudsman’s report titled Centrelink’s Automated Debt Raising and Recovery System dated April 2017 (the 2017 Investigation Report).

In October 2018, the Ombudsman commenced its “implementation” investigation into the Scheme, pursuant to s 15 of the Ombudsman Act, examining the extent to which the recommendations contained in the 2017 Investigation Report had been implemented by the Department of Human Services (DHS) and the Department of Social Services (DSS), and the extent to which implementation action had achieved the outcomes intended by those recommendations. The report of that investigation was published in April 2019 (the 2019 Implementation Report).

The Ombudsman took the position that current and former officers could not be compelled to give evidence to the Commission, pursuant to s 35(8) of the Ombudsman Act. The Commission did not entirely accept this view but agreed to proceed on the basis that the Ombudsman would assist the Commission voluntarily. Current and former officers gave evidence by statement to the Commission, and in person at its hearings.
2 The “own motion” investigation power

The Ombudsman's Office can investigate as the result of a complaint or on its own initiative (by its “own motion”). Section 5(1)(b) of the Ombudsman Act permits the Ombudsman:

... of his or her own motion to investigate any action, being action that relates to a matter of administration taken either before or after the commencement of this Act by a Department, or by a prescribed authority.

The term “matter of administration” is not defined in the Ombudsman Act, but was the subject of some discussion in the explanatory material for the Ombudsman Bill 1976, and its predecessor, the Ombudsman Bill 1975. It was thought preferable that the term be left undefined so as not to limit the Ombudsman’s flexibility.

The Ombudsman Act does not specify the considerations to which an Ombudsman is to have regard in exercising the discretion to initiate an own motion investigation or in the investigation’s conduct. It may, however, be taken that the discretion should be exercised, and the investigation carried out, with regard to the purpose of the relevant provisions of the Ombudsman Act. With that statutory purpose in mind, the fact that an own motion investigation is one that is commenced on the Ombudsman’s own initiative, without there having first to be an individual’s complaint, implies that the Ombudsman is to consider the exercise of the discretion with regard to broader considerations than the interests of any particular individual. (Of course, an accumulation of individual complaints may, as in the case of the Scheme, prompt an own motion investigation.)

The provisions that deal with reports of Ombudsman investigations are relevant. Section 15(1) lists defects in departmental action – including that it appears to have been contrary to law, was based on an error of law, was unreasonable, or was otherwise, in all the circumstances, wrong – as to which the Ombudsman’s positive opinion formed after their investigation can give rise to a requirement for the Ombudsman to make a report to the department under investigation.

Section 15(2) empowers the Ombudsman in the report to make recommendations that steps be taken to remedy defective aspects of the department’s action. A report is provided to the department concerned but may also be provided to the Prime Minister under s 16 and ultimately to Parliament under s 17, if those recommendations are not implemented. Those provisions indicate that an own motion investigation has as an object the exposure of instances of unlawful, unreasonable or wrong departmental action through a process that is separate from, and independent of, the political and bureaucratic processes of government.

A third relevant feature of the Ombudsman Act is to be found in the provisions which secure the Ombudsman’s independence and confer the Ombudsman’s investigative powers. The Ombudsman may only be removed from office by the Governor-General on grounds of misbehaviour or physical or mental incapacity after an address by both houses of Parliament. The Ombudsman’s investigative powers include coercive powers to require the production of documents and information and the attendance of persons, including public servants, at formal interviews. These powers are not inhibited by provisions of other Acts, legal professional privilege, the privilege against self-incrimination or claims of public interest immunity. The Ombudsman is empowered to examine witnesses on oath.

These provisions ensure the independence of the Ombudsman. They confer on the Ombudsman sufficient powers to look behind the assertions of departments that are being investigated, rather than merely accepting at face value what those departments have to say. This includes what departments assert about the law. The Ombudsman is expressly authorised to report on action that appears to have been contrary to law or which was based either wholly or partly on a mistake of law.
2.1 The 2017 own motion investigation

In late 2016 and early 2017, as the effects of the roll-out of the OCI phase of the Scheme began to be felt, the Ombudsman received complaints from recipients experiencing a variety of problems including debt inaccuracy, technical problems with the online platform, being forced to proceed online, being unexpectedly contacted by debt collectors, and inconsistent DHS advice. Advocacy groups and members of Parliament were also making complaints on behalf of those they represented. Complaints to the Ombudsman almost tripled in December 2016.

The various complaints were originally treated as three different “issues of interest” but on 5 January 2017 Louise Macleod (then director, Social Services and Indigenous Team, Social Services, Indigenous and Disability Branch, Ombudman’s Office) prepared a minute proposing that the Ombudsman, Colin Neave, conduct an own motion Investigation into the Scheme.

Ms Macleod (who subsequently became acting Deputy Ombudsman) described the threshold that warrants an own motion investigation:

… when a systemic issue of public administration is identified (such as being the subject of numerous complaints affecting many people that has or could cause appreciable damage to citizens, is complex, there is broader public interest in publicising the problem) and the Office perceives there is no, or insufficient, appetite or engagement by the relevant agency/s to address the systemic issue, which could warrant comment being made under s 12(4) of the Act or a report under s 15 that is published under s 35A of the Act.

A deficiency in an individual case which was “likely to be repeated in other cases” could also, she said, meet the threshold for an own motion investigation.

Ms Macleod outlined key concerns in relation to the Scheme in her minute to Mr Neave, based on complaints, feedback from stakeholders, and commentary in the media. Mr Neave decided to undertake the investigation. Ms Macleod’s concerns were reflected in his letter to Finn Pratt (then DSS secretary), which informed DSS that the Ombudsman was undertaking an investigation pursuant to s 8 of the Ombudsman Act. (Before beginning an investigation, the Ombudsman must inform the principal officer of the agency or department concerned.) The letter advised that the investigation would cover the following issues:

• adherence to relevant legislative requirements
• accuracy of debts being raised via the platform
• adequacy of risk assessments and decision making during the planning and implementation stages
• adequacy of safeguards and impact on vulnerable customers
• impact of automated decision making on quality of decisions
• service delivery issues.

Letters advising of the investigation had also been sent to the DHS secretary and the ministers in the Social Security portfolio.

In her minute, Ms Macleod had elaborated on those concerns. In particular, she had referred to the first issue of “adherence to relevant legislative requirements” as arising “in the relevant social security and data matching legislation.” In relation to the question of debt accuracy, Ms Macleod specified particular concern as to “the impact of: averaging data; shifting onus to supply historical fortnightly earnings information to customers; and shifting away from obtaining historical information from employers.”

Ms Macleod also pointed out that from feedback it appeared that DHS was correcting decisions “without invoking formal internal review mechanisms,” so that, without an investigation, “larger questions about whether the system fetters or fails to comply with legislative requirements” might not be addressed.
Having sent the letters advising of the commencement of the own motion investigation, Mr Neave left the role of Ombudsman. Richard Glenn, who had previously been Deputy Ombudsman became Acting Ombudsman from 16 January 2017 to 25 April 2017.

2.2 The Ombudsman’s use of the section 8(3) power in the own motion investigation

Section 8 of the Ombudsman Act deals with the Ombudsman’s conduct of investigations. Investigations are conducted in private, and, subject to the Act, as the Ombudsman sees fit.\(^{28}\) Section 8(3) gives the Ombudsman power to obtain information and make inquiries, also as the Ombudsman sees fit.\(^{29}\) Although one would expect an agency or department to provide information requested by the Ombudsman under s 8, the provision does not impose an obligation to respond, nor does it say what is to happen in the event of non-compliance. That contrasts with s 9 of the Act, which empowers the Ombudsman to issue formal notices to compel the provision of information and documents. Section 9 gives the Ombudsman power to serve a notice in writing requiring a person, at a time and place specified, to produce information or documents\(^{30}\) or where the Ombudsman has reason to believe a person can give information relevant to an investigation, require their attendance to answer questions relevant to the investigation.\(^{31}\) A person attending under s 9 can be examined on oath or affirmation.\(^{32}\) The failure to comply with a notice under s 9 is an offence.\(^{33}\) The Ombudsman may make an application to the Federal Court for an order directing compliance with the notice.\(^{34}\)

For the purposes of the 2017 own motion investigation into the Scheme and the 2019 Implementation Report investigation, the Ombudsman issued requests for information to DHS and DSS pursuant to s 8(3) of the Ombudsman Act. No requests for information were issued pursuant to s 9.

Both DHS and DSS provided incomplete responses to the Ombudsman’s various s 8 notices and withheld key documents that fell within the scope of the requests.

2.3 The requests for legal advice and the responses

The December 2016 request

In December 2016, pursuing one of the “issues of interest” raised as a result of the many complaints received in connection with the OCI platform, the Ombudsman asked DHS, pursuant to s 8(3), the question:\(^{35}\)

\[
\text{Did DHS seek legal advice about the legality of averaging income for social security overpayment calculations? If yes, please provide a copy of the advice.}
\]

That request was followed up with an email from Ms Macleod to DHS, asking that the Ombudsman be briefed about a number of matters, including how DHS was ensuring:\(^{36}\)

\[
\text{the collection and assessment of income data and the subsequent decision to raise a debt adheres to the social security legislation...}
\]

and

\[
\text{the income data is accurate and the decision to raise a debt is legally valid and complies with administrative law.}
\]

Ms Macleod’s concern about the legality of the debt-raising process continued, as was evident from her identification, in the minute to Mr Neave, of adherence to relevant legislative requirements as an issue for the own motion investigation.
Ms Macleod led a small team of investigators (the Investigation Team) for the purposes of the own motion investigation. The Investigation Team reiterated the “issue of interest” question as to whether DHS had sought legal advice, requesting a copy of it in late January 2017, in the context of the own motion investigation.

DHS responded on 24 January 2017 with copies of three internal advices from its legal offices: the 14 January 2015 advice, the 17 April 2015 advice, and the 14 May 2015 advice. As was apparent to the Investigation Team, none directly addressed the legality of income averaging as it was used in the Scheme.

### The 3 February 2017 request

On 3 February 2017, at a meeting between members of the Investigation Team and DHS employees, the Ombudsman’s representatives provided a further list of questions and requests for information. As recorded in a DHS email of that date, the list included a request for “any legal advices that the Department thinks would be useful for the Ombudsman’s investigation.” In a later email, however, an Ombudsman staff member added, “for clarity” a qualification to that request: “particularly in relation to automization [sic] of decisions.”

DHS responded by pointing to the three advices it had sent on 24 January.

At the time of its responses, both to the January request and the February request, DHS was holding two further internal advices, given on 11 January after Barry Jackson (acting secretary, DHS) questioned the legal position in relation to averaging.

The first, the draft advice of Mark Gladman (acting general counsel, DHS) expressed a tepid view that there were “some reasonable arguments” to support the use of income averaging, while counselling that it might be “prudent” to seek external legal advice. Instructions to the Australian Government Solicitor (AGS) were drafted for that purpose but were never sent.

The second advice, from Glyn Fiveash (deputy general counsel, DHS), said bluntly that income had to be apportioned between fortnights “at the rate it was actually earned, derived or received;” averaging an amount received over a larger period such as 12 months was impermissible.

Ms Macleod said that she considered that these documents – the advices and the instructions – fell within the scope of the s 8 legal advice request made by the Ombudsman to DHS and should have been provided.

That characterisation of the department’s approach is fair but it is doubtful that the documents, strictly speaking, fell within the s 8 request. The question asked of DHS was in the past tense, “Did DHS seek legal advice?” which could reasonably be interpreted as asking about the period when the Scheme was first developed. A frank and forthcoming answer to the February request would have included the Fiveash and Gladman advices but it might be argued that the focus of that request was on “automization,” which neither advice concerned.

### The 19 February 2017 request

Perturbed that the advices provided by DHS did not disclose any legal basis for income averaging as it was used in the Scheme, Ms Macleod wrote to DSS on 19 February 2017 explaining that the Ombudsman wanted to understand what gave DHS authority to average employment income to determine entitlement to, and possible overpayment of, social security. She asked DSS to provide copies of any legal advice it had received on the topic, “either in the past or in the context of the OCI.” (The letter said that the Ombudsman had asked for “the same” from DHS, but, while that was undoubtedly the intent of previous requests, those were not the terms used.)
The scope of the request was unquestionably broad enough to embrace advice DSS had obtained internally in 2014 (the 2014 DSS legal advice) and the instructions on which it was given, explaining how the measure involving averaging would work. That advice cautioned that averaging might not be consistent with the legislative framework, because of the statutory requirement of assessing entitlement on the basis of income received in each fortnight.

Arguably within the request was the advice DSS had given DHS in early 2015, when DHS was preparing an Executive Minute for the then Minister for Social Services. The Executive Minute dealt with measures including the PAYG proposal, involving averaging of Australian Taxation Office (ATO) data, which became the beginning of the Scheme.

DSS’s advice included a series of dot points (the DSS dot points) forwarded on 20 January 2015 setting out the legal problems with the proposal, one point being:

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.

Relevant, too, was internal DSS advice given on 3 March 2015, in which a DSS lawyer, asked to advise on all the proposals contained within a New Policy Proposal, including the pay-as-you-go (PAYG) proposal, noted that it appeared to be part of the proposal that ATO information would be given some special status as “primary evidence;” he was “not sure” that the social security law would permit that. It might, he said, be necessary to insert a new rule in the Social Security Act to provide that in the absence of other information, the ATO data could be taken as the person’s employment income.

None of that material was provided.

Instead, on 23 February 2017, DSS provided legal advice authored by Anne Pulford (principal legal officer, Social Security and Families, DSS) dated 24 January 2017 (the 2017 DSS legal advice). This advice expressed the opinion that the use of income averaging as a “last resort” to determine a social security debt where no other information about the recipient’s circumstances was available was lawful.

However, DHS had earlier provided the Ombudsman with a copy of the Executive Minute in which the statement was made of the PAYG proposal, “DSS has also advised that legislative change would be needed to implement this initiative.” Plainly, that could not be a reference to the 2017 DSS legal advice.

The 23 February 2017 request

On the same day the 2017 DSS legal advice was received, Ms Macleod asked DSS to provide a copy of the advice about the legislative change referred to in the Executive Minute and “any other notes, documents, or emails related to [that] advice.” Precisely the same request was made of DHS.

DSS responded to Ms Macleod’s request on 2 March 2017 with an email that attached the text of the 2014 DSS legal advice and the text of the 2017 DSS legal advice, combined into one document without the benefit of the briefing instructions. It contained an “explanation” (the DSS explanation) of the inconsistent conclusions between the two.

The DSS explanation was as dishonest a document as the Commission has seen. According to it, when DSS gave the 2014 DSS legal advice, it had not been understood that recipients would have the opportunity to correct information presented to them on the basis of ATO income averaging or that averaged income would only be used if attempts had been made to obtain information from the recipient and no other information was available.

By early 2015, having become aware of those circumstances (DHS having adjusted the process), DSS had come to the view that no legislation was required to implement the measure and the Scheme was lawful. The 2017 DSS legal advice was only obtained because there had been some movement of staff responsible for social security and debt within DSS.
The instructions on which the 2014 DSS legal advice was provided would have given the lie to that excuse. Those instructions made clear that, as DSS knew in late 2014 (and as remained the position through all iterations of the proposal) a recipient would be provided with the information about the debt based on averaging and given the opportunity to dispute it. But, of course, the 2014 DSS legal advice was provided devoid of that information.

The DSS dot points which were unquestionably within the terms of this request as the more specific advice to DHS in connection with the Executive Minute were not provided at all. The dot points made it clear that by early 2015, DSS had not become at all comfortable with the proposal. The sanguine approach to averaging the DSS explanation attributed to DSS from early 2015 was irreconcilable not only with the DSS dot points but also with the insistence of senior DSS officers to the Commission that in early 2017 they were startled to learn that DHS was using income averaging.58

DSS forwarded a copy of what it had sent to the Ombudsman – the combined 2014 and 2017 DSS legal advice texts, devoid of instructions, and the DSS explanation – to DHS,59 thus ensuring that there would be no confusion about the line adopted with the Ombudsman. DHS then provided its response to the Ombudsman. It noted that “very early in the development process” DSS had raised the possibility of a need for legislative change.

Ultimately, however, DSS had not identified legislative changes in respect of the PAYG measure as presented in the New Policy Proposal which went to Cabinet (which contained no reference to averaging). Nothing else relating to the advice referred to in the Executive Minute was provided, particularly not the DSS dot points.

Ms Macleod explained in her evidence the Ombudsman’s reaction to the DSS explanation. It was accepted at face value as indicating that DSS had concerns prior to the commencement of the Scheme and communicated them to DHS, which made changes which dispelled those concerns. Nonetheless, the Investigation Team had some doubts which were not overcome but which were not acted on.60

After being taken to the 2014 DSS legal advice, complete with the instructions on which it was based, Ms Macleod said that she felt misled. Having the documents in their entirety would have had an impact on the investigation; it was “another piece of evidence we could have put to the Acting Ombudsman, showing they were ‘not doing the right thing’.”61

2.4 Requests for other information

It was not only in respect of legal advice that the Ombudsman was deceived.

Numbers of recipients who had a debt based on averaging?

The 3 February 2017 list of questions that the Investigation Team had given to DHS included, as question three:

How many recipients, subject to OCI, have had their final outcome based on averaging?

Jason Ryman (director, Customer Compliance Branch, DHS) prepared a response to that question, which included the information that as at 27 January 2017, 76 per cent of the Scheme’s debts had been based on averaging, involving 100,281 debts and 99,404 people.62 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.63

Between 16 February 2017, when Mr Ryman sent it for “Dep Sec clearance” and mid-March 2017, his answer to question three bounced between Malisa Golightly (deputy secretary, DHS), Annette Musolino (chief counsel, DHS) and DHS’s Ombudsman, Relationship and Management section.
Originally, Ms Golightly raised concerns about whether Mr Ryman’s response was sufficient information, because it did not make clear whether averaging was occurring over a 12-month or a shorter period and whether it occurred because the recipient accepted the ATO data or because the system “auto-completed.”

Another response was prepared which retained the figures in the original but explained the process by which DHS had arrived at the figures, with a sentence added to clarify that the identification of averaging did not differentiate between system-generated averaging and averaging proposed or agreed to by a recipient.  

Again, the response went via the chief counsel to the deputy secretary, who now expressed a concern that, in fact, the figures might overstate averaging because they might represent income figures which actually were identical each week or which had been averaged by the system or the recipient. This, in fact, made very little sense because if the income figures were identical every week across the entire benefit period, so that averaging unusually managed to produce a correct result, it would still have been a product of the system or the recipient’s entering the information. And, however the averaging was done, it did not alter the averaging figures which Mr Ryman had originally proposed.

The end result was that Ms Macleod was told that the information was not available.

The final DHS response was to note the complexities which the request raised – the fact that there were any number of reasons averaging might occur, and that earnings were not always divided by 26 fortnights. None of this, of course, provided an answer to the question asked; an answer which was available and which could readily have been given.

It does not appear that the Ombudsman pressed the matter. A file note recorded that the complexity of the issue was explained and the reaction of the Ombudsman’s Office was to say that a response to that effect would suffice.

The acceptance of DHS’s claim that it could not provide the averaging figures seems to have been largely the product of the pressure of time.

DHS was able to stall from 3 February until the middle of March 2017, when the Ombudsman was ready to produce the final draft of its Investigation Report, and then bat the enquiry away with the excuse that it was all very complex.

**Scale of the Scheme?**

The 3 February 2017 list of questions also included, as question two, a request for this information: “Scale of OCI in the total departmental compliance and debt recovery activity.” It seems the OCI information was not available, possibly because that phase of the program had only been in full swing for four months, but Craig Storen (general manager, Customer Compliance Division, DHS) was able to assemble figures for the manually-conducted Employment Income Matching program (EIM), the predecessor to the OCI program, for the 2015–16 year. Mr Storen reported that there had been 101,563 EIM reviews, with 99,035 debts raised. Debts resulting from the EIM measure were 47 per cent of all debts raised as a result of “social welfare compliance activity” but four per cent of all debts raised for “customer receiving social welfare payments” (which might include, for example, recovery of payments such as family tax benefit paid in advance). Ms Golightly expressed confidence that the Ombudsman only wanted the last figure and that was the only information conveyed to the Ombudsman in answer to question 2, despite its specific reference to compliance activity.
Data modelling?

Earlier, the Ombudsman had requested any modelling done on how many debts DHS had expected would be under-calculated or over-calculated as a result of averaging.\(^{71}\) In fact, analysis had been done based on customer records for the years from 2010–11 to 2012–13 which showed that debts increased by 13.06 per cent when income averaging was applied.\(^{72}\) Mr Ryman advised Ms Golightly accordingly. Ms Golightly informed him that she did not regard the analysis as “data modelling” and advised the Ombudsman that none had been undertaken.\(^{73}\)

2.5 How information could have been sought

The power to obtain information and documents

The Ombudsman Act contains no sanction for non-compliance with a request made under s 8(3). Section 36 of the Act makes it an offence to refuse or fail without reasonable excuse to furnish information\(^{74}\) or to answer a question or produce a document\(^{75}\) when required pursuant to the Act, but in this case the Ombudsman’s Office was making requests for information, rather than requiring its provision. That is not surprising given Mr Glenn’s perspective, which was to assume that public servants would comply with the APS Code of Conduct.\(^{76}\)

Mr Glenn also expressed the view that the Ombudsman’s Office could not function effectively if it were required to question whether information provided by departments in response to complaints or investigations was true and correct. One can accept that the Ombudsman has a high level of interaction with Commonwealth departments and agencies, particularly agencies like Services Australia, and works with them on a cooperative basis. The arrangement would be unworkable if every piece of information communicated had to be checked. But where palpably incomplete and inconsistent information is provided on important matters, it may be necessary to use the powers available under s 9.

The responses to requests made for information in the 2017 own motion investigation warranted the use of the s 9 powers in the Ombudsman Act, particularly the associated power to examine on oath, to compel answers as to why the obvious inconsistencies and deficiencies in production of information were occurring and to require production of the documents which were so obviously missing.

The Commission does not propose to make any formal recommendation as to how the Ombudsman’s Office should use s 9 in general, given the evidence of Iain Anderson, the current Commonwealth Ombudsman. Mr Anderson recognised the desirability of providing “guidance on the manner in which we scope out an investigation at the outset”\(^{77}\) to ensure clarity on the purpose for and potential key issues in an investigation and to assist in making tactical decisions in the course of an investigation. That would include dealing with the manner in which information was sought. The formal issuing of a notice under s 9 of the Ombudsman Act “would not be taken lightly, given it will involve delay to an investigation,” but it was important, he said, that the Office’s investigation team know that it was an option and that they, and the Ombudsman, were able to draw the power to the attention of an agency, or their minister, as an option that they were willing to pursue if necessary.\(^{78}\)

In light of the evidence of the readiness to conceal and mislead exhibited by certain departmental staff in relation to the Scheme, the Commission considers that there ought to be a clearly stated statutory duty reposed in departmental secretaries and agency chief executive officers to ensure that their departments or agencies use their best endeavours to assist in Ombudsman investigations and a corresponding duty on the part of Commonwealth public servants to use their best endeavours to assist in Ombudsman investigations. The obligation, which might be imposed in the form of an amendment to the Ombudsman Act or, alternatively, to the Public Service Act 1999 (Cth) (PS Act), would not be dissimilar to that imposed on decision-makers and parties appearing in the Administrative Appeals Tribunal (AAT), to assist the AAT.\(^{79}\)
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.

Another power to obtain information

Section 14 of the Ombudsman Act enables an “authorised person” of the Ombudsman’s Office to enter premises occupied by a department to carry on an investigation in that place. The provision is expressed in similar terms to s 32 of the Auditor-General Act 1997 (Cth) (Auditor-General Act), but there is no equivalent in the Ombudsman Act to s 33(3) of the Auditor-General Act, which compels the occupier to provide the authorised person with all reasonable facilities for the effective exercise of powers.

Mr Anderson noted that in practice the Auditor-General used the s 33(3) power to directly access the IT systems of agencies. He did not think that s 14 of the Ombudsman Act would permit him to do likewise (which is undoubtedly correct) but he had considered how he might obtain specialist services to “actually trawl through agency IT systems to be able to locate documents or to ... double-check whether the agencies” had provided the documents.80 He would not, of course, require such powers for investigations where the level of complexity did not justify it, or the agency participated in good faith.81

A power equivalent to that in s 33(3) of the Auditor-General Act would not, of course, be necessary if one could assume good faith participation in Ombudsman investigations. The departmental responses to the 2017 own motion investigation make it abundantly clear that good faith cooperation cannot be assumed, although it might reasonably be expected, and that greater power is needed in what one would hope would be the exceptional case where a department or agency sets out to thwart the investigation through non-compliance or deliberate misleading. In the Commission’s view, the Ombudsman should be given the additional power.

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.

2.6 Ensuring disinterested responses

Mr Glenn, Acting Commonwealth Ombudsman, assumed that Commonwealth public servants would adhere to their Code of Conduct and provide proper cooperation to his investigation.82 It would, in ordinary circumstances, be reasonable to assume that officers serving one part of the Commonwealth government would assist those in another part of the Commonwealth government, but, as has already been observed, the evidence was plainly to the contrary when it came to the own motion investigation into the Scheme.

Part of the problem in the 2017 own motion investigation, unknown to the Ombudsman, was that the very people in DHS who had devised, or who, in DSS, had waved through, the Scheme in 2015, were involved in responding to the investigation. Departmental responses to own motion investigations by the Ombudsman (as the more significant investigations undertaken by the Ombudsman’s Office) should be overseen by the relevant department’s legal services division rather than those responsible for implementing the program or policy whose administration has come under question. That assumes, of course, the independence of departmental lawyers which itself is the subject of recommendations in the Lawyers and Legal Services chapter.
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.

2.7 Permitting involvement in the report drafting process

Section 8(5) of the Ombudsman Act prevents the Ombudsman from finalising a report that includes opinions that are expressly or impliedly critical of a department, unless the department has been given the opportunity to make submissions.

In Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman, the Federal Court said that subs 8(5) requires that “prior to the completion of an investigation any opinions carrying potentially adverse implications about an individual, department or prescribed authority” be put to the relevant party, who must then be “afforded an opportunity to be heard before those adverse opinions are finally embodied in a report.” The Ombudsman need not, the court considered, put to the individual or department concerned the “exact critical opinion in the form it will appear in the final report,” but must put the “substance” of the proposed opinion.

In 2017, the usual practice of the Ombudsman’s Office, in accordance with its Work Practices Manual for Complaint Management was to provide a draft report to the agency subject to investigation so that the recipient could understand what was investigated and the basis for any possible criticism, and provide comments on the draft. That was to go beyond the requirements of s 8(5) but it might in some instances have been the most efficient way of proceeding. Mr Anderson, the current Ombudsman, suggested that the provision of draft reports to departments under investigation could be an effective tool for achieving better engagement by those departments with Ombudsman investigations.

However, the process that the Ombudsman adopted in the 2017 investigation went further still. It involved taking the unusual step at the outset of the investigation of providing a draft “outline” of the report to DHS, with an invitation to comment on it, before the report itself had yet been drafted by the Ombudsman. The draft outline detailed, at a high level of generality, topics that were proposed to be included in the report of the investigation, as well as an indication of the approach that was proposed to be taken in dealing with those topics. It evidently reflected preliminary thinking by members of the Ombudsman’s Office.

This was a time of heightened media and political interest in the Scheme which DHS employees had sought to counter with a set of “master talking points.” The success of that strategy would be greatly enhanced if an independent office holder, such as the Ombudsman, were to reach conclusions in terms consistent with those talking points. Mr Glenn recalled in his oral evidence that senior DHS officers with whom he met on 19 January 2017 emphasised that DHS was investing considerable resources in correcting the public record at every opportunity.

The Ombudsman provided the draft outline to DHS by email on 30 January 2017, giving the department the opportunity to make changes in track. Members of DHS saw this as an opportunity to influence the content of the report in a way that would further the department’s interests, particularly by ensuring that it would be consistent with its public narrative about the Scheme. Michael Robinson (national manager, Ombudsman and Information Release Branch, DHS) made this extraordinary observation in an email to other DHS employees about the draft outline shortly after it was provided:

Having read the report outline I think the department has been given a great opportunity to effectively co-write the report with the Ombudsman’s Office.

The subsequent conduct of DHS employees is consistent with their seizing that opportunity.
On 3 February 2017, Jonathan Hutson (deputy secretary, DHS) provided a marked-up copy of the draft outline to Mr Glenn. The marked-up copy included DHS comments in green text under the corresponding dot points. In his email to Mr Glenn attaching the marked-up outline, Mr Hutson said, “As you will see from our comments on the attached we have quite a long way to go.”

The language that Mr Hutson chose to use in his email, “...we have quite a long way to go,” is not consistent with a process whose statutory object is that it be conducted in a manner independent of the department under investigation. It suggests Mr Hutson (and Kathryn Campbell, DHS Secretary, under whose instructions he was acting) took the view that the process was one of negotiation between DHS and the Ombudsman’s Office as to what should be included in the 2017 Investigation Report. There is no evidence of anyone from the Ombudsman’s Office dispelling that view which, indeed, was invited by the provision to DHS of the opportunity to comment on the draft outline.

Subsequent drafts of the 2017 Investigation Report were provided to DHS in Word format so that DHS could make proposed amendments in track changes. On 10 March 2017, the Ombudsman’s Office provided a copy of the draft report to DHS and DSS for comment. A week later, on 17 March, Mr Glenn and members of his staff met Mr Hutson and other DHS officers to discuss the report. The email from Mr Hutson to Ms Campbell giving her the details of the meeting noted that they had agreed on “key changes to recommendations and findings.” The Ombudsman’s Office was to develop a new draft report based on their discussions, additional material and further discussions. The new draft report would be the basis for a formal reply from Ms Campbell, so there was no need for her to reply to the draft received on 10 March 2017.

On 20 March 2017 Mr Robinson sent an email to Ms Macleod with the subject “Draft Report Markups.” Attached to the email was a document titled “Tracked Changes to draft own motion report 20 March 2017 (003).docx,” which contained various insertions and revisions on the findings and recommendations in the report.

On 29 March 2017, the Ombudsman’s Office provided a copy of an updated draft report to DSS. The cover letter noted that the updated version reflected “further amendments we have made to the draft, following our consideration of comments from DHS.” The covering letter also noted there had been a change to Recommendation 1 in relation to the 10 per cent recovery fee and no change to Recommendation 4 which related to DSS. On 30 March 2017, the Ombudsman’s Office sent Mr Robinson a copy of a “clean version of the report incorporating the suggested changes discussed this afternoon.”

Some of DHS’s changes were accepted by the Ombudsman’s Office. Others were not. It may be that members of the Ombudsman’s Office only accepted those changes after satisfying themselves that they were warranted.

However, in accepting those changes, the Ombudsman’s Office allowed wording chosen by DHS for its own purposes to be inserted into the 2017 Investigation Report.

The Commission understands that there may be advantages, given the requirements of s 8(5), of providing draft report material to an agency being investigated. Doing so allows the agency to correct factual or technical information, provide context, explain action it is taking to address a problem, or comment on the practicality of implementing a proposed recommendation. (The same objective could often be achieved, one would expect, by a letter articulating the issues, setting out the proposed opinion or recommendation and requesting that any comments be provided in the form of a submission.)

But the process used in the 2017 investigation involved DHS from an early stage in the drafting of the 2017 Investigation Report in a manner that was not fully documented. In his evidence, Mr Glenn sought to justify that process by reference to considerations of accuracy and fairness. Beyond checking the accuracy of technical details in the report, it is not apparent how concern for “accuracy” could justify what was done. The process adopted for the investigation went well beyond any conventional understanding of procedural fairness requirements. It also went well beyond what Mr Anderson appeared to contemplate in his evidence about better engagement.
Professor John McMillan AO, former Commonwealth Ombudsman, identified a number of factors which he considered were particularly important in evaluating the performance and effectiveness of an Ombudsman Office. They included:

Whether the office is perceived (functionally and anecdotally) as having an arms-length operation from the agencies that it investigates.\textsuperscript{111}

Unfortunately, the circumstances here give rise to a reasonable perception that the Ombudsman’s Office conducted the 2017 own motion investigation in a way which allowed DHS to influence the content of the resulting Investigation Report in order to further DHS’s own interests, thus compromising the independence of the investigation.

The Ombudsman’s Office is currently updating its guidance material in relation to own motion investigations. In his statement to the Commission, Mr Anderson said the guidance on procedural fairness should be updated:

\begin{quote}
\text{to make clear that the process is limited to enabling agencies to make submissions on the matters being investigated, that ultimately the report is a statement of the opinion of the Ombudsman, and also note that agencies will get an opportunity to respond formally when a s 15 report has been finalised.}\textsuperscript{112}
\end{quote}

The guidance material should also counsel against the provision of draft reports to agencies in Word format, to avoid the both appearance and reality of inviting agencies to co-write reports. Consideration should be given to whether the obligation in s 8(5) can be met by articulating the issues in a letter and inviting the agency to make submissions. If the contents of the report must be provided to allow the agency to identify errors of fact or law, it should be provided in PDF.

The documentary evidence indicates that there was a number of discussions between DHS and the Ombudsman’s Office which influenced the content of the 2017 Investigation Report.\textsuperscript{113} Often, those discussions do not appear to have been recorded. Nor is there a record of the reasons why changes were made to the report outline or the report itself as a result of those discussions.

In its submission to the Commission, Monash University Law Faculty recommended that the Ombudsman’s Office maintain a log of its communications with an agency undertaken in the course of its investigation into that agency. Such a record would help to ensure, and to evidence, the integrity of the Ombudsman’s processes. The submission pointed to the value of a transparent record “accessible in the event of a controversy about the process of Ombudsman investigations.”\textsuperscript{114} There is considerable merit in that suggestion, at least in relation to own motion investigations, which are likely to be the more significant investigations undertaken by the Ombudsman. The Commission endorses it.

**Recommendation 21.4: Log of communications**

\begin{table}[h]
\begin{tabular}{|l|}
\hline
The Ombudsman maintain a log, recording communications with a department or agency for the purposes of an own motion investigation. \\
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3 The failure to examine the Scheme’s legality in the 2017 Investigation Report

The Ombudsman’s ability to consider the legality of action taken by a Commonwealth official is clearly stated in the Ombudsman Act. Section 15 of the Ombudsman Act provides the Ombudsman’s Office with powers to prepare a report that contains an adverse finding against an agency and that makes recommendations for corrective agency action. Among the grounds for an adverse finding are that the agency action “appears to have been contrary to law” (s 15(1)(a)(i)) or “was based either wholly or partly or in a mistake of law” (s 15(1)(a)(iv)). According to Professor McMillan, the Ombudsman’s most important power is the ability to prepare a report that contains an adverse finding against an agency and that makes recommendations for corrective agency action.\(^\text{115}\)

Despite undertaking to investigate the adherence of the Scheme to legislative requirements and despite holding concerns about the legality of the Scheme, the Ombudsman did not publish doubts about legality in the 2017 own motion report, and the Ombudsman’s Office did not use tools available to it to substantiate those concerns.

3.1 The investigation of the legality question

On 6 January 2017 the Investigation Team had been given a DHS briefing about the Scheme, including a walk-through of the OCI platform, but it did not answer questions about the legality of averaging.

The team resolved to ask DHS what legislative provision it was relying on.\(^\text{116}\) At the meeting on 3 February 2017, DHS officers advised that averaging was authorised by the “Guide to Social Security Law.”\(^\text{117}\) That claim was reiterated in DSS’s comments on the Ombudsman’s draft outline, in which it was asserted that the Guide provided for averaging in the absence of other information from the customer.\(^\text{118}\)

On 20 February 2017, Ms Macleod briefed the Acting Ombudsman for a meeting he was to attend with Mr Hutson of DHS the following day.\(^\text{119}\) In her email, Ms Macleod referred to the fact that she had made enquiries with the AAT about the possibility of a request for its opinion under s 10A of the Ombudsman Act. She attached an earlier version of the draft report (which has not been produced to the Commission) which contained a section about the legality of averaging.

On 23 February 2017, DSS provided to the Ombudsman the 2017 DSS legal advice, which was flawed in a number of respects. It was expressed to be confined to situations where averaging was used as a “last resort” which was not the case in the Scheme, and would have been irrelevant to the legality of the practice if it were. The advice referred to s 79 and s 80 of the Social Security Act.\(^\text{120}\) Section 79 requires the secretary, if satisfied that the rate of a social security payment is higher than the rate provided for by the social security law, to make a determination specifying the correct rate. Section 80 was irrelevant. Neither provision entitles the secretary to assess income other than as provided for by the Social Security Act and no other provision of the social security law which did authorise income averaging as used in the Scheme was identified.

The deficiencies in the advice were not lost on at least one lawyer in the Ombudsman’s Office:

I could drive a truck through the holes in this advice.\(^\text{121}\)

The draft report section on legality

In March 2017, the Ombudsman’s Office prepared a draft report, in which the Investigation Team’s doubts about the lawfulness of averaging were reflected in a section headed “Relevant Legislation and Policy” (the draft legality text).\(^\text{122}\) The draft report made these points: DHS could argue that s 79 of the Social...
Security Act contemplated a reduction in the rate of benefit payment if there had been an overpayment, which might be able to be shown on the balance of probabilities by pointing to averaged income. Against that, averaged income, as examples before the Ombudsman showed, was in some cases unreliable. It was, in any case, doubtful that the secretary could determine the correct rate of payment as s 79 required, because the Social Security Act provided for averaging only in very limited circumstances. The rate calculators in the Social Security Act required a person’s income “earned, derived or received during the ... pay period” to be taken into account, with certain statutory exceptions, for the calculation of entitlement for the corresponding benefit period on a fortnightly basis.

The Social Security Act did not specify what evidence was needed to establish the amount of income a recipient had received. DHS had advised that averaging was authorised under the Guide to Social Security Law, but the Guide was not a statute and in any event it was silent on averaging annual ATO income data. DHS’s own Operational Blueprint envisaged averaging only if every other possible means of obtaining actual income information had been attempted, as had been the case in past reviews.

The DSS and DHS legal advices indicated that the Scheme had commenced and continued without adequate legal advice about the lawfulness of income averaging.

The draft legality text stopped short of pronouncing the use of averaging in the Scheme unlawful, but it included the following observations under the heading “Did DHS have due regard to questions of lawfulness?”:

[2.50] While we understand DHS has used averaging for some time, to our knowledge its lawfulness has not been tested in the courts. With limited exceptions, an error of fact is generally not also an error of law. In our view, this question as it relates to the OCI is complex and can only be settled with certainty by the courts or can be clarified by an Act of Parliament.

[2.51] Whether legal or not, best practice principles of good public administration required that decision makers ensure every finding of fact is based on evidence that is relevant and logically supports the finding. It requires that decision-makers must not base a decision on a finding that is manifestly unreasonable. They must not be based on guess work, preconceptions, suspicion or questionable assumptions.

[2.52] Prior to the introduction of the OCI, the averaging process involved DHS basing a finding of fact about a person’s fortnightly income on an estimate using best available evidence. The averaging process now involves DHS basing a finding of fact about a person’s fortnightly income on an estimate using already available evidence.

[2.53] The risks associated with this factfinding process are identified by DHS in its operational blueprint where it recognises that it can lead to incorrect results if a person’s wages fluctuate, or if there were part periods of employment. We are concerned about how well these risks are managed under the OCI by providing people with the opportunity to challenge the proposed finding of fact, and what strategies are in place to assist disadvantaged and vulnerable customers. Our concerns about the fairness and adequacy of processes for customers to respond, and the support of people to obtain relevant information I discussed in Part 3 of this report.

[2.54] Overall we are not satisfied that DHS gave adequate consideration to questions about the lawfulness of the averaging process. The risks identified in the pre-existing operational blueprint are not articulated in OCI documentation in any level of detail. In our view it would have been appropriate to include these risks in briefings, planning documents and risk assessments and to have sought external advice from the Australian Government Solicitor about the lawfulness of the approach.

Reasons to question legality

There was a number of reasons to doubt DHS’s and DSS’s claims about the legality of averaging.

1. DHS internal legal advices provided to the Ombudsman in the course of the 2017 investigation did not support the use of income averaging as it was applied in the Scheme and it was evident that DHS had embarked on the Scheme without legal advice as to the legality of income averaging as used in it.
2. The 2014 DSS legal advice, given prior to the commencement of the Scheme, indicated that income averaging used in the way proposed was unlawful.\(^{125}\)

3. It ought to have been apparent at the time the Ombudsman’s Office received the DSS response of 1 March 2017, that DSS had withheld additional “notes, documents, or emails” that related to the 2014 and 2017 DSS legal advice (as requested in the s 8 notice dated 24 February 2017), because of the way that the two advices had been lifted and pasted into a single document, without any of the briefing questions.

4. The DSS explanation made no sense. The instructions for the 2014 DSS legal advice would have made it very clear that DSS understood the basis of the proposal as it was and continued to be, but even the 2015 executive minute, which the Ombudsman had, should have raised questions on that issue. It revealed, in relation to the PAYG proposal, that the customer was to be presented with the ATO information and given an “opportunity to update” it; the same proposal of which, in the executive minute, it was said that DSS had advised legal change would be needed.

5. The 2017 DSS legal advice did not identify any authority for income averaging and, in any case, on its face only applied when averaging was being used as a last resort.\(^{126}\) The Ombudsman was aware that income averaging was not being used as a last resort in the Scheme.\(^{127}\)

6. Neither department had provided the Ombudsman’s Office any external legal advice.\(^{128}\)

7. Finally, and critically, Mr Glenn’s own staff of the Ombudsman’s Office were unconvinced by the 2017 DSS legal advice obtained after the Scheme had commenced.

In those circumstances it should have been obvious to Mr Glenn that there was substantial reason to doubt the lawfulness of income averaging as it was used in the Scheme and any assertion by either department that it was lawful.

That begs the question whether he should have taken steps to resolve the legality issue or, failing that, retained the wording in the draft report which concerned the legality of the Scheme.

**The Ombudsman’s reasons for not dealing with the legality question**

Legality was, Mr Glenn said, just one part of the broader consideration of the Scheme as required by the Ombudsman Act.\(^{129}\) He considered it important to finalise the 2017 Investigation Report quickly because the Scheme was having an immediate effect upon people and immediate recommendations were needed. He wanted to complete the report before his term as Acting Ombudsman ended so that the next Ombudsman could continue the work, and finalising the report would not prevent the Ombudsman’s Office from further assessing the Scheme, as was occurring in any event, or preclude it making a referral to the AAT.\(^{130}\)

In any event, Mr Glenn said he thought it preferable that questions of law be ventilated in matters proceeding through the AAT.\(^{131}\) He provided a list of “pending AAT cases” of which, according to his statement, the Ombudsman’s Office was aware.\(^{132}\) Missing from that list, unfortunately, is a key AAT decision in respect of the Scheme, made by Professor Carney on 8 March 2017. Professor Carney reached a reasoned conclusion that calculating social security debts based on income averaging was unlawful because income averaging provided an insufficient evidentiary basis for the calculation.\(^{133}\) There was no appeal of that decision.\(^{134}\) It would have supported a finding in the 2017 Investigation Report that the continued use of income averaging was unlawful, but the Investigation Report contains no mention of the decision or of the fact that it was not appealed.

Mr Glenn sought to justify the failure to deal with the lawfulness of income averaging in the 2017 Investigation Report on the basis that he had not been able to come to a “crisp ... view” on the issue.\(^{135}\) While his Office had doubts, it did not have a definitive view and ultimately “took a path that focused on implementation for the report with a view that other questions could be dealt with subsequently.”\(^{136}\)
However, there were powers available to him as Ombudsman which might have been used to determine the issue, such as seeking independent legal advice or recommending that DHS do so, making a referral to the AAT himself or recommending to the principal officer of DHS that a referral be made.

Professor McMillan observed that his experience was that agencies would cite internal or external legal advice as their reason for defending a disputed decision. As Ombudsman he was prepared, if he held a strong doubt on an issue, to question the agency’s advice, to obtain his own independent legal advice and share it with the agency, or to foreshadow that he might refer the matter to the AAT for an advisory opinion. Using those options might be necessary if there were disagreement with the agency about the correct construction of a statutory provision, or the Ombudsman doubted that the agency had properly considered the legal basis for actions with detrimental consequences for individuals.137

### 3.2 Failure to obtain external legal advice

The Ombudsman’s general powers of investigation are sufficiently wide to empower the Ombudsman to seek independent legal opinions on contentious questions of law relevant to investigations. According to Ms Macleod, the Ombudsman’s Office did, on occasion, seek advice from AGS.138 However, despite its doubts about the advice provided by DSS, the Ombudsman’s Office did not take steps available to it to obtain its own legal advice.

Mr Glenn regarded the *Legal Services Directions 2005* (Cth) (the Directions) as an obstacle to obtaining an independent legal opinion.139 The Ombudsman’s Office is subject to the Directions,140 paragraph 10.1 of which would have required the Office to consult with DSS, as the agency administering the social security legislation, before obtaining external legal advice.141 But is not clear why that presented any insuperable difficulty.

Mr Anderson, the current Ombudsman, did not see the requirements of the Directions as a problem,142 although his preferred option was to inform the department that it should seek external legal advice. If it declined to do so, his Office had the alternatives available to it of seeking the advice itself or issuing a s 15 report formally recommending that the agency seek the advice within a specified timeframe on a specified question, and share it with his Office.143 The advantage of the latter course, in his eyes, was that it served to improve public administration because the agency itself agreed to take the action.144

In circumstances where there was a live question about the legality of averaging in the Scheme not satisfactorily answered by anything produced by DHS or DSS, the Ombudsman should have seriously considered the possibility of obtaining advice from the AGS or at least should have made the formal recommendation that DHS obtain advice from an external provider. The latter course would not have imposed any additional strain on the resources of the Ombudsman, nor would it have lengthened the investigation. It would have aligned with the last point at [2.54] in the draft legality text, that it would have been appropriate for DHS to have sought external advice from the AGS about the lawfulness of the averaging process.

Not to adopt either option was to fail to confront a fundamental issue in the investigation.

### 3.3 Failure to refer

As well as seeking an independent legal opinion, the Ombudsman has the power under s 10A of the Ombudsman Act to refer questions of law arising in an investigation for the opinion of the AAT and a related power, under s 11, to recommend that the principal officer of a department do so.145 That recommendation may be contained in the Ombudsman’s report or can be made at any time before the investigation is completed and must be acted on by the principal officer within 30 days, or a longer date if the Ombudsman agrees. The provisions conferring those powers ensure that the Ombudsman’s power to report on instances of departmental action that are contrary to law or based on mistakes of law is not
defeated by unresolved legal controversy associated with the action under investigation. The referral power in s 10A has never been used. The cognate power in s 11, of requiring an agency to refer a question to the AAT has been used twice, with only one of those referrals resulting in a decision.146

In February 2017, staff within the Ombudsman’s Office formed a view that the referral power in s 10A should be used.147 Ms Macleod sought advice from the AAT on what it would need from the Ombudsman’s Office before an advisory opinion under s 10A could be obtained and was informed by the AAT that its president would require a “fully argued hearing supported by written submissions from both sides.”148 However, she said, Mr Glenn did not consider the s 10A referral feasible within the existing resources dedicated to the investigation and was concerned that it would considerably extend the length of the investigation.149

Mr Glenn considered the exercise of the referral powers, but chose not to exercise them for a number of reasons. As Ms Macleod confirmed, one was that using the referral power would extend the length and cost of the investigation.150 In his statement of 22 February 2023, Mr Glenn asserted that the need to finalise the 2017 Investigation Report rapidly weighed against referral to the AAT. He was also constrained by the limited resources of his Office, because counsel would have to be engaged for “a fully contested AAT hearing.” Another reason offered for not seeking a referral was his assumption that the lawfulness of income averaging would be dealt with by decisions of the AAT.151

It is not clear why the 2017 Investigation Report needed to be completed so quickly, and why it could not have been completed by a newly appointed Ombudsman. Mr Anderson said that it seemed to him that “that the 2017 investigation and report were completed in a very short timeframe for a report on such a major issue.” 152 In any case, Mr Glenn conceded in oral evidence that the report could have been completed even if proceedings in the AAT on a referral were not finished.153

As to the resources required, as Mr Anderson pointed out, a contested hearing on a narrow question of law could be conducted in a very focussed manner.154

In any case, resource considerations have to be balanced against the statutory purpose of own motion investigations.155 Given the scale of debt raising under the Scheme, and of the impact on social security recipients if those debts were being raised unlawfully, limitations on the resources of the Office did not justify Mr Glenn refusing to make the referral to the AAT which his own staff recommended.

The fact that the s 10A process had not been used previously was not an argument against it. If the previously identified circumstances in relation to the paucity of any convincing legal advice to support the Scheme, and the proportions and effects of the Scheme itself were not sufficient reason, it is difficult to conceive of a use for the power. There could be no confidence that the AAT, whose focus is on merits review, would produce a decision which articulated why income averaging, as used in the Scheme, did not comply with the social security law, (although unknown to Mr Glenn, Professor Carney, had in fact done so) or that if it did so, it would be publicly accessible.

Given the doubts about the Scheme’s legality and the implications if they were realised, there was no reason not to make a recommendation under s 11 that the secretary of DSS refer the question to the AAT, which, pursuant to s 11(3), they would have been obliged to do.

The referral powers in s 10A and s 11 are an important tool for the Ombudsman, the use of which ought not to have been dismissed in the own motion investigation, and should not be overlooked in future investigations. Mr Anderson has expressed an intention that the Office’s revised guidance material make the formal and informal options and powers clear to staff, as well as the fact that the Ombudsman is willing to use them.156 The Commission endorses this approach.

**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.
3.4 The failure to include draft text concerning legality in the 2017 Investigation Report

Mr Glenn did not take any of the possible steps to have the question of legality resolved. But that should not have prevented him from including the draft legality text in the 2017 Investigation Report. It did not pronounce on the lawfulness of income averaging but raised some valid questions about it and made the entirely reasonable point that DHS should have sought advice from the AGS about its lawfulness before embarking on the Scheme.

Mr Glenn elected not to include the draft legality text. Ms Macleod said that she and the others in the Investigation Team had genuine doubts about the lawfulness of the Scheme but Mr Glenn was reluctant to publish a report relying on their views and dismissing DHS's and DSS's advice and position.

Mr Glenn’s recall was somewhat different. He did not think that it was possible on the available information to confidently express a final conclusion in relation to the Scheme’s legality. He had questioned the robustness of the Investigations Team analysis as well as their confidence in what they were saying. They then updated the report draft removing the section and did not question his views. But the decision as to what opinions, reasons and recommendations were included in the Investigation Report was, by virtue of s 15, entirely Mr Glenn’s as Ombudsman.

In his statements, Mr Glenn offered a number of reasons for not dealing with the issue. Public servants were obliged to ensure the legality of their actions, and DHS and DSS had taken a strong position on the basis of their legal advice, on which they were entitled to rely. He placed considerable weight on the fact that Mr Pratt, the DSS Secretary had signed a letter asserting that his department was satisfied the Scheme was “operating in line with legislative requirements.” (Unfortunately, Mr Pratt had not made any enquiry to satisfy himself of the truth of that statement, but there is some irony in the fact that after the release of the 2017 Investigation Report, both DHS and DSS cited the report in support of the proposition.)

The 2017 Investigation Report abstained from making any comment about whether the use of averaging in the Scheme was legal or even about whether there were questions to be asked on the matter. It also did not make it clear that it was refraining from doing so. Instead, it included the confusing statement that the “business rules in the OCI that support the debt calculation are comprehensive and accurately capture the legislative and policy requirements.”

Ms Macleod explained that the “business rules” were the “Detailed Requirements Document” for the Scheme which contained business rules and requirements for the design and build of the system. The only sense in which it appears to have been understood that the legislative requirements were met was that the rate calculators had not changed. That was not explained in the Investigation Report and the term “business rules” was not defined, so it was most unlikely that anybody not intimate with the specifications for the system would have understood what was being conveyed. Instead, that statement was misread and misused by DHS as representing an endorsement of the legality of the Scheme.

Mr Glenn accepted that the final 2017 Investigation Report did not clearly state that it was not purporting to express a concluded view on the legality of the Scheme. With the benefit of hindsight, he said, he could see how making that clear would have made it more difficult for the final Report to be misrepresented as supporting the legality of the Scheme. However, the risk of misrepresentation was not something he considered at the time, and he was focused on completing a report within his tenure “that outlined substantive matters of improvement for the Scheme.”
3.5 The failure of the 2017 Investigation Report to deal adequately with debt accuracy

Accuracy, like lawfulness, was one of the “key concerns” that had been identified in Ms Macleod’s minute proposing the own motion investigation. It was plainly a matter that needed to be addressed in the 2017 Investigation Report, regardless of any conclusions on the question of lawfulness.

The Executive Summary on page one of the 2017 Investigation Report said:

Administrative decisions are made based on the best available information at the time of the decision. If further information becomes available, a new decision can be made.

We examined the accuracy of debts raised under the OCI. We are satisfied the data matching process itself is unchanged. There are a number of instances where no debts were raised following contact with a customer (approximately 20%) was consistent with DHS’s previous manual debt investigation process. This figure has been incorrectly referred to as an “error” rate.

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 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.

Those words emphasised the circumstances in which debts raised under the Scheme could be accurate. However, as the Ombudsman knew, the Scheme was likely to raise inaccurate debts if the qualifications contained in the statement, particularly that “the customer can collect their employment income information and enter it properly into the system, or provide it to DHS to enter,” were not met.

Those qualifications were highly significant. It is implicit in the “key issues” identified in Part 3 of the 2017 Investigation Report that those qualifications were systemically not being met under the Scheme. It followed that inaccurate debts were systemically being raised on a massive scale against social security recipients.

However, the 2017 Investigation Report contained no express acknowledgement of this fact. Instead, the report used neutral language to highlight the potential for inaccurate debts to be raised and suggested that the issue be the subject of “more thorough research and analysis.”

This was in contrast to words which appeared in a draft of the report that at least went some way to explicitly acknowledging the inaccuracy of debts that could be produced by the Scheme. That language was removed in track changes proposed by DHS and accepted by the Ombudsman’s Office.

Tracked changes added at the instance of DHS included these words: “Administrative decisions are made on the best available information at the time of the decision.” Those words were a DHS talking point that was frequently used by persons defending the Scheme against criticism that it raised inaccurate debts. They were, and are, meaningless absent a requirement that the best available information also be probative; in other words, if the best available information still does not prove what the Social Security Act requires to be proved, it is no basis for a decision at all.

The words were also, to the knowledge of the Ombudsman’s Office, inapplicable to the use of income averaging in the Scheme because, by the Scheme’s explicit design, income averaging was used to calculate and raise debts against social security recipients when no inquiries had been made to ascertain whether there was better information available through the use of evidence-gathering powers.
The adoption of those words in the 2017 Investigation Report conferred validation by an independent statutory office holder of DHS talking points that had no objective basis and which were contrary to the facts known to the Ombudsman’s Office. That was precisely what DHS intended.\textsuperscript{178}

Those who sought to defend the Scheme took advantage of the way in which the accuracy issue was dealt with in the 2017 Investigation Report.\textsuperscript{179}

\section*{3.6 The effect of the 2017 Investigation Report}

Ultimately, the 2017 Investigation Report contained no section examining the legality of averaging and it did not include any expression of the Ombudsman’s doubts about the legality of averaging or the potential for it to produce inaccurate debts.\textsuperscript{180}

Mr Glenn argued the positive aspects of the Investigation Report, saying that it provided a foundation for further investigations. It was “critical of the Scheme and highlighted a range of issues related to the Scheme that needed to be addressed.”\textsuperscript{181} He pointed out that the Investigation Report covered:

- DHS’s use of PAYG data from the ATO
- the method by which the 10 per cent penalty was applied
- the requirement for public administration processes to be transparent
- a recommendation for improvement of the \textit{Guide to Social Security Law} to include guidelines in relation to obtaining employment income evidence
- the use of fortnightly income tests under the Social Security Act, and
- the use of automated decision making and the concern as to fettering the exercise of discretion through its use.

The Commission understands that in the 2017 own motion investigation, the Ombudsman’s Office was operating under great pressure to rapidly produce results which would improve the situation income support recipients were facing with the Scheme. There is no doubt that the 2017 Investigation Report identified a number of practical measures, many of which DHS were putting in place, to improve recipients’ encounters with the system.

But the fact is that the 2017 own motion investigation did more harm than good. It gave those wanting the Scheme to continue unexamined a shield against criticism from advocacy groups, the media and political opponents.

The Ombudsman’s 2017 Investigation Report was regularly quoted from the time the Minister for Human Services, the Hon Alan Tudge, first issued a media release in relation to it on 10 April 2017.\textsuperscript{182} That media release, titled (not surprisingly in the circumstances) “Government welcomes Ombudsman’s report on Online Compliance system,”\textsuperscript{183} asserted that the Ombudsman had found that “the system calculate[d] debts accurately.”

In June 2017 Mr Tudge wrote to the Chief Executive Officer of the Australian Council of Social Service and cited the 2017 Investigation Report as calculating debts “accurately based on the information when the decision is made.”\textsuperscript{184}

When the Shadow Minister for Human Services issued a press release\textsuperscript{185} ahead of an anticipated report from a Senate Committee critical of the Scheme, Mr Tudge countered with a media release which asserted that the Commonwealth Ombudsman had found:\textsuperscript{186}

\begin{quote}
The online system meets all legislative requirements, accurately calculates debts when the required information is entered and the method of data matching has not changed from the approach used by successive governments.
\end{quote}
DHS seized on those words, even though the first part of the statement – that the online system met legislative requirements – misrepresented what the Ombudsman had found, and the second part – that it accurately calculated debts when the required information was entered – was misleading, because it referred to a minority of cases.

The third contention in the media release, that the method of data matching had not changed, was correct only in a very general sense (aspects of it had changed). In any case, DHS adjusted that element to make the much broader claim that the Ombudsman had found that debts were raised consistently with previous investigation processes.

The claim of consistency with previous processes was certainly untrue, and it was untrue to say that it was what the Ombudsman had found. The 2017 Investigation Report set out the details of the previous manual process involving DHS compliance officers investigating debts by issuing notices under the Social Security Act to recipients seeking information and obtaining payroll records from employers, all undertaken by an allocated DHS compliance officer dealing with the customer. As the Ombudsman’s description of the Scheme made clear, that was entirely different from the processes adopted.

The response regularly made to troublesome enquiries from journalists was:

> The independent review by the Commonwealth Ombudsman found the Online Compliance system meets all legislative requirements, accurately calculates debts when the required information is entered, and debts raised are consistent with the previous investigation processes.

“Holding lines” for DHS’s use in responding to the media for the December 2017 – January 2018 period advocated the use of those words.

The 2017 Investigation Report, rather than exposing the questions surrounding a program whose lawfulness was doubtful and which was known to recover debts which were not necessarily accurate from a vulnerable population, instead, through abstention from comment and a lack of clarity, gave the Scheme a veneer of legitimacy which enabled it to continue.

## 3.7 Failure to correct the public record

Section 35A of the Ombudsman Act makes it clear that the Ombudsman can disclose information or make a statement to the public in relation to his or her functions investigation if it is in the public interest to do so. As Professor McMillan says, it is an important power. Surprisingly, the Ombudsman did not at any time elect to make a statement pointing out that the 2017 Investigation Report was being misquoted in significant respects.

In May 2018 Jaala Hinchcliffe (Deputy Ombudsman) raised with Ms Musolino a quote by Hank Jongen (DHS media spokesperson), which used the first two elements of the department’s line:

> The Commonwealth Ombudsman found the Online Compliance system met all legislative requirements and accurately calculated debts when the required information was entered.

The Deputy Ombudsman remonstrated, mildly, that while the second part of the sentence reflected what was in the 2017 Investigation Report, she did not think that the first part “reflects our findings.” It does not seem that the criticism penetrated very deeply, because as at 23 November 2018 DHS was responding to an enquiry from The Age: 

> … the Commonwealth Ombudsman’s investigation … found the Online Compliance system meets all legislative requirements, accurately calculates debts when the required information is entered, and debts raised are consistent with the previous investigation processes.
The legality question continues

Michael Manthorpe assumed the position of Ombudsman in May 2017, on Mr Glenn’s departure. During the balance of 2017, he focussed on improving the Scheme’s administration, but in early 2018 began to form the view that there was a risk that the use of averaging rendered the Scheme unlawful.192

In May 2018, possibly stung by an article in The Guardian in which Professor Carney was quoted as saying that the Ombudsman’s Office had failed in its 2017 Investigation Report to make proper enquiries as to the legality of debts raised under the Scheme,193 and certainly concerned about a lengthy article Professor Carney had written in which he went into detail about why the Scheme did not comply with the law,194 the Ombudsman’s Office arranged a meeting with DHS officers to speak about legal issues relating to debt recovery action.

It seems that at the meeting, which both Mr Manthorpe, who was not a lawyer, and Ms Hinchcliffe, who was, attended, there was some discussion about the prospect of averaging leading to inaccurate debt raising. DHS employees, including the chief counsel, advanced arguments about the legal aspects and represented a high degree of confidence in the legality of the program.195 The discussion was summarised in an email from Ms Musolino to Ms Hinchcliffe in which Ms Musolino said that Professor Carney had disregarded the abundance of procedural fairness afforded to DHS customers, misunderstood the burden of proof and wrongly asserted that DHS had specific legal obligations and evidential burdens in debt raising. Averaged income was, Ms Musolino contended, in some instances the only information and hence the best evidence available to determine a recipient’s earnings. (That seems to have been the sum of the legal justification of averaging.)

Ms Hinchcliffe in reply expressed some concern about the situation where a debt higher than was actually owed (having regard to the actual fortnightly income earned) was raised, because it had been acknowledged at their meeting that could occur. She enquired whether this would mean that part of the debt was raised ultra vires (beyond the power of the department); whether DHS had considered this and obtained external legal advice; and whether DHS considered it might have some limited duty to make further enquiries when raising debts. The Ombudsman would, she said, be grateful for “further assurance as to [the Scheme’s] legal underpinnings and practical application.”196

Ms Musolino replied that the social security law did not provide for how debts were to be raised, so the decision to raise a debt was clearly an administrative decision within the department’s legal authority. Where the recipient had not taken the opportunity to explain a discrepancy between declared income and ATO income information, the ATO information could be used to conclude that a debt was owed and, as the best information available, used to make a finding of fact as to what the debt was. The debt amount could be reduced or increased if additional information came to hand; which was where procedural fairness came in, because recipients had the opportunity to contradict the department’s findings or seek merits review.197

3.8 The Ombudsman’s options in dealing with the legality issue

The Ombudsman was unconvinced. Not only was there Professor Carney’s view as to the Scheme’s unlawfulness, but in July 2017 Peter Hanks KC had given his paper at the Australian Institute of Administrative Law Conference in which he too raised questions about the legality of the Scheme.

Mr Manthorpe considered the options available. One of the members of his staff, who had been involved in the 2017 own motion investigation, suggested obtaining advice from an external administrative law expert.198 But Mr Manthorpe was concerned that a legal advice from an external expert would be repudiated in the way that the views of other legal experts had been repudiated.199 He was not sure that getting external advice “would get [him] much further.”200 One would think, to the contrary, had Mr...
Manthorpe obtained external legal advice, he would have been on much firmer ground in dealing with DHS and DSS.

Mr Manthorpe was not very clear about the AAT option, but he knew that it had been ruled out by his predecessor in the 2017 own motion investigation. Certainly, it might have been rather awkward, given the lapse of time since the Ombudsman had first become involved in investigating the Scheme, to now seek to have the matter referred to the AAT.

Mr Manthorpe said he had also considered the option of writing to the relevant ministers to raise his concerns about the legality of the Scheme along the lines of what was later contained in the draft 2019 Implementation Report. He did not do so because he did not think it would be effective: “The Government’s senior ministers were plainly committed to Robodebt.” If he had raised his doubts, they would have taken advice from DHS and DSS which would have assured them that the Scheme was legally sound.

But the fact that writing to the relevant ministers with concerns about legality might not have produced the desired result was not a reason for not doing it. It might have produced a response and the failure to take that step meant that the ministers were left unaware that a senior independent officeholder considered that there were live issues of legality associated with the Scheme.

Mr Manthorpe settled instead on the idea of using an own motion investigation report to air his concerns. The Ombudsman’s Office had commenced an implementation investigation in respect of the 2017 Investigation Report in September 2017 and it was decided to move this into a new phase with the aim of publishing a report which would include comments on legality. DHS and DSS were duly advised. In a 20 August 2018 letter to DSS seeking information under s 8, a staff member expressed the view of the Office that the legality of the Scheme was not certain and that certainty would only be provided by legislation or a decision by the Federal Court or High Court.

The Ombudsman was not to know that a week earlier DSS had received advice from Clayton Utz that the Social Security Act did not permit determination of fortnightly income by averaging, requiring instead evidence of actual fortnightly income.

3.9 The removal of the “comment on legality” from the 2019 Implementation Report

The decision to prepare a “comment on legality”

Mr Manthorpe did not consider that he was in a position to reach a firm view as to the Scheme’s legality, but he did want to draw attention to the issues in that regard. He communicated to Ms Macleod that in the section of the report dealing with legality, he wanted to acknowledge and summarise the concerns raised by various stakeholders about legality, summarise the legal position of DHS and DSS and conclude that his Office was unable to resolve the issue of legality. He would recommend the department clarify the legality of the Scheme by obtaining external legal advice, running a test case or obtaining legislative amendment.

On 22 February 2019, a draft of the 2019 Implementation Report was prepared by the Ombudsman and provided to DHS. The draft report included Part 4, a section titled “Comment on Legality” which made a number of observations regarding the legality of the Scheme, including:

- that “the question around the legality of the EIC system [was] still a matter of public debate,” with “some observers [citing Professor Carney and Mr Hanks] arguing that the use of averaging was “legally flawed,” although DHS had “strenuously refuted” that view.
- 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 in the Federal Court (Masterton) where issues of legality might be considered.
- that “with the benefit of hindsight,” a lesson from the implementation of the EIC was the importance of providing public assurance about the legality of decisions made under new digital systems.”
- that “if the legality of programs of automation are [sic] not reasonably certain... agencies should ensure a mitigation strategy is in place,” which would include seeking external legal advice which could be cited to reassure the public, or advising the minister to amend the relevant legislation. 212

**DHS seeks to remove the “comment on legality”**

On 1 March 2019 Mr Manthorpe met Renee Leon (secretary, DHS) to discuss the draft Implementation Report. Ms Leon expressed her view that Part 4 should be removed from the draft report, 213 a view she reiterated by email on 8 March 2019. She asserted (correctly) that DHS had consistently maintained that the Scheme had a sound legal basis, and pointed out that the department would have to waive legal professional privilege if it were to make advices concerning the Scheme public (without giving any reason for not obtaining external legal advice at all). She said that it was premature to consider legislative amendment when the department’s position was that the Scheme was not legally uncertain, and asked Mr Manthorpe to refrain from making comments regarding the legality of the Scheme on the basis that doing so might appear to pre-judge or in fact prejudice the litigation’s outcome.

Ms Leon omitted to mention in connection with the department’s alleged certainty as to legality that two days earlier AGS lawyers had given an advice in which they said they did not think Ms Masterton’s application in attacking the use of averaging was “hopeless;” a roundabout way of saying that she had some prospect of success. 214

Mr Manthorpe decided to remove the “comment on legality” from the 2019 Implementation Report, advising Ms Leon by email on 13 March 2019 that he would do so. Consistent with his obligation under s 8(5) of the Ombudsman Act, he provided Ms Leon with an embargoed version of the Implementation Report in advance of publication on 29 March 2019. Two days earlier, AGS had given a more formal advice that Ms Masterton had good prospects of succeeding in her application on the basis that averaged income would not establish that she owed a debt. 215 That was not communicated to the Ombudsman.

In April 2019, _Centrelink’s Automated Debt Raising and Recovery System: Implementation Report_ (the Implementation Report) was published. It contained no reference to questions of legality.

**The reasons for the decision to remove the “comment on legality”**

Mr Manthorpe gave three reasons in his statement, expanded on in a submission, for deciding to do as DHS wished.

- He thought that, because the Ombudsman was part of the administrative review system, it was not appropriate for him to make public comment on the topic of legality when the Masterton case was before the Federal Court.
- Given DHS’s reaction of vigorous defence of the Scheme and rejection of experts’ public criticism, he did not think publishing the “comment on legality” would have any useful effect and it might be counter-productive in reducing DHS’s willingness to engage with his Office to improve the Scheme. He said that to his perception, publishing the comment would not have made any difference because his doubts had been repudiated.
- He considered he had fulfilled his responsibility to raise his concern with senior DHS and DSS officials and whether he published the comment was a “secondary issue.” 216
Mr Manthorpe said he did consider publishing the “comment on legality” to respond to those critics of the Ombudsman’s Office who perceived it as having turned a blind eye to the question of the Scheme’s legality, but because the Ombudsman Act stipulated for investigations in private and it was then the Ombudsman’s responsibility to decide whether or not to publish opinions or findings, he had formed the judgment that refraining from publishing the comment at that time was the correct approach.217

Mr Manthorpe said that he was anxious to maintain his Office’s ability to produce improvements to the Scheme. The 2019 Implementation Report had included recommendations for that purpose. He was not certain that the Scheme was unlawful and even if he thought it was, he could not have made a binding determination to that effect. He was aware that the matter was before a court where the question of legality would be resolved.

But Mr Manthorpe had started from the position that he could not pronounce on the legality of the Scheme, hence the “comment on legality,” which simply raised the issues without reaching a conclusion. Even without the AGS advices, he must have entertained a healthy scepticism about Ms Leon’s claim as to DHS’s certain position on legality. He had the 2014 DSS advice, he was aware of the views of Mr Hanks and Professor Carney, and Ms Hinchcliffe had raised some valid doubts. There was no reason not to make the observations that there was a live issue with the proposed (entirely reasonable) recommendation that agencies embarking on automated programs first make sure they were legal. There was no prospect whatever that the comment, which expressed no view as to the correct outcome, could have any implications for the Masterton case or even be faintly inappropriate. It seems highly likely that if Mr Manthorpe had consulted one of his own Office’s lawyers he would have been told as much.

The fact that public criticism, including from legal experts, was having no effect on DHS and DSS and was not causing them to reconsider the legality of the Scheme, was all the more reason for Mr Manthorpe to take the matter up publicly. In circumstances where for two years DHS and DSS had not produced any external legal advice to support averaging, or even any convincing internal advice, but had instead chosen to rely on consistent misrepresentation of the Ombudsman’s position to claim the Scheme was lawful, remaining silent in order to secure further cooperation was a very poor choice indeed.

If the Ombudsman had included the “comment on legality” in April 2018 it might have expedited the end of the Scheme, but it is more likely that DHS and DSS would have held their ground as long as possible. What is depressingly clear, however, is that the Ombudsman’s Office was not able to fulfil its role in exposing maladministration over the almost three years it investigated Robodebt complaints; it took litigation to do that. Individuals who were the victims of unfair debt raising could not look to the Ombudsman’s Office for relief.
4 Observations on the Ombudsman’s role

It can be accepted that it is important for the Ombudsman to work cooperatively with the departments it is investigating, but it is also necessary that the Ombudsman be capable of taking a stand. Maladministration is much less likely to occur where there is an Ombudsman who is known to impose limits on the cooperative approach in an appropriate case.

Robodebt was a massive scheme. In 2017 the Ombudsman knew, from the information provided pursuant to s 8 notices,\(^\text{218}\) that it was affecting tens of thousands of people. There had been an outcry from the public, the media, academia, advocacy groups and some politicians about its unfairness. By mid-2017 there was respectable and publicly-available legal opinion in the form of Mr Hanks’ paper that it did not meet the legislative requirements (to say nothing of the less accessible AAT decisions to the same effect (of which the Ombudsman seems not to have been aware). However, successive holders of the Ombudsman’s Office were hesitant to use the investigative and reporting powers the Ombudsman Act conferred when the circumstances clearly warranted it.

The Scheme demonstrates the importance of a properly resourced and, more importantly, an independent and robust Ombudsman. It exemplifies the social importance and economic sense of having such a person in the role. The Ombudsman could have played an important part in stopping a poorly thought-through and, worse, illegal program from proceeding at grave personal cost to thousands of individuals and at enormous public expense.


Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan, 7 March 2023 [p4768: line 35–p4769: line 7].


Exhibit 4-7133 - IAN.9999.0001.0002_R, Response to Notice NTG-0203 - Statement of Mr Iain Anderson, dated 22 February 2023 [p6: para 43].


Exhibit 2-1440 - CTH.3005.0003.6061_R, Tracked Changes to draft Own Motion report 20 March 2017 (003).


Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan, 7 March 2023 [p4768: line 35–p4769: line 7].


Exhibit 4-7905 - RBD.9999.0001.0499_R - 2023 03 07 RRC - Statement of John McMillan [p 13, 2.13].


Exhibit 2-1420 - CTH.3005.0003.6061_R, Tracked Changes to draft Own Motion report 20 March 2017 (003).

Exhibit 9447 - CTH.3001.0047.3151 - 2017-06-21 - media release (update 5.40am) - DHS Senate Inquiry response + with MO.docx.

Exhibit 4-7147 - LMA.1000.0001.2996_R - Report - Centrelink’s automated debt raising and recovery system - April 2017 copy, April 2017 [p3029: para 1.8-1.11].

Exhibit 9487 - CTH.3004.0008.5297 - Re: For clearance: Media enquiry - ABC (Ange Lavriopierre) - extension of automated debt recovery system [DLM=For-Official-Use-Only]; Exhibit 3-4430 - CTH.3004.0008.3450_R - RE- For approval- Media response - The Canberra Times (Doug Dingwall) and The Guardian (Paul Karp and Christopher Knaus) - Online compliance [SEC=UNCLASSIFIED], 4 April 2018; Exhibit 3-4482 - CTH.3004.0010.6168_R - RE- For urgent clearance - Response to The Age - OCI [DLM=For-Official-Use-Only], 23 November 2018. See Exhibit 4-7248 - LMA.1000.0001.3436_R - FW- OCI [SEC=UNCLASSIFIED] referring to Fairfax Media on 5 April 2018 quoting Mr 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], 23 November 2018.


Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p7-8: para 36-38].


Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p7-8: para 36-38].

Exhibit 4-7268 - LMA.1000.0001.1245_R, RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].

Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p11:para 59].

Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p11:para 59].

Exhibit 4-7268 - LMA.1000.0001.1245_R, RE- Further s 8 questions under IOI-2016-400007 [SEC=UNCLASSIFIED].

Exhibit 4-7253 - LMA.1000.0001.3424_R, Draft report - legality section (A1677898) [SEC=UNCLASSIFIED], 3 October 2018.

Transcript, Michael Manthorpe, 8 March 2023 [p4743: lines 25-34].

Transcript, Michael Manthorpe, 8 March 2023 [p4743: line 24-32].

Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p1:para 59].

Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe,27 February 2023 [p1:para 59].

Exhibit 4-7268 - LMA.1000.0001.1541, EIC s 15 report - Project Initiation Form copy.


Exhibit 3-4157 - DSS.5099.0001.0003_R, EIC Implementation Phase 2 - SAO letter to DSS post entry meeting, 20 August 2018 [p3].

Exhibit 1-0135 - DSS.5006.0001.4242, Draft advice on income averaging 7.08.18, 14 August 2018.

Transcript, Michael Manthorpe, 8 March 2023 [p4741: lines 1-3].

Transcript, Michael Manthorpe, 8 March 2023 [p4740: lines 23-28].

Exhibit 4-7269 - LMA.1000.0001.3447_R, RE- Draft report - legality section (A1677898) [SEC=UNCLASSIFIED].


Not a correct use of the word, “refuted”. DHS had denied the correctness of those views; it had never refuted them.

Exhibit 4-6056 - CTH.1000.0011.5564_R, img-213085449-0001 [p27-28].


Exhibit 4-6254 - CTH.3003.0011.0705_R, AGS Advice 5 March 2019, 5 March 2019.


Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p10: para 53].

Exhibit 4-7129 - MMA.9999.0001.0001_R, Response to NTG-0202 – Statement of Michael Manthorpe, 27 February 2023 [p10: para 53].

Exhibit 4-7146 - LMA.1000.0001.1702_R - FW- FOR INFORMATION- Online Compliance Intervention Meeting 3 February 2017 - Action Item 10 response.
Chapter 22: Office of the Australian Information Commissioner
1 Introduction

This chapter considers the roles that the Office of the Australian Information Commissioner (OAIC)\(^1\) and the former and current Information Commissioners played in overseeing the Scheme’s compliance with the *Privacy Act 1988* (Cth) (the Privacy Act), the voluntary Data-matching Guidelines and the *Privacy (Tax File Number) Rule 2015* (TFN Rule).

In the 2015–16 mid-year economic forecast (MYEFO), the OAIC received funding of $4.7 million across the years 2015-16, 2016-17, 2017-18 and 2018-19, to provide oversight of privacy implications arising from ‘DHS’s Enhanced Welfare Payment Integrity – non-employment income data matching’ (NEIDM) Budget measure.\(^2\)

While the NEIDM program did not form part of the Robodebt scheme (the Scheme), the Information Commissioner told the Commission that, as part of the OAIC’s oversight role under the ‘Enhanced Welfare Payment Integrity – non-employment income data matching’ Budget measure, the OAIC conducted six privacy assessments over three years.\(^3\) Three of those privacy assessments were relevant to the Scheme:

- **DHS assessment:** An assessment of the Department of Human Services’ Pay-As-You-Go (PAYG) data-matching program under Australian Privacy Principle (APP) 10 (quality of personal information) and APP 13 (correction of personal information)\(^4\)
- **Services Australia assessment:** An assessment of Services Australia’s handling of personal information in respect of the PAYG and NEIDM programs under APP 11 (security of personal information)\(^5\) (DHS became Services Australia before the report was completed)
- **ATO assessment:** An assessment of the Australian Taxation Office’s handling of personal information by the PAYG and NEIDM programs under APP 11 (security of personal information)\(^6\)

The Information Commissioner’s decision to conduct three limited scope assessments\(^7\) (rather than investigations) of DHS’s and the ATO’s processes under the Scheme meant that the Information Commissioner did not have the power to:

- compel production of records or information, or
- investigate potential interferences with privacy and if appropriate make enforceable determinations.

It also meant that the Information Commissioner had limited opportunity to consider whether the various collections and disclosures of personal information which attended the data-matches and data exchanges under the Scheme were compliant with:

- the APPs in the Privacy Act,
- the *Guidelines on data matching in Australian Government Administration 2014* (the voluntary Data-matching Guidelines), and/or
- the TFN Rule.\(^8\)

1.1 Engagement with the Commission

The Commission’s terms of reference required it to investigate and report on “how risks relating to the Robodebt scheme were identified, assessed and managed by the Australian Government.”\(^9\)

Both Timothy Pilgrim, the former Information Commissioner and Privacy Commissioner, and Angelene Falk, the current Information Commissioner and Privacy Commissioner, declined to provide witness statements and to attend the Commission and give evidence.\(^10\) The Commonwealth informed the Commission:

> The Commissioner [Ms Falk] is not minded to give evidence or submit a witness statement particularly to avoid any potential that doing so may, or may be seen to, impact decisions presently under consideration by her or may touch on an actual historical case or investigation. She is concerned to avoid any potential that
revealing information about a particular investigation or matter might prejudice the perceived independence of her office and thereby prejudice the functions of the office. As she would not, for those reasons, be in a position to elaborate on specific factual circumstances, the submission will be the extent of the assistance the Information Commissioner can provide.\textsuperscript{11}

The Commission agreed to proceed on the basis that the Information Commissioner and Privacy Commissioner would assist the Commission voluntarily through the provision of the written submission, which was exhibited as evidence.\textsuperscript{12}

In the circumstances, the Commission turned to documents produced by DHS and the ATO which touched upon their involvement with the OAIC over the course of the Scheme.

The Commission’s findings in respect of the OAIC’s role in relation to the Scheme have been reached following examination of this evidence, notes made by a representative of the Ombudsman’s Office of a conference with OAIC representatives in early 2017,\textsuperscript{13} and the three publicly available reports produced by the OAIC in 2019\textsuperscript{14} and 2020\textsuperscript{15} concerning the Scheme.

To avoid confusion, all references to the OAIC relate to work undertaken by the Office of the Australian Information Commissioner on the oversight of the Scheme. References to the Information Commissioner and Privacy Commissioner refer to actions taken by Mr Pilgrim or Ms Falk in the discharge of their statutory functions as Information Commissioner and Privacy Commissioner. The Commission does not propose to make any findings in relation to Ms Falk or Mr Pilgrim personally.
2 The roles of the OAIC, the Information Commissioner and the Privacy Commissioner

Since 1 November 2010, the OAIC has existed as an independent statutory agency within the Commonwealth Attorney-General’s portfolio. The primary functions of the OAIC relate to privacy, freedom of information and government information policy.

The OAIC consists of three statutory appointees: the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner, as well as staff who are APS employees.

The Information Commissioner is ‘the agency head of the OAIC for the purposes of the Public Service Act 1999 and the Public Governance, Performance and Accountability Act 2013’.

Ms Falk was appointed as both Information Commissioner and Privacy Commissioner in August 2018. Her predecessor, Mr Pilgrim, held both roles from July 2015 until his retirement in 2018.

On 3 May 2023, the Attorney-General announced that the government will appoint a “standalone” Privacy Commissioner. At the time of writing this report, the new Privacy Commissioner has not been announced.

The privacy functions of the Information Commissioner relevantly concern responsibility for the following:

- The Privacy Act and specifically, compliance with the APPs
- The voluntary Data-matching Guidelines
- Compliance with the TFN Rule
- Data-matching programs conducted under the Data-matching Program (Assistance and Tax) Act 1990 (Cth) (the DMP Act).

2.1 The Information Commissioner’s power to conduct assessments and investigations

The Information Commissioner has the power to undertake both assessments (formerly known as audits) and investigations under the Privacy Act. The Information Commissioner can also direct an agency to conduct a privacy impact assessment.

Assessments

In 2008, the Australian Law Reform Commission (ALRC) published its report, For Your Information, Australian Privacy Law and Practice (the ALRC Report). The ALRC Report extensively reviewed the Privacy Act and led to substantial amendments to that Act in terms of its application to government agencies.

The ALRC described the assessment process (which at that time was known as an “audit”):

The OPC’s (Office of the Privacy Commissioner’s) audit functions are an important part of its compliance activities. The power to conduct audits is one of the few proactive regulatory tools vested in the OPC, in that it allows the Commissioner to monitor an agency or organisation’s compliance with the Privacy Act before, and in the absence of, evidence of noncompliance, with the aim of preventing such non-compliance occurring in the future. It also allows the Commissioner to identify systemic issues and bring about systemic change, and to use information gathered in an audit to target educational materials and programs.
Ms Falk told the Commission:

The OAIC undertakes privacy assessments where it will contribute to achieving its goal of promoting and ensuring the protection of personal information. When deciding whether it is appropriate to undertake a privacy assessment in a particular situation, the OAIC will refer to the ‘Selecting appropriate privacy regulatory action’ section of the Privacy regulatory action policy. The OAIC also undertakes a risk assessment targeting exercise each financial year to identify possible industry sectors and/or entities that should be subject to a privacy assessment. The OAIC will also undertake an assessment when specifically funded to do so.26

Ms Falk also said:

The OAIC publishes finalised assessment reports on its website to help promote good privacy practice.

.. the voluntary Data Matching Guidelines aim to assist agencies to use data matching as an administrative tool in a way that complies with the APPs and the Privacy Act and is consistent with good privacy practice. The OAIC may take the voluntary Data Matching Guidelines into account when assessing whether an entity has complied with the APPs. The voluntary Data Matching Guidelines were considered in several of these assessments where appropriate.

The OAIC made recommendations in these assessments in response to identified privacy risks. These recommendations were accepted or noted by the relevant departments.27

At the time of the Scheme’s operation the Information Commissioner did not have the power to require an agency to produce documents or give information where the Commissioner was undertaking an assessment.

However, in 2022 the Privacy Act was amended to provide the Information Commissioner with this power, where the Information Commissioner has reason to believe that an entity being assessed has information or a document relevant to the assessment,28 and subject to reaching a state of satisfaction that it is reasonable to do so having regard to the public interest, the impact on the recipient and other relevant matters.29

As noted by Ms Falk (above), the Information Commissioner may publish information relating to the assessment on the OAIC website.30

Investigations

Investigations can arise from an individual’s complaint about a possible interference with their privacy, or the OAIC can conduct an “own motion investigation”31 on its own initiative in respect of a possible interference with an individual’s privacy or a breach of APP 1 of the Privacy Act: the obligation to manage personal information in an open and transparent manner.32

The ALRC Report also commented on the Information Commissioner’s investigative power:

It is important to maintain a clear distinction between the Commissioner’s PPA (privacy impact assessment) functions under the Act, which are educative and preventative, and the power to conduct an own motion investigation.

Where the OPC has a reasonable belief that an organisation is engaging in practices that contravene the privacy principles in the Act, then the appropriate power to investigate such conduct is the own motion investigation power. The point of the own motion investigation power is to allow the Commissioner to investigate an act or practice that may be an interference with privacy of an individual. It is not appropriate for the Commissioner to respond to such circumstances by undertaking a process with a purely educational focus. In addition, the distinction between an own motion investigation and a PPA will be much clearer if the ALRC’s recommended compliance order power is implemented, which would empower the Commissioner to issue an order following an own motion investigation.33

The forensic decision to conduct an assessment as opposed to an investigation was an important one at the time of the Scheme, because the power to compel the production of documents or the giving of information existed only in respect of investigations.34 An investigation may result in a determination
containing binding declarations concerning the practices of the entity investigated, which can be enforced in the Federal Court.\textsuperscript{35}

The Information Commissioner has a statutory obligation to consider whether to investigate complaints lodged by individuals and, unless satisfied an investigation should not commence,\textsuperscript{36} to investigate the complaints for possible interferences with the privacy of the complainant.\textsuperscript{37}

The Commission has learned of two complaints made to the OAIC by individuals in respect of aspects of the Scheme. These are described below. They almost certainly do not comprise the totality of the complaints made to the Information Commissioner about the Scheme.

**Privacy impact assessments**

The Information Commissioner can at any time direct an agency to undertake a Privacy Impact Assessment (PIA).\textsuperscript{38}

As the Information Commissioner and Privacy Commissioner noted in her submission to the Commission:\textsuperscript{39}

Undertaking a PIA can assist entities to:

- describe how personal information flows in a project
- analyse the possible impacts on individuals’ privacy
- identify and recommend options for avoiding, minimising or mitigating negative privacy impacts
- build privacy considerations into the design of a project
- achieve the project’s goals while minimising the negative and enhancing the positive privacy impacts.
3 Consultation on the design of the Scheme

It does not appear that DHS engaged with the OAIC ahead of the commencement of the Scheme. However, following a meeting on 13 November 2015 with the OAIC to discuss the related NEIDM proposal, DHS gave the OAIC an advice it had received that year from the Australian Government Solicitor (AGS) on data-matching in relation to the NEIDM process (the AGS data-matching advice).

That advice warned DHS of the need to ensure both it and the ATO complied with relevant secrecy provisions in undertaking the proposed data matches. What it said in that regard was equally relevant to the data-matching under the Scheme.

The OAIC also encouraged DHS to undertake a PIA for its data-matching activities but as it transpired, no PIA was completed before the Scheme commenced.
4 The Scheme commences

4.1 Early concerns and criticisms

The Online Compliance Intervention (OCI) phase of the Scheme commenced on 1 July 2016, following a manual pilot phase.

In January 2016, DHS was notified that the OAIC proposed to investigate a complaint lodged by a person who alleged that DHS interfered with her privacy by unlawfully collecting her TFN and employment history from the ATO and incorrectly applying it to, and raising a debt against, her twin sister.43

The OAIC advised DHS that it would be investigating whether breaches of the APPs had occurred, including breaches of APP 10.1 (accuracy of personal information collected, used and disclosed) and APP 13 (ensuring personal information held is accurate, up to date and complete, relevant and not misleading).44

The Commission has inferred from the available documents that a complaint was also lodged by either the complainant or her sister with the Inspector-General of Taxation.45

Dr Elea Wurth, a partner from Deloitte Risk Advisory Pty Ltd (Deloitte) who was engaged by the Commission to provide expert analysis on the technical structure of the Scheme, was asked to give a view on whether or not the “fuzzy” and “tight” matching processes that were introduced by DHS after this time would have prevented this issue from occurring:46

DR WURTH: … Based on that information, and looking at the fuzzy and tight rules which are applied, it would seem that that would pass through...within the top sets of fuzzy rules there. If you can see on the next page is there are the rules specified, and...you are looking for a fuzzy surname, fuzzy first name and fuzzy date of birth, when here you would have a tight match on surname, a tight match on date of birth and a fuzzy first name.

MS BERRY: And so is the upshot of that that because the medium confidence CIDC codes were being passed to DHS, even when the fuzzy and tight matching rules were introduced, a circumstance such as this would not have been prevented by those rules?

DR WURTH: It is possible, yes.47

The Commission has not been able to determine how and when this complaint was resolved.

In early January 2017, The Australian was seeking information about what (if any) steps were being taken to investigate the Scheme.48

On 5 January 2017, Mr Pilgrim issued a statement to The Australian in response to questions about the OAIC and welfare data-matching issues.49 The OAIC gave DHS advance notice of Mr Pilgrim’s statement in which Mr Pilgrim referred both to action being taken on the NEIDM and the OAIC’s oversight of DHS “data-matching activities” (in context, a reference to the Scheme).

Malisa Golightly (deputy decretary, DHS) rightly saw the statement as problematic for DHS, particularly as no PIA had been undertaken for the Scheme. In an internal email on 5 January 2017, she observed:

However there are a number of concerns that I have picked up (there may be others):

first we need to know what the media query was that generated this. If it wasn’t a media enquire [sic] what was it?

Who are proposing [sic] to issue this statement to? When?

if it is not referring to the income matching programme then what is the relevance of the statement?

Presumable [sic] they have been asked for a statement to do with the programme being discussed in the media – not some other programme?? their third para says that the assessment is not finalised – this will be interpreted by commentators as we released a system without have [sic] a privacy assessment completed and that will cause huge problems for us.
Audit will involve notice to DHS, seeking policy and procedural documents, field work (ie interviews, collection of data, observations), report and recommendations. First audit to be published mid-year.

Will look at governance arrangements, decision making, privacy by design approach, risk assessments (high, medium, low).

• OAIC are involved in oversight of data-matching across government – were given funding to oversee non-employment income data matching (NEIDM)
• DHS told OAIC last week that its compliance platform falls outside scope of oversight because its employment income data being used – OAIC don’t necessarily agree with this distinction
• OAIC have had several briefings from DHS re data matching – have encouraged DHS to do Privacy Impact Assessment (PIA) *recommend we seek copy of this and data matching protocol
• OAIC going 2 DHS audits – field work for first audit in Feb 2017 and second audit at end of FY – second audit will look at accuracy of data and its use – therefore narrow focus compared with OCO oversight.

• Accuracy issues will include considering whether DHS has taken reasonable steps and adequate testing to ensure the accuracy of data.
• DHS are not using the Data Matching Act – ceased using it last July – now using OAIC’s voluntary data matching guidelines and their own powers under the legislation and the Privacy Act. DHS would need to seek an exemption from the Privacy Commissioner if it wanted to deviate from the guidelines. The guidelines don’t provide specific timeframes – for example notices to individuals must give a “reasonable” timeframe. Guidelines concern data retention, use and destruction.
• The OAIC audit looks at DHS compliance with:
  o APP 1.2 – open and transparent management of personal info, specifically governance arrangements and compliance with the data matching guidelines
  o APP 3 – collection of personal info
  o APP 5 – notification of collection of personal info
  o APP 11 – security of personal info
• Audit will involve notice to DHS, seeking policy and procedural documents, field work (ie interviews, collection of data, observations), report and recommendations. First audit to be published mid-year. Will look at governance arrangements, decision making, privacy by design approach, risk assessments (high, medium, low)
• At this stage the Privacy Commissioner is not intending to do a Commissioner-initiated report but this may change. OAIC keen to share information on data accuracy subject to any restrictions.
• OCO referred OAIC to the Better Practice Guide for Automated Decision Making and the Centrelink Service Delivery report (links sent after the meeting).
• OCO has received complaints about data matching issues with Centrelink debt recovery. Also has IOI’s which monitor broader systemic issues. Has received briefings from DHS about the LMA:1000.0001.1971 platform over past 6 months and is seeking a further briefing about current issues with platform and debt recovery – broadly, governance and design, linkages between data matching and assessment, risk assessment of customers, linkages between platform and other systems, functionality of the platform.
• Also looking a [sic] issues of legality, auto-decision making and fettering of powers, averaging of data, customer vulnerabilities and ability to access DHS and to challenge the debt and seek review, what data is being obtained from ATO
• Agreed to meet again in mid Feb to share info obtained from field work/briefings etc.

[emphasis in original]
(The term “audit” in this email should be read as “assessments” as this was the term commonly used by the OAIC.57 The term “Commissioner-initiated report” is assumed to mean “own motion investigation”).

4.2 The 2004 and 2017 Protocols
In the ‘Data Matching and Exchanges’ chapter, the Commission has found that DHS did not review and replace the 2004 Protocol before the commencement of the Scheme.59

The Commission has also found that from 2011, DHS failed to comply with the 2004 and 2017 Protocols, and consequently failed to comply with the voluntary Data-matching Guidelines, by retaining the PAYG matched data it collected from the ATO even though it was no longer required.60

The OAIC was one of many interested parties which sought access to the 2004 Protocol. The document change history in the Protocol outlines that revisions were made to the document in 2004 (April and May) as a result of the OAIC’s review,61 but there is no evidence of having DHS provided it to the OAIC once finalised, or later.

The Information Commissioner did not have power, absent an assessment or investigation, to compel DHS to produce the 2004 Protocol.62 On 16 January 2017, an OAIC officer wrote an email to DHS which suggested that the OAIC considered it should have received a copy of the 2004 Protocol.63

I’m following up to ensure I have a broad overview of the data matching programs and protocols relevant to this issue.

DHS has sent the OAIC a Privacy Impact Assessment and a data matching program protocol for the Non Employment Income Data Matching program.

It would be helpful to have an updated list of all the data matching programs relevant to debt collection (including the Employment Income Data matching program).

For those programs, could DHS please indicate which, if any, data matching program protocol they are operating under and when the protocol was sent to the OAIC?

Following enquiries from the media,64 the public and the OAIC in early 2017 about the data-matching protocol, DHS proceeded to review and replace the 2004 Protocol in May 2017. This became the 2017 Protocol.65

The OAIC was consulted on the draft 2017 Protocol.66

The Commission has not identified any document where DHS disclosed to the OAIC that:
• it had failed to comply with the voluntary Data-matching Guidelines by failing to review the 2004 Protocol before the Scheme commenced, or
• it was not complying with the 2004 Protocol when the Scheme commenced.
Instead, DHS told the OAIC that the new protocol was required to accommodate the changes under the EIC phase of the Scheme.\(^6^7\)

The Commission can infer from available documents that the OAIC provided comment to DHS on two drafts of the 2017 Protocol.\(^6^8\) A second draft of the 2017 Protocol was provided to the OAIC on 23 May 2017 with the following advice from DHS:

> The department has been continuing to develop this protocol and has noted your feedback, which includes consideration of publication of its data-matching protocols on the external facing website to ensure awareness of the program and additional detail describing the administrative action which may be taken. Please see attached an updated draft for the PAYG Protocol May 2017 for your review and feedback.\(^6^9\)

DHS prepared a submission for the Minister for Human Services to explain its intention to publish the 2017 Protocol. It included the following advice:

> The department developed a program protocol for this activity in 2004, when the department commenced receiving the PAYG data file from the Australian Taxation Office (ATO). The process for this data matching activity has not changed since 2004. The original program protocol for PAYG data matching was implemented in 2004, following consultation with OAIC.

> The 2004 protocol is out of date and currently being updated in consultation with the OAIC to establish a 2017 version. Once settled it is proposed that the 2017 version will be made available on request. The updates are focussed on changes such as the name of the entities involved and the technology that supports the data matching. The fundamentals of the data matching programme remain unchanged.\(^7^0\)

The OAIC offers assistance

In April 2017, the Ombudsman’s report *Centrelink’s Automated Debt Raising and Recovery System* was published. It disclosed that the ATO was using TFNs to match identities and extract data for provision to DHS under the Scheme.\(^7^1\)

On 16 May 2017, the OAIC advised DHS in writing that it did not propose to commence a Commissioner-initiated investigation into the Scheme, but was ready to assist DHS to implement the Ombudsman’s recommendations in so far as they related to the Privacy Act:

> As you will be aware, the Australian Information Commissioner chose to await the Commonwealth Ombudsman’s report into Centrelink’s automated debt raising and recovery system, before deciding whether to commence a Commissioner Initiated Investigation (CII) into privacy aspects of the PAYG data matching program. The OAIC’s data matching assessment program for DHS was also put on hold pending the outcome of this report. As the Ombudsman’s report has now been published, I would like to let you know of the Australian Information Commissioner’s decisions in relation to these matters.

**Commissioner Initiated Investigation into PAYG data matching**

Having reviewed the Commonwealth Ombudsman’s recommendations and findings in relation to Centrelink’s automated debt raising and recovery systems, including DHS’ responses to these recommendations and findings, the Commissioner has decided not to undertake a CII (Commissioner initiated investigation) under s 40(2) of the Privacy Act 1988, into this matter.

…..

**OAIC assessment of the PAYG data matching program**

While the Commissioner does not propose to commence a CII into Centrelink’s automated data-matching and debt recovery system, based on our review of the Commonwealth Ombudsman’s report, implementation of this system appears to have raised privacy implications that warrant monitoring. The particular issues that appear to arise include whether DHS has taken reasonable steps to ensure the accuracy of personal information used in the data-matching and debt recovery process (see APP 10), and whether individuals have had a reasonable opportunity to correct their personal information (see APP 13).

To help address these issues, we would like to offer our expertise, to the extent permitted by our resources, to assist DHS to implement privacy aspects of the Ombudsman’s recommendations. As a first step, we would appreciate if you could meet with us to provide a briefing about DHS’ implementation of these recommendations.
In addition, in the 2017-2018 financial year, the OAIC intends to conduct an assessment, under s 33C of the Privacy Act, in relation to the DHS PAYG data matching program Online Compliance Intervention system. This will provide an opportunity for DHS to implement the recommendations in the Commonwealth Ombudsman report and for the Commissioner to then assess whether concerns remain about the quality and accuracy of personal information.72

On 27 June 2017, Annette Musolino (chief counsel, DHS) responded to the OAIC.73 She advised:

I appreciate your offer to assist the department to implement the privacy aspects of the Commonwealth Ombudsman’s recommendations. As noted at the meeting, the department is on track to implement the recommendations by August 2017. The department will provide status updates as appropriate.

There is no record to suggest the OAIC was involved in assisting DHS to implement the Ombudsman’s recommendations.

More criticism

A damning media article was published by The Mandarin a few days later (on 30 June 2017), titled “A litany of privacy disasters: how to ruin public faith in just 12 months.”74 The article observed:

The human services disaster-zone known as ‘robedebt’ hit the news, with stories of its victims raising significant concerns about the very real human cost of automated data-matching programs, designed and conducted by Centrelink without due regard to data quality.

... Privacy Commissioner Timothy Pilgrim hinted at this, when he wrote to the Secretary of PM&C recently that, given the “several high profile privacy incidents in recent times”, there is an “urgent need” for action by the Australian Public Service to ensure compliance with privacy law, and “broader cultural change” to improve privacy protections, so as to “facilitate the success of the Australian Government’s broader data, cyber and innovation agendas”.

Pilgrim said that more work is needed by government to “build a social licence for its uses of data”, particularly in relation to proposed new uses and increasingly ‘open’ data. He suggested that social licence can only be built through transparency about intended uses of personal information, and effective privacy governance – the current deficiencies in which were the trigger for his letter. However, he also noted that social licence can only be gained when ‘the broader community must believe that the uses of data which are permitted are valuable and reasonable”.75

The OAIC’s review of the Scheme that followed did not align with the idea of an “urgent need” for action by the Australia Public Service to ensure compliance with privacy law.
5 The DHS Assessment (2017-2019)

In December 2017 the OAIC commenced an assessment of DHS’s management of the Scheme (the DHS Assessment). It should be noted that the assessment commenced more than five months after field work was originally scheduled to begin, and more than two and a half years after the Scheme commenced.

Five months later, in May 2018, the OAIC issued a draft report to DHS with queries. Its final report was completed in June 2019, one and a half years after the DHS assessment commenced and just short of four years after the Scheme began.

5.1 Scope

The scope of the DHS Assessment was confined. The OAIC did not assess whether DHS lawfully collected, used and disclosed personal information (including compliance with social security secrecy provisions) for the purposes of the data matches and data exchanges conducted under the Scheme.

Instead, and consistent with the original plan it had outlined to the Ombudsman in January 2017 and the Information Commissioner’s correspondence to DHS on 16 May 2017, the DHS Assessment was limited to DHS’s handling practices:

The scope of this assessment was limited to considering DHS’s handling of personal information for the purposes of the PAYG program under Australian Privacy Principle (APP) 10 (quality of personal information) and APP 13 (correction of personal information).

This is despite the OAIC being aware of the following matters which might have caused it to expand the scope of its assessment:

- The volume of records matched and resulting in debt-raising under the Scheme had substantially increased from those associated with the PAYG data-matching process which operated prior to the Scheme
- Compliance with both social security and taxation secrecy provisions was necessary if the data matches and data exchanges were to be lawful
- The ATO was using TFNs for the purposes of matching recipients’ data with PAYG summaries
- DHS and the ATO had commenced the Scheme without reviewing the 2004 Protocol and had also failed to publish the 2004 Protocol
- The 2017 Protocol was prepared and implemented almost one year after the Scheme commenced, and
- The Information Commissioner had encouraged DHS to conduct a PIA for its data-matching and had no reason to suppose that one had been conducted in respect of data-matching under the Scheme.
- The Data-matching and exchanges chapter examines some of these matters in more detail, as well as the possible associated interferences with privacy arising which might have suggested to the Information Commissioner that an own motion investigation should be conducted.

The OAIC had originally understood that the scope of the Ombudsman’s investigation might address some of these matters. The OAIC would not have wanted to conduct an assessment which covered the same territory as the Ombudsman. However, once the Ombudsman’s 2017 Investigation Report was released in April 2017, it should have caused the OAIC to reflect on whether there were privacy issues arising from the data-matching process which the Ombudsman’s report had not addressed. For example, this extract from the Ombudsman’s 2017 report Centrelink’s Automated Debt Raising and Recovery System should have raised questions:
2.3 Since 2010-2011 DHS has had the capacity to store its matched data, so it holds records of discrepancies from that year onwards. In early 2015 DHS proposed a new online approach to compliance which would allow it to review all discrepancies from 2010-2011.

2.4 The scale of the OCI project is significantly larger than DHS’ previous debt raising and recovery process. DHS estimates it will undertake approximately 783,000 interventions in 2016-2017 compared to approximately 20,000 compliance interventions per year under the previous manual process.83

5.2 The Report

The following key findings emerged from the DHS Assessment report.

Failure to conduct a privacy impact assessment

The DHS Assessment report noted DHS had not conducted a privacy impact assessment (PIA) prior to the commencement of the Scheme. However, it did not make any finding on the topic beyond this faint criticism:

A PIA was not conducted for the PAYG program before it commenced in 2004, prior to the introduction of the OCI (now EIC) system in 2016, or before the changes to introduce the EIC in February 2017. However, during fieldwork, DHS noted that a PTA (sic) had been completed in relation to the anticipated changes to the PAYG program that were scheduled to occur after the OAIC’s assessment.84

The Information Commissioner recommended that DHS “continue to conduct ... where appropriate, PIAs for any future changes to the PAYG program.”85

Failure to comply with the voluntary Data-matching Guidelines

The DHS Assessment report also noted DHS’s failure to review and update the 2004 Protocol ahead of the commencement of the Scheme, but explained that compliance with the Protocol was not a matter within the terms of its investigation:86

3.73 DHS created a program protocol for the PAYG program when the program formally commenced in 2004. An updated version of the protocol was published in May 2017, following consultation with the OAIC. DHS advised that a review of the protocol must occur every three years. The scope of this assessment did not specifically include examination of the program protocol. However, this assessment presented an opportunity for the OAIC to gain a clearer understanding of the context and technical details of the PAYG program, as well as to discuss the changes to the PAYG program since the publication of the May 2017 version of the protocol.

However, the DHS Assessment report did make some important observations about the 2017 Protocol, such as:87

3.75 The technical standards report provides very little detail about the matching algorithm used in the program, as well as only a brief overview of the risks associated with the program, the data quality controls employed, and the security and confidentiality safeguards in place to minimise access to personal information.

3.76 Further, some sections of the protocol appeared out-of-date, such as the sample initial contact letter provided at Appendix B of the protocol.

These observations suggest there was at least a potential risk of interferences with the privacy of an individual, namely:88

- The lack of evidence about the risks of the program and data quality controls which increased the risk of breaches of APPs 1, 10 and 11
- The lack of evidence of the security and confidentiality safeguards to minimise access to personal information which increased the risk of breaches of APP 11
• The protocol did not appear to contain an up to date description of the data-matching program suggesting the actual use by DHS of the personal information collected was not consistent with the stated purpose which increased the risk of breaches of APPs 1, 5, 6 and 10.

• A breach of the voluntary Data-matching Guidelines by DHS would not automatically constitute a breach of the Privacy Act, unless the agency’s action also breached an APP in the Privacy Act. However, the voluntary Data-matching Guidelines are drafted to encourage agencies to adopt best practice and conduct data-matching in a manner which complies with the APPs, so non-compliance is an indication that further investigation may be required.89

• The OAIC had also advised the Ombudsman in January 2017 that “DHS would need to seek an exemption from the Privacy Commissioner if it wanted to deviate from the guidelines.”91

This is consistent with the advice on the OAIC website that:

Agencies can request an exemption from complying with some parts of the guidelines, if the agency believes that is in the public interest. To ask for an exemption, the agency has to give the OAIC:

- advice about the proposed program
- details of the exemption they want
- details of why they think the exemption would be in the public interest.92

The Information Commissioner and Privacy Commissioner advised the Commission:

The OAIC does not have a formal role in ensuring that protocols governing data matching programs are regularly reviewed and, if necessary, updated. Under the voluntary Data Matching Guidelines, the responsibility for updating data matching protocols sits with the primary user agency conducting the data matching.93
6 The Services Australia Assessment (2018-2020)

In August 2018, more than three years after the Scheme commenced, the OAIC commenced another assessment of DHS’s handling of personal information under the Scheme (the Services Australia Assessment). Similarly to the other assessments, the Services Australia Assessment had a very limited scope in respect of the Scheme:

The purpose of this assessment was to establish whether DHS is taking reasonable steps to secure personal information under the Pay-As-You-Go (PAYG) and Non-Employment Income Data Matching (NEIDM) programs, in accordance with APP 11. APP 11 requires an entity to take reasonable steps to protect personal information it holds from misuse, interference and loss, as well as unauthorised access, modification or disclosure.94

The OAIC’s draft report was provided to Services Australia on 24 February 2020 and the final report was published on 20 July 2020, more than five years after the commencement of the Scheme, and after the Scheme had been discontinued.

The following key findings were made in the Services Australia Assessment.

6.1 Destruction of data

The Services Australia Assessment addressed DHS’s storage and destruction of data under the Scheme. The Information Commissioner did not identify a lack of compliance with the 2017 Protocol.

Instead, the report found:

3.125 At the time of the assessment, Guideline 7 of the OAIC’s Guidelines on Data Matching in Australian Government Administration (Guidelines), specifically advised agencies that in order to comply with the Guidelines they should destroy records collected for the purpose of data matching in accordance with the National Archives of Australia’s General Disposal Authority 24 – Records Relating to Data Matching (GDA 24). GDA 24 stated that unmatched records and matched records not selected for investigation or where a decision was made not to proceed with investigation should be destroyed within 90 days of the completion of the data matching activity unless extension of time was approved by the Privacy Commissioner.

3.126 DHS provided the OAIC with updated copies of the PAYG and NEIDM program protocols. Both protocols state that DHS destroys all data that is not required, in line with Guideline 7.

Analysis

3.127 The OAIC did not identify any privacy risks associated with DHS’s destruction and de-identification processes of the PAYG and NEIDM data.95

6.2 Failure to conduct a PIA

Similarly to the DHS Assessment, the OAIC reported that DHS had failed to conduct a PIA ahead of the commencement of the Scheme.96
7 The ATO Assessment

On 10 December 2018, more than three and a half years after the Scheme commenced, the OAIC advised the ATO that it intended to review its handling of personal information under both the NEIDM and PAYG data-matching programs (the ATO Assessment). This was also an assessment by the OAIC under section 33C of the Privacy Act. The assessment was limited to considering the ATO’s compliance with APP 11 (the requirement to take reasonable steps to protect personal information it held from misuse, interference and loss, as well as unauthorised access, modification or disclosure).

On 10 January 2019, the ATO corresponded with the OAIC and commenced by clarifying its role in the data-matching program under the Scheme. It took the opportunity in that correspondence to describe the steps in the data-matching program as it saw them. This description recorded the fact that TFNs were “appended to the input file” but did not directly acknowledge “use” of the TFNs in the data-matches the ATO conducted.

On 6 June 2017, the ATO had corresponded with the OAIC to respond to a privacy complaint. The complainant told the OAIC that his employment income details had been disclosed by the ATO to DHS.

In responding to the complaint, the ATO informed the OAIC:

The ATO is authorised to disclose taxpayer protected information (e.g. income information) to DHS when the disclosure meets an exception in the taxpayer confidentiality provisions in Schedule 1 to the Taxation Administration Act 1953 (TAA 1953). Item 1 of table 1 in subsection 355-65(2) of Schedule 1 to the TAA 1953 provides that an ATO officer can lawfully disclose “protected information” to:

...an Agency Head (within the meaning of the Public Service Act 1999) [sic] of an agency (within the meaning of that Act) dealing with matters relating to the social security law (within the meaning of subsection 23(17) of the Social Security Act 1991) [sic] [when that record or disclosure] “is for the purpose of administering that law”.

The ATO discloses taxpayer information to DHS for the purpose of DHS administering social security laws. The DHS letter to [the complainant] is consistent with such a disclosure. Consent is not required or indeed relevant to the lawfulness of this disclosure by the ATO.

We can only disclose protected information (described by [the complainant] as his ‘personal information’) to a third party when such a disclosure meets an exception in the taxpayer confidentiality provisions. The disclosure of [the complainant’s] income details to DHS by the ATO was lawful. It was for the purpose of DHS administering their social security laws, which meets an exception in the taxpayer confidentiality provision in Schedule 1 to the TAA 1953.

As it was authorised by law, it meets the exception provided by Australian Privacy Principle (APP) 6.2 (b) which permits the disclosure of personal information when:

...the use or disclosure of information is required or authorised by...an Australian Law.

In reply, on 15 June 2017, the OAIC advised the ATO that it was satisfied with the ATO’s response to the complaint and had decided not to proceed to an investigation.

More than a year and a half later, on 7 July 2020, the OAIC finalised the ATO Assessment. The report accepted and wholly adopted the narrated steps for the Scheme that the ATO had provided.

The report did not consider:

- the ATO’s compliance with any other APPs
- whether the data-matches conducted by the ATO under the Scheme were lawful or the lawfulness of the ATO’s use of TFNs for the purpose of the data-matches it conducted under the Scheme
• the changes from the PAYG program which had existed prior to the Scheme, to the Scheme, or
• the ATO’s compliance with the voluntary Data-matching Guidelines including whether the ATO complied with the 2004 and the 2017 Protocol.

Despite being aware from April 2017 (from the Ombudsman’s 2017 Investigation Report) that the ATO was using TFNs for the data matches it conducted under the Scheme, the OAIC did not amend the scope of its ATO assessment to consider the question of compliance with APP 6 of the Privacy Act (use and disclosure of personal information). 106

The OAIC had asked a question about the ATO’s use of TFNs when consulting DHS about the draft DHS Assessment report. 107 DHS had suggested that the OAIC ask the ATO. 108

In the final DHS Assessment report the following words appeared:

<table>
<thead>
<tr>
<th></th>
<th>Collection/Use</th>
<th>The ATO uses its proprietary software to indentify match the DHS Customer information with ATO records</th>
</tr>
</thead>
<tbody>
<tr>
<td>(ATO)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The question was an important one, not just because of the implications for the ATO’s compliance with APP 6, but because of the TFN Rule, which obliged the ATO to use TFN information only for a permitted purpose under taxation or personal assistance law. 109

It does not appear that the OAIC ever asked the question of the ATO.

### 7.1 Australian Government – Privacy Act Review Report 2023

On 16 February 2023, the Attorney-General released the Privacy Act Review Report 110 containing 116 proposals for reform of the Privacy Act. The government sought public comment on each of the proposed reforms.

The Report contains a number of proposals which are relevant to the privacy issues which have been canvassed in this chapter and the Data-matching and exchanges chapter:

**Additional protections**

**Proposal 13.1** APP entities must conduct a Privacy Impact Assessment for activities with high privacy risks.

(a) A Privacy Impact Assessment should be undertaken prior to the commencement of the high-risk activity.

(b) An entity should be required to produce a Privacy Impact Assessment to the OAIC on request.

The Act should provide that a high privacy risk activity is one that is ‘likely to have a significant impact on the privacy of individuals’. OAIC guidance should be developed which articulates factors that that may indicate a high privacy risk, and provides examples of activities that will generally require a Privacy Impact Assessment to be completed. Specific high risk practices could also be set out in the Act. 111

**Organisational Accountability** 112

**Proposal 15.1** An APP entity must determine and record the purposes for which it will collect, use and disclose personal information at or before the time of collection. If an APP entity wishes to use or disclose personal information for a secondary purpose, it must record that secondary purpose at or before the time of undertaking the secondary use or disclosure.

**Proposal 15.2** Expressly require that APP entities appoint or designate a senior employee responsible for privacy within the entity. This may be an existing member of staff of the APP entity who also undertakes other duties.

**Automated decision making** 113

**Proposal 19.1** Privacy policies should set out the types of personal information that will be used in substantially automated decisions which have a legal or similarly significant effect on an individual’s rights.
Proposal 19.2 High-level indicators of the types of decisions with a legal or similarly significant effect on an individual’s rights should be included in the Act. This should be supplemented by OAIC Guidance.

Proposal 19.3 Introduce a right for individuals to request meaningful information about how substantially automated decisions with legal or similarly significant effect are made. Entities will be required to include information in privacy policies about the use of personal information to make substantially automated decisions with legal or similarly significant effect.

This proposal should be implemented as part of the broader work to regulate AI and ADM, including the consultation being undertaken by the Department of Industry, Science and Resources.

Security, retention and destruction

Proposal 21.7 Amend APP 11 to require APP entities to establish their own maximum and minimum retention periods in relation to the personal information they hold which take into account the type, sensitivity and purpose of that information, as well as the entity’s organisational needs and any obligations they may have under other legal frameworks. APP 11 should specify that retention periods should be periodically reviewed. Entities would still need to destroy or de-identify information that they no longer need.

Proposal 21.8 Amend APP 1.4 to stipulate than an APP entity’s privacy policy must specify its personal information retention periods.

The Commission notes that the government has not yet provided a formal response to the Privacy Act Review Report.

The Commission supports each of these proposals.
8 Conclusion

The Information Commissioner and Privacy Commissioner told the Commission that the OAIC’s preferred regulatory approach is to facilitate voluntary compliance with privacy obligations and to work with entities to ensure compliance and better privacy practice and prevent privacy breaches.115

The Information Commissioner’s task is a difficult one. The Commission appreciates the OAIC’s preference for educative and preventative action by conducting assessments under the Privacy Act. However, as noted in the ALRC Report,116 the OAIC needs to be prepared to adopt a more formal regulatory posture where there is a “reasonable” apprehension of possible interferences with the privacy of an individual.

The Information Commissioner could have decided to undertake an own motion investigation into either or both of DHS or the ATO on the basis of a reasonable apprehension that one or more interferences with the privacy of individuals was suspected, but did not do so.

Instead, the Information Commissioner decided to proceed wholly by way of assessment of limited aspects of the Scheme on the assumption that this was the preferable course for achieving its aims in terms of compliance and education about the APPs in the Privacy Act.117 In conducting the three assessments under the Privacy Act, the Information Commissioner did not have the power to compel DHS to produce documents (such as the 2004 Protocol).118

The Commission’s findings about the possible breaches of the APPs in the Privacy Act in the Data-matching and exchanges chapter are significant and arise in the context of repeated and voluminous exchanges of personal information and data matches conducted by DHS and the ATO under the Scheme.

As discussed above, in January 2016 DHS was notified that the OAIC proposed to investigate a complaint lodged by a person who alleged that DHS interfered with her privacy by unlawfully collecting her TFN and employment history from the ATO and incorrectly applying it to, and raising a debt against, her twin sister.119 Even if this complaint were successfully conciliated by the OAIC, it could have triggered an own motion investigation.

This chapter, and the Data Matching and Exchanges chapter, also point to other evidence that suggests there was much to be gained by the Information Commissioner undertaking an own motion investigation into the Scheme, particularly in respect of DHS and ATO compliance with APPs 1, 3, 6, 10, 12 and 13 in Schedule 1 of the Privacy Act.

While it is difficult to assess what difference it would have made, the Commission notes that the Information Commissioner also had the ability to direct DHS to undertake a PIA120 but did not do so.

With the benefit of hindsight, it is apparent now that the OAIC approach, particularly in light of the substantial media attention and criticism around the Scheme, was too muted to meet the circumstances. Its three assessments, each with a narrow scope, were of little real consequence. What was occurring in the data matching under the Scheme was not given the examination which it needed and which could, with the use of the OAIC’s full investigative powers, have occurred.
The OAIC comprises the positions of Information Commissioner, Privacy Commissioner and FOI Commissioner.

Exhibit 2-2566 - SMO.0001.0002.0013 - MYEFO_2015-16_Final.pdf [p 211].

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [p 12: para 2.44].

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [para 5.3].

Office of the Australian Information Commissioner, Securing personal information: Services Australia (formerly Department of Human Services), data matching activities (Report, 20 July 2020) [para 1.3].

Office of the Australian Information Commissioner, Securing personal information: Australian Taxation Office, data matching activities (Report, 7 July 2020) [para 1.4].

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 12: para 2.44].

For further information about TFNs and the TFN Rule see Data-matching and exchanges chapter.

Commonwealth of Australia, Letters Patent, 18 August 2022 [p 2: (i)].

Exhibit 4-6717 - RBD.9999.0001.0473_R - 20221215 Letter to OSA - OAIC 22006293, 15 December 2022.

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023.

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019).

Office of the Australian Information Commissioner, Securing personal information: Australian Taxation Office, data matching activities (Report, 7 July 2020).

Australian Information Commissioner Act 2010 (Cth) s 2.


See the guidance in section 33C of the Privacy Act 1988 (Cth).

See Privacy Act 1988 (Cth) ss 36A and 40.

See Privacy Act 1988 (Cth) s 33D(1).


See the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth) (No. 197 of 2012).


Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 11: para 2.43].

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 13: paras 2.45-2.47].

See Privacy Act 1988 (Cth) s 33C(3).

See Privacy Act 1988 (Cth) s 33C(4). The Information Commissioner’s ability to issue a notice under s 33C is also subject to s 70 of the Privacy Act. Section 33C was amended by the Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022 (Cth) which inserted s 33C(3)-(8).

See Privacy Act 1988 (Cth) s 33C(8).

See Privacy Act 1988 (Cth) ss 40(2).

See Privacy Act 1988 (Cth) ss 36A, 40(2).


See Privacy Act 1988 (Cth) s 44.

See Privacy Act 1988 (Cth) ss 52, 55, 55A.

See Privacy Act 1988 (Cth) s 41.

See Privacy Act 1988 (Cth) s 40(1).

See Privacy Act 1988 (Cth) s 33D(1).

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 17: para 2.72].

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017; Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [para 3.71].

Exhibit 9906 - CTH.3023.0018.2130_R - CP15 02003 [redacted] s40 letter to DHS.PDF; Exhibit 9900 - CTH.3004.0009.6409_R - RE: 3 September 2018 PLEXID 24477 & 24478 - privacy complaint to the OAIC [DLM=Sensitive:Personal].

Transcript, Dr Wurth, 8 March 2023 [p 4652: lines 1-12]; see further discussion on “fuzzy” and “tight” data matches in the Data-matching and exchanges chapter.

Transcript, Dr Wurth, 8 March 2023 [p 4653: lines 3-14].

Exhibit 9451 - CTH.3001.0032.3904 - RE: SUBMIT FOR OK/ Head’s Up Media enquiries - Ben Butler - Australian [DLM=For-Official-Use-Only]; Exhibit 4-7055 - CTH.3001.0032.3989_R - FOR INFO- Minister’s Office - today’s media and communication interactions [DLM=For-Official-Use-Only], 5 January 2017.

Exhibit 9457 - CTH.3001.0032.3843 - FW: FYI - Statement by the Aost Information and Privacy Commissioner [SEC=UNCLASSIFIED].

Exhibit 4-7048 - CTH.3001.0032.3900_R - RE- URGENT-- FYI - Statement by the Aost Information and Privacy Commissioner [DLM=For-Official-Use-Only].pdf.


Exhibit 4-7165 – LMA.1000.0001.0380, Minute to Ombudsman DHS online compliance platform OM copy.docx, 5 January 2017.

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.

Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 2; para 1.16].

See Privacy Act 1988 (Cth) ss 33C(3), 44.

In late 2016 and early 2017, DHS received repeated media requests to disclose or publish the 2004 Protocol. This prompted DHS officers to review the 2004 Protocol, at which point it was realised that the 2004 Protocol had not been updated to reflect the OCI program and therefore was not compliant with the Information Commissioner’s Guidelines: see section 5.1.2 of the Data-matching and exchanges chapter.

See section 6.2 of the Data-matching and exchanges chapter.

Exhibit 1-1108 - CTH.3000.0030.0386 - 2004 Pay As You Go PAYG v1.0.docx [p 1].

See Privacy Act 1988 (Cth) ss 33C(3), 44.


See, e.g., Exhibit 3-4417 - CTH.3001.0032.2826_R - FOR OK- Head’s Up Media enquiries - Ben Butler - Australian [DLM=For-Official-Use-Only], 5 January 2017 and Exhibit 9453 - CTH.3001.0033.1472 - For urgent clearance: Data matching protocol media response [DLM=For-Official-Use-Only].


Exhibit 9456 - CTH.3004.0004.3000 - MS17-000506.docx.


Exhibit 9902 - CTH.3000.0030.1019 - Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program.pdf.
Exhibit 9903 - CTH.3001.0047.7961 - Letter to A Falk from DHS.PDF.


Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019).

Exhibit 9901 - CTH.3000.0030.1018 - IMPORTANT OIC ADVICE: Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program [SEC=UNCLASSIFIED]; and Exhibit 9902 - CTH.3000.0030.1019 - Privacy Assessment of the Non-Employment Data Matching Program and PAYG Data Matching Program.pdf.

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [1.2].

Exhibit 4-7147 – LMA.1000.0001.2996_R – Report – Centrelink’s automated debt raising and recovery system, April 2017 [p 5: para 2.4] and [p 40: para 2.21].

Exhibit 2-2790 - CTH.3000.0024.5960_R - RE- Data-matching proposal, 13 November 2015.

Exhibit 4-7147 – LMA.1000.0001.2996_R – Report – Centrelink’s automated debt raising and recovery system, April 2017 [p 39: para 2.15].

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.


Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [3.71].

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [4.9].

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [3.73].

Office of the Australian Information Commissioner, Handling of personal information: Department of Human Services PAYG data matching program (Report, 30 September 2019) [3.75]-[3.76].

See Privacy Act 1988 (Cth), s 13 and Schedule 1.

Exhibit 1-0505 - ATO.9999.0001.0003 - Guidelines on data matching in Australian Government administration [para 8].

Exhibit 1-0505 - ATO.9999.0001.0003 - Guidelines on data matching in Australian Government administration [para 6].

Exhibit 4-7154 - LMA.1000.0001.1970 - Notes from meeting with OAIC re DHS data matching copy, 3 January 2017.


Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [page 18: para 2.74].

Office of the Australian Information Commissioner, Securing personal information: Services Australia (formerly Department of Human Services), data matching activities (Report, 20 July 2020) [para 1.3].

Office of the Australian Information Commissioner, Securing personal information: Services Australia (formerly Department of Human Services), data matching activities (Report, 20 July 2020) [paras 3.125-3.127].

Office of the Australian Information Commissioner, Securing personal information: Australian Taxation Office, data matching activities (Report, 7 July 2020) [para 3.41].

Exhibit 1-0293 - ATO.001.933.6001_R - OAIC Review Response, 10 January 2019.

Office of the Australian Information Commissioner, Securing personal information: Australian Taxation Office, data matching activities (Report, 7 July 2020) [para 1.2].

Office of the Australian Information Commissioner, Securing personal information: Australian Taxation Office, data matching activities (Report, 7 July 2020) [para 1.3].

Exhibit 1-0293 - ATO.001.933.6001_R - OAIC Review Response, 10 January 2019.

Exhibit 9907 - ATO.002.077.3568_R - 2016.06.06-[REDACTED] - Letter from ATO to OAIC - Final.docx.

Exhibit 9907 - ATO.002.077.3568_R - 2016.06.06-[REDACTED] - Letter from ATO to OAIC - Final.docx.

Exhibit 9909 - ATO.002.077.3575_R - Privacy complaint by [REDACTED]: Our ref: [SEC=UNCLASSIFIED].

105 Exhibit 1-0293 - ATO.001.933.6001_R - OAIC Review Response.

106 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [1.3].

107 Exhibit 9904 - CTH.3004.0010.3741 - Draft DHS PAYG program report (All DSA Comments) CLEAN.docx [p 9].

108 The ATO was required to comply with the TFN secrecy provision in s 8WB *Taxation Administration Act 1953*.

109 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [1.3].


115 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [p 3: para 1.17].

116 The ATO was required to comply with the TFN secrecy provision in s 8WB *Taxation Administration Act 1953*.

117 Office of the Australian Information Commissioner, *Securing personal information: Australian Taxation Office, data matching activities* (Report, 7 July 2020) [1.3].


123 Exhibit 4-6719 - RBD.9999.0001.0454 - Response to request for information from AIC to Royal Commission - 16 January 2023 [p 11: para 2.43].

124 See *Privacy Act 1988* (Cth) s 33C(3).

125 Exhibit 9906 - CTH.3023.0018.2130_R - CP15 02003 [redacted] s40 letter to DHS.PDF; Exhibit 9910 - CTH.3030.0018.8382_R - RE: For urgent review please - For action: Escalated Privacy Complaint - LEXID 12079 [DLM=Sensitive].

126 See *Privacy Act 1988* (Cth) s 33D.
Section 7: The Australian Public Service
634 Royal Commission into the Robodebt Scheme
Chapter 23: Improving the Australian Public Service
1 Introduction

*I think what we can see is that to some degree, the service, parts of the service at times have lost its soul, lost its focus on people, its empathy for people. We’ll need to reflect on how we discharged our legal and ethical responsibilities under law, including in our leadership, and we’ll need to examine and act to strengthen our systems, including training and performance management across the service, to ensure that what we’ve seen so far isn’t repeated.*

- Gordon de Brouwer, current Australian Public Service Commissioner

*Regardless of the political complexion of the government of the day, or its policies, it is highly desirable if not essential to the proper functioning of the system of representative and responsible government that the government have confidence in the ability of the APS to provide high quality, impartial, professional advice, and that the APS will faithfully and professionally implement accepted government policy, irrespective of APS employees’ individual personal political beliefs and predilections.*

- Comcare v Banerji

The volume on the Chronology of the Robodebt Scheme in this report describes the conditions that led to the Robodebt Scheme’s (the Scheme’s) establishment and continuation. Those conditions included repeated failures by members of the Australian Public Service (APS) to discharge their professional obligations and to adhere to the values and standards that applied to their roles.

But the behaviour of individuals is only part of the story. In the Commission’s view, many of the failures of public administration that led to the creation and maintenance of the Scheme can be traced to features of the APS structure. These features include:

- the separation of responsibilities between agencies in relation to the development and maintenance of government programs and the lack clear definition of those responsibilities
- a lack of independence on the part of secretaries
- woefully inadequate recordkeeping practices
- a lack of understanding on the part of some of those involved of the APS’ role, principles and values.

Those hoping for recommendations for wholesale reform of the APS may be disappointed. The Commission had neither the time nor the resources to examine whatever shortcomings exist in the APS as a whole, and is anyway conscious of a recent and expert review. However, the Commission’s work does enable it to add its voice to some of the recommendations of that review and to make some recommendations of its own more particularly related to the deficiencies in conduct and failure to recognise responsibilities and obligations which were starkly manifested in the design and implementation of the Scheme.
2 The current state of public service reform

On 20 September 2019, an independent review of the APS titled *Our Public Service, Our Future* (the Thodey Review) was published. In that review, an independent panel analysed the structure of the APS and made recommendations for reform.

The Thodey Review affirmed the “basic role” of the APS is to provide robust and evidence-based advice to Ministers, frankly and freely. The recommendations were largely directed at the need for a clear understanding of the APS’s role. They included the codification of new “principles” in the *Public Service Act 1999* (Cth) (*Public Service Act*) to complement the existing APS values, and further training concerning the roles and responsibilities regulating interactions between ministers, their advisers and the APS. Additionally, the Thodey Review recommended the implementation of a more robust set of processes relating to the appointment, termination and performance management of secretaries.

That change is already underway. The Morrison Government accepted a number of recommendations made by the Thodey Review and began a process of implementation. In the wake of the 2022 federal election, the Albanese Government has indicated that its APS reform agenda will build on the recommendations made.

As a result of the Thodey review, amendments to the PS Act have been proposed through the *Public Service Amendment Bill 2023* (Cth), introduced into Parliament on 14 June 2023. These proposed changes include the following:

- the addition of “stewardship” as an APS Value, recognising that the APS “builds its capability and institutional knowledge, and supports the public interest now and into the future, by understanding the long-term impacts of what it does,”

- the imposition of requirements that “capability reviews” be undertaken of public service agencies to build organisational capacity and accountability, and

- amendments that prohibit Ministers from directing Agency Heads.

Other reforms traceable to the Thodey Review (that did not require legislative amendment) include the establishment of professions within the APS for data, digital, and human resources giving effect to the recommended establishment of an APS professions model to build capability.

The Commission welcomes the establishment of the National Anti-Corruption Commission (NACC) which will investigate and report on serious or systemic corrupt conduct in the APS.

The Commission also notes the establishment of the APS Integrity Taskforce on 8 February 2023 to deliver “a pro-integrity culture” across the public service. That taskforce’s terms of reference are directed at, in part, framing a comprehensive response to the themes emerging from this Commission. The taskforce will consider measures in relation to cultural and behavioural practices, values and leadership capabilities that support (or undermine) integrity and leadership (including the roles and responsibilities of secretaries and agency heads).

The Thodey Review also recommended that the Public Service Act be amended to give the APS Commissioner own-motion powers to initiate investigations and reviews. It envisaged that the expansion of the responsibilities and functions of the Australian Public Service Commissioner (APSC) would complement the NACC, which will have been established by the time this report is published. The Commission agrees with this recommendation.

What became apparent through the course of the Commission’s inquiries is that there were practices by APS employees which would not reach the level of corrupt conduct in section 8 of the *National Anti-Corruption Commission Act 2022* (Cth) but which were systemic, not merely individual, and constituted conduct sufficiently concerning to warrant investigation.
3 Structural relationships between Social Services and Services Australia

Throughout the life of the Scheme, there was division between the responsibilities of DSS and DHS (now Services Australia). Fundamentally, DSS was responsible for policy while DHS was responsible for service delivery.

This was not a new idea. Following a review of statutory authorities published in 2004, the Howard Government created DHS, giving it oversight of six government agencies, including Centrelink.18 Shortly after, the Hon Joe Hockey, then Minister for Human Services, noted that the new system – which had the effect that an agency would report to one departmental secretary on policy matters and another on service delivery – had already led to some “creative tensions” between portfolios.19 In 2007, the service delivery agencies were brought within a new Human Services portfolio.20 In 2008, DHS was given responsibility for the development of service delivery policy.21 As Raymond Griggs AO CSC identifies,22 and the evidence before the Commission clearly indicates, these creative tensions endured.

The effect of this was that service delivery policy and practice became separated from, and in some ways began to compete with, broader social services policy administration. Another result, according to Andrew Podger AO, who delivered a report to the Commission was that service delivery policy and practice became subject to much closer political control,23 when, in his view, it is desirable for service delivery to be insulated from political control.24

This chasm between DSS and DHS, and a lack of clearly identified responsibilities was, in the Commission’s view, a contributing factor to the Scheme’s establishment and continuation. Despite the prescribed division of their responsibilities and how the relationship between agencies was defined, the Scheme and its underlying policy was developed primarily by DHS, with DSS kept on the periphery.25

Rebecca Skinner, CEO, Services Australia, cited confusion about the division of responsibility between DSS and DHS during the life of the Scheme.26 Mr Griggs, Secretary, DSS, similarly acknowledged “tension” between the respective agencies, particularly in relation to service delivery and policy.27 Mr Griggs’ view was that if the NPP (that informed Cabinet’s decision to approve funding for the Scheme) had been led by DSS, “the chances of the right advice being provided to Government would have been higher”.28

The creation of Services Australia as an executive agency in February 2020 went some way in reversing those circumstances, in particular because responsibility for service delivery policy was returned to DSS at the time.29 Mr Podger’s report supports this change, although he maintains that Services Australia should now also be made a statutory authority, to further insulate it from political control.30 Drawing on submissions from Mr Podger, the Thodey Review endorsed the view that “A greater degree of independence can be warranted for service delivery, regulation, integrity and government business functions”.31 The Thodey Review in turn recommended that the “form, function and number of government bodies” be reviewed to ensure they remain fit for purpose.32 As part of that recommendation, the report proposed that the Commonwealth Government Structures Policy be amended “to include explicit guidance on the appropriate level of independence best suited to deliver different types of government functions.”33

The Commission notes that the present government has undertaken to implement a number of the recommendations made by the Thodey Review, although it is not clear to what extent any formal organizational review is underway.34 The most recent Government Structures Policy, updated in February 2023, recommends periodic reviews of existing government bodies every five to 10 years.35

While acknowledging that Mr Podger may well be right that Services Australia should become a statutory authority, the Commission is not well placed to consider that matter. It has not, for example, received sufficient evidence about the present structural shortcomings of DSS and Services Australia. However,
given Ms Skinner’s observations about Services Australia’s transition from DHS, and the fact that that transition took place without the benefit of the information in this report, the Commission recommends that the government undertake an immediate and full review of the structure of the social services portfolio, and of Services Australia as an entity.

**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.
4 Public service employees

The idea for the Scheme was conceived by employees of DHS who failed to recognise its inconsistency with social security legislation, its incompatibility with an underlying policy rationale of that legislation and the cohort of people it was likely to affect.

Its continuation was enabled and facilitated by employees who disregarded the considered views of the Administrative Appeals Tribunal, deceived the Commonwealth Ombudsman and failed to give frank and fearless advice to the executive.

The findings in this report evidence a failure of members of the APS to live up to the values and standards of conduct expected of them by the Australian community. These expectations are not opaque. They are clearly set out in:

- The Public Service Act which sets out the standards of conduct required of APS employees in the form of ‘APS Values’ and ‘APS Employment Principles’ and establishes a framework for dealing with employee misconduct. All APS employees are required to inform themselves of their obligations under the Public Service Act.\(^3^7\)
- The APS Code of Conduct, which lists a number of requirements governing the actions and behaviours of APS employees.\(^3^8\)
- The Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act), under which APS employees are required to exercise their powers, perform their functions and discharge their duties honestly, in good faith and for a proper purpose,\(^3^9\) with a degree of care and diligence that a reasonable person would exercise in their position.\(^4^0\)
- The Public Interest Disclosure Act 2013 (Cth) (PID Act), which serves to promote the integrity and accountability of the Commonwealth public sector and to ensure that disclosures by public officials (about conduct that is illegal, or that otherwise involves corruption, maladministration, abuse of public trust or wastage of public money)\(^4^1\) are properly investigated and dealt with.\(^4^2\)

Knowing these obligations and understanding how they apply is clearly essential for any public servant. Mr Podger argued that more needs to be done to ensure APS employees (in particular Secretaries, the SES and Executive Level officers) appreciate their statutory and other responsibilities.\(^4^3\) The Commission agrees. It is quite clear that there was insufficient understanding and recognition of these obligations across DSS and DHS throughout the Scheme.

The Thodey Review recommended that the APSC should deliver whole-of-service induction on essential knowledge required for public servants, with participation required to pass probation.\(^4^4\) The Commission agrees with that recommendation.

**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.

Those who designed and implemented the Scheme failed to recognise their role in a service delivery organisation, and the characteristics of the people they sought to serve. Mr Griggs commented on the lack of citizen focus throughout the Scheme, acknowledging that the Department “failed to fully understand the cohort of citizens impacted and to keep their best needs central to any policy advice or actions”.\(^4^5\) Ms Skinner described her plan for Services Australia as embodying the principles of simple, helpful, respectful and transparent; and expressed her uncontroversial view that the Scheme did not reflect these principles, in design or customer experience.\(^4^6\) The Australian Council of Social Service recommended that the DSS and Services Australia implement a strategy to actively employ people who have experience of using the social security system.\(^4^7\)
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.

Public servants, whether lawyers or not, should have a basic understanding of natural justice principles and administrative decision making, including the statutory provisions governing that decision making.

In the Administrative Appeals Tribunal chapter, the Commission has recommended the re-instatement of the Administrative Review Council (ARC) which was defunded and effectively discontinued in the 2015-16 Budget. Its functions include facilitating training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and to promote knowledge about the Commonwealth administrative law system.

During its operation, the ARC produced best practice guides on topics of lawfulness, natural justice, evidence facts and automated decision-making, which are still available on the Attorney-General’s Department website (though may now be somewhat dated). These are useful resources for public servants.

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)

Both Dr Sue Vardon AO (former and inaugural Centrelink CEO) and Mr Podger referred the Commission to an internal college that was established within Centrelink in 2001 (and was at some point disbanded) to provide a facility for staff to acquire accredited training. The college provided training and development to staff that was linked to the skills and knowledge required to undertake their duties and reflected Dr Vardon’s “vision for an organisational learning culture.”

There would be a good deal to be said for the availability of training in that form, but the Commission recognises that staff numbers in Services Australia are many times those of Centrelink in its heyday, so it may not feasible. Nonetheless, the possibility should be explored.

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.

Senior Executive Service (SES) staff at Services Australia should be required to spend time in front-line service delivery, and should also spend time engaging with Services Australia Community Partnership Specialist Officers (CPSOs) placed in non-government community services as part of the Community Partnership Pilot (which is a community-based approach to helping customers in need). The CPSOs are experienced Centrelink officers who have been co-located at a partner organisation (such as St Vincent de Paul), work with people to connect them with relevant government support, and “have expertise in identifying and addressing barriers face[d] by vulnerable cohorts in accessing Centrelink entitlements and rights.”

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.
5 Senior executives and secretaries

The Commission heard evidence from a number of SES officers who held leadership and other senior positions. The role of SES officers within each department is to provide APS-wide leadership of the highest quality that contributes to an effective and cohesive APS. The most prominent SES officers within each department are the secretaries and deputy secretaries, who were integral to the making of key decisions, communications with ministers, and in directing other APS employees within their departments in relation to the Scheme.

The secretary of a department holds a distinct role as an “agency head”, and is bound by the Code of Conduct in the same way as APS employees. However, as an agency head, the secretary of a department also has a separate statutory obligation to uphold and promote the APS Values and the APS Employment Principles.

The APS Value of ‘Impartial’ requires the public service to be apolitical, and provide the government with advice that is frank, honest, timely, and based on the best available evidence. The Commission heard evidence about APS leaders (both Secretaries and SES leaders) being excessively responsive to government, undermining concept of impartiality and frank and fearless advice. For example, when the Scheme was developed in 2015, the New Policy Proposal was apt to mislead the Expenditure Review Committee and Kathryn Campbell (Secretary, DHS) did not take any steps to correct that misleading effect.

Mr Podger referred to a number of recent developments that have discouraged the appropriate level of independence, including to the loss of tenure of Secretaries and the control that the Prime Minister has over the appointment and termination of Secretaries. The Thodey Review found that the lack of transparency around the appointment, performance management and termination processes of senior leaders affects the APS’s culture with the impact that “the APS leadership favours being ‘agreeable’ rather than engaging in debate and challenge”. The Thodey Review made recommendations aimed at ensuring confidence in the appointment of agency heads, ensuring that performance management of secretaries is robust and comprehensive, and that robust processes govern the termination of secretaries’ appointments.

Mr Podger recommended that the APS Commissioner have the lead role in advising on Secretaries’ appointments and terminations.

The current government has emphasized that the public service must be empowered to be honest and truly independent. It has asked the Public Service Commissioner to ensure that SES performance assessments cover both outcomes and behaviours.

In the Commission’s view, this does not go far enough.

The Commission endorses a number of recommendations made in the Thodey Review in relation to Secretarial appointments which should be revisited, including:

- That the PM&C Secretary and APS Commissioner agree and publish a policy on processes to support advice to the Prime Minister on appointments of secretaries and the APS Commissioner,
- That the PM&C Secretary and APS Commissioner undertake robust and comprehensive performance management of secretaries,
- That the PM&C Secretary and APS Commissioner publish the framework for managing the performance of secretaries under the Public Service Act, and
- That the PM&C Secretary and APS Commissioner ensure that robust processes govern the termination of secretaries’ appointments.

The extent to which these recommendations have been endorsed by the government is unclear.
6 Former employees

A number of employees involved in the Scheme have resigned from the public service. In 2013, the Public Service Act was amended with the introduction of s 41B to empower agencies to determine alleged breaches of the Code by former APS employees.75

The Public Service Commissioner may inquire into a former APS employee’s conduct,76 but given that sanctions relating to a breach of the APS Code of Conduct can only be imposed on current APS employees,77 no meaningful consequence would flow from any found breach. In Queensland, s 95 of the Public Sector Act 2022 (Qld) provides for a disciplinary declaration if employment as a public sector employee ends, and a disciplinary ground arises in relation to that person. The declaration includes a statement of the action that would have been taken against the former public sector employee had their employment not ended. A similar consequence for APS members would be relevant and appropriate if the individual wished to re-join the APS or seek consulting work from it.

However, the position is less clear in relation to former agency heads. Section 41A of the Public Service Act, which enables inquiry into conduct by agency heads, unlike s 41B, does not use the term “former”. There is a strong argument that the time at which the person concerned must be an agency head for the purposes of the section is the time at which the breach occurred, not the time of inquiry, and it is in that sense that the expression “agency head” is used. It would be inconsistent with the Act’s object of establishing an effective public service, if immunity were effectively conferred on any agency head who in that capacity committed breaches of the Code but then ceased to occupy the position (while possibly taking up a different APS role). That result would be anomalous and detrimental to the proper management of the APS.

If the conclusion were reached that s 41A did not apply to former agency heads, there remains an argument that s 41B would nonetheless apply to any former agency head who had commenced their career as an APS employee, because they would, literally, be a former APS employee as defined by s 7 of the APS. It is an unsatisfactory reading of the inquiry power, though, because it would mean that someone appointed to the position of agency head from outside the APS would not be caught, unlike a career public servant.

The uncertainty as to the meaning of s 41A should be resolved by further amendment.

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.
7 Record-keeping failures

I have been aware on many occasions of ministerial expectations that sensitive or difficult matters not be clearly expressed in written briefs. As a matter of good practice it would be desirable if Ministers did not impose that expectation on public servants, and clearly expressed an expectation that important advice — whether convenient or inconvenient — be conveyed in writing and maintained as a Commonwealth record.78

- Renee Leon PSM, Former Secretary of the Department of Human Services

The evidence before the Commission was riddled with instances in which no record could be found to explain why significant action was taken or not taken. The following are merely some examples of significant events where public servants and in-house lawyers failed to contemporaneously document and retain file notes of important decisions and conversations:

- **The decision not to proceed with the acting secretary’s request:** On 6 January 2017, Barry Jackson (acting secretary, DHS) sought advice about the legality of averaging to determine social security entitlement.79 A draft advice was subsequently prepared by DHS lawyers that recommended that external legal advice be sought on whether it was open to DHS to rely on information received from the ATO to calculate a customer’s entitlement to income support.80 Draft instructions to AGS were prepared,81 and an AGS lawyer was contacted about the advice.82 The documentary evidence suggests that a decision was made not to proceed with the work Mr Jackson had requested about the legality of averaging to determine social security entitlement, including to instruct AGS to advise. There is no record of this decision.

- **The DHS chief counsel handover meeting:** Ms Musolino had been on leave in January 2017. During her leave, Mr Menzies-McVey performed her role from 3 to 8 January 2017 and Lisa Carmody from 9 to 15 January 2017.83 A lot happened during that period - the Scheme was under intense media scrutiny and, as above, a draft advice had been prepared,84 and instructions drafted to AGS.85 A further advice was prepared by Glyn Fiveash (deputy general counsel, DHS) which stated that where there was no income averaging method provided for in calculation of a person’s social security rate in the first place, it could not be used to calculate a debt.86 On 16 January 2017 there was a handover meeting between Ms Musolino and Ms Carmody (the handover meeting), as is clear from a calendar record of that meeting.87 The oral evidence suggests Ms Carmody provided Ms Musolino with a hard copy folder of documents.88 However, there is otherwise no documentary record of what was said in that handover meeting, including whether Ms Musolino was provided with the significant advices about the Scheme and the instructions to AGS that had been prepared during her period of leave.

- **The DHS secretary handover meeting:** On 10 January 2017, Ms Campbell returned from leave and resumed the role of secretary from Mr Jackson. Mr Jackson recalls a verbal handover that took place.89 Mr Jackson’s evidence was that he informed Ms Campbell of his request for legal advice about averaging.89 Ms Campbell did not recall a substantive handover.90 There is no documentary record of this handover.

- **The discussion between OLSC and chief counsel, DHS:** Sometime after 20 January 2017 a phone call occurred between Ms Samios and Ms Musolino in which Ms Musolino informed Ms Samios that there were no legal issues and nothing to report to the Office of Legal Service Coordination (OLSC). There is no documentary record of this call.
The decision that the PwC report should not be finalised and delivered to DHS: On 13 February 2017, PricewaterhouseCoopers (PWC) was engaged to provide an independent review of the compliance and fraud activities of DHS. The letter of engagement required PwC to set out its key recommendations in a final report. No report was ever delivered and instead, a PowerPoint presentation was made to the Minister for Human Services on 22 May 2017. There is no record of DHS communicating to PwC that the PowerPoint presentation satisfied the report deliverable set out in the letter of engagement, or any record of an internal DHS decision that effect.

- The decision to pay for, but not to finalise, the Clayton Utz advice: On 14 August 2018, Clayton Utz provided a draft advice to DSS. That advice was left in draft and never finalised. On 18 September 2018, a decision was made to pay Clayton Utz for the advice. No record was made of why that occurred when instructions to finalise the advice were not given.

While there is no specific policy requiring important decisions and conversations to be documented by public servants, the APS values include that the APS is open and accountable to the Australian community under the law and within the framework of ministerial responsibility, which requires:

- being open to scrutiny and being transparent in decision making
- being able to demonstrate that actions and decisions have been made with appropriate consideration
- being able to explain actions and decisions to the people affected by them.

The APS Guide states that the creation, maintenance, and accessibility of Commonwealth records is essential for accountability and sound public administration and that the level and standard of recordkeeping needs to reflect the circumstances and the importance of the decision or action being recorded.

The National Archives of Australia information management policy, which came into effect on 1 January 2021, makes the point in its Foreword: “For transparent and accountable government, records of decisions — including the reasons for those decisions — need to be made and kept.”

The Commission does not suggest that the examples of record-keeping failure given above amount to breaches of the APS values. However, in the Commission’s view, transparent and considered decision-making requires appropriate records to be kept of significant events, meetings, discussions and of course, decisions. Record-keeping is a basic skill that should be standard practice for any public servant. Throughout the Scheme, important information seemed to be given in oral conversations, limiting the ability of the Commission (and the public) to scrutinize actions and decisions taken.

Professor Peter Shergold AC, in his 2015 report Learning from Failure, following the Royal Commission into the Home Insultation Program, recommended that an APS-wide policy provide practical guidance about record keeping including when records should be created and retained. Mr Podger also recommended that guidance should be issued from the Australian Public Service Commission.

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.
8 Ministerial staff Code of Conduct

The role of the APS is properly distinguished from the role of ministerial staff, who provide political and policy advice to ministers and whose employment is governed separately under the *Members of Parliament (Staff) Act 1984* (Cth) (MOP(S) Act). The inherently political nature of ministerial advisers’ roles sets them apart from the APS and their separation is designed to enable and protect the political impartiality of the APS.\(^{102}\)

Ministerial staff are employed under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act) and are not subject to the APS Code of Conduct. They are employed to assist a parliamentarian to carry out duties as a Member of Parliament and not for party political purposes.\(^ {103}\)

In his report to the Commission, Andrew Podger AO pointed to the “steadily increasing role and number of ministerial staff” which may lead to “excessive responsiveness by APS leaders (both Secretaries and the SES who report to them) to the wishes of ministers.” Such responsiveness may undermine “public confidence in the non-partisanship of the APS.”

I consider there has been such a failure over at least the last two decades and most particularly over the Relevant Period for the Robodebt scheme, and that this systemic problem may well have contributed to the ‘fiasco’ (the term used by Peter Whiteford (Whiteford 2021)).\(^ {104}\)

The Thodey Review and the Jenkins Review both recommended that the MOP(S) Act be amended to include a legislated code of conduct for ministerial staff and a statement of values that clarifies their distinct role from that of the APS (and the Parliamentary Service); and that the code clarify that such staff do not have authority to direct the APS.\(^ {105}\) The Commission supports this recommendation, and understands that it will be implemented by the Parliamentary Leadership Taskforce.\(^ {106}\)
2 Comcare v Banerji (2019) 267 CLR 373, 401 [34].
7 Senator the Hon Katy Gallagher, “Albanese Government’s APS Reform agenda” (Speech, Institute of Public Administration Australia, 13 October 2022).
8 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 96, recommendation 5; Public Service Amendment Bill 2023 sch 1, item 2.
9 Commonwealth of Australia, Department of the Prime Minister and Cabinet, Our Public Service, Our Future. Independent Review of the Australian Public Service, 20 September 2019, p 73, recommendation 2a; Public Service Amendment Bill 2023 sch 1, item 8.
10 Public Service Amendment Bill 2023 sch 1, item 6.
17 This recommendation was also supported by the Phillip Moss AM, Review of the Public Interest Disclosure Act 2013, 20 October 2016.
18 Report to the Royal Commission into the Robodebt Scheme, Andrew Podger AO, published 27 February 2023, p 10; Department of Parliamentary Services, The Uhrig Review and the future of Statutory authorities (Research note, 30 May 2005) p 3.
20 Report to the Royal Commission into the Robodebt Scheme, Andrew Podger AO, published 27 February 2023, p 10.
22 Exhibit 8202B – DSS.9999.0001.0042_R, 20230220 NTG-0176 Secretary Griggs signed statement 47202363.1, 20 February 2023, p 8.
23 Cf Report to the Royal Commission into the Robodebt Scheme, Andrew Podger AO, published 27 February 2023, p 10.
24 Report to the Royal Commission into the Robodebt Scheme, Andrew Podger AO, published 27 February 2023, p 10; Andrew Podger, How independent should administration be from politics? in Andrew Podger, Si Tsai-tsu and John Wanna, Designing Governance Structures and Accountability: Developments in Australia and Greater China (ANU Press, 2020) 35, 52.
25 Report to the Royal Commission into the Robodebt Scheme, Andrew Podger AO, published 27 February 2023, p 10; Andrew Podger, How independent should administration be from politics? in Andrew Podger, Si Tsai-tsu and John Wanna, Designing Governance Structures and Accountability: Developments in Australia and Greater China (ANU Press, 2020) 35, 52.

58 Public Service Act 1999 (Cth) s 35(2).

59 Public Service Act 1999 (Cth) s 7.

60 Public Service Act 1999 (Cth) s 14(1).

61 Public Service Act 1999 (Cth) s 12.

62 Public Service Act 1999 (Cth) s 10.

63 Exhibit 4-6019 – RBD.9999.0001.0431_R, Report to the Royal Commission into the Robodebt Scheme prepared by Andrew Podger AO, 20 February 2023, p 2).

64 See chapter 2015 to 2016: Implementation of the Scheme.

65 Exhibit 4-6019 – RBD.9999.0001.0431_R, Report to the Royal Commission into the Robodebt Scheme prepared by Andrew Podger AO, 20 February 2023, p 2).


68 Exhibit 6019 – RBD.9999.0001.0431_R, Report to the Royal Commission into the Robodebt Scheme prepared by Andrew Podger AO, 20 February 2023 [p 5].

69 Senator the Hon Katy Gallagher, “Albanese Government’s APS Reform agenda” (Speech, Institute of Public Administration Australia, 13 October 2022).

70 Senator the Hon Katy Gallagher, “Albanese Government’s APS Reform agenda” (Speech, Institute of Public Administration Australia, 13 October 2022).


76 Public Service Act 1999 (Cth) s 41B.

77 Public Service Act 1999 (Cth) s 15(1).

78 Exhibit 4-6041 - RLE.9999.0001.0002_R, 20221123 RL Statement FINAL 22006293(46499412.1), 23 November 2022, p 39 – 40.

79 Exhibit 4-5830 - SKR.0001.0001.0054_R - Re- UPDATE- Media and Social Media Commentary re- online compliance system - Friday 6 January [DLM=For-Official-Use-Only].

80 Exhibit 4-5845 - CTH.3113.0004.7076 - calculating of income for income support payments; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.

81 Exhibit 3-4231 - CTH.3038.0002.6641 - AGS Instruction.

82 Exhibit 4-5848 - CTH.3881.0001.0009_R - RE- urgent advice - calculating income for income support payments [DLM=Sensitive-Legal].

83 Exhibit 4-5845 - CTH.3113.0004.7076 - calculating of income for income support payments; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.

84 Exhibit 3-4231 - CTH.3038.0002.6641 - AGS Instruction.

85 Exhibit 4-5828 - CHT.3881.0001.0009_R - RE- urgent advice - calculating income for income support payments [DLM=Sensitive-Legal].

86 Exhibit 4-5820 - AMU.9999.0001.0003_R - 20221031 NTG-0012 - Response (Annette Musolino)[46258465.1] [p 9: para 11].

87 Exhibit 4-5845 - CTH.3113.0004.7076 - calculating of income for income support payments; Exhibit 4-8090 - JBL.0001.0001.0456 - calculating of income for income support payments.

88 Exhibit 3-4231 - CTH.3038.0002.6641 - AGS Instruction.

89 Exhibit 4-6245 - CTH.3884.0001.0001_R - Fw- debts.

90 Exhibit 4-5813 - CTH.3135.0001.0002_R - Lisa and Annette handover [SEC=UNOFFICIAL].

91 Transcript, Lisa Carmody, 27 February 2023 [p 3901: lines 1-14]; Transcript, Annette Musolino, 30 January 2023 [p 2672: line 47 – p 2674: line 5].

92 Exhibit 4-6850- BAJ.9999.0001.0001_R - NTG-0218 - Barry Jackson - DocID update(47338496.1)[p 7: para 40].

93 Exhibit 4-6850 - BAJ.9999.0001.0001_R, NTG-0218 - Barry Jackson - DocID update(47338496.1) [p 18: para 40-42]; Transcript, Barry Jackson, 7 March 2023 [p 4518: lines 25-45].
Closing observations

In closing, I return to the Terms of Reference. I do not propose to go through them and tick them off – the report has addressed them and as far as possible answered the questions they raise – but I will make some observations about them and the difficulties the Commission encountered in inquiring into them. In the context of the first Term of Reference, the question of public interest immunity arises and I have made recommendations in respect of that issue.

The establishment, design and implementation of the Robodebt Scheme

The report paints a picture of how the Robodebt Scheme (the Scheme) was put together on an ill-conceived, embryonic idea and rushed to Cabinet. If ever there were a case of giving an unproportion’d thought his act, this was it. It is clear enough why it was thought necessary and desirable: because of the dual advantages of supposed savings – the misconceived notion that unreviewed discrepancies between ATO and DHS income data represented mountains of gold – and its neat alignment with the political rhetoric of the day about the social security system and the need for “integrity” in welfare payments.

The harder question to answer is how it was established, when a major component was the use of income averaging in the absence of other evidence to determine the entitlements of current and former recipients and, hence, the debts they were said to owe; when not only were the resulting debts inaccurate, but the method of determining entitlement was not one which the Social Security Act permitted; and when DSS had given that advice. How did the Scheme make its way to Cabinet in the form of a New Policy Proposal (NPP) which referred to the use of ATO income data but made no mention of the income averaging which would be required (and was used, despite its illegality) in its use to determine entitlement? One can understand that a member of Cabinet not involved in the formulation of the NPP would not have appreciated what applying ATO income to a recipient’s record meant. But what about those who were involved, who were in the know? The Commission found it remarkably difficult to get any kind of consistent answer, and the process did not inspire confidence in the transparency of government policy making and implementation.

The Minister for Social Services, Mr Morrison, said that he knew the proposal involved income averaging, but he thought that DSS, which had originally said legislative change would be required, had indicated a change of that position by ticking a checklist in the NPP saying no legislation was required. Ms Wilson, Deputy Secretary DSS with responsibility for social security, said that DSS had advised legislative change would be needed to allow income averaging, but DHS had assured her that income averaging would not be part of the proposal. The Secretary of DSS, Mr Pratt, said that he knew nothing of averaging, but he would assume that if DSS gave DHS advice that legislation was needed, DHS would have taken the advice and altered what they were doing so that legislation was not required. The Secretary of DHS, Ms Campbell, said that the proposal remained the same (involving averaging) when it went to Cabinet, but DHS did not get involved in legislation; that was up to DSS and she did not remember whether she had asked about the legislative change.

The General Manager of Business Integrity at DHS, Mr Withnell, who was involved in the preparation of the proposal, said that it was clear to him that income averaging could not be used because it would require legislative change, so the whole idea was abandoned before it even went to the Minister for Social Services and the Minister for Human Services and formed no part of the NPP. His subordinates, Mr Britton and Mr Ryman, said averaging was always part of the proposal, they just didn’t think it would happen as much as it did. The Minister for Human Services, Ms Payne, could not remember whether the need for legislation in relation to the income averaging proposal was raised with her; she could not recall what happened to the advice that legislative change was needed and she did not have a record. Ms Payne did not remember anybody coming up with a proposal other than income averaging as a means of using
She did not have any specific recall how the question of legislative change for the proposal had disappeared and there was no material to inform her. This series of disparate and unsatisfactory answers would have the makings of a child’s nursery rhyme if it were not so serious.

The inability to gain access to Cabinet documents

Here a particular issue arises. There was a committed group of people trying to establish the facts of the Scheme: journalists, academics and activists. I do not propose a roll call; they know who they are and some of their names have emerged in the Commission’s hearings. They played a stalwart role. Some of them attempted to get to the bottom of how this measure had come to pass by making Freedom of Information applications. But they were, in part at least, thwarted by the existence of public interest immunity. The application of the immunity has also limited the Commission’s ability to reveal the entirety of the documentation concerning how the original proposal which became Robodebt, was passed and what was put to Cabinet thereafter. The salient points have been able to be made, but large parts of the relevant ministerial briefs, materials put before Cabinet and Cabinet minutes themselves have not been able to be revealed.

It is time to ask whether the rationale of public interest immunity – the maintenance of Cabinet solidarity and collective responsibility – really justifies the withholding of information that routinely occurs under that mantle. Nothing I have seen in ministerial briefs or material put to Cabinet suggests any tendency to give full and frank advice that might be impaired by the possibility of disclosure, and the Cabinet minutes which are in evidence are sparing in detail, with a careful mode of expression revealing nothing of individual views.

To explain: Cabinet documents are, by virtue of section 34 of the Freedom of Information Act 1982 (Cth) exempt as a class from disclosure. That means that the mere fact that they are documents of the kind exempts them from disclosure. The exemption applies to these documents:

- Cabinet submissions that:
  - have been submitted to Cabinet, or
  - are proposed for submission to Cabinet, or
  - were proposed to be submitted but were in fact never submitted and were brought into existence for the dominant purpose of submission for the consideration of Cabinet (s34(1)(a))

- official records of Cabinet (s34(1)(b))
- documents prepared for the dominant purpose of briefing a minister on a Cabinet submission (s 34(1)(c))
- drafts of a Cabinet submission, official records of the Cabinet or a briefing prepared for a minister on a Cabinet submission (s 34(1)(d)).

Cabinet records are released to the public and held in the National Archives of Australia once the “open access period” has been reached, which is 20 years for Cabinet records and documents, and 30 years for Cabinet notebooks.

What has happened in the case of the Scheme demonstrates the need for greater transparency of Cabinet decisionmaking. If the Executive Minute that was put to Mr Morrison and the NPP which was presented to Cabinet had been available for public scrutiny, it would have become apparent firstly, that there was advice that income averaging in the way it was proposed to be used could not occur without legislative change, and secondly, that Cabinet was told nothing of those things. That raises the real question of whether the protection of Cabinet documents as a class from disclosure ought to be maintained or whether, when access is sought, disclosure should be given unless there is a specific public interest in maintaining its confidentiality.

New Zealand has gone as far as requiring, not merely allowing, publication of Cabinet documents, and Queensland, having accepted the recommendation of the Coaldrake Report, seems about to do something similar.
As with all Government documents, there may be reasons why disclosure of Cabinet documents, or parts of those documents, would not be in the public interest. Obvious examples include documents, or parts of documents, that would prejudice national security, law enforcement or Australia’s international relations if released. Whether non-disclosure for those, or other, reasons, is warranted by the public interest would of course depend on the individual circumstances of each case.

However, the Government should end the blanket approach to confidentiality of Cabinet documents. To give effect to this, section 34 of the FOI Act should be repealed. The wide range of class and conditional exemptions in the FOI Act is sufficient to protect the public interest in relation to Cabinet documents. The mere fact that a document is a Cabinet document should not, by itself, be regarded as justifying maintenance of its secrecy.

**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.

DHS always intended to use income averaging in the Scheme. The report explores how that information came to be removed from the NPP, who knew or should have known that income averaging remained a feature of it, and who knew or should have known that it required legislative change and that Cabinet needed to be told that. But in this regard, a caution is needed. Because of the focus there has been on the unlawfulness of the Scheme, there is a risk of thinking that if legislation had been passed to allow the application of income averaging where recipients did not respond with information to contradict the results, there would have been nothing objectionable about the Scheme. It was extraordinary that a program with an unlawful aspect could be passed through Cabinet, but even if that obstacle had been recognised and legislation passed to authorise averaging as it was used in the Scheme, it would still have been problematic. As Mr Fiveash succinctly pointed out in his advice, it would have entailed paying people their benefits on the basis of one form of entitlement assessment and then clawing them back by applying a different entitlement test; taking back from them what they had legitimately received.

Even if the plan to use averaging were not retrospective, it would still run counter to the rationale for social security payments, to ensure that people on income support received benefit when they needed it, recognising what they actually were earning in any given fortnight, not using an average which did not reflect their reality. And, in addition, to suddenly require that hundreds of thousands of people prove their income after periods as long as five years on the basis of an uncertain indicator as the discrepancy between an annual income figure and their reporting was simply unreasonable. In high discrepancy cases it would be perfectly reasonable to review the file and make inquiry, but not to issue mass demands of this kind which caught up so many people who had done nothing wrong in their reporting. DHS should have known how unreliable the discrepancy factor would be as an indicator of debt from the information that Professor Whiteford reports as to the tiny percentages – 6 per cent and lower – of Newstart and Youth Allowance recipients who were on any sort of regular income.19

**The use of third party debt collectors**

The Commission examined the role of third party debt collectors under the Scheme, but no witness came forward with any example of deliberate wrongdoing. The removal of the entire contents of Felicity Button’s bank account was a mistake, albeit an appalling one, but it was not a systemic flaw except to the extent that it appears, alarmingly, that banks may be prepared to act on the say-so of debt collectors; but that is an issue for another day and another inquiry. Generally, what the Commission found was that the debt collectors did what debt collectors do: they badger people for payment. The evil in this case was the government’s unleashing them on social security recipients who, even in normal circumstances, ought to
be given more consideration because of their financial and other vulnerabilities than a debt collector is likely to give. But these were not normal circumstances, these were demands for often inexplicable debts, made of bewildered people who had no warning that DHS was suddenly going to raise a debt against them and, in some instances, had no warning that DHS had, in fact, raised a debt against them.

**Concerns raised about the Scheme once it was implemented**

One of the worst aspects of the Government’s response to concerns raised was its resistance to the warnings from staff who could see what was happening. Some of the witnesses who gave evidence before the Commission would make one despair of the Australian Public Service; but there were others, like Colleen Taylor, who restored faith. The shame is that people of her calibre were not listened to. Ms Taylor first began raising problems at the beginning of 2016. She saw clearly that the emperor had no clothes and did her best in a dispassionate, loyal way to warn the Secretary of the Department. She was absolutely correct in the points she made, but they were highly inconvenient, and they were never going to be received in the spirit in which they were delivered.

One of the questions in the Terms of Reference is when the Australian Government knew or ought to have known that debts were not, or may not have been, validly raised. That depends on how one construes the term “Australian Government”. Some DHS senior executives always had that knowledge; some DSS senior executives must have suspected it, at least by 2016. As to members of the Government, one Minister, Mr Morrison, took the proposal to Cabinet, knowing that it involved income averaging and that his own Department had indicated that it would require legislative change, but on the basis of the contrary indication in the NPP checklist, proceeded without enquiring as to how the change had come about. There was no reason for any other member of Cabinet, however, to question the proposal, because it was devoid of any indication that income averaging was involved or that there was any issue of legislative authority.

In 2017, however, it was a different picture; there were plenty of indications that income averaging without other evidence was not a legitimate way of calculating entitlement. The shaky legal underpinnings of the system were being identified by journalists and academics. An obvious and necessary step then, for ministers and senior departmental executives, was the obtaining of authoritative legal advice, ideally from the Solicitor-General.

**Prevention of scrutiny of the Scheme**

As to whether the Australian Government sought to prevent scrutiny of the Robodebt Scheme, there is no doubt that there was a constant misrepresentation that the Scheme involved no change in the way income was assessed or debts were calculated. The report is replete with examples. The Ombudsman was deliberately misled, thus providing further opportunity for the Government to resist scrutiny by using his report as a shield.

Another question asked in connection with whether the Australian Government sought to inhibit scrutiny of the Scheme is, whether it did so by moving departmental or other officials or otherwise. There is evidence that Professor Carney was not reappointed to the Administrative Appeals Tribunal after his five decisions concluding that income averaging was unlawful, and Ms Leon’s position as Secretary of Services Australia was abolished after she gave the direction to her department to cease income averaging. Ms Harfield and Mr Britton both gave evidence of being moved to other positions at the direction of Ms Golightly, in Ms Harfield’s case after she, on her account, had raised whether the emerging problems of the Scheme required a broader approach. But there is not evidence enough from which one could draw the inference that the loss of position, in the case of Professor Carney and Ms Leon, or the transfers, in the case of Mr Britton and Ms Harfield, were part of an attempt to prevent scrutiny of the Scheme.
The “non-pecuniary impacts” of the Scheme on individuals

The impacts of the Scheme on the people embroiled in it were vividly illustrated in the evidence before the Commission from the witnesses who spoke of the distress and damage they had suffered and, of course, the evidence of the mothers of the two young men who took their own lives, at least in part because of it.

That brings me to a question I have given long and careful consideration to: whether there is any practical way of setting up some sort of compensation scheme. My reluctant conclusion is that there is not. Hundreds of thousands of people were affected by the Scheme. It is impossible to devise any set of criteria that will apply across the board, because people were affected in such varying ways. Not everyone was caught by averaging, but even in the cohort that was, there would be different groups. A minority would actually have benefited from the income spreading effect of averaging; for some, the difference made to the amount of debt would not have been significant; but for others, the demand made was substantial and wrong. To determine the use and effect of averaging in any given case, one would have to examine the DHS file, a time intensive activity.

Other people did not have their income averaged but experienced the stress of other errors in calculation; duplication of employer-reported income, for example. Others still suffered the distress of the automated process and lack of human involvement when a debt assessment, provisional or final, was made, or the sense of stigmatisation that went with being accused of owing the government money.

The point is that people suffered from the effects of the Scheme in a multiplicity of ways, so there is no common starting point. The administration costs of a scheme which addressed all the different ways in which people were harmed by the Scheme and examined their circumstances to establish what compensation was appropriate in each case would be astronomic, given the numbers involved. A better use of the money would be to lift the rate at which social security benefits are paid, to help recipients achieve some semblance of the “security” element of that term; because with financial security comes the dignity to which social security recipients are entitled and to which the Scheme was so damaging.

People may have individual or collective remedies. On the evidence before the Commission, elements of the tort of misfeasance in public office appear to exist. Where litigation is not available, the Commonwealth does have a “Scheme for Compensation for Detriment caused by Defective Administration” (which would be a very euphemistic way of describing what happened in the Robodebt Scheme) where a person has suffered from defective administration and there is no legal requirement to make a payment. It is not appropriate to say any more on that front.

As is apparent from the content of the chapter – Experiences of Human Services employees, the Commission also considered the impacts the Scheme had on DHS staff members. In that context, another question that has arisen is whether a recommendation should be made that Services Australia apologise to the staff who had to deal with the effects of the Scheme; because it was unquestionably a gruelling and demoralising time for them. I have decided against recommending an apology for the simple reason that an apology by direction is not worth very much. No doubt, senior levels of management at DSS and Services Australia will reflect on what is contained in the report and act appropriately.

The costs of the scheme

The economic costs of this misbegotten idea are set out in a separate chapter. The irony of the expense to the public purse of what was thought to be a savings bonanza is obvious.

Recommendations and referrals

The recommendations made are collected at the beginning of this report. I hope that they are of use. At the least, I am confident that the Commission has served the purpose of bringing into the open an extraordinary saga, illustrating a myriad of ways that things can go wrong through venality, incompetence and cowardice.
In addition to the recommendations, I have made referrals of information in respect of a number of individuals to four different authorities for further investigation. I do not propose to name the entities to which I have made referrals, because it would only lead to speculation about who had been referred where, which would almost certainly be wrong.
Closing observations

1 Transcript, the Hon. Scott Morrison MP, 14 December 2022, [p 1814 : lines 5-23; p 1838 : lines 22-34].
3 Transcript, Serena Wilson, 9 November 2022, [p 791 : lines 7-15; p 793 : lines 7-8].
4 Transcript, Finn Pratt, 10 November 2022, [p 903 : lines 15-25].
5 Transcript, Kathryn Campbell, 10 November 2022, [p 914 : lines 23-26].
6 Transcript, Kathryn Campbell, 10 November 2022, [p 913 : lines 21-26] [p 915 : lines 26-32].
7 Transcript, Kathryn Campbell, 11 November 2022, [p 944 : lines 11-20].
8 Transcript, Mark Withnell, 9 December 2022, [p 1487 : lines 27-45].
9 Transcript, Mark Withnell, 9 December 2022, [p 1504 : lines 22-28; p 1515 : lines 20-41].
12 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1694 : lines 37-42].
13 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1676 : lines 6-11; p 1694 : line 42].
14 Transcript, the Hon. Marise Payne, 13 December 2022, [p 1716 : lines 4-9].
15 Transcript, the Hon. Marise Payne, 2 March 2023, [p 4293 : lines 12-45].
16 Archives Act 1983 (Cth) s 3(7), s 22A.
17 CO (18) 4, Cabinet Office CO-18-4--proactive-release-of-cabinet-material-updated-requirements.pdf (dpmc.govt.nz)
18 Professor Peter Coaldrake AO, Review of culture and accountability in the Queensland public sector | Final Report, 28 June 2022, p60.
19 Exhibit 4-8342, RBD.9999.0001.0505, Robodebt and Social Security Policy [p 11-12: para 3.6].
20 Transcript, Terry Carney, 24 January 2023, Brisbane [p 2252: line 20 – p2523: line 15].
21 Transcript, Renee Leon, 28 February 2023, Brisbane [p 3995: lines 28 to 30].
22 Exhibit 2690, KHA.999.0001.0001_2_R2 [at paras 190, 200 and 205].
23 Exhibit 1175, SBR.999.001.002_R [at paras 22 and 102].