



Executive Summary

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Background

Penalties, in the form of reductions or withdrawal of payments, may be imposed on unemployed recipients of Newstart Allowance (NSA) and Youth Allowance (YA) who do not comply with requirements specified in Commonwealth social security legislation. A failure to comply with those requirements is described as a “breach” and the penalty is known as a “breach penalty”.

2. There was a significant rise in the incidence of breach penalties from the latter half of 1998 through to 2001. There had also been an increase of over 140% in complaints to my office about breach penalties over recent years.

3. Review, by my office, of a sample of complaint records identified some significant deficiencies in Centrelink procedures and practice in relation to breach penalties. Our complaints sample was certainly small by comparison with the numbers of unemployed people who incur a breach penalty and we acknowledge that the experience of people who complain to the Ombudsman is unlikely to be representative. However, in view of the consistency with which deficiencies were identified within our complaint sample and the similarity to issues identified in both previous Ombudsman reports and other public reports, I decided that my office should conduct a formal investigation into Centrelink’s administration of the breach provisions.

Ombudsman investigation

4. Our investigation concentrated on whether the administrative procedures and practices adopted by Centrelink decision makers were of an acceptable standard, given the terms of the legislation, Centrelink’s responsibilities and general standards of government administration. Because of their responsibility in providing guidance on policy and the administration of the Social Security Act, the investigation also included some examination of the role of the Department of Family and Community Services. The investigation also identified some issues touching on the role of the Department of Employment and Workplace Relations and its relationship with Centrelink.

5. The investigation involved further examination of the initial sample of complaints and close monitoring of new complaints on breach penalties. We also obtained details of a sample of cases involving breach penalties from Centrelink to ascertain whether the administrative deficiencies identified in our small complaints sample were evident to a similar extent in a general Centrelink sample.

6. As part of the investigation we also examined policy guidelines, administrative instructions and training materials as well as statistical and performance reports produced by Centrelink and its client departments about activity testing and breach penalties.

7. Much of the analysis underlying this report was based on information and samples of cases obtained late last year. At that time and since both Centrelink and FaCS were undertaking their own



analysis of breaching issues as part of their response to various external reports and as part of the internal review initiated by the then Minister for Community Services (Mr Anthony). Those agencies have since then initiated a number of changes to breaching procedures and the Minister (Senator Vanstone) has announced additional changes. It is, as yet, too soon to analyse the impact of those changes.

Observations on practice and procedures

8. Our review of complaints to the Ombudsman about breach penalties identified some deficiencies in Centrelink procedures and practice in the cases examined. However we acknowledge that the sample involved was very small by comparison with the number of breach penalties. In most of the cases where the Ombudsman's office considered that Centrelink's investigation of the breach was deficient, Centrelink subsequently overturned the breach decision.

9. Examination of a separate small sample of breach cases, supplied by Centrelink, indicated similar issues. It was not possible, from the information provided, to determine whether, in those cases, the original breach decision was incorrect. However, our examination did suggest that the information gathered by Centrelink decision makers in those cases was insufficient as a proper basis for a breach decision.

10. In summary the issues we identified for further investigation included:

- whether appropriate attempts had been made to contact the job seeker prior to making a breach decision;
- whether reasons for the non- compliance with requirements were properly investigated and considered prior to a breach decision;
- if the burden of proof (in establishing whether there was a good excuse for non- compliance) rested too heavily with the job seeker;
- the level of understanding of the relevant activity test breach provisions by Centrelink decision makers (including whether the training provided was correct and appropriate); and
- practices and procedures for providing access to rights of administrative review.

Issues and conclusions

11. As noted, the issue of breach penalties has been subject to considerable scrutiny and review recently, including the Independent Review of Breaches and Penalties in the Social Security System (Independent Review) and a substantial internal review by Centrelink. My report does not raise any significant new issues. However it does examine the range of administrative (and associated policy) issues, identified through our complaint experience, in some more depth.



12. I acknowledge that over the last year Centrelink and FaCS have undertaken a considerable amount of work aimed at improving the administration of the breaching rules and this appears to be helping to resolve many of the problems my investigation identified. However I consider that further attention to the following issues and the recommendations contained in my report will lead to further improvement in this difficult and contentious area of administration.

Administrative or Activity Test Breach?

13. A substantial proportion of breach penalties are imposed due to the unemployed person failing to attend at either a Centrelink office or a job network provider when required to do so. Although the administrative breach scheme outlined in the Act would seem to be intended to cover such administrative non-compliance, the majority of penalties applied in such cases are in fact identified as activity test breaches. Compared to administrative breach penalties, activity test breach penalties result in a greater reduction in payment, for a longer period and also escalate with subsequent breaches.

14. Earlier this year the Minister for Family and Community Services announced changes to the administration of breach penalties to take effect from July 2002. The announcement indicated that failure to attend an interview without a reasonable excuse would now be classed as an administrative breach rather than an activity test breach. This would seem to be more in keeping with the distinction made within the Act between administrative and activity test breaches. However, despite the terms of that announcement, our discussions with senior officers of FaCS suggest that this will only be the case in relation to Centrelink interviews and some initial interviews with job network providers and that a failure to attend an interview will still be treated as an activity test breach in many circumstances.

Investigation of possible breaches

15. My office considers that, given the terms of the relevant legislation and principles of procedural fairness, the issues to be investigated and decided in each case of a possible breach should include:

- whether the action or failure to comply did actually occur;
- whether the requirement imposed on the jobseeker was reasonable in the circumstances; and
- any reasons for the person's actions or failure to comply.

16. In the case of some types of activity test breaches, various broader matters may need to be investigated and considered.

17. Assessment of such matters would generally require discussion with the person.

18. Both Centrelink and FaCS advised that they have issued instructions to staff requiring the investigation of any reasons for actions leading to a breach of activity test requirements. They advise that this includes a requirement to interview the customer where this is possible. However our examination of Centrelink training material indicated that, while the requirement, to contact the person to give them an opportunity to explain, is seen as "best practice" it is presented as optional in relation to some breach types. It appears that this training could be completed without any discussion of the requirement to (at least attempt to) contact the customer.



19. There was some evidence in the sample of Centrelink breach cases that Centrelink had been unsuccessful in trying to contact some job seekers by telephone, and that some job seekers had not responded to Centrelink's efforts to contact them in writing. However, our own experience suggests that this problem may be considerably overstated.

20. In her announcement of changes to breaching rules, the Minister for Family and Community Services announced that Centrelink will now be able to temporarily suspend payments when a job seeker has failed to meet their obligations and cannot be contacted. This approach should ensure that jobseekers, who are otherwise unable to be contacted, make contact with Centrelink and have an opportunity to present any reasons for non-compliance, before a breach penalty decision is taken. However it is imperative that there have been reasonable attempts made to contact the person (including in writing) prior to any suspension of payments and that payment can be immediately restored, once contact is made. FaCS and Centrelink have advised that the procedures do not provide for the person to be contacted in writing prior to the suspension of payments in all cases.

Standard of proof and acceptable reasons

21. It would seem appropriate and consistent with guidance provided by the Administrative Appeals Tribunal that any evidence offered as to "reasonable excuse" etc should be assessed on the basis of balance of probability. (ie. If the person is able to provide some evidence to verify their reasons or excuse, this should be assessed against any evidence to the contrary to form a view on the basis of the balance of probabilities.)

22. Centrelink's instructions and training material may be reinforcing an incorrect view that the onus is on the person to prove that a breach did not occur to avoid a penalty and that they must prove this beyond reasonable doubt. Those instructions and training material also suggest criteria that should be applied in assessing whether the reasons offered by a person for their action or failure are acceptable. While some or all of the factors indicated may be relevant considerations in assessing a jobseeker's actions in a particular breach decision, there does not seem to be any basis for adopting them as a set of general criteria to apply in all such cases.

Misreporting of Earnings

23. There are good reasons why the breach penalty for under-reporting of earnings should only be applied in extreme and blatant cases. The design of the allowance income test and associated rules about when and how earnings are reported are complex and make some level of under-reporting inevitable.

24. The requirement that gross earnings (before tax and other deductions) be reported as they are earned rather than the amount actually received makes the accurate reporting of earnings virtually impossible for some jobseekers. This is particularly the case where the person commences casual employment with variable working hours each week.

25. Centrelink's own guidelines acknowledge that in some situations a person will have to provide their best estimate of the amount earned. Subsequent receipt of actual payment information can often show that the estimate was incorrect.



26. Our further investigation of some of the complaints relating to breach penalties for under-declaration of earnings also showed that the information on which Centrelink bases its calculation of earnings debts can sometimes be incomplete and can present an incorrect picture of under-declaration.

Review and Appeal issues

27. There are two levels of review of decisions made under social security law, including breach penalty decisions. The first level is an internal review by the Secretary, CEO or an Authorised Review Officer. The second level is an independent review by the Social Security Appeals Tribunal (SSAT). A person can only apply for a review by the SSAT if the person has already had the matter reviewed internally and been given a decision on that internal review.

28. In practice, in many cases, Centrelink appear to require two stages of internal review. If a person requests a review of a breach penalty decision, they are advised that the matter must first be reviewed by the original decision maker (ODM). If the ODM affirms the decision, the person is then advised that they can ask for the decision to be reviewed by an Authorised Review Officer. This practice of referring all “requests for review” firstly to the original decision maker appears to cause some confusion among complainants about the review/reconsideration process. Complainants do not usually see the option of raising the matter with the person who made the decision as part of a genuine review process.

29. Many complainants who did access the review process experienced unreasonable delays at various stages in the process. Delays were sometimes very lengthy after an SSAT or AAT decision. The Act allows the Secretary a period of 28 days to lodge an appeal against a tribunal decision. However in most cases it should not be necessary to delay implementation of a decision for that period. In some cases, the 28 day period was significantly exceeded.

Performance Management Issues

30. Our examination of a sample of performance reports provided to the Centrelink Board and senior management indicates that measures against key performance indicators on breaches have simply been reported without any commentary. Centrelink has also advised that there has been no discussion at board meetings about breach performance, other than when reporting or responding to media comments and external reports. This suggests that there has not been a particular focus on breach numbers as a performance issue at the Centrelink Board or at senior management level.

31. However our examination of a sample of lower level performance reports provided to Centrelink network staff appear to show that previous performance indicators relating to the proportion of possible breach notifications leading to an actual breach penalty were being viewed as performance requirements for Centrelink.

32. It is possible that the inappropriate design of the previous breach performance indicators and associated performance management activity within Centrelink contributed to some Centrelink staff adopting inadequate investigation practices when considering breach decisions.



33. The previous performance indicators were replaced by a single performance measure on the timeliness of processing of possible breach notifications. We have been advised that the next performance agreement will not include any such indicators but that Centrelink will continue to monitor the timeliness of processing of possible breach notifications. If timeliness of processing is unduly emphasized, there is some risk that officers will seek to achieve the required timeliness benchmark by deciding the matter without an adequate investigation. It is, therefore, important that Centrelink and FaCS institute measures to regularly monitor the quality of investigation and decision making in breach cases.

The Agencies' Responses

35. As noted earlier both FaCS and Centrelink have developed and implemented improvements to the administration of breach processing over the last year. This has included action to address some of the issues identified through this investigation as they were raised and discussed rather than delaying action until formal recommendations were developed. This reflects well on those agencies' commitment to improving the standard of administration in this area.

36. I have appreciated the cooperative and proactive approach of the Departments and Centrelink in their dealings with my office on this investigation. The detail of their responses to my recommendations appears in the following section. In general the agencies indicated that they agreed with or supported the recommendations relevant to them. However their specific responses indicate that, in most cases, work to achieve the result recommended has not yet been completed or there is a commitment to examine the recommendation further. Table 2 below summarises the agency responses to the recommendations in this paper. It indicates a substantial commitment to further work by both FaCS and Centrelink. Given the impact of the penalties on unemployed people the agencies are urged to complete this work as quickly as possible. In particular the further consideration and implementation of recommendations R7 and R11 (relating to reasonable contact attempts), R23 (redress for those effected by earnings breach penalties) and R29 (establishing mechanisms to measure and monitor the quality of breach decision making) should be given urgent attention.

37. Recommendation R4 (that attendance at interviews not be included as a requirement in activity agreements) has not been accepted. While I note the comments provided by FaCS and DEWR on this matter and acknowledge that such requirements have been accepted by review tribunals, I remain of the view that further consideration should be given to this recommendation, for the reasons indicated in the report.



Table 2: SUMMARY OF AGENCY RESPONSES

Agency Response	<i>Already fully addressed</i>	<i>Partially addressed</i>	<i>Work underway to address</i>	<i>Commitment to examine further</i>	<i>Recommendation not accepted</i>
Recommendation Numbers	R2, R3.3, R8, R9, R10, R15, R26, R28	R1, R3.1, R3.4, R11, R21	R5, R12, R13, R16, R17, R18, R19, R24, R25, R29, R29.1	R3.2, R6, R7, R12.1, R14, R22, R23, R27	R4

37. My intention is to consult with the agencies and report progress on my recommendations in my 2002/03 Annual Report.

R N McLeod
Commonwealth Ombudsman



Recommendations and Responses

Activity Test or Administrative Breach?

- R1.** In any case where a person fails to comply with a requirement to attend an interview with either Centrelink or an employment service provider, without a reasonable excuse, an administrative breach penalty should apply rather than an activity test penalty.

Agency responses:

FaCS

As a result of changes implemented from 1 July 2002, all initial referrals to Job Network Members and Community Work Co-ordinators and all requests to attend Centrelink offices are being made under the Social Security (Administration) Act 1999, and failure to attend these interviews without a reasonable excuse results in an administrative breach penalty rather than the current activity test breach penalty.

A person will continue to incur an activity test breach where they have entered into a Preparing for Work Agreement (PfWA) with a provider and they fail to comply with that agreement. This may include failure to attend the office of the provider on a regular basis where the requirement to attend was considered an important part of their participation in a labour market program (that is Job Search Training or Intensive Assistance) and where this requirement had been included in their PfWA. It is appropriate that such interviews should remain part of a job seeker's activity test requirements.

DEWR

From July 2002, all requests to attend an interview with a Job Network Member (JNM) or Community Work Coordinator (CWC) for the purpose of negotiating a Preparing for Work Agreement (PfWA) have been covered by administrative breach provisions, using existing legislation, and the new suspension arrangements apply. However, once the PfWA is signed by the job seeker, all activities, including attendance at interviews with the JNM or CWC should continue to be covered by activity test penalty provisions. These interviews are an essential element of the employment assistance provided to job seekers to improve employment outcomes. See also our response to Recommendation 4.

- R2.** If it is considered necessary (to achieve R1), FaCS should recommend changes to the Act to remove the activity test breach associated with non-attendance at an interview for the purposes of negotiating an activity agreement.



Agency Responses:

FaCS

The new arrangements referred to above will mean that this unnecessary. Under the new arrangements, a person's attendance at their initial interview, at which they will be asked to enter into a PfWA, will be made under the Social Security (Administration) Act 1999, which means that failure to attend without a reasonable excuse will not result in an activity test breach penalty.

DEWR

See response to Recommendations 1 and 4.

R3. In the absence of the changes indicated in R1 and R2, or pending their implementation, FaCS and Centrelink should adopt the following approaches:

R3.1. FaCS and Centrelink should critically review whether activity agreements are required in all of the situations in which this requirement is currently applied.

Agency Responses

FaCS

The changes to be introduced from July 2002 will give job seekers added protection from being breached for failing to enter into agreements. This should remove the need to limit the use of agreements. Agreements are necessary both to reinforce the Government's mutual obligation message and because they are the legislative means by which the full flexibility of the activity test can be utilised. This latter aspect of PfWAs will become increasingly important under the Australians Working Together initiatives.

Centrelink

Agreed

Centrelink will apply the policy in relation to activity agreements consistent with the direction provided by FaCS.

DEWR

DEWR considers that PfWAs are appropriate tools to manage participation in employment programmes. PfWAs ensure job seekers are aware of their participation requirements and allow these requirements to be tailored to individual needs.

R3.2. Where it is considered that activity agreements are required, the person should be provided with a copy of the proposed terms of the agreement and information regarding their right to propose alternative terms and to raise any issues affecting their capacity to comply with the proposed terms, at the time



that they are given notice of the negotiation requirement (under section 605 or 544A).

Agency Responses

FaCS

FaCS will examine this in consultation with Centrelink. There may be some logistical difficulties, such as the fact that most PfWAs are entered into at the new claim interview. There is generally insufficient time between the job seeker's first contact with Centrelink and their new claim interview to provide them with a draft agreement. It should also be noted that PfWAs must be developed after taking into account an individual's circumstances and interests. It would therefore not be possible to provide anything but a very generalised list of proposed terms prior to the interview. However, there may be some scope for an information product concerning PfWAs, which we will discuss with Centrelink.

Centrelink

Agreed

Centrelink will examine this in consultation with FaCS.

DEWR

DEWR is concerned about the impact that this might have on delaying commencements in employment services. In Job Search Training and WfD/Community Work placements there seems to be little need for this change given that these programmes have clear participation requirements. In Intensive Assistance there is more scope for individualised PfWAs and current practice already gives the job seeker time to consider the proposed terms of their PFWA. Intensive Assistance participants can also ask for review of the certified PFWA if their circumstances have changed and providers have a responsibility under their contract to renegotiate the terms of the PFWA if required.

- R3.3.** Where a person fails to attend the negotiation interview, the Centrelink decision maker should give full consideration to whether the person is “unreasonably delaying” entering into an agreement, before making any breach decision.

Agency Responses

FaCS

FaCS agrees that this is the correct process. The relevant legislative provisions require that a person can be breached for failing to attend an interview to negotiate an agreement only if the secretary is satisfied that the person is “unreasonably delaying” entering into the agreement. It is difficult to establish that one missed interview constitutes “unreasonably delaying”. For this reason, under the new arrangements, people who miss their first



interview with a provider will not be breached for failing to enter an agreement, even though the purpose of the interview will be to negotiate an agreement (although they may incur an administrative breach for failing to attend the interview).

Centrelink

Agreed

Centrelink will apply the policy in relation to “unreasonably delaying” consistent with the direction provided by FaCS.

- R3.4.** All other notices to attend an interview with either Centrelink or an employment service provider should be issued under the authority of section 63 of the Admin Act so that failure to attend the interview without a reasonable excuse would result in an administrative breach (not an activity test breach).

Agency Responses

FaCS

As the responses to R1 and R3.3 indicate, we have gone a long way towards implementing this recommendation. Once we have been able to assess the impact of the new arrangements, we will review the extent to which section 63 is used, including looking at any possible extension of its use.

DEWR

For the reasons outlined in Recommendations 1 and 4 we believe that failure to attend an interview with a JNM or a CWC after a PFWA has been signed should continue to incur an activity test breach.

- R4.** Requirements to attend interviews with Centrelink or Job Network providers should not be included in the terms of activity agreements.

Agency Responses

FaCS

Activity agreements will not include a requirement to attend Centrelink interviews. The requirement for a job seeker to attend the office of their Job Network provider on a regular basis is an important part of their participation in a labour market program. It is therefore appropriate that such attendance should be considered an activity test requirement and be included in their PFWA.

DEWR

DEWR notes with concern the Ombudsman’s view that attendance at interviews should not be included in the terms of activity agreements. It is our view that requirements to attend interviews with JNMs and other providers are an important aspect of the employment assistance provided to job seekers.



Currently, PFWAs supporting Intensive Assistance activities include attendance at review interviews for participation monitoring purposes. The review mechanisms are important for the job seeker, outlining activity expectations and when their performance against these expectations will be assessed and re-assessed. The PFWA is not only a compliance tool but an important planning document for job seekers and providers. It is appropriate and consistent with the legislation for these interviews to remain part of the activity test requirements.

Under the Active Participation Model, from July 2003 job seekers will be required to attend interviews with their JNM on a regular basis. At these meetings, JNMs will advise the job seeker on job search approaches, refine the job seeker's vocational profile to improve job matches and refer job seekers to complementary programmes where appropriate. These interviews will be directly related to motivating and helping job seekers to obtain employment, and will be an important feature of PFWAs. As the purpose of these interviews is to assist job seekers to obtain employment, they are entirely consistent with the purpose of activity test agreements. Therefore, it is appropriate that attending these interviews remain within the terms of the PFWAs.

R5. FaCS should amend the "Guide to Social Security Law" to:

- clarify the distinction between administrative and activity test breaches;
- indicate the range of considerations that must be addressed in investigating the different breach types; and
- give guidance on the matters that can appropriately included as terms of activity agreements.

Agency Responses

FaCS

Agreed. As part of the response to Centrelink's internal review of breach processing, FaCS undertook to conduct, with Centrelink, a thorough review of the activity test sections of the "Guide to Social Security Law". We expect this process to be completed by the end of 2002.

R6. Centrelink, DEWR and FaCS should review any standard or printed terms of activity agreements and any guidance material for Job Network providers in light of the FaCS guidance.



Agency Responses

FaCS

Agreed. FaCS will review standard or printed terms for activity agreements in light of any changes to FaCS guidelines. Where changes to guidelines necessitate revision of guidance material for Job Network members, DEWR will be advised.

Centrelink

Centrelink will work with FaCS in any review they undertake on the terms of the PFWA.

DEWR

DEWR regularly reviews guidelines provided to JNMs and CWCs regarding participation reports and appropriate terms for PFWAs. It will continue to review these guidelines to ensure they are consistent with Government policy on breaching and the Guide to Social Security Law. However, in line with our views above, we would not support changes which remove interviews with JNMs and CWCs from the terms of activity agreements.

Investigation of possible breaches

- R7.** All FaCS and Centrelink instructions and training material relating to breaches should be amended to more clearly reinforce (as a procedural requirement) that Centrelink decision makers should contact the jobseeker in all cases as part of any breach investigation. The minimum acceptable requirements should be:
- a reasonable attempt to contact the person by telephone and/or any alternative contact recorded on Centrelink records; plus
 - a letter requesting immediate contact to be sent to the person's last recorded postal address (the letter should outline the possible breach issue and advise that a penalty will not be imposed if the person provides a reasonable excuse); and
 - allowing at least 10 days from the date of the letter before any breach decision is made.

Agency Responses

FaCS

FaCS will ensure that the "Guide to Social Security Law" emphasizes the need for Centrelink to contact job seekers before imposing a breach. We understand that Centrelink's revised training material reflects this emphasis. The new arrangements to come into operation from 1 July 2002 largely meet the above requirements. Under these arrangements:



- *if the job seeker has provided a contact number, Centrelink must make at least two attempts, over two days, to contact them by telephone; or*
- *if the job seeker has not provided a contact number, they will be sent a letter explaining that a breach is being considered and asking them to contact Centrelink within 7 days of the notice being sent.*

If after this Centrelink is still unable to contact the job seeker then payment will be suspended to encourage the job seeker to contact Centrelink.

FaCS believes that the above process provides adequate safeguards for job seekers and therefore disagrees with the proposal to set a 10 day minimum period before any breach decision could be made. A 10 day minimum would unnecessarily delay the process of getting the job seeker to contact Centrelink to resolve the breach.

FaCS is not convinced that additional written notification prior to suspending payment would be effective. Suspension will be used as a last resort and usually in cases where the job seeker has failed to advise Centrelink of a change of address. An additional letter will not assist in such cases.

However, FaCS agrees to consider this further.

Centrelink

Agreed

In the interest of procedural justice, Centrelink makes informed (reasonable) decisions based on the evidence at hand, including the job seeker's circumstances. Centrelink instructions and training materials do convey the need to make contact and the reasons why this is important. Centrelink officers seek out the personal factors and the circumstances that may explain why a customer did not comply and may suggest a course other than breaching. This approach has been widely promoted within Centrelink.

The Third Breach Alert initiative is indicative of this focus. Although the Alert is targeted at breach decisions that result in non-payment penalties, the principle and support materials have been adopted, wherever possible, with other breach decisions.

The importance of making contact and discussing breach decisions is also emphasised in the decision support tools developed for breach decision making. The JNM/CWC breach script successfully guides a CSO through the process for making a breach decision, including discussion with the job seeker, and clearly records the progress. This approach is being replicated and enhanced to cater for vulnerable job seekers for all other breach decisions from 1 July 2002.

Another tool that Centrelink has devised is the Integrated Service Management script. This tool is available to use when a job seeker lodges their fortnightly application for payment form. At that point the script is run which identifies any outstanding activities against the job seeker record and flags these to the CSO.



This will also include participation reports that are not finalised. The CSO can then interview the job seeker immediately and make a breach decision. Centrelink communication products also reinforce the message that to avoid a breach penalty job seekers should talk to Centrelink and are encouraged to disclose information. The new information seminar package includes video scenarios on the importance of disclosure to get the right assistance and a couple of scenarios on avoiding a breach. Centrelink's communication strategy on breaches includes the production of an A5 Breach Flyer that is targeted at vulnerable job seekers (flyer is at Attachment C). The flyer is written in plain English with the key message that talking to Centrelink is the best way to avoid a breach penalty. The same messages were reinforced in the recent television campaign. Further actions are identified in the attached action plan. The breaching package recently announced by the Minister for Family and Community Services, Senator Vanstone, will allow Centrelink to suspend payment, as an absolute last resort, when a customer cannot be reached to discuss a possible breach penalty. Centrelink, as a minimum, is to attempt two telephone contacts over two days to discuss a breach for non-attendance or send a letter if there is no current telephone number. If those attempts fail, then a suspension of payment can occur to facilitate the contact with the job seeker. The payment will be restored, from the time of the original suspension, when the customer makes contact.

DEWR

DEWR is supportive of mechanisms which ensure proper investigation of breaches, and believes consideration should be given to the second requirement in this recommendation. However, on the third requirement, we are concerned that allowing more time for delivery of letters, particularly where this is in addition to a successful telephone contact, would impact on participation in employment services and may delay job seekers' connection with Job Network/CWCs.

- R8.** Centrelink should investigate and implement a system for electronic "scripting" of breach investigation processes to require recording of contact attempts (and results) before a breach decision can be implemented. (Similar to the process we understand is required for job network breaches.)

Agency Responses

Centrelink

Agreed

Centrelink had earlier identified extending the use of system support tools (eg the script for processing third party breach decisions) for breach decision-making. Although we are not able to have one system solution for all breach decisions, from 1 July 2002 Centrelink will have in place breach decision support tools for all breach decisions. The tools will reinforce the procedural requirements to breach decisions and record all the attempts and contacts made in regard to the decision. The tool will also flag to the Customer Service Officer the factors that



need consideration for vulnerable job seekers including indigenous, homeless and those with a medical history.

- R9.** Centrelink should review its procedures for recording contact details for jobseekers, including suitable, reliable alternative contacts in appropriate cases, as recommended by the Independent Review.

Agency Responses

Centrelink

Agreed

Centrelink is able to record various address and telephone contact details for job seekers. This information is used in a variety of ways to contact job seekers by means of letter, telephone, agent and home visits by specialist staff. Centrelink is also trialing the use of SMS messaging to contact younger customers. This recorded information is regularly updated through customer correspondence and through its use to verify job seeker identities.

Centrelink is and will continue to investigate technology options to increase the number of communication channels available to customers.

- R10.** Where contact is made with the jobseeker, Centrelink inquiries of the person should include:
- confirmation that the incident giving rise to a possible breach occurred;
 - any circumstances affecting the persons capacity to comply with the relevant requirement;
 - reasons for the person's actions or omission; and
 - any broader considerations (depending on the nature of the breach).

Agency Responses

FaCS

Agreed. The above process is required under the legislation.

Centrelink

Agreed

The new and updated system support tools to be in effect from 1 July 2002 will script and record that these four considerations are made. Centrelink instructions will also be updated in line with these new processes and procedures.

DEWR

DEWR supports moves to consider the circumstances of the job seeker when investigating a breach, where this is in accordance with the legislation and case law. Nevertheless, we would have concerns if this prolongs the process and results in job seekers being able to avoid participation in employment services.



- R11.** The safeguards described at paragraph 5.23 of this report should be developed and applied in those cases where Centrelink proposes to suspend the payments of jobseekers who do not respond to contact attempts and requests.

Agency Responses

FaCS

The safeguards described at paragraph 5.23 are mirrored in the approach Centrelink has taken from July 2002 where payment is suspended from July 2002. See the response to R7.

Centrelink

Supported

The guidelines developed by FaCS and Centrelink for suspending job seekers that are uncontactable do include safeguards consistent with those recommended by the Ombudsman for investigation of 'marriage like relationships'. The option to suspend payment is promoted as a last resort. Those safeguards include: the use of alternate contact methods; a minimum of two attempted telephone contacts (on different days) or a letter to the last known address; a suspension advice and the ability to restore payment quickly. Local arrangements with specialist staff (social workers, indigenous customer service officers etc) will provide additional safeguards.

Assessing the jobseeker's explanation

- R12.** By July 2002 FaCS should prepare and include guidance on breach decision making in its "Guide to Social Security Law" to address the following issues:

- the decision making framework provided under the legislation;
- an explanation of the onus of proof and standard of proof applying in breach penalty decisions;
- the matters to be addressed in relation to various types of breach decisions (with specific guidance relating to determining those matters); and
- procedural requirements arising from the terms of the legislation and procedural fairness principles.

This guidance should be based on concepts established through AAT decisions and other relevant case law as well as accepted principles of natural justice. (The Ombudsman's office will be available to advise and assist with the preparation of this guidance.)



Agency Responses

FaCS

As indicated at R5, this process is already underway, but resource (and some technical) constraints mean that we will not be able to complete this exercise until late 2002. In reviewing the Guide, we will take these recommendations into account. FaCS would also welcome the participation of the Ombudsman's office in this process, as suggested.

- R12.1** FaCS should prepare and recommend changes to the Act to simplify and achieve greater consistency in the specification of breaches. This should include providing a more appropriate basis for assessing “reasonable steps” (sub-section 601(6)).

Agency Responses

FaCS

Legislative changes are not feasible in the short term. However, FaCS does intend to undertake a broad review of participation-related legislation in the context of the development of a single workforce age payment.

DEWR

DEWR would also support any changes to the Social Security legislation which make the law relating to breaching simpler and more consistent. Any such review should take the opportunity to develop a cohesive and robust breaching system that encourages participation and provides disincentives for non compliance.

- R13.** Centrelink should immediately amend all instructions and training materials to address the issues and deficiencies identified in chapter 6 including:

- references in Centrelink instructions and training to the “onus of proof” and “benefit of the doubt”;
- the *Barriers to Breaching* exercises;
- the guidance on “acceptable reasons” including the nature of verifications required; and
- the incorrect advice relating to “unreasonably delaying” entering into an activity agreement and “reasonable steps” to comply with an activity agreement.

Agency Responses

FaCS

FaCS is happy to assist with the clarification of the terms mentioned.



Centrelink

Supported

The Secretaries Advisory Group on Youth has taken up the issue of defining what constitutes a 'reasonable excuse'.

Centrelink policy is guided by interpretation from client departments. Centrelink was given an interpretation for "acceptable reasons" when making breach decisions from participation reports. This advice stated that a reasonable excuse included either an action to remedy the non-compliance or verification of a circumstance for non-compliance. This advice is still current and is reflected in Centrelink guidelines. Changes in Centrelink guidelines will be made when a new policy interpretation is given.

This advice was inadvertently applied to other breach decisions, probably for consistency, and reference to "onus of proof" and "benefit of doubt" was included in training material and guidelines. All references to "onus of proof" has been removed from Centrelink training material and reference to "benefit of the doubt" will be further examined.

The 'Barriers to Breaching' exercise you refer to is contained in the trainers' notes rather than in all training material, as stated in your report. Only one (of four) of these trainers' notes includes the examples cited in the report. Those particular responses, produced by participants in the pilot breach training course, are discussion points and should be used in the context of the entire training package. They are responses that the trainer can expect from the participants in the training course rather than being listed as legitimate 'barriers to breaching'. To eliminate further confusion both examples will be removed.

The specific example of inappropriate advice in Centrelink instructions is taken somewhat out of context. The policy advice is that failure to attend an interview for the purposes of negotiating an activity agreement is taken to be a breach of the activity test for "unreasonably delaying entering into an agreement". The text in the Centrelink guidelines is to address the issues of simply revoking a breach decision because the job seeker complies and/or revoking a decision because of pressure from the service provider. The intent is on making correct decisions, not that a CSO cannot change a decision. The new policy interpretation from 1 July, for failing to attend an interview, will address this issue. Centrelink instructions have been changed in accordance with the new policy and process.

DEWR

With the commencement of suspension arrangements, all interviews to negotiate a PFWA have been covered by administrative breach provisions and breaches for "unreasonably delaying entering into an activity agreement" are no longer applied in these circumstances. However, where the job seeker attends the interview, but does not negotiate the PFWA, this type of breach may still arise. Therefore, DEWR supports moves to ensure guidelines and practices are in line with the legislation and case law on this point.

- R14.** Centrelink should review its training material and instructions and prepare summaries and case scenarios based on the FaCS guidance referred to in



R12. and ensure that all Centrelink breach decision makers receive training based on that guidance by December 2002.

Agency Responses

Centrelink

Supported

Centrelink will amend training material and instructions in accordance with any change in policy from client Departments. A training strategy will be developed at that time.

R15. Centrelink should ensure that all breach decision makers understand and apply the FaCS policy instruction relating to claims of non-receipt of notifications.

Agency Responses

Centrelink

Agreed

The FaCS policy advice regarding non-receipt of mail has been circulated widely throughout the Centrelink network. Centrelink e-Reference guidelines and training packages have also been updated to reflect this policy advice. A strategy used to promulgate this advice was via the Centrelink Education Network training on breach decision-making that was delivered in August 2001.

Misreporting earnings

R16. FaCs should prepare and include detailed guidance in the Guide to Social Security Law on assessing income from earnings for allowances. This should include an acknowledgement of the difficulties that may be faced by clients in reporting income in the way required.

Agency Responses

FaCS

Agreed. FaCS is undertaking a significant revision of the income assessment parts of the Guide to Social Security Law as part of the implementation of both the Working Credit and new employment income assessment and reporting rules for income support customers. Guide amendments for Working Credit will not be in place until April 2003.

However, Guide amendments relating to breach processing for misdeclaration of earnings will be made by September 2002. They will emphasise the need to consider the job seeker's level of understanding of the assessment process in determining whether the job seeker "knowingly or recklessly" misdeclared their earnings. FaCS believes this will address the main concern behind this recommendation.



R17. Centrelink should review its training material on earnings reporting and assessment based on the FaCS guidance.

Agency Responses

FaCS

While Centrelink has responsibility for this recommendation, FaCS has been contributing to the development of training material on reporting and assessing earnings for the implementation of Working Credit.

Centrelink

Agreed

Centrelink recently updated and circulated to the network all training material for the identification, calculation and raising of debts. The training material does not contain specific information for earnings reporting processes but does contain what is appropriate evidence for verification of earnings and how to calculate, both manually and with the debt calculator, earnings to the pay period.

R18. Centrelink should develop simple information products and tools to assist clients to correctly declare income.

Agency Responses

FaCS

While Centrelink has responsibility for this recommendation, FaCS understands that information products and tools are being developed as part of the implementation of Working Credit that will address this concern. An example of recent work already undertaken is the modification of the job seeker's new claim seminar and supporting products to make it more explicit to customers that gross income rather than net income needs to be reported.

Centrelink

Agreed

Centrelink is reviewing its publications and promotional material to ensure that consistent debt prevention messages are conveyed. The communication strategy on breaches will address this. Some of these products have already been developed and others are scheduled.

The release of the Life Events brochures in July 2002, have a focus on emphasising the need for customers to inform Centrelink of their change of circumstances and correctly declare income and earnings to ensure payment correctness.

The new information seminar package includes a running theme and scenarios on correct declaration of income and the consequences for failing to declare earnings.

The A5 Breach Flyer is a plain English flyer targeted at vulnerable job seekers that advises how to avoid a breach penalty including earnings breach penalties.



A multimedia campaign, run jointly by FaCS and Centrelink, was announced in the 2000-2001 Budget and launched in April 2002. Advertisements on national television, radio, print media and transit advertising, aim to increase the level of voluntary compliance with Centrelink customers of working age. Target audiences are Newstart and Youth Allowance and Parenting Payment (single) customers. Products were also developed for people of diverse cultural and linguistic backgrounds and Aboriginal and Torres Strait Islanders.

Preliminary research also shows that people who saw, heard or read the campaign advertising products have a better understanding of Centrelink notification obligations. Case studies are also indicating the success of the campaign, and feedback from members of the public is positive. The campaign also intends to assure the public that the government is active in encouraging Centrelink customers to report their circumstances correctly.

A Rate Estimator is being developed by the Service Integration Shop that is designed to allow CSOs to help customers estimate what effect income may have on their own entitlement. Customers will be able to ask "what if ..." questions either in a Customer Service Centre or over the phone.

A range of market research is being conducted to ascertain from customers the best ways of informing them about the Working Credit initiative and about different aspects of reporting and what type of tools would best assist them in reporting accurately on a regular basis, whether by phone, through a CSC or one of the self-service options being introduced through Working Credit (Web and IVR Natural Language Speech Recognition). Customers are also being involved in the development of the new self-service tools to ensure that they are as simple to use and effective as possible.

R19. FaCS should prepare and include detailed guidance in the Guide to Social Security Law on matters that must be considered in determining earnings breaches and minimum investigation standards in such cases. The guidance should cover:

- the need to contact the person and discuss the circumstances of the misreporting prior to any breach decision;
- acknowledgement of common difficulties for clients and the need to exercise care when determining whether any under-reporting was done "knowingly or recklessly" and, that in view of the difficulty for clients in complying with the reporting requirements, they should be given the benefit of any reasonable doubt;
- the need to obtain full earnings details (hours worked, hourly rate, net pay and when received) before making a breach decision if the client could not be contacted; and
- reinforcement of the policy of issuing a warning and explanation for a first offence.

Agency Responses



FaCS

Agreed. FaCS has already been alerted to problems with breach processing for misdeclaration of earnings and is taking action. Centrelink alerted FaCS to the problem in April 2002, following their discussions with the Ombudsman's office. Centrelink and FaCS have established a working group to review the process.

- R20.** Centrelink should review all training material in relation to earnings breaches in light of the FaCS guidance and ensure that all breach decision makers, including debt recovery staff are trained using the revised materials before December 2002.

Agency Responses

FaCS

Centrelink to respond. However, FaCS will ensure that this is considered as part of the review.

Centrelink

Agreed

Centrelink and FaCS are engaged in reviewing the policy and procedures surrounding earnings related breach decisions that will include minimum investigation standards. The implementation of this change will include a training strategy and amendment to Centrelink instructions and guidelines. As an interim measure, foreshadowing the new processes, Centrelink has updated e-Reference guidelines for earnings related breaches. The Debt Operations Guide has also been amended to reflect these changes. Articles in weekly newsletters to compliance and debt staff have also supported and promoted these changes. The key message being that customers need to be contacted before making a decision about the breach and that the debt decision is a separate decision to the breach. Processes have been modified so that a Q122 letter is used to engage the customer before a breach decision is made.

- R21.** FaCS should adopt as policy that no earnings breach will be applied for non-reporting (or under-reporting) of earnings if, at the time of reporting, the earnings had not yet been received. (However, any overpayment would still be calculated and recovered.)

Agency Responses

FaCS

Under current legislation, if a breach has occurred under subsection 630AA(1), then it must be imposed regardless of whether the income has been received. However, with improvements to breach processing proposed by the review referred to in our response to R18, the concerns which have given rise to this recommendation should be addressed. For example, with correct processing a person's non-receipt of income may be considered as a possible reasonable excuse for misdeclaration.



- R22.** FaCS and Centrelink should prepare a discussion paper on the implications of assessing earnings as received rather than earned in most cases. (There might be a discretion to assess the income as earned or derived in cases of apparent manipulation of timing of receipt.) The discussion paper should also consider the impact of the proposed “Working Credit” on earnings reporting, assessment and earnings breaches. Following preparation of the discussion paper and consultation with welfare groups, FaCS should present options and implications to Government for consideration.

Agency Responses

FaCS

The issue of whether it is preferable to assess earnings when they are “first earned, derived or received” or when they are actually received has been considered in depth in the past. There would be extensive policy and administrative implications in changing the income test to assess earnings when received.

FaCS believes that the proposed review of the administration of earnings-related breaching and the introduction of the Working Credit will go a long way towards addressing the concerns that underpin this recommendation.

For these reasons, we intend to assess the effects of the Working Credit initiative and improved administration of breaching before looking again at this matter. In the meantime we will continue to work with Centrelink on examining the potential for direct reporting of earnings by employers, which also has implications for any consideration of a change in the way income is assessed.

FaCS notes that the issue of how income is assessed could be re-examined after Working Credit has been implemented and an assessment of its impact has been made, perhaps in the context of the development of a new working age payment.

FaCS agrees that it will be crucial to consult with welfare organizations on any future policy development in this area, as the Government has done in the case of Australians Working Together.

Centrelink

Support

Centrelink will contribute fully to any investigation of this issue that FaCS wishes to pursue.

- R23.** In any case where a second or subsequent breach penalty (within 2 years) is to be imposed for any reason, and one of the previous breach penalties was for under-reporting of earnings, the earnings breach decision should be re-examined and, if the earnings breach had been imposed without any



discussion with the person prior to the decision, the earnings breach should be removed from the person's record before imposing the new breach.

Agency Responses

FaCS

FaCS agrees to give this further consideration, but makes the following points.

Administrative and systems constraints would make this recommendation very difficult to implement. The Centrelink system does not differentiate between different types of earnings breaches and in many cases it would be difficult to ascertain whether the customer was contacted in order to discuss that earlier decision.

It should also be noted that not contacting the job seeker was only really an issue for breaches resulting from data matching. Breach and debt action are taken only where data matching indicates significant and sustained under-declaration of income. It is likely, therefore that the decision to breach would have been correct in most cases.

Review and appeal issues

- R24.** If there is any contact from a person after a breach decision (eg. to seek an explanation of or to complain about the decision) the Centrelink officer should ask the person if they wish to apply for a review of the decision. If the person indicates they do, that contact should be recorded as the date of request for the review.

Agency Responses

Centrelink

Agreed

We agree that this is a sensible recommendation and this is consistent with Centrelink's existing policy when customers are dissatisfied with a decision. Centrelink is looking to continually improve the original decision maker/Authorised Review Officer reconsideration/review process. To assist in achieving this we are currently devising a business improvement strategy to assist the organisation to refocus on the objectives that support the internal review concept. Your recommendation is in line with our thinking at this stage of the review. We will take this opportunity to reinforce to staff the customer's right to have most decisions reviewed. The new breach flyer emphasises the customer's right to an independent review.



R25. All requests for review of a breach decision should be allocated to an ARO. As part of their review process the ARO can ask the ODM to reconsider their decision and report the outcome of their reconsideration.

- If the ODM reconsideration results in revoking the breach the ODM or ARO should then advise the person of this decision in writing and the review be regarded as finalised.
- If the ODM reconsideration affirms the breach decision, the ARO should then review the decision prior to advising the person of their decision in writing.
- Written notice of advice to the person should include advice of the right to seek an independent review by the SSAT and give advice on how to do so.

[Alternatively the person should be given a choice of review by ODM or ARO and advised that either way they have the right to a written notice of the decision. The notice of decision (whether by ARO or ODM) should include advice of right to seek independent review by the SSAT. There should be no necessity for the person who receives a notice of decision from an ODM to have the case further reviewed by the ARO.]

Agency Responses

Centrelink

Supported

Centrelink is looking to continually improve the original decision maker/Authorised Review Officer reconsideration/review process. To assist in achieving this we are currently devising a business improvement strategy to assist the organisation to refocus on the objectives that support the ODM reconsideration concept. We will take these recommendations into account in developing this strategy as they align with our current thinking.

R26. Appointments for an ODM reconsideration or for an ARO review should be available within a week of request. It should not be necessary for any person to make an appointment to lodge a request for reconsideration, review or appeal. These should be able to be taken over the telephone or by email.

Agency Responses

Centrelink

Agreed

We agree that applications for reconsideration, review or appeal should be able to be lodged without the need for an appointment. This is consistent with Centrelink policy.

Appointments should be made for customers who request an ODM reconsideration or ARO review as soon as possible. However, it should be noted that the standard set by the client agency for ARO reviews is 95% of reviews



completed within 14 days for customers who are left with no income, and 75% of reviews completed within 28 days for all other customers

- R27.** The process outlined at Attachment B should be implemented by FaCS and Centrelink to ensure that SSAT decisions are implemented, without undue delay, and in compliance with legislative requirements.

Agency Responses

FaCS

In conjunction with Centrelink, FaCS will closely examine the recommendation.

Centrelink

Supported

Centrelink, in conjunction with FaCS, is looking to continually improve the SSAT decision scrutiny process. To assist in achieving this Centrelink and FaCS are currently discussing this process with a view to achieving greater efficiencies in accordance with the legislative requirements and without compromising the customers' rights. We will take these recommendations into account in refining this process.

Performance management issues

- R28.** Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/Centrelink agreement.
(FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)

Agency Responses

FaCS

Agreed. FaCS is currently exploring this option in the latest draft of the BPA, in consultation with DEWR and Centrelink. We are considering the option of a joint FaCS/DEWR performance indicator which will ensure that participation reports are actioned in a timely manner without compromising correct breach processing.

Centrelink

Supported

This issue is being reviewed in the current round of BPA negotiations. There is agreement that the process to action and apply a decision to a participation report from Job Network members and CWCs will be funded by FaCS. It therefore follows that KPIs are a matter to be negotiated between FaCS and Centrelink.



DEWR

The timely actioning of participation reports is reflected in DEWR's 2002-3 BPA with Centrelink as a key part of the Department's performance monitoring of Centrelink. However, the BPA no longer contains this requirement as a KPI.

- R29.** FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.

Agency Responses

FaCS

Agreed. FaCS is also keen to emphasize the importance of consistent decision-making.

- R29.1** As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.

Agency Responses

FaCS

Agreed. FaCS and Centrelink have been exploring this option and will continue to do so.

Centrelink

Supported

The Business Partnership Agreement 2001-2004 between Centrelink and FaCS outlines key performance indicators. One of these indicators, Promotion of Economic and Social Participation, measures the number of activity test and administrative breaches to reflect Centrelink performance, joint FaCS and Centrelink performance and the state of the economy in relation to this indicator. There is no benchmark on the number, quality of or timeliness of breaches in this Agreement.

Centrelink has acknowledged that current indicators do not adequately provide a measure of quality decision-making. A working group of Activity Test Coordinators is convening to develop a process of quality checks of the work performed by Centrelink in relation to the activity test.

Centrelink has produced a Breach Decision Improvement Plan that outlines strategies and actions to improve breach decision-making. A working group of stakeholders has carriage of the plan, which also serves as a record of continuous improvement in breach decision-making.



BACKGROUND

- 1.1 The Social Security Act provides for penalties to be imposed on unemployed recipients of Newstart Allowance (NSA) and Youth Allowance (YA) who do not comply with specified activity test or administrative requirements. A failure to comply with those requirements is described as a “breach” and the penalty is known as a “breach penalty”. The penalty may be either a reduction or total cessation of allowance payments for a period of time.

Previous Ombudsman Reports

- 1.2 Complaints by Centrelink customers affected by breach penalties have comprised a significant proportion of Newstart and Youth Allowance complaints received by the Commonwealth Ombudsman over recent years. It is recognised that this is (and has always been) a difficult area of administration for Centrelink. The topic has, therefore, been kept under close review within the Ombudsman’s office in recent years and the Ombudsman’s last two annual reports have raised concerns about the administration of these provisions.

- 1.3 The 1999/2000 Annual Report stressed the importance of taking into account a customer’s capacity to comply with the relevant requirement when deciding whether to impose a breach penalty. The report noted that:

“It is crucial that Centrelink consider whether there are circumstances which may impede the customer from acquiring the information or completing the task required.”¹

- 1.4 The 2000/01 Annual Report noted that the breach penalties “usually result in extreme financial hardship, and should not be imposed without due process.” The report raised specific concerns about the actions of Centrelink decision makers in response to reports by Job Network providers and indicated that:

“My staff will be monitoring this situation to ensure that Centrelink’s original decision-makers are properly considering all breach recommendations before imposing penalties.”²

A substantial increase in the incidence of breach penalties

- 1.5 Statistics, released by the Department of Family and Community Services (FaCS) in 2001, revealed a significant rise over recent years in the number of breach penalties imposed on unemployed people. The total number breach penalties imposed in 2000/01 was reported as 346,078. This compared to totals of 302,078 in 1999/00, 212,900 in 1998/1999 and 120,718 in 1997/98 - an increase of 187% in three years.

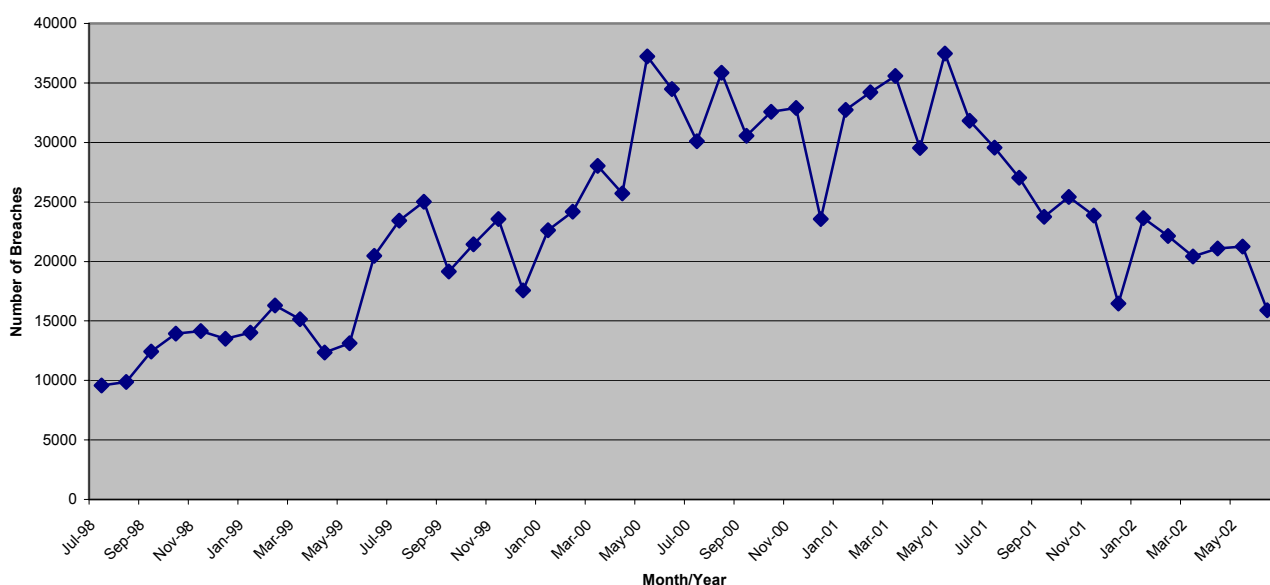
¹ Commonwealth Ombudsman Annual Report 1999-2000, page 41

² Commonwealth Ombudsman Annual Report 2000- 2001, page 52



- 1.6 In 1998/99 approximately 11% of unemployed allowance recipients incurred a breach penalty. By 2000/01 this had risen to 18% of unemployed allowance recipients. There has also been a significant increase in individuals incurring multiple breach penalties.
- 1.7 Figure 1 below plots the total number of breach penalties imposed on a monthly basis from July 1996 to November 2001.³

Figure 1: TREND IN BREACH NUMBERS



- 1.8 The graph indicates a rising trend in breach penalties from the later half of 1998 until mid 2001. The rise coincided with (or followed) the introduction of a number of significant changes in government assistance to the unemployed: the introduction of the job network, Work for the Dole and additional (mutual obligations) requirements for 18-24 year old jobseekers. However, those measures did not directly or fully explain the rise in the incidence of breach penalties. The number of breach penalties in other categories, not associated with those measures, also rose significantly from that time. The decline in the number of breach penalties imposed since June 2001 followed increased public criticism and scrutiny of breach penalties by a range of organisations and measures introduced by Centrelink and FaCS to address some of the concerns raised. As discussed in chapter 9, this may have also resulted from changes to performance indicators and associated changes to Centrelink performance management activities.

³ Data supplied by the Department of Family and Community Services



ACOSS Report

- 1.9 In August 2001 the Australian Council Of Social Services (ACOSS) published a discussion paper titled *"Breaching the safety net: the harsh impact of social security penalties"*⁴. The report was prepared jointly by ACOSS and the Welfare Rights Network and was based on analysis undertaken by those two organisations, information obtained by Welfare Rights under Freedom of Information and the experience of Welfare Rights (in their advocacy role) and ACOSS affiliate welfare organisations (particularly those involved in the provision of emergency relief).
- 1.10 A number of welfare agencies, involved in the provision of emergency relief, also published papers during 2001 that reported on the impact of breach penalties.⁵
- 1.11 The ACOSS report raised a number of concerns about the impact of breach penalties and the administration of those provisions. The report noted that:
- breach penalties had resulted in financial hardship for many unemployed people and this has led to considerable pressure on individuals, families and welfare organisations;
 - the incidence of breach penalties was high (and their impact particularly severe) among especially vulnerable groups such as the homeless, people with literacy difficulties, people with an intellectual disability and other disadvantaged groups such as indigenous people and people of a non-English speaking background;
 - necessary safeguards and standards, to protect against the unfair imposition of penalties, were often not being appropriately applied;
 - some unemployed people were being presented with unreasonable requirements to fulfil and an unreasonable burden of proof to explain their actions ; and
 - errors and deficiencies in the automated processes of referral and communications between Job Network providers and Centrelink appeared to result in breach penalties in some cases.
- 1.12 The report also noted that a rise in the incidence third breaches (resulting in full withdrawal of payments) was leading to substantial hardship, particularly among vulnerable groups.
- 1.13 The publication of the ACOSS report resulted in increased public comment and public interest in this area of social security policy and administration.

⁴ *"Breaching the safety net: the harsh impact of social security penalties"*, Australian Council of Social Services report, August 2001.

⁵ See, for example – *Stepping into the Breach*, report by the Salvation Army and *Two Australias* – report by the Society of St Vincent De Paul.



Centrelink Internal Review

1.14 In response to the report the Minister for Community Services, the Hon Larry Anthony MP announced that he had requested Centrelink to review its administrative processes and guidelines relating to breaching. The Minister's media release indicated that the internal review would have a particular focus on dealing with vulnerable groups.

*"We recognise that there are people in the community who find it difficult to comply with their obligations because they are homeless, have drug or alcohol related problems, a mental illness or literacy problems. These people can be exempted from the activity test. However, I am concerned that many of these people may be falling through the cracks in their dealings with Centrelink."*⁶

Independent Review

1.15 ACOSS announced that it had (in conjunction with other agencies) commissioned an independent review of breach penalties. The Independent Review of Breaches and Penalties in the Social Security System (Independent Review) was to be chaired by Emeritus Professor Dennis Pearce, a former Commonwealth Ombudsman. Professor Julian Disney of the University of New South Wales and Ms Heather Ridout, Deputy Chief Executive of the Australian Industry Group were the other members of the Independent Review. The terms of reference for the Independent Review were to:

- identify factors affecting, and the consequences of, recent changes in the incidence of breaches and penalties relating to unemployed people receiving social security payments;
- recommend any improvements in the effectiveness and fairness of the system which we consider desirable in relation to statutory provisions and policies and practices of governmental and non-governmental agencies.

1.16 The Independent Review reported March 2002, providing a comprehensive report with a range of recommendations covering legislative change, and changes to policy and administrative practice.⁷

Initial Analysis of Ombudsman complaints

1.17 Following the Minister's announcement of a review by Centrelink, this office undertook an analysis of recent complaints relating to breach penalties. Complaint statistics and a sample of complaint files were examined to identify any relevant trends and issues. The outcome of this analysis was reported to Centrelink and FaCS to assist with the Minister's

⁶ "Securing the Safety Net" – media release by the Hon Larry Anthony MP, Minister for Community Services, 13 August 2001

⁷ "Making it work – The Report of the Independent Review of Breaches and Penalties in the Social Security System" March 2002.



review. It also formed the basis of a submission to the Independent Review by the Ombudsman's office.

- 1.18 This initial analysis indicated that there has been an increase of over 140% in complaints received about breach decisions over recent years. This was broadly consistent with the rising trend in the number of breach penalties imposed as identified in the ACOSS report.
- 1.19 Review of a sample of 100 complaint records⁸ identified some significant deficiencies in Centrelink procedures and practice in relation to breach penalties. It was not possible, at that stage, to determine whether those procedures and practices were in accordance with Centrelink guidelines or instructions from the policy department (FaCS).
- In most of the cases reviewed, there did not appear to be any attempt by Centrelink to discuss the circumstances of, or reasons for, the person's actions prior to making a decision to impose a breach penalty.
 - Where the person did receive an opportunity to explain their actions to the decision maker, they were often presented with an unreasonable burden of proof. Typically they were required to obtain and provide written evidence from third parties to support any explanation before it was accepted.
 - It appeared that many of the Centrelink decision makers involved did not have an adequate understanding of the activity test breach provisions.
 - There was little evidence of adequate investigation in cases involving a penalty for under reporting of income from earnings. In such cases a penalty may be applied if the person *knowingly or recklessly* provides false or misleading information about their earnings. The requirements for reporting income from earnings are complex and can lead inevitably, to some under-reporting. Our investigations suggested that in many of those cases, the jobseeker had misunderstood, or had been unable to meet the reporting requirements. Under-reporting due to a misunderstanding of the reporting requirements should certainly not be regarded as "knowingly or recklessly providing false or misleading information".
 - Many complainants were unaware of the administrative review process. Some complainants also suggested they had been discouraged from appealing breach decisions and some complainants, who did access the review process, experienced unreasonable delays at various stages in the process.
- 1.20 The analysis suggested that, if the experience of our complainants was indicative of the standard of administration of the breach provisions, a significant proportion of breach penalties were being imposed without an adequate investigation or decision making process and, as a result, many unemployed people may have been penalised incorrectly.

⁸ See Appendix 2 - "Notes on Ombudsman Complaint Statistics" ,for information on the complaint sample.



- 1.21 Responses to this analysis by Centrelink and FaCS noted that Ombudsman complaints were unlikely to be representative and that there was no evidence to suggest that the problems identified through our analysis were widespread. It was also noted that official guidelines, instructions and staff training stressed the importance of proper investigation and decision-making.

Ombudsman own-motion Investigation

- 1.22 In view of the consistency with which deficiencies were identified within our complaint sample, the similarity to issues identified in both previous Ombudsman reports and other public reports and the increased public interest in this topic, the Ombudsman decided to conduct an investigation into Centrelink's administration of the breach provisions.

The aims of our investigation

- 1.23 The aims of the Ombudsman's own motion investigation were to obtain further information to indicate the causes and likely incidence of administrative deficiencies and to develop practical proposals for improving the standard of administration of the social security breach penalty provisions. We intended to have regard to any changes implemented by Centrelink in response to the Minister's review and the Independent Review in developing any recommendations or proposals.

The scope of our investigation

- 1.24 The ACROSS report, the Report of the Independent Review and various other recent reports by welfare agencies raised a wide range of issues about the breach penalty provisions including:
- the fairness and appropriateness of the penalties and the level of penalties (including in comparison to other statutory penalties);
 - the reasonableness of activity test requirements; and
 - the role of job network providers and the effectiveness of job network arrangements.
- 1.25 While all of the above matters are within the jurisdiction of the Ombudsman to investigate, it was decided that this investigation should focus on the administration of the breach provisions by Centrelink, given their key decision making role in this area.
- 1.26 The investigation therefore concentrates on whether the administrative procedures and practices adopted by Centrelink decision makers are of an acceptable standard, given the terms of the legislation, Centrelink's responsibilities and general standards of government administration. Because of their responsibility in providing guidance on policy and the administration of the Social Security Act, the investigation also includes some examination of the role of the Department of Family and Community Services.

How we conducted the investigation



- 1.27 As indicated, an initial examination of complaints to the Ombudsman about breach penalties was undertaken in late 2001. This included some analysis of our complaint statistics and a detailed examination of a sample of 100 individual complaint records.⁹ It also involved consultation with staff of the Ombudsman's regional offices who had dealt with individual complaints on breach penalties.
- 1.28 The results of this analysis were reported to Centrelink and FaCS in September 2001 for their comment or clarification. Comments were received by the agencies in October 2001. During this period, the Ombudsman's staff also met with relevant Centrelink and FaCS managers to discuss the issues identified.
- 1.29 The analysis of Ombudsman complaints was also an important component of our own motion investigation on this topic. This involved further examination of our initial sample of complaints, some further discussion with some of those complainants and close monitoring of new complaints on breach penalties.
- 1.30 We then sought and obtained details of a sample of cases involving breach penalties from Centrelink. Additional information was requested on three categories of breach penalties:
- a group where the breach involved a failure to attend an interview with Centrelink;
 - a group where the breach involved a failure to attend an interview with a job network provider; and
 - a group where the breach involved misreporting of income from earnings.
- 1.31 None of the people in the cases, included in the Centrelink sample, had complained to the Ombudsman about the breach penalty.
- 1.32 Our aim, in examining this Centrelink sample, was to test whether the administrative deficiencies identified in our small complaints sample were evident to a similar extent in a general Centrelink sample.
- 1.33 We obtained names and contact details for the people in the Centrelink sample and interviewed some of the people involved (by telephone) to try to clarify (or verify) some matters. However many of those contacted were either disinterested in revisiting their experience, could not recollect details or were concerned about the consequences of discussing Centrelink's actions. We therefore discontinued this approach and relied mainly on information reported by Centrelink from their records to analyse these samples.
- 1.34 Our investigation also included examination of a large amount of documentation and data obtained from Centrelink and FaCS. This comprised:
- FaCS policy guidelines on activity testing and breach penalties;
 - Centrelink procedural and administrative instructions (both printed and electronic);
 - training materials and course outlines;
 - briefing materials, minutes and papers associated with breach policy and administration;

⁹ See Appendix 2 "Notes on Ombudsman Complaint Statistics"



- statistical reports;
- records of and commentaries on Administrative Appeal Tribunal (AAT) and Social Security Appeals Tribunal (SSAT) decisions;
- performance reports relating to activity testing and breaching;
- agreements between Centrelink and its client departments relating to activity testing and breaching;
- an explanation of FaCS performance monitoring relating to Centrelink's administration of breach provisions; and
- records of discussions and papers provided to the Centrelink Board and Guiding Coalition¹⁰ on breach issues.

1.35 We also continued discussions with relevant Centrelink and FaCS managers during the course of our investigation.

¹⁰ The "Guiding Coalition" is the senior management committee of Centrelink. The committee includes Centrelink's National Managers (with functional responsibilities) and Area Managers (with responsibility for the management of groupings of Centrelink offices).



BREACH POLICY AND RESPONSIBILITIES

Legislation and Policy Intent

- 2.1 The circumstances in which Newstart and Youth Allowance breach penalties can be imposed are prescribed in some detail in the *Social Security Act 1991* (the Act) and *The Social Security Administration Act 1999* (the Administration Act). There is a reasonably clear distinction between “activity test breach penalties” and “administrative breach penalties”. (However, as discussed later, the “Guide to the Social Security Act”, indicates that some particular actions could incur either an administrative or an activity test penalty, depending on the circumstances.)

Administrative breaches

- 2.2 Administrative breaches are incurred if a person fails to comply with a requirement to attend a Centrelink office, a medical examination or to advise of or provide information when requested to do so by Centrelink. The Administration Act provides discretion not to apply (or to reverse) a breach penalty if the person had a reasonable excuse for not complying with the requirement. The intention of administrative breach penalties is to secure compliance and cooperation with general administrative measures necessary for Centrelink to correctly perform its role of assessing and administering Social Security entitlements.

Activity Test breaches

- 2.3 Activity test breaches are incurred if a person fails to comply with requirements relevant to the activity test. The activity test is a fundamental and long-standing feature of social security payments where qualification for the payment derives predominantly from the fact of the person being unemployed. The basis of the activity test is that the person must be actively seeking and willing to undertake suitable paid work or be engaged in some other approved activity (generally activities designed to improve the person’s prospects of obtaining paid work).
- 2.4 The circumstances in which a person is taken to have breached the activity test (and therefore may be subject to an activity test breach penalty) are specific in the Act. They are:
- the person becomes unemployed voluntarily or due to their own misconduct; or
 - the person fails to enter into an activity agreement when required to do so (other than when there are special circumstances that prevent the person from doing so); or
 - the person fails to take reasonable steps to comply with



- the terms of an activity agreement or;
 - a requirement to take up a job or a program to improve their employability (Work for the Dole, training etc) or;
 - a requirement to show evidence of having applied for an advertised job vacancy (employer contact certificate); or
 - the person refused or fails without a reasonable excuse to attend a job interview; or
 - the person fails, without good reason to commence or complete a program to improve their employability when required to do so.
- 2.5 If an activity test breach penalty is to be imposed in accordance with the Act it must be for one of the above reasons.
- 2.6 The intention of activity test breach penalties is to secure compliance and cooperation with the requirements of the activity test. The broader policy aims are to ensure that unemployed recipients of these allowances are active in taking steps to obtain employment, thereby increasing their chances of obtaining paid employment and improving the efficiency of the labour market.
- 2.7 Compliance with activity test requirements is also seen as a key component of the mutual obligation on recipients of unemployment payments. In return for receiving financial support and other employment assistance, recipients are obliged to take action on their own behalf to improve their situation and to cooperate with measures designed to help them.
- 2.8 There appears to be strong community support for both the aims and requirements of the activity test and the existence of some penalties for people who fail to meet those requirements. Research by the Department of Family and Community Services has also demonstrated support for those requirements and for the existence of penalties among recipients of the activity tested payments.

Breach penalty for not correctly reporting earnings.

- 2.9 Section 630AA of the Act effectively defines a failure to report income from earnings as a breach of the Newstart activity test and subject to an activity test breach penalty. (Other sections apply for allowances other than Newstart.)
- 2.10 Although the reporting of income is not a relevant matter for the activity test, the legislation links the non-reporting of earnings to the activity test in this way to provide a significant administrative penalty against such action. The repayment of any debt incurred as a result of non-declaration of earnings was considered insufficient penalty on its own. (In effect that amounted to an interest free loan and was considered to provide insufficient deterrent against what was regarded as a very serious abuse of the social security payment system.)
- 2.11 The intention of this policy is to penalise blatant and deliberate abuse of the system. It was expected that the penalty would be applied mostly in case of deliberate non-declaration of earnings but rarely in cases of under-reporting of earnings. If earnings were under-reported the intention was that the penalty would only be applied if the under-



reporting was significant and blatant (with a clear intention to mislead and defraud). The wording of the relevant provisions reflects this intention. For non-declaration the Act refers to the person refusing or failing without reasonable excuse to provide information about their earnings. However, for under-reporting, the Act refers to the person knowingly or recklessly providing false or misleading information about their earnings.

The roles and responsibilities of the departments and agencies

- 2.12 The *Social Security Act 1991* gives power and responsibility for decision-making under that Act, and general responsibility for the administration of the Act, to the Secretary of the Department of Family and Community Services (the Secretary).
- 2.13 Many of the provisions relating to breach penalties also include a reference to the Secretary being satisfied as to certain matters (for example whether the person's actions were reasonable) in making a decision under those provisions.
- 2.14 The Act authorises the Secretary to delegate his powers under the Act and decision-making powers relating to breach penalties have been delegated to certain officers of the FaCS and Centrelink. (In practice it is only Centrelink officers located in local customer service centers who exercise these decision-making powers regularly.)
- 2.15 The Department of Family and Community Services provides policy guidelines to Centrelink on the administration of aspects of the Social Security Act, including the breach provisions. These guidelines are effectively instructions by the Secretary to his delegates on how his delegated powers are to be exercised.
- 2.16 Centrelink management is responsible for providing the necessary support and tools for delegated decision makers to allow them to perform their role effectively. This includes any necessary training and procedural guidance.
- 2.17 In making decisions under the Social Security Act, Centrelink decision-makers/delegates receive information from a range of sources including claimants and third parties. In the case of breach decisions, job network providers (and other providers or coordinators of services to the unemployed) are key sources of information that may lead to a breach decision. For example a job network provider may advise Centrelink that a jobseeker failed to attend a job interview. However, it is the responsibility of the Centrelink decision maker to determine if that action constitutes a breach and to decide to implement a breach penalty. In order to make that decision, the Centrelink officer will normally need to obtain and consider additional information.
- 2.18 Job network providers (and other providers of employment services) are contracted to the Department of Employment and Workplace Relations (DEWR) to deliver employment services to jobseekers. DEWR sets conditions and expectations for providers that include a requirement to advise Centrelink of any job seeker actions which could indicate a breach. DEWR also provides procedures and mechanisms for this to be done.



Misconceptions about roles and responsibilities

2.19 The understanding of these roles and responsibilities appears to have become confused (including for some Centrelink staff) because of the difficult matrix of relationships arising from the establishment of the job network and the purchaser- provider arrangements between Centrelink and its two main client departments, FaCS and DEWR.

2.20 For instance some public commentary on breach penalties indicates that commentators (and perhaps some Centrelink staff) may have the following misconceptions about roles and responsibilities.

- Job Network and other DEWR service providers are responsible for breach investigations or decisions.
- Centrelink simply process breach penalties on the advice of those providers – in effect a breach decision is mandatory.
- DEWR is responsible for policy on breach decisions and penalties.

Recommendations

R28 Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)

R29 FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.

R29.1 As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



OBSERVATIONS ON PRACTICE AND PROCEDURES

- 3.1 The review of recent complaints to the Ombudsman about breach penalties identified significant deficiencies in Centrelink procedures and practice in the cases examined. It is acknowledged that the sample involved was very small (approximately 150 complaints), by comparison with the number of breach penalties imposed. We accept the comments made by FaCS and Centrelink that complaints to the Ombudsman are unlikely to be representative of the experience of most unemployed people. However, a significant proportion of complaints were about second or third breaches. In those cases the level of penalty imposed is higher because of previous breach penalties. Therefore, the circumstances of previous breach decisions (which did not result in a complaint to the Ombudsman) were also examined. The same deficiencies in practice and procedures were evident in that sub-sample.
- 3.2 In those cases, where the investigation of the breach by Centrelink was considered to be deficient, investigation by the Ombudsman's office normally resulted in the breach penalty decision being overturned. (ie. the original decision was incorrect.)
- 3.3 Examination of a similarly small sample of breach cases supplied by Centrelink indicated similar deficiencies (but in a smaller proportion in the case of breaches arising from job Network reports). It was not possible, from the information provided, to determine whether, in those cases, the original breach decision was incorrect. However, the available information did indicate that the information gathered was insufficient as a basis for a breach decision.

Inadequate investigation to support breach decisions

- 3.4 In a significant majority of the cases reviewed there did not appear to be any attempt to discuss the circumstances of or reasons for the person's actions or failure prior to making a decision to impose a breach penalty. This is significant because the provisions of the Act that authorise breach penalties or define failure of the activity test all require assessments of reasons or intent or include provisions that the breach has not occurred if there are special circumstances or a reasonable excuse.

Case Study 1.

In August 2001, Eddie complained that Centrelink had imposed a breach penalty on him for failure to attend an interview with his job network provider on 10 July 2001. He had had no contact with Centrelink about this matter prior to receiving notification of the breach penalty. Neither his address nor any other contact details had changed and Eddie considered that he was readily contactable at most times after 10 July.

Eddie acknowledged that he had not attended a scheduled interview with his Job Network provider but said that was because the provider had double booked him on that day and he was attending a training course organised by the job network provider. We suggested that Centrelink ask the job network provider to check their records. The Job Network provider confirmed that Eddie was attending a training course at the time of the interview. The breach penalty was revoked.



- 3.5 In more than 80% of our complaint sample there did not appear to have been any attempt to contact the person prior to arriving at a breach penalty decision. However, it should be noted that our investigations generally did not include an examination of Centrelink records, so there may have been unsuccessful attempts at contact in some cases. The 80% estimate is based on the person's advice that there had been no contact (usually confirmed by Centrelink) and there having been no indication of any reason for difficulty in contacting the person.
- 3.6 Examination of the Centrelink sample showed a significant variation in the incidence of attempts to contact the person prior to a breach decision, depending on the type of breach. Prior contact was attempted in 74% of the sub-sample comprising breaches for failure to attend a Job Network provider interview (26% with no contact attempt). However, there was a record of attempted contact in only 6% of the group of breaches for failure to attend a Centrelink interview (94% with no contact) and only 2% for breaches due to misreporting of earnings (98% with no contact attempt).¹
- 3.7 Administrative breaches are defined as occurring when the person fails (*without a reasonable excuse*), to attend a Centrelink office, a medical examination or to advise of or provide information when requested to do so by Centrelink. FaCS advises that their instructions for Centrelink officers "emphasise the requirement to thoroughly investigate the circumstances surrounding a possible breach and, where possible, to interview the customer before a decision is made."
- 3.8 The practice that appears to have been adopted in many of the administrative breach cases examined was to impose the breach penalty without any further investigation. The circumstances surrounding the person's actions (ie. any excuse) would then only be considered if such information was volunteered by the person at a subsequent review.

Case Study 2.

Alicia complained that Centrelink had reduced her Newstart Allowance payments because she had not attended an Information Seminar at the Centrelink office. (Centrelink had imposed an administrative breach penalty of 16% rate reduction for 13 weeks.) Alicia advised that she had not known about the issue until she received the notice of rate reduction. She advised that she had changed her address shortly before the interview, because of a dispute with flatmates and that she had advised Centrelink of the change on her next regular fortnightly form. Upon checking, Centrelink established that the advice confirming the time of the information seminar had been sent to her previous address and accepted that she did not receive it. The breach penalty was revoked.

¹ In nearly all of the cases in this sub-sample, the person had been sent a form letter (Q135) prior to the breach decision. However this letter does not refer to the breach issue. It is intended to seek confirmation of earnings. There was no record of any discussion of reasons for the incorrect income declaration in any of the cases where the person responded to the Q135 letter.



- 3.9 The specific legislative provisions that define failure of the activity test include the need to specifically consider “good reason” or “reasonable excuse” in some circumstances. In other circumstances an assessment is required as to whether the person is taking “reasonable steps” to comply with a general requirement. However, our case review suggested that there was no real investigation of these aspects of the breach decision. In many cases, if there was one indicator to suggest possible non-compliance (for example failure to attend an interview), it appears to have been assumed that the person was not taking reasonable steps (or did not have a reasonable excuse), without any further investigation or discussion with the person.

Case Study 3.

Rene complained on behalf of her sister, Debbie, that Centrelink had imposed a breach penalty on Debbie for failure to attend an interview with a job network provider. Centrelink had not contacted Debbie prior to the breach decision. Rene advised that Debbie has a serious drug and alcohol problem and had her jaw broken in a fight shortly before the scheduled interview. With Rene’s assistance Debbie was able to obtain a doctor’s letter regarding this issue and Centrelink agreed to revoke the breach penalty.

Burden of Proof

- 3.10 Where the person did receive an opportunity to explain their actions to the decision maker, either prior to or (more likely) after the breach decision, they were sometimes presented with an unreasonable burden of proof. For instance, they were required to obtain and provide written evidence from third parties to support any explanation before it was accepted. It is reasonable that, where the person’s actions indicate prima facie a breach of the requirements, the onus should be on the person to show good reason and provide verification if this is feasible. However, a requirement to obtain written evidence from third parties, should not be applied if the person can provide another form of reasonable verification.

Case Study 4

Sergio complained that Centrelink had imposed an 18% rate reduction activity test penalty on him because he failed to attend an interview to negotiate a “preparing for work agreement”. He had contacted Centrelink after being advised of the penalty and advised them that on the morning of the interview he was involved in a motor bike accident and had broken his wrist. He also offered to attend another interview to negotiate the agreement. Centrelink advised that before the breach penalty could be revoked he would need to obtain medical evidence of his injury. Sergio contacted the Doctor who treated him and obtained a note confirming that he attended the doctor on the afternoon of the interview day and was treated for a broken wrist. However, on providing this information to Centrelink, he was advised that it would be insufficient to justify lifting the breach and that he would need to obtain a statement from someone who was a witness to the accident.



Case Study 5.

Joel complained that Centrelink was refusing to revoke a breach penalty for failure to attend an interview. Joel had been scheduled to attend an interview with Centrelink on 14 September 2001. He did not attend the interview with Centrelink because he had a job interview around that time at a different part of the city. He claims to have phoned Centrelink later that day to explain. Centrelink advised him they had no record of the telephone conversation and advised him that he would need to obtain a letter from the prospective employer confirming his attendance at the job interview. The employer had refused to provide such a letter. At the suggestion of this office, Centrelink telephoned the employer who confirmed that Joel had attended the interview. The breach penalty was revoked.

Requirement for corrective action

- 3.11 In considering whether reasons or excuses offered by a person are reasonable, Centrelink may sometimes give undue weight to a failure on the part of the person to take corrective action. The following case study illustrates this issue.

Case Study 6.

Pamela's Newstart Allowance payments had been stopped as a result of a third breach penalty. She had been evicted from her rental accommodation and was staying with friends as she had no income to support herself. Her friends suggested she contact the Ombudsman's office. Pamela advised that her payments had been stopped because she had not attended an interview with a job network provider following her referral for "intensive assistance". She said she had not had any other breaches. Centrelink advised that, Pamela had been breached twice within 2 weeks for failing to attend an interview with a job network provider. When she failed to attend the first scheduled interview the job network rescheduled the interview for a later date (but had also advised Centrelink of her failure to attend). Pamela did not attend the rescheduled interview. Centrelink also advised that Pamela had had a previous breach penalty for failure to correctly declare some casual earnings.

We suggested to the Centrelink decision maker that it was unfair to breach Pamela twice for failing to attend the interviews since both interviews had been for the one purpose and the second interview was simply a rescheduling of the first. We also noted that, as activity test breach penalties were applied, they were on the basis that she was "delaying entering into an activity agreement". Effectively she was being penalised twice for the same offence. The Centrelink decision maker refused to alter the decision but advised that Pamela could ask a review officer to review the decision.



Case Study 6 cont.

Pamela indicated to us that the reason she had not attended the interviews was that at the time she had obtained regular casual work and had hoped that she would no longer require Centrelink assistance. She therefore didn't respond to what she saw as an offer of "intensive assistance". She could not recall whether she was actually working on the days of the interviews. (Pamela had subsequently been retrenched from that casual job.)

With Pamela's authority, we contacted her former employer who was able to confirm that Pamela worked on both days. On one day she had been working at the time of the scheduled interview and on the other day for some hours prior to the interview.

We contacted the Centrelink decision maker to provide this information and asked that the breach decision be reconsidered in light of this information. We suggested that her work commitments provided a reasonable excuse for not attending the interviews. (We also questioned whether her referral to intensive assistance was appropriate, given that at the time she was engaged in a significant amount of casual work.)

However, the original decision maker advised that both breach decisions would remain because, although it was accepted she could not have attended at least one of the interviews, she did not contact either Centrelink or the Job Network provider to advise them that she could not attend. A Review Officer affirmed this decision. Pamela lodged appeals to the SSAT in relation to the breach decisions and her payment was reinstated pending the outcome of the appeal.

Given that Pamela's payments had been restored and she had exercised her right for an independent review, we decided not to investigate the complaint further. However, we did discuss this case with Centrelink national office in the context of this own motion investigation and requested some additional details.

We were subsequently advised that both breaches had been revoked prior to the matter going to the SSAT. It was also noted that Centrelink's referral of Pamela to an intensive assistance provider (which prompted the interview appointments) had been incorrect and should never have occurred.

Understanding of activity test breach decisions



- 3.12 The review of cases in our complaint sample also suggested that some Centrelink decision makers have an incomplete or inadequate understanding of the activity test breach provisions. This was most notable in cases involving a failure to attend an appointment with Centrelink for the purposes of negotiating an activity agreement or other activity test related purposes or an interview with a Job Network provider. (Such cases made up a significant component of the review sample.)
- 3.13 In many of the cases reviewed, the failure to attend such an interview resulted in an activity test breach, without further investigation. When questioned about the reason for the breach penalty decision, Centrelink decision makers typically responded that it was imposed because the person failed to attend the interview. In fact there is no authority in the Act to impose an *activity test* breach penalty simply because of a failure to attend an interview (either with Centrelink or the job network provider). In reality, the activity test breach decisions were being applied under an activity test breach provision that requires consideration of other, broader matters in reaching a decision.
- 3.14 For example, if a Newstart Allowance recipient failed to attend an appointment for the purposes of negotiating an activity agreement the decision to impose an activity test breach penalty would normally have to be made under the authority of Section 607 of the Act. Section 607 provides, inter alia, that if, because a person did not attend the negotiation of an activity agreement, the Secretary is satisfied that the person is unreasonably delaying entering into the agreement (and the person is notified of this view) the person is taken to have failed to enter the agreement.²
- 3.15 In imposing an activity test breach penalty for failing to attend such an appointment it is not sufficient for the decision maker simply to identify that the person failed to attend the appointment. The decision maker/delegate must be satisfied that the person is unreasonably delaying entering into an agreement. Many decision makers seemed unaware of this aspect of a decision to impose an activity test breach penalty in these circumstances. The result was that decisions to impose an activity test breach penalty in such circumstances were made solely on the basis of non-attendance at the appointment, even when there was considerable evidence that the person was not unreasonably delaying the process. (For example, in some cases the person had attended a subsequent interview or had actually entered into an activity agreement by the time they were notified of an activity test breach for non-attendance at the original interview.)

Case Study 7.

Bob contacted the Ombudsman's office after having been breached (first activity test breach - 18% penalty) for failing to attend an interview with Centrelink for purposes of negotiating a "Preparing for Work Agreement". He advised that he had initially forgotten about the interview but realised he had missed it about 10 minutes after the scheduled interview time. He then rang Centrelink, apologised and obtained a new interview time approximately one week later. He attended the subsequent interview and negotiated and signed a Preparing for Work Agreement. Shortly afterwards, he received the advice that he had been breached for failing to attend the originally scheduled interview. The Centrelink decision maker confirmed that Bob had phoned Centrelink 30 minutes after the scheduled interview time and that he had subsequently signed a Preparing for Work Agreement but advised that "forgetting" is not a reasonable excuse for non attendance at an interview and that his subsequent compliance was not a valid reason for revoking the breach decision.

² Section



- 3.16 In other cases of failure to attend an interview with a job network provider the decision to impose an activity test penalty was based on a decision that the person failed the activity test because they failed to take reasonable steps to comply with the terms of an activity agreement. For such penalty to be applied, the terms of the activity agreement would need to include a specific requirement about attending interviews with the job network provider. As with failure to attend appointments to negotiate an activity agreement, there was no evidence in our review sample that original decision makers considered this issue and breach penalties were applied simply because the person failed to attend the interview.

Breach penalties for incorrect reporting or non-disclosure of earnings

- 3.17 In most of the cases we reviewed that involved an activity test breach penalty due to reporting of earnings, the failure to correctly report earnings was identified through the regular data-matching that occurs between Centrelink records and the ATO. When that data matching identifies that a Centrelink allowance recipient has commenced employment, Centrelink sends the allowance recipient a letter (standard letter - Q135) noting the information received by the ATO and asking the person to contact a Centrelink officer by telephone to confirm the earnings details. The letter does not refer to the possibility of a breach penalty for incorrectly reporting income, nor seek an explanation for any misreporting.

Case Study 8.

Dragan contacted the Ombudsman's office after receiving advice that his Newstart Allowance would be reduced by 18% as a breach penalty for not correctly declaring his earnings from a casual job over Christmas. He had previously been advised that he had been overpaid \$282 as a result of this under-declaration but no one had previously discussed the extra penalty with him. The job had been on a casual on-call basis and at the time he had advised Centrelink that he was not sure how much he would be earning. The Centrelink officer advised him that he would have to give an estimate and he did. Dragan said he thought his earnings weren't much different to the estimate he gave.

After the Ombudsman's office contacted Centrelink, the overpayment calculation was checked and recalculated to be \$72. The breach penalty was revoked and Dragan was repaid the amounts that had been deducted from his allowance.



- 3.18 Our investigation of these cases suggested that, in those cases, activity test breach penalties were being applied virtually automatically when earnings had not been correctly reported. There was little evidence of any attempt to seek an explanation or to give any specific consideration to whether the under-reporting was knowingly or recklessly intended to mislead.
- 3.19 In response to this observation, Centrelink noted that statistical records show that only a proportion of Newstart and Youth Allowance overpayments due to earnings result in the imposition of a breach penalty.³ They argue that this suggests that officers are giving some consideration to whether there was a good reason for the non-declaration or under-declaration of earnings.
- 3.20 They also note that the Q135 letter offers an opportunity to discuss the circumstances involved. However, as noted above, the Q135 letter does not refer to a possible breach penalty for incorrect reporting of earnings. In the sample reviewed (both in the complaint sample and Centrelink sample), even in cases where the person responded to the Q135 letter, there is no record of any discussion of possible reasons for incorrect reporting.
- 3.21 Several of our investigators reported conversations with Centrelink decision makers during which the Centrelink procedure in these cases was explained as processing the breach penalty without investigation of this aspect on the basis that, if the person had an excuse for their action, they could bring that up when requesting a review. This appears to be a standard practice adopted by Centrelink in such cases. Managers of Centrelink debt recovery teams in three different states gave the same explanation.

"Q1. Did ODM attempt to contact Customer to discuss before imposing breach?"

No. It is only a requirement if a third activity test breach and non payment period is to be applied to a customer that we discuss with the customer if there where any mitigating circumstances. As this was not the case the expectation is that the customer will use their appeal rights if they are dissatisfied with the decision."

(Excerpt from written response by a debt recovery team leader to questions submitted by an Ombudsman investigation officer)

Access to review and appeal rights

³ Centrelink provided us with statistics comparing the number of Employment Declaration Form (EDF) matching debts with the number of earnings breaches imposed. This showed that earnings breaches occurred in only about 20% of the EDF debts. However Centrelink subsequently revised their methodology for obtaining the number of earnings breaches and advised that the previous statistics had significantly understated the number of these breaches. When the revised breach numbers were compared with the number of EDF debts previously supplied the proportion of debts resulting in breaches was actually between 70% and 80%.



- 3.22 While the administration of social security includes a well-developed structure for obtaining an administrative review of adverse decisions, our examination of breach complaints suggested that these arrangements have not worked quickly or effectively for some unemployed people affected by breach penalty decisions.

Understanding of review and appeal rights

- 3.23 Many complainants affected by breach decisions indicated they had not as yet sought a review of the decision. While some had made some contact with Centrelink after being advised of the decision, most did not understand the review process and were unsure of how they could get a reconsideration of their case underway. This suggests that the written and oral advice provided to those affected by breach decisions may not be clear about what action the person should take if they wish to dispute the decision. There was also some indication that the procedures adopted by Centrelink when a person initially requests a review of a breach decision may be discouraging the person from accessing the further stages of the review and appeal process.

Delays in the review process

- 3.24 Some of our complainants, who did access the review process, complained of unreasonable delays at various stages in the process and lengthy delays in implementing a decision, made on appeal, to set aside a breach penalty.

Case Study 9.

Alan contacted the Ombudsman's office to complain about Centrelink's failure to review a decision to impose a breach penalty on the basis of a report by his Job Network provider. Alan said he requested a review of the decision three months ago and when he had inquired (on several different occasions) he had been told that an interview would be arranged but this had not been done.

When the Ombudsman's office checked with Centrelink we were advised that the original decision maker had reviewed and affirmed the decision (without any further contact with or advice to Alan) and that the matter had been referred to an Authorised Review Officer who had requested a statement from Alan. The Authorised Review Officer did subsequently overturn the breach decision.

Case Study 10.

Kyle complained to the Ombudsman's office on 18 August that Centrelink was delaying implementing an SSAT decision to overturn a breach penalty decision. Kyle had been breached in March 2001 for failing to attend a job network interview and incurred an 18% rate reduction penalty. The matter was decided by the SSAT on 13 July 2001. The SSAT accepted that Kyle had a reasonable excuse for not attending the interview. Centrelink told him that the decision had not been implemented because Centrelink had 28 days to decide whether to appeal the matter to the AAT. They had decided not to, but Kyle's local office had still not received his file to calculate the arrears. The local office stated that it had not received the file because the national office had not yet received it.



Recommendations

- R28** Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)
- R29** FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.
- R29.1** As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



ACTIVITY TEST OR ADMINISTRATIVE BREACH?

Legislation

- 4.1 Breach penalties for administrative non-compliance were introduced in 1991, to coincide with the introduction of Newstart Allowance (and Job Search Allowance).¹ At that time, the Act provided that, if a person failed to comply with a requirement to attend an office of the Department or of the CES or to contact the Department or CES or to provide requested information, an allowance was not payable to that person for a “administrative deferment period” of 2 weeks. Prior to that time, such penalties only applied for failure to satisfy the activity test.
- 4.2 In 1994 the legislation was altered to separately identify “administrative deferment periods” and “activity test deferment periods” and, in 1996, this distinction was made clearer when the penalty for administrative breaches was changed to a rate reduction penalty (16% reduction for 13 weeks). Since that time, administrative breaches have attracted a lesser penalty than breaches of the activity test requirements.

Policy Intent

- 4.3 This distinction is intended to recognise that a failure to comply with an administrative request, such as a request to attend an interview (even without a reasonable excuse) is a less serious breach of the recipient obligations than a deliberate failure to take up opportunities for employment training and other assistance services. However, the distinction has become considerably blurred in practice.

Failure to attend an interview

- 4.4 A substantial proportion of breach penalties are imposed due to the unemployed person failing to attend at either a Centrelink office or a job network provider when required to do so. Although the administrative breach scheme outlined in the Act would seem to be intended to cover such administrative non-compliance, the majority of penalties applied in such cases are in fact identified as activity test breaches. Compared to administrative breach penalties, activity test breach penalties result in a greater reduction in payment, for a longer period and also escalate with subsequent breaches.
- 4.5 Failure to attend an interview (other than a job interview) is being categorised as an activity test breach in the following situations:
- where the interview is for the purpose of negotiating an activity test agreement; or

¹ Jobsearch Allowance (for the first 12 months of unemployment) and Newstart Allowance (for unemployment durations over 12 months) replaced the previous “Unemployment Benefit”. Job Search Allowance was later incorporated into an expanded Newstart Allowance.



- when attendance at the interview has been specifically included as one of the terms of an activity agreement.

Interview for purposes of negotiating an activity agreement

- 4.6 Section 607 of the Act provides that if, because a person did not attend an interview (or the purposes of negotiating an activity agreement) when required to do so, the Secretary is satisfied that the person is unreasonably delaying entering into an agreement, the person is taken to have failed to enter into an activity agreement. Under section 625 of the Act, if a person fails to enter into an activity agreement when required to do so, the person is subject to an activity test breach penalty.
- 4.7 The administration of Newstart Allowance and Youth Allowance for unemployed people now involves many situations that are classified as requiring the negotiation of an activity agreement. (For example, soon after claiming or commencing to receive a Newstart Allowance the unemployed person may be asked to attend an interview for the purpose of negotiating a form of activity agreement called a Preparing for Work Agreement. The person may also be asked to negotiate an activity agreement on first contact with a job network provider or when first becoming eligible for particular employment service programs.)
- 4.8 In practice, many of these interview situations also have an administrative purpose such as gathering information from or confirming information and obligations with the jobseeker, and may not need to be formally notified as for the purposes of negotiating an activity agreement. If this were the case, failure to attend the interview, without a reasonable excuse would constitute an administrative breach and incur the lesser penalty. This would seem to be more in keeping with the distinction made within the Act between administrative and activity test breaches.
- 4.9 Under the current arrangements, if a failure to attend such an interview is to be assessed under the provisions outlined above (sections 607 and 625), the assessment of such a failure to attend requires consideration of different issues than would be required if the failure to attend was assessed under administrative breach rules. For an administrative breach, the decision maker is required to assess the person's reasons for non-attendance against the criteria of whether this amounted to a "reasonable excuse". However, if the failure to attend is to be assessed under the specific provisions applying to the negotiation of activity agreements, the decision maker would need to be satisfied that the person is "unreasonably delaying entering into an agreement". Our review of both the complaints sample and the Centrelink sample, indicates that the issue of whether the person is "unreasonably delaying" does not seem to be specifically considered in these cases. In some cases there was even evidence to the contrary, but an activity test breach was still applied, simply on the basis that the person failed to attend. (See Case Study 7, page 18).

Attendance at an interview as one of the terms of an activity agreement



- 4.10 In some cases, a failure to attend an interview has resulted in an activity test penalty because the failure to attend is regarded as a failure to comply with the terms of an activity agreement. In these cases, an activity agreement may include a general requirement such as to attend interviews with (for example) a particular job network provider, “when requested to do so”.
- 4.11 Section 626 of the Act provides that, where a person is required to comply with the terms of an activity agreement and fails to take reasonable steps to do so, the person is subject to an activity test breach penalty. This provision appears to require that the decision maker not simply consider one incident (for example, the failure to attend the interview), but to assess whether overall, having regard to all of the terms of the agreement, the person has taken reasonable steps to comply. This view has been adopted by the AAT in reviewing a number of such cases.²
- 4.12 However, in the cases examined this broader consideration is not evident in the decision making process and the decision to apply an activity test breach penalty has been made simply on the basis of a failure to attend the interview.
- 4.13 Section 606 of the Act sets out the range of “activities” that a person can be required to undertake as follows.

Newstart Activity Agreements-terms

606.(1) A Newstart Activity Agreement with a person is to require the person to undertake one or more of the following activities approved by the Secretary:

- (a) a job search;
- (b) a vocational training course;
- (c) training that would help in searching for work;
- (d) paid work experience;
- (e) measures designed to eliminate or reduce any disadvantage the person has in the labour market;
- (ea) subject to section 607A, development of self-employment;
- (eb) subject to section 607B, development of and/or participation in group enterprises or co-operative enterprises;
- (ec) an approved program of work for unemployment payment;
- (f) participation in a labour market program;
- (fa) participation in a rehabilitation program;
- (fb) an activity approved by the Employment Secretary under the CSP;
- (g) an activity proposed by the person (such as unpaid voluntary work proposed by the person).

- 4.14 Given the nature and range of terms indicated, it is questionable whether attendance at an interview (either with Centrelink or an employment service provider) should be included as a specific requirement of an activity agreement. The intention would appear to be to specify “activities” in which the person can participate that are intended either to improve their chances of employment or that, in the particular circumstances, may be a reasonable

² See for example the principles applied in *Sec DEETYA & Ferguson* (1997) – 147 ALR295, *Sec DEETYA & Ruiz* (1996) 41 ALD 627 and *Sec DEWRSB & Pool* (1998)



substitute or adjunct to looking for work. Given that there is a range of specific provisions in the Act (including administrative breach penalties) that are intended to secure compliance with reasonable administrative requirements, it seems unnecessary and unreasonable to use the activity agreement requirements for this purpose.

Recent changes?

- 4.15 Recently, the Minister for Family and Community Services has announced that “failing to attend an interview without a reasonable excuse ...will now become an administrative breach rather than an activity test breach, thereby attracting the lesser penalty of a 16 per cent reduction of payments for 13 weeks instead of an 18 per cent reduction for 26 weeks”.³
- 4.16 As discussed above, failing to attend an interview without a reasonable excuse has been defined, under the legislation, as an administrative breach since 1994. The Minister’s announcement means that that practices, such as those described above, which have had the effect of classifying a failure to attend an interview as an activity test breach will cease. However Centrelink, FaCS and DEWR have advised that failure to attend an interview with an employment service provider is still to be classed an activity test breach if attendance at interviews is included as a condition of a Preparing for Work Agreement.

Policy Guidelines

- 4.17 Current FaCS policy guidelines on activity test and administrative breaches may contribute to some confusion on whether an activity test or administrative breach should apply in particular situations. Those guidelines include the following statement under the heading “Rules for Applying Breach Penalties”.

Activity test or administrative breach?

In some circumstances it may be possible for both an activity test breach and an administrative breach to apply to the same event. In such cases the activity test penalty should apply.

- 4.18 Although this advice reflects a rule established by Section 630BD (that an activity test breach override the administrative breach), the explanation would seem to be misleading, given that, as explained above, establishment of an activity test breach normally requires consideration of a different, usually broader, range of issues than is required in determining an administrative breach. In most situations where the person failed to comply with a requirement, the question of whether an activity test or administrative breach is appropriate will also depend on the authority under which that requirement was imposed.

³ “Breaching rules change to protect the vulnerable” Media Release by Senator the Hon Amanda Vanstone, Minister for Family and Community Services 4 March 2002.



Conclusion

- 4.19 The Parliament has made a distinction between administrative and activity test breaches and provided a lesser penalty for administrative breaches. It would therefore seem more in keeping with the Parliament's intent, in such situations, to adopt the position that an administrative breach should apply, unless the specific considerations relating to activity test breaches are addressed.



Recommendations:

- R1.** In any case where a person fails to comply with a requirement to attend an interview with either Centrelink or an employment service provider, without a reasonable excuse, an administrative breach penalty should apply rather than an activity test penalty.
- R2.** If it is considered necessary (to achieve R1) FaCS should recommend changes to the Act to remove the activity test breach associated with non-attendance at an interview for the purposes of negotiating an activity agreement.
- R3.** In the absence of the changes indicated in R1 and R2, or pending their implementation, Centrelink should adopt the following approaches:
- R3.1.** FaCS and Centrelink should critically review whether activity agreements are required in all of the situations in which this requirement is currently applied.
- R3.2.** Where it is considered that activity agreements are required the person should be provided with a copy of the proposed terms of the agreement and information regarding their right to propose alternative terms and to raise any issues affecting their capacity to comply with the proposed terms, at the time that they are given notice of the negotiation requirement (under section 605 or 544A).
- R3.3.** Where a person fails to attend the negotiation interview, the Centrelink decision maker should give full consideration to whether the person is “unreasonably delaying” entering into an agreement, before making any breach decision.
- R3.4.** All other notices to attend an interview with either Centrelink or an employment service provider should be issued under the authority of section 63 of the Social Security (Administration) Act 1999 - so that failure to attend the interview without a reasonable excuse would result in an administrative breach (not an activity test breach).
- R4.** Requirements to attend interviews with Centrelink or Job Network providers should not be included in the terms of activity agreements.
- R5.** FaCS should amend the “Guide to Social Security Law” to:
- clarify the distinction between administrative and activity test breaches;
 - indicate the range of considerations that must be addressed in investigating the different breach types; and
 - give guidance on the matters that can appropriately be included as terms of activity agreements.
- R6.** Centrelink, DEWR and FaCS should review any standard or printed terms of activity agreements and any guidance material for Job Network providers in light of the FaCS guidance.



Recommendations

- R28** Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)
- R29** FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.
- R29.1** As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



INVESTIGATION OF POSSIBLE BREACHES

5.1 Centrelink may receive advice of actions that indicate a possible breach of administrative or activity test requirements from a range of different sources, for example:

- advice from job network providers or Centrelink's own records that a person did not attend a scheduled interview;
- a report from an employer that a person left a job voluntarily;
- computer matching with tax records indicates a person has not correctly disclosed earnings to Centrelink; or
- a member of the public may provide information that suggests a possible breach of activity test requirements.

5.2 The issues to be investigated and decided in each case will vary depending on the nature of the possible breach and the applicable provision of the Act. However, each case will require investigation and consideration of the following matters:

- *whether the action or failure to comply did actually occur* (This should generally be able to be accepted without investigation where the information came from Centrelink records or a Job Network provider. However, a check with the jobseeker will readily identify if any additional confirmation/verification is required.) ;
- *whether the requirement imposed on the jobseeker was reasonable in the circumstances* (This could be assessed on the basis of information available to Centrelink on its own records or the records of employment service providers. A discussion with the jobseeker will also help to identify any issues that should be taken into account.);

and

- *any reasons for the person's actions or failure to comply.* (Depending on the particular breach provision, these would need to be assessed against criteria such as whether they constitute a reasonable excuse" or "special circumstances".).

In the case of some types of activity test breaches, various broader matters may need to be investigated and considered. (These generally involve consideration of the person's intent or an overall assessment of their efforts to comply with the particular requirement.)



Contact with the jobseeker as part of the investigation process

- 5.3 Given the terms used in the legislation (and policy instructions), it would not seem possible to reach a decision to impose a breach penalty without at least attempting to discuss the matter with the person involved and offering them an opportunity to explain their actions. As well as being a matter of natural justice, as noted in the Independent Review, “the existence of phrases such as ‘without good reason’, ‘reasonable excuse’, ‘reasonable steps’ and ‘special circumstances’ in the relevant legislative provisions indicate that the Parliament intended to guard against the arbitrary and unfair imposition of penalties.”¹ Assessment of such matters would generally require discussion with the person. Contact with the person may also indicate whether further confirmation or verification of any of the matters indicated above is necessary.
- 5.4 As noted previously, in our examination of a sample of breach complaints and the sample cases provided by Centrelink we identified a significant proportion of cases in which the person was not contacted prior to imposing a breach penalty. In many of those cases there is no record of any attempt to do so.
- 5.6 Both Centrelink and FaCS have indicated that instructions issued to staff involved in breach decisions are clear in requiring the investigation of any reasons for actions leading to a breach of activity test requirements. They advise that this includes a requirement to interview the customer where this is possible.
- 5.7 In their response to our initial analysis, FaCS indicated that,
-policy guidelines clearly indicate that the reason for non-compliance should be investigated before the breach is applied in the case of both an administrative breach and an activity test breach. The guidelines repeatedly state that customers must be given an opportunity to explain their actions prior to the penalty being imposed.*
- and that,
-Centrelink staff emphasise the requirement to thoroughly investigate the circumstances surrounding a possible breach and, where possible, to interview the customer before a decision is made.*
- 5.8 We have been unable to locate any indication of such a requirement in FaCS “Guide to Social Security Law”.
- 5.9 Our examination of Centrelink’s guidelines and training for breach decision makers does confirm that the staff are directed to contact the person to discuss possible reasons for non-compliance wherever possible, as part of the decision making process. The general Centrelink guidelines on determining activity test breaches contains the following instruction,

¹ “Making it work, The Report of the Independent Review of Breaches and Penalties in the Social Security System” March 2002



*Wherever possible, you **must** contact the customer and give them an opportunity to explain their reasons for failing to meet their obligations*
(The bolding is as appears in the text.)

Centrelink Training material

- 5.10 Our examination of Centrelink training material showed that reference to this requirement varied depending on the type of breach.
- 5.11 Centrelink has developed three different training packages covering administrative breaches, Centrelink initiated activity test breaches and third party activity test breaches. ("Third party activity test breaches" refers to breach investigations as a result of information received from Job network or other employment service providers.)
- 5.12 In the training material about third party breaches, contacting the person to seek an explanation for non-compliance is identified as a specific step in the decision making process and the trainer's notes require that the issues involved and options for initiating contact are discussed in some detail. The notes suggest that contacting the customer is "not a legal requirement" but is considered "best practice" and is consistent with "natural justice obligations".
- 5.13 However, there is no such discussion included in the training notes for administrative and Centrelink initiated activity test breaches. In those training notes, "contact with the customer" is not identified as a specific step in the decision making process. The only reference in the training notes to possible contact with the customer is in a brief discussion of concepts of natural justice which appears after the decision making process has been described. A note that, "wherever possible, a person should have an opportunity to put their case" is included as one possible answer to the question "What is 'Natural Justice'?" It is therefore quite possible that this training could be completed without any discussion of the requirement to (at least attempt to) contact the customer.
- 5.14 The training material for third party breaches also explains the procedural requirements of the "breach script", an electronic tool for assisting Centrelink staff with the processing of third party information about possible breaches. The breach script requires the recording of information about attempts to contact the customer. There is no similar tool for administrative or Centrelink initiated activity test breaches.
- 5.15 These differences in the training and tools provided for Centrelink staff for the different breach types may account for the marked difference noted in our examination of the samples of Centrelink breach cases. Evidence of attempts to contact the jobseeker to discuss the circumstances of any non-compliance was considerably more likely to be evident in the sample of cases involving failure to attend an interview with a job network provider than in the samples of Centrelink initiated breaches.



- 5.16 As noted previously (paragraph 3.21), in the case of breaches due to incorrect reporting of earnings, some Centrelink staff have adopted a standard practice of not attempting to contact the customer to seek an explanation, in the belief that any reasons offered by the person can be considered at a subsequent review, if necessary.

Inability to contact the jobseeker

- 5.17 In their response to our initial analysis Centrelink noted that:

One of the principal difficulties faced by Centrelink in investigating whether job seekers have a reasonable excuse occurs when customers do not respond to the efforts of the CSOs to contact them by phone and by mail.

- 5.18 There was some evidence in the sample of Centrelink breach cases we examined that Centrelink had been unsuccessful in trying to contact job seekers by telephone, and that job seekers had not responded to Centrelink's efforts to contact them in writing. However, our own analysis suggests that this problem may be considerably overstated. In the majority of cases we examined, where no contact had been made with the jobseeker prior to a breach decision, there was no evidence of an attempt by the Centrelink officer to initiate contact. (It is possible that some unsuccessful attempts to contact the person were not recorded but, given Centrelink's normal work practices, this seems unlikely.) Where we attempted to contact jobseekers, this office did not have any significant difficulty in most cases, even though the contact details had been recorded some months previously.
- 5.19 It may be that a general view of the difficulty in contacting jobseekers, or occasional experiences of such difficulties are dissuading some Centrelink staff from attempting to contact job seekers prior to making a breach decision.
- 5.20 In her announcement about changes to breaching rules, the Minister for Family and Community Services announced that "Centrelink will be able to temporarily suspend payments when a job seeker has failed to meet their obligations and cannot be contacted".²
- 5.21 The aim of this change, which was introduced from 1 July this year, is to provide a strong encouragement for jobseekers to contact Centrelink to discuss the circumstances of any possible breach.³

² "Breaching Rules change to protect the vulnerable" media release by the Senator the Hon Amanda Vanstone, Minister for Family and Community Services- 4 March 2002

³ The Minister also noted that this would also "discourage cheats from simply accepting the rate reduction breach when in fact they may have no entitlement".



- 5.22 Provided that this approach is administered appropriately and sensitively, it could ensure that jobseekers, who are otherwise unable to be contacted, make contact with Centrelink and have an opportunity to present any reasons for non-compliance, before a breach decision is taken. However it is imperative that adequate safeguards are included in the procedures involved with this approach.
- 5.23 In his 1998/99 Annual Report, the Ombudsman reported his concerns about Centrelink's administration of provisions to suspend payment of allowances and pensions "pending investigation" in cases involving the investigation of marriage-like relationships. It was noted that a full loss of payments, even for a temporary period, could result in considerable hardship. That report included some recommended safeguards that should apply equally in the case of the suspensions that may occur in breach situations.

The criteria suggested were as follows.

- Establishing clear criteria. - This should include requirements that:
 - there has been at least one attempt to contact the person by telephone and through any other alternative contact recorded on Centrelink's records;
 - a letter has been sent to the person's last recorded postal address requiring them to contact Centrelink;
 - sufficient time has been allowed for the person to have received the letter and initiated contact; and
 - prior to activating any suspension of payments, a further check of Centrelink records is undertaken to ensure that the person has not contacted Centrelink or altered any of their contact details.)
 - Providing formal advice of the suspension prior to the cessation of payments.
 - A notice of suspension (clearly indicating the reason for the suspension and what action is required to avoid or correct it) should be sent to the person at least 7 days prior to any payment being stopped.
 - Ensuring that the person is fully advised of their right to have the suspension decision (and, if necessary, any subsequent breach decision) reviewed.
 - Fast-tracking action to restore payments (any decision on the breach) once the person makes contact with Centrelink.
- 5.24 Centrelink and FaCs have provided this office with a detailed briefing on the new procedures. They do not meet the requirements indicated above. In particular the new procedures provide that, if a person has provided Centrelink with a telephone contact number, two telephone calls will be made to the person to attempt to contact them. If no contact is made, payment will then be suspended immediately. (No written request to contact Centrelink is sent in these cases.)



- 5.25 Correspondence to the person's postal address is likely to be one of the most reliable methods of contacting a person who is receiving unemployment payments. As part of their regular payment arrangements most unemployed people are sent a form each fortnight to their postal address that must be returned before they can receive their next payment. Given the likelihood that unemployed people will not always be available by telephone and the normal expectation that important news from Centrelink is received in writing, a minimum of at least one letter to the person's postal address should be required as part of any reasonable attempt to contact the person.
- 5.26 The Independent Review made a number of suggestions aimed at improving Centrelink's success in contacting jobseekers. These included obtaining alternative (reliable) contact details for some jobseekers, third parties who may be able to get a message to the jobseeker, SMS messaging etc. It would seem advisable for Centrelink to record and update alternative contact details for jobseekers if there is any indication that it may be difficult to contact the person and particularly after it has been necessary to suspend the person's payments to encourage contact.

Requirements for administrative breaches

- 5.27 In our report of our initial analysis of breach complaints we suggested that the terms of the Act would require a consideration of any reasonable excuse prior to the imposition of an administrative breach penalty. In response, FaCS indicated a view of the legislative requirements as follows.

Section 63 of the Social Security (Administration) Act 1999 makes the allowance not payable if the person does not comply with a reasonable requirement to attend an office, contact Centrelink and so on. Subsection 63 (9) then allows the Secretary to reverse this decision if the Secretary is satisfied the person had a reasonable excuse for not complying with the requirement. These provisions operate differently to the activity test breach provisions, which can only apply the breach after the excuse has been considered.

- 5.28 The relevant provisions of section 63 of the Admin Act are as shown below.

Requirement to attend Department etc.

63.(3) If the Secretary is of the opinion that a person who is receiving, or has made a claim for, a newstart allowance should:

- (a) attend an office of the Department; or
- (b) contact the Department; or
- (c) attend a particular place for a particular purpose; or
- (d) give information to the Secretary;

the Secretary may notify the person that he or she is required, within a specified time, to:

- (e) attend that office; or
- (f) contact the Department; or
- (g) attend that place for that purpose; or



(h) give that information;
as the case may be.

63.(5) If:

- (a) a person is receiving, or has made a claim for, a newstart allowance; and
 - (b) the Secretary notifies the person under subsection (3); and
 - (c) the requirement of the notification is reasonable; and
 - (d) the person does not comply with the requirement;
- a newstart allowance is not payable, and if, at a later time, a newstart allowance becomes payable to the person, an administrative breach rate reduction period applies to the person.

63.(9) The Secretary may determine:

- (a) that a social security payment that was not payable because of paragraph (4)(f) or subsection (5) is payable to a person; or
- (b) that an administrative breach rate reduction period does not apply to a person under paragraph (4)(e) or subsection (5);

if the Secretary is satisfied that the person had a reasonable excuse for not complying with the requirement under subsection (2) or (3), as the case may be.

5.29 The provisions of section 63 of the Admin Act do appear to allow the imposition of an administrative breach penalty without the prior investigation or consideration of any excuse. The decision to remove that penalty on the basis of any excuse offered is then discretionary.

5.30 However, the Social Security Act 1991 also includes a specific provision relating to administrative breach penalties that is worded differently (as follows).

Administrative breach rate reduction period to apply to persons who fail to comply with notification requirements

631. If a person refuses or fails, without reasonable excuse, to comply with a requirement made of the person under section 63, 64, 67, 75 or 192 of the Administration Act:

- (a) a newstart allowance is not payable to the person; and
- (b) if, at a later time, a newstart allowance becomes payable to the person-an administrative breach rate reduction period applies to the person.

5.31 The wording of that provision would require investigation and consideration of any excuse prior to the imposition of a penalty.

5.32 We have been unable to locate any explanatory documentation relating to this difference or the intended interaction between these provisions. Given that the intent of the Parliament seems unclear in this regard, for consistency with natural justice principles, it would seem desirable for Centrelink to give consideration to any excuse prior to imposing an administrative breach under either provision. As noted above, notwithstanding their explanation of the legislative requirements, FaCS have advised that,



....policy guidelines clearly indicate that the reason for non-compliance should be investigated before the breach is applied in the case of both an administrative breach and an activity test breach. The guidelines repeatedly state that customers must be given an opportunity to explain their actions prior to the penalty being imposed.

- 5.33 Centrelink instructions and training material also clearly state that decisions to impose an administrative breach penalty should be made under the authority of section 631 of the Act.



Recommendations:

- R7. All FaCS and Centrelink instructions and training material relating to breaches should be amended to more clearly reinforce (as a procedural requirement) that Centrelink decision makers should contact the jobseeker in all cases as part of any breach investigation. The minimum acceptable requirements should be:**
- a reasonable attempt to contact the person by telephone and/or any alternative contact recorded on Centrelink records; plus
 - a letter requesting immediate contact to be sent to the person's last recorded postal address (the letter should outline the possible breach issue and advise that a penalty will not be imposed if the person provides a reasonable excuse) ; and
 - allowing at least 10 days from the date of the letter before any breach decision is made.
- R8. Centrelink should investigate and implement a system for electronic "scripting" of breach investigation processes to require recording of contact attempts (and results) before a breach decision can be implemented. (Similar to the process we understand is required for Job Network breaches.)**
- R9. Centrelink should review its procedures for recording contact details for jobseekers, including suitable, reliable alternative contacts in appropriate cases as recommended by the Independent Review.**
- R10. Where contact is made with the jobseeker, Centrelink inquiries of the person should include:**
- confirmation that the incident giving rise to a possible breach occurred
 - any circumstances affecting the persons capacity to comply with the relevant requirement
 - reasons for the person's actions or omission; and
 - any broader considerations (depending on the nature of the breach).
- R11. The safeguards described at paragraph 5.23 of this report should be developed and implemented prior to Centrelink implementing the option of suspending jobseekers who do not respond to contact attempts and requests.**



Recommendations

R28 Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)

R29 FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.

R29.1 As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



ASSESSING THE JOBSEEKER'S EXPLANATION

- 6.1 Our examination of breach complaints suggested that, in some of those cases, the person was presented with a substantial burden of proof to establish that they had an acceptable reason or excuse for any action or failure that suggested a possible breach. In those cases, there appeared to be a shifting of the onus of proof to the person together with a requirement for a high standard of proof. In some cases, even where the reason offered was proven, it was not accepted if there was no evidence of action by the person to correct or ameliorate the effect of any failure. (See case studies 4, 5 and 6)
- 6.2 The Admin Act enunciates a number of principles to guide the Secretary (and his delegates) in the administration of social security law. These include:
- the desirability of achieving ... the delivery of services under the law in a fair manner (Admin Act 8 (a) (iii)); and
 - the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal (Admin Act 8 (f)).
- 6.3 The Administrative Appeals Tribunal (AAT) has made a number of decisions on the determination of breaches and other relevant matters that provide some guidance on the onus and standard of proof required in making such decisions.¹

Onus of proof

- 6.4 In deciding to apply a breach penalty under social security law, there is clearly an obligation (onus) on the Secretary's delegate (Centrelink) to establish that a breach of the relevant legislative requirements has occurred.² This includes a requirement to consider all of the matters that are expressed in the legislation as making up a breach. In all cases it is not simply a matter of deciding that a failure or action occurred but also that it occurred without a "reasonable excuse" ("good reason", "special circumstances" etc.). In the case of most activity test breaches it also requires consideration of broader issues (overall efforts to comply with an activity agreement, whether the person is unreasonably delaying entering into an agreement etc.).
- 6.5 However it is also the case that there is, in practice, an onus on the person to show that they have a "reasonable excuse" etc. Centrelink would seem to be obliged under the terms of the legislation (and on the basis of procedural fairness) to give the person an

¹ See for example, *Re SDFaCS and Difford (2000)*, *SDFaCS and Perks (2000)*, *SDFaCS and Quinn (2002)*

² See the discussion of this issue by the AAT in, for example, *Re Wan and SDSS (1992)*



opportunity to present (and satisfactorily establish) their “reasonable excuse” etc but, if the person does not do so, the conclusion must be that there was no reasonable excuse.³

Standard of Proof

- 6.6 A number of AAT decisions provide guidance on the issue of the standard of proof that should apply in breach penalty cases. It has been argued before the AAT (in both breach cases and other administrative penalty cases) that a criminal standard of proof – “beyond reasonable doubt” should apply. The AAT has consistently rejected this argument and adopted the firm position that the standard of proof required in such decisions is the civil standard of proof – “balance of probabilities”. However, it has noted that, notwithstanding that the decision should be made on the basis of the “balance of probabilities”, the standard of proof required should be regarded as being of a reasonably high level, given the nature and consequences of the penalty for the person.⁴
- 6.7 While the comments of the AAT on the standard of proof relate to decisions by Centrelink to impose a breach penalty, it would seem unfair and unreasonable to impose a higher standard of proof on the person in relation to establishing a “reasonable excuse” etc. Our examination of breach complaints suggested that a “beyond reasonable doubt” standard might be being applied to the person in some of those cases. It would seem appropriate and consistent with the AAT guidance that any evidence offered as to “reasonable excuse” etc should be assessed on the basis of balance of probability. (ie. If the person is able to provide some evidence to verify their reasons or excuse, this should be assessed against any evidence to the contrary to form a view on the basis of the balance of probabilities.)

Centrelink Instructions and Training

- 6.8 FaCS policy guidelines do not provide any direction for Centrelink decision makers on matters relating to the onus or standard of proof to be applied in breach penalty decisions.
- 6.9 Centrelink’s instructions and training material also have very little discussion of these issues but, where they are alluded to, the advice provided may be misleading. It is possible that this may have led to some of the problems we identified in our examination of breach complaints. For instance:
- 6.10 Centrelink’s staff instructions include the following advice,

The onus is with the customer to provide sufficient proof in each case.

- 6.11 Instructions on third party breaches and training material includes the following advice,

*you must **not** give the job seeker the ‘benefit of the doubt’*

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(Bolding as appears in text.)

6.12 These statements could reinforce an incorrect view the onus is on the person to prove that a breach did not occur to avoid a penalty and that they must prove this beyond reasonable doubt. This may be further reinforced by some of the discussion included in Centrelink training material.

6.13 Although not specifically stated in the identified training objectives, one objective of the Centrelink training material on breaches appeared to be to overcome a perceived reluctance on the part of some Centrelink staff to impose breach penalties. All of the training material began with a module that includes an exercise on the “barriers to breaching”. The aim of the suggested exercise is to “get participants to think about some of the barriers which prevent them or others from applying breaches.” The group is then asked to suggest potential solutions to those barriers.

- The “possible barriers” listed include:

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sympathy for customer eg. accepting their ‘reasonable excuse’.*

- The suggested solutions include:

change in attitude (eg customer is the one who has breached, we’re only applying the penalty).

6.14 While other sections of the training and instructions deal appropriately with issues of Natural Justice requirements and the need to base decisions on the legislation, it is possible that the examples quoted above could lead to an incorrect approach to decision making in breach penalty cases, and lead to penalties being applied unfairly.

Acceptable reasons

6.15 Centrelink instructions and training also seek to provide advice and guidance on determining whether reasons offered by jobseekers are acceptable (amount to a reasonable excuse). The following general guidance on this issue appears in most Centrelink instructions and training material relating to all breach types.

When contacted, the jobseeker may give a reason/reasons for non-compliance. Centrelink staff then need to establish whether these reasons are acceptable in accounting for the jobseeker’s non-compliance.

An acceptable reason can exist where the main reason for non-compliance was OUTSIDE the jobseeker’s control. This is usually an unforeseeable or unavoidable circumstance followed by

Some action taken by the customer to address the situation (eg phone call to arrange alternative time etc)



Verification of situation where appropriate (eg medical certificate, police report, earnings etc)”

- 6.16 From our examination of breach complaints, and from the wording of this guidance in training material and instructions it would appear that the factors indicated in the above excerpt are being regarded as criteria to be applied in all breach cases when assessing reasons offered by job seekers. (ie. in each case the reason offered should be a matter outside the jobseekers control, unforeseeable, unavoidable, verified and followed by some steps on the part of the jobseeker to address the situation.)
- 6.17 While some or all of the factors indicated may be relevant considerations in assessing a jobseeker's actions in a particular breach decision, there does not seem to be any basis for adopting them as a set of general criteria to apply in all such cases. For instance, if a person was working at the time of a scheduled interview, this should be accepted as a “reasonable excuse” for not attending the interview, notwithstanding that it was a matter that may have been foreseeable and the person did not take any subsequent steps to address the situation.
- 6.18 As noted previously, the range of issues to be considered in deciding whether a breach has occurred vary according to the type of breach. The factors that have been used in the general guidance provided by Centrelink appear to have been derived from sub-section 601(6) of the Act. That provision provides that:

For the purposes of this section, a person takes reasonable steps to comply with a notice under subsection (1A), with a requirement of the Secretary under subsection (2), or with the terms of a Newstart Activity Agreement (as the case requires) unless the person has failed so to comply and:

- (a) the main reason for failing to comply involved a matter that was within the person's control; or
- (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.

- 6.19 The effect of that sub-section of the Act is limited to consideration of “reasonable steps” in relation to activity test matters included in section 601. It does not apply to many breach types, for example:

- all administrative breaches
- breaches for failure to enter into an activity agreement (including failure to attend an interview for that purpose)
- failure to attend a job interview
- failure to report or misreporting earnings
- voluntary unemployment or unemployment due to misconduct as a worker

- 6.20 This description of what constitutes reasonable steps also does not apply to Youth Allowance breaches. In the case of Youth Allowance section 541F provides that the person is to be regarded as having taken reasonable steps to comply with a requirement unless:



the Secretary is satisfied that the person has not attempted in good faith and to the best of his or her ability to comply with the requirement.

- 6.21 There have been many AAT decisions that involved a review of a decision to impose a breach penalty for failure to comply with a Newstart activity agreement. In those decisions, the AAT did consider the issues of control and foreseeability as criteria that should be applied in assessing reasons for non-compliance in each case (because sub-section 601(6) or previous similar provisions apply for that particular breach type). The AAT also gave consideration to other steps taken by the jobseeker. (Because of the requirement to assess overall whether the person was “taking reasonable steps”.)
- 6.22 Although, as noted, some of these factors may still be relevant considerations in other types of breach decisions, there is no basis for adopting them as general criteria for the administration of breach provisions that do not include those requirements.
- 6.23 Centrelink instructions and training material also provide guidance on how to deal with specific reasons that may be offered by jobseekers as excuses for non-compliance. This provides reasonable suggestions for verifying excuses offered by jobseekers. However, these instructions could be improved by noting that such verifications (eg. police reports, medical certificates) may not always be reasonably available to the person (particularly sometime after the event) and that, even where the suggested verification cannot be obtained, the person’s reasonable excuse” etc should be considered and a decision made on the balance of probabilities.
- 6.24 One specific example of inappropriate advice, included in the Centrelink instructions and training material, relates to decision making on breaches for failure to attend an interview for the purposes of negotiating an activity agreement. As noted previously (paragraph 4.9) in such cases an activity test breach may be imposed on the basis that the person is “unreasonably delaying entering into an agreement”. However the Centrelink instructions indicate that,

*you must **not**revoke the breach notification just because they now agree to attend the interview or comply with their PFWA.*

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*JNM/CWCs should **not** seek to have breach notifications revoked on the basis that a job seeker has simply ‘turned up’ in spite of failing to attend one or more prior appointments. CSOs should only make a decision on the basis of the job seeker’s actions in failing to attend the first appointment. To do otherwise sends the wrong message to job seekers and runs counter to the main purpose of the Activity Test provisions of the legislation, which is to ensure that job seekers comply at all times with their obligations for the receipt of income support.*

- 6.25 The above statements indicate a lack of understanding of the basis of activity test breach decisions in such cases and misrepresent the purpose and application of the activity test.



Non-receipt of notifications

- 6.26 In quite a number of cases of breach penalties imposed following non attendance at interview (either with Centrelink or a Job Network provider) the person has claimed that they did not receive the notice advising them of the interview. A number of problems were identified with the way in which such claims were assessed.
- 6.27 In dealing with these claims there was a presumption by the Centrelink officers that if Centrelink computer records show that a notice was issued to the correct address it was received and that they should require a significant level of proof that it was not. This suggests a very high level of confidence in the automated notice production, printing and distribution process operated for Centrelink by contracted mailing house companies. There have been a number of substantial errors and failures in the production of advices for Centrelink at various times, which would suggest that such an unshakeable level of confidence might not be warranted.
- 6.28 In such cases, it would seem unreasonable to require the complainant to show positive proof of non-receipt (eg. evidence of interference with mail) if the person has previously demonstrated appropriate responsiveness to Centrelink notices. As noted earlier, there are also other considerations that need to be taken into account before deciding that an activity test breach penalty is warranted.
- 6.29 A policy instruction by the Department of Family and Community Services suggests that this approach may have arisen from a misunderstanding of the legislative provisions relating to the giving of notices.

*"It has become clear through customer complaints, appeal cases and consultations with welfare organisations that some ODMs and AROs are interpreting sections 28A and 29 of the Acts Interpretation Act 1901 to mean that mail can be deemed to have been received if it has been correctly served. This is not correct."*⁵

- 6.30 The instruction advises that if the person claims not to have received a notice and there is no reason to doubt the persons claim, it should be accepted. If that instruction had been followed in many of the cases leading to complaints to the Ombudsman, a decision to impose an activity test breach penalty could not have been made. The action by the Department in issuing this instruction suggests that the incorrect practices identified in the sample of Ombudsman complaints may have been widespread. Complaints received by the Ombudsman since that policy instruction was issued suggest that information about the correct procedures in such cases may not have reached all relevant decision makers.

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Recommendations

R12. By July 2002, FaCS should prepare and include guidance on breach decision making in its “Guide to Social Security Law” to address the following issues:

- the decision making framework provided under the legislation;
- an explanation of the onus of proof and standard of proof applying in breach penalty decisions;
- the matters to be addressed in relation to various types of breach decisions (with specific guidance relating to determining those matters); and
- procedural requirements arising from the terms of the legislation and procedural fairness principles.

This guidance should be based on concepts established through AAT decisions and other relevant case law as well as accepted principles of natural justice.

(The Ombudsman’s office will be available to advise and assist with the preparation of this guidance.)

R12.1 FaCS should prepare and recommend changes to the Act to simplify and achieve greater consistency in the specification of breaches. This should include providing a more appropriate basis for assessing “reasonable steps” (sub-section 601(6). Section 541F (relating to Youth Allowance) may provide a reasonable alternative.

R13. Centrelink should immediately amend all instructions and training materials to address the issues and deficiencies identified in this chapter including:

- references in Centrelink instructions and training to the “onus of proof” and “benefit of the doubt”;
- the *Barriers to Breaching* exercises
- the guidance on “acceptable reasons” including the nature of verifications required
- the incorrect advice relating to “unreasonably delaying” entering into an activity agreement and “reasonable steps” to comply with an activity agreement.

R14. Centrelink should review its training material and instructions and prepare summaries and case scenarios based on the FaCS guidance referred to in R13 and ensure that all Centrelink breach decision makers receive training based on that guidance by December 2002.

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- R28** Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)
- R29** FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.
- R29.1** As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



ASSESSING THE JOBSEEKER'S EXPLANATION

- 6.1 Our examination of breach complaints suggested that, in some of those cases, the person was presented with a substantial burden of proof to establish that they had an acceptable reason or excuse for any action or failure that suggested a possible breach. In those cases, there appeared to be a shifting of the onus of proof to the person together with a requirement for a high standard of proof. In some cases, even where the reason offered was proven, it was not accepted if there was no evidence of action by the person to correct or ameliorate the effect of any failure. (See case studies 4, 5 and 6)
- 6.2 The Admin Act enunciates a number of principles to guide the Secretary (and his delegates) in the administration of social security law. These include:
- the desirability of achieving ... the delivery of services under the law in a fair manner (Admin Act 8 (a) (iii)); and
 - the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal (Admin Act 8 (f)).
- 6.3 The Administrative Appeals Tribunal (AAT) has made a number of decisions on the determination of breaches and other relevant matters that provide some guidance on the onus and standard of proof required in making such decisions.¹

Onus of proof

- 6.4 In deciding to apply a breach penalty under social security law, there is clearly an obligation (onus) on the Secretary's delegate (Centrelink) to establish that a breach of the relevant legislative requirements has occurred.² This includes a requirement to consider all of the matters that are expressed in the legislation as making up a breach. In all cases it is not simply a matter of deciding that a failure or action occurred but also that it occurred without a "reasonable excuse" ("good reason", "special circumstances" etc.). In the case of most activity test breaches it also requires consideration of broader issues (overall efforts to comply with an activity agreement, whether the person is unreasonably delaying entering into an agreement etc.).
- 6.5 However it is also the case that there is, in practice, an onus on the person to show that they have a "reasonable excuse" etc. Centrelink would seem to be obliged under the terms of the legislation (and on the basis of procedural fairness) to give the person an

¹ See for example, *Re SDFaCS and Difford (2000)*, *SDFaCS and Perks (2000)*, *SDFaCS and Quinn (2002)*

² See the discussion of this issue by the AAT in, for example, *Re Wan and SDSS (1992)*



opportunity to present (and satisfactorily establish) their “reasonable excuse” etc but, if the person does not do so, the conclusion must be that there was no reasonable excuse.³

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MISREPORTING EARNINGS

- 7.1 There are good reasons why the breach penalty for under-reporting of earnings should only be applied in extreme and blatant cases. The design of the allowance income test and associated rules about when and how earnings are reported are complex and make some level of under-reporting inevitable.

Gross versus net earnings

- 7.2 It is a requirement that gross earnings (before tax and other deductions) be reported rather than the amount actually received. Centrelink's experience suggests that this is not well understood by most people. It is in some ways counter-intuitive and can seem unfair. Also a person is more likely to know and recall an amount actually received rather than the gross figure. As a result, net rather than gross earnings is often declared, particularly by people who have not previously had to report earnings. While it could be argued that this is careless (they may not have fully read all the relevant notes on the reporting form), it should not be regarded as "knowingly or recklessly providing false or misleading information".

Reporting income when earned rather than received

- 7.3 Another requirement that does not appear to be well understood is that, for the allowance income test, income from earnings has to be taken into account and reported as it is earned, rather than when it is received. This means that when someone commences part time employment, they must report the gross amount earned in the first allowance reporting period even though they may not yet have received any payment for their work (and may not have received a pay slip showing gross earnings). In this circumstance, many people do not accurately know how much they are to receive for the work as a gross figure. Centrelink guidelines acknowledge that in such a situation the person will have to provide their best estimate of the amount earned. Subsequent receipt of actual payment information can often show that the estimate was incorrect.
- 7.4 This requirement also means that, unless the person's allowance reporting period lines up exactly with their pay period for employment, they will have to calculate the amount to be reported rather than simply rely on the gross amount shown on their payslip. In practice the person would have to know their gross hourly rate of pay (including any loadings for overtime, weekend work etc) and calculate the amount earned by multiplying the appropriate hourly rate by the number of hours worked on each day in the reporting period. This is, in reality, not an issue for people who have a regular earnings pattern because the amount earned in any fortnightly period is usually the same as the amount received in their pay period. However, the correct calculation can be quite complex if there are extra allowances (eg overtime or bonuses) for some days and not others or if the number of hours worked varies from week to week. This is often the case with part time or casual work. As a result, there is technical misreporting (which is probably unavoidable) in



many cases. In practice, this makes little difference because the variations in income reported and allowance paid even out over time and if any significant overpayments are identified, they can be recovered. These incidents of technical under-reporting could certainly not be regarded as “knowingly or recklessly providing false or misleading information”.

Failure to investigate relevant issues

- 7.5 Our examination of both our complaint sample and the sample of earnings breach cases provided by Centrelink showed little evidence of any attempt to seek an explanation or to give any specific consideration to whether the under-reporting was knowingly or recklessly intended to mislead. As reported (at paragraph 3.21) our discussions with some Centrelink staff (in the course of investigating complaints) indicated a widespread practice of ignoring this aspect of the breach decision on the basis that, if necessary, it could be raised in any review or appeal.
- 7.6 The provisions of the Act that provide for a breach penalty to be applied in cases of under-reporting of earnings (Section 630AA for Newstart Allowance and Section 550A for Youth Allowance) make it clear that a breach does not exist (and no penalty can be lawfully applied) unless the person “knowingly or recklessly provides false or misleading information”. The imposition of breach penalties in situations where this issue has not been established (or even considered) is unauthorised, unfair and amounts to a serious defect in administration.
- 7.7 In our view, an adequate investigation of issues in these cases would require a discussion with the person in all cases unless the level and duration of the under-declaration and other relevant information indicates a very high probability that the under-declaration did not involve the person “knowingly or recklessly providing false or misleading information”.
- 7.8 For instance, if the person only under-declared on their initial period of earnings or the level of under-declaration was relatively low it might reasonably be concluded that the under-declaration may be due to issues associated with the timing of receipt of income and/or net versus gross earnings and might be decided (on the balance of probabilities) that the under-declaration was therefore not knowing or reckless.
- 7.9 Where the level of under-declaration appears significant (eg. less than half of the actual earnings was declared) and continued over a number of fortnights there may be a strong indication that the under-declaration was probably at least reckless. However, even in such circumstances, we would suggest that procedural fairness requires at least giving the person an opportunity to explain before imposing any penalty.
- 7.10 In the absence of any discussion with the person, we would suggest that the following detailed information should be obtained about the person’s earnings before any decision is made:
- details of hours worked each day and the gross hourly rate applicable to those hours (to correctly calculate the level of earnings that should have been declared); and



- the gross and net total amounts of each payment actually made to the person and the date on which the net amount was paid to the person (to identify if the net amount was declared and/or income was declared when received).

The investigation and calculation of earnings overpayments

7.11 Our further investigation of some of the complaints relating to breach penalties for under-declaration of earnings indicated that the information on which Centrelink bases its calculation of earnings debts can sometimes be incomplete and can present an incorrect picture of under-declaration.

7.12 When requesting details of earnings from an employer Centrelink send the employer a form letter that asks for details of days and hours worked and a breakdown of dates worked, dates paid, gross pay and any allowances included. However, depending on the nature of records maintained by the employer, this breakdown of information may not always be provided as requested. Often the employer will report the gross and net pay for each pay period, but may not include details of days worked, hours worked each day or when the payment was actually paid to the person. Centrelink then calculates any entitlement (and overpayment) based on the information provided. This necessarily involves assumptions about those matters on which there is no information and those assumptions will rarely be correct in any particular case. This problem is illustrated in the following case study.

Case Study 11

Pamela was receiving Newstart allowance from 1/5/01 to 21/8/01. She worked casually from 3/7/01 to 1/10/01. In September after receiving advice from the ATO that her employer had lodged an Income Instalment Declaration relating to Pamela, Centrelink wrote to the hospital requesting verification of Pamela's earnings.

The employer provided Centrelink with computer printouts showing details of Pamela's earnings for the pay periods from 15/7/01 to 9/9/01. In summary these provided the following (relevant) information:

Pay period	Gross Pay	Net Pay
2/7 – 15/7/01	\$952.96	\$676.96
16/7 – 29/7/01	\$766.84	\$548.84
30/7 – 12/8/01	\$595.61	\$433. 61
13/8 – 26/8/01	\$699.84	\$503.84

Pamela's Newstart Allowance reporting periods during this time were the fortnights ending on 10/7, 24/7, 7/8, and 21/8/01.



Case Study 11 cont.

To calculate the amount Pamela earned during those reporting periods the Centrelink officer apportioned the gross pay amounts across the periods on the basis of a daily rate determined by dividing the Gross Pay for each fortnight by 14. For example earnings in the first reporting period ending 10/7 were calculated using an daily rate of \$68.06 (\$952.96 /14) for 9 days (\$68.06 x 9 = \$612.54). The results of these calculations are summarised below:

Reporting period	Calculation	Earnings
Ent ending 10/7	9x \$68.06	\$612.54
-- 24/7	(9x \$54.77) + (5 x \$68.06)	\$833.23
-- 7/8	(9 x \$42.54) + (5 x \$54.77)	\$656.71
-- 21/8	(9 x \$49.99) + (5 x \$42.54)	\$662.61

The earnings figures calculated as above were then compared with the earnings declared by Pamela for each of the allowance periods.

The earnings figures reported were identified to be significantly below the amounts Centrelink had calculated. An overpayment was calculated. A debt was raised and Pamela was requested to commence repayments. In addition a breach penalty was imposed for under-declaration of earnings (without any additional investigation).

As part of our investigation into the breach decision, and with Pamela's authority, we contacted the employer to get some additional information about Pamela's earnings during the period in question. The employer was able to provide details of each day actually worked, the hours payable for each day and the hourly rate. They also advised the dates payments were actually made for Pamela. The payments were normally made about 4 days after the end of the pay period. (It was not until that time that Pamela received a payslip.) From this information we were able to accurately calculate the gross amount Pamela actually earned and the net and gross amounts she actually received in each of the allowance reporting periods. This information is summarised (together with the amounts calculated by Centrelink, for comparison purposes) in the table below.

Reporting period ending	Centrelink calculation	Actual income if declared as earned	Gross income if declared as received	Net income if declared as received
10/7	\$612.54	\$714.72	Nil	Nil
24/7	\$833.23	\$1027.41	\$952.96	\$676.96
7/8	\$656.71	\$593.60	\$766.84	\$548.84
21/8	\$662.61	\$439.25	\$595.61	\$433.61



Case Study 11 cont.

The figures shown in the table above illustrate the following:

- **A considerable difference in income actually earned when actual working hours and hourly wage rates are used instead of a notional pro-rata calculation. (In this example the overpayment would have been around \$100 less if actual income earned had been used in the calculation. In other cases, the difference could mean a greater overpayment amount.)**
- **Had Pamela declared net income as it was received (column 4 in the above table), the level of under-declaration would have appeared to have been considerable, when compared to the Centrelink calculation but, nonetheless, may not have been a deliberate attempt to misrepresent.**

7.13 It is virtually impossible for many jobseekers to fully comply with the earnings reporting requirements and, in some cases, Centrelink seems unable to do so in its own calculations and assessments.

Conclusion

7.14 Given the significant complexity involved in the current requirements for reporting earnings, the related breach penalty provisions should be administered very carefully. The matter of whether any under-declaration was done knowingly and recklessly should be fully and appropriately considered before any decision to impose a penalty. This should take into account the difficulties associated with the delay between when the income is earned and received and the difference between net and gross income. It would seem appropriate to give the person the benefit of any doubt in deciding that issue.

7.15 Another reason why an activity test breach penalty should not automatically be applied for under-reporting cases is because the amount of any overpayment involved can often be quite small compared to the financial impact of an activity test breach penalty. The imposition of the breach penalty can result in a loss of allowances amounting to over \$800 (higher for a second or subsequent breach). In a larger sample (500 cases) of breach penalties due to under-declaration of income, 50% of the sample involved overpayments of less than \$800. Even for a substantial overpayment/debt of \$1000, a first activity test



breach penalty (18% rate reduction over 6 months) would be equivalent to well over 200% pa interest on the debt.

- 7.16 A policy instruction issued by FaCS in 1998 acknowledged some of these issues.¹ It noted that the under-declaration of earnings could often occur as a result of genuine mistakes or misunderstandings (for instance due to rounding of income amounts or declaration of net rather than gross earnings). That instruction advises Centrelink decision makers to exercise their discretion in cases of first time offences and, rather than impose a penalty, issue a warning letter to the person explaining the correct method of declaring earnings. We could find no evidence of this policy being applied in any of the samples of earnings breach penalties provided to us.
- 7.17 While our examination of complaints and samples of earnings breach cases suggests widespread defective administration in relation to earnings breaches, the level of under-declaration involved in most of the cases suggests that the under-declaration was probably deliberate. However, there was insufficient investigation to properly determine that in virtually all cases and it is probable that, in a significant minority of those cases, penalties would not have been applied, had the cases been appropriately investigated and decided in accordance with the legislation.
- 7.18 We have given considerable thought about whether there should be some form of redress provided to people who have incorrectly incurred a breach penalty as a result of the defective administration of this provision. In considering what may be appropriate in these circumstances we have had regard to the fact that in all cases those affected had rights to administrative review that were not exercised and to the considerable resources that would have to be expended in identifying and fully reviewing all of the cases that incurred a breach penalty for under-declaration of earnings. We concluded that *as a minimum* action should be taken to ensure that people who may have been incorrectly penalised due to an inadequate investigation of the relevant issues are not further disadvantaged if they incur a subsequent breach. Accordingly we are recommending that in any case where a second or subsequent breach penalty (within 2 years) is to be imposed for any reason, and one of the previous breach penalties was for under-reporting of earnings, the earnings breach decision should be re-examined before imposing the new breach.

¹ FaCS - Activity Test Section Policy Decision: 06/1998 dated 27/3/1998



Recommendations

- R16. FaCs should prepare and include detailed guidance in the Guide to Social Security Law on assessing income from earnings for allowances. This should include an acknowledgement of the difficulties that may be faced by clients in reporting income in the way required.**
- R17. Centrelink should review its training material on earnings reporting and assessment based on the FaCS guidance.**
- R18. Centrelink should develop simple information products and tools to assist clients to correctly declare income.**
- R19. FaCS should prepare and include detailed guidance in the Guide to Social Security Law on matters that must be considered in determining earnings breaches and minimum investigation standards in such cases. The guidance should cover:**
- the need to contact the person and discuss the circumstances of the misreporting prior to any breach decision;
 - acknowledgement of common difficulties for clients and the need to exercise care when determining whether any underreporting was done “knowingly or recklessly” and that in view of the difficulty for clients in complying with the reporting requirements they should be given the benefit of any reasonable doubt;
 - the need to obtain full earnings details (hours worked, hourly rate, net pay and when received) before making a breach decision if the client could not be contacted; and
 - reinforcement of the policy of issuing a warning and explanation for a first offence.
- R20. Centrelink should review all training material in relation to earnings breaches in light of the FaCS guidance and ensure that all breach decision makers, including debt recovery staff are trained using the revised materials before December 2002.**
- R21. FaCS should adopt as policy that no earnings breach will be applied for non- reporting (or under- reporting) of earnings if the at the time of reporting the earnings had not yet been received. (However, any overpayment would still be calculated and recovered.)**
- R22. FaCS and Centrelink should prepare a discussion paper on the implications of assessing earnings as received, rather than as earned, in most cases. (There might be a discretion to assess the income as earned or derived in cases of apparent manipulation of timing of receipt.) The discussion paper should also consider the impact of the proposed “Working Credit” on earnings reporting, assessment and earnings breaches. Following preparation of the discussion paper and consultation with welfare groups, FaCS should present options and implications to Government for consideration.**



Recommendations

R23. In any case where a second or subsequent breach penalty (within 2 years) is to be imposed for any reason, and one of the previous breach penalties was for under-reporting of earnings, the earnings breach decision should be re-examined and, if the earnings breach had been imposed without any discussion with the person prior to the decision, the earnings breach should be removed from the person's record before imposing the new breach.

Recommendations

R28 Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)

R29 FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.

R29.1 As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



REVIEW AND APPEAL ISSUES

- 8.1 The Administration Act makes available two levels of review of decisions made under social security law, including breach penalty decisions. The first level is an internal review by the Secretary, CEO or an Authorised Review Officer. The second level is an independent review by the Social Security Appeals Tribunal (SSAT). The Administration Act provides that a person can only apply for a review by the SSAT if the person has already had the matter reviewed internally and been given a decision on that internal review.
- 8.2 However, practices that have been adopted within Centrelink appear to require two stages of internal review. If the person requests a review of the decision, they are advised that the matter must first be reviewed by the original decision maker (ODM). If the ODM affirms the decision, the person is then advised that they can ask for the decision to be reviewed by an Authorised Review Officer.
- 8.3 This practice of referring all “requests for review” firstly to the original decision maker appears to cause some confusion among complainants about the review/reconsideration process. Complainants do not usually see the option of raising the matter with the person who made the decision as part of a genuine review process. In some cases, there has been some discussion with the ODM, either in conveying the decision (prior to written advice) or when the person makes a complaint or inquiry about notice of a breach or disruption to their payment. When this occurs after notification, it is not clear to the complainant (or to the Ombudsman’s office) if the discussion with the ODM and the ODM’s confirmation and explanation of the decision is a “review” in the terms of the Administration Act.
- 8.4 It would seem that, in many cases, the ODM has been so definite in explaining the reason for the breach (either before or after it is imposed), the complainant cannot see any point in requesting a review by that same person. In a few cases, complainants report that they have been told by the ODM that there is nothing that can be done, or no point in appealing. (This has also been frequently reported to the Ombudsman’s office in complaints on other matters and has been raised in meetings between the Ombudsman’s office and Centrelink.) Whether or not ODM’s have actually said such things it is clearly the impression that many complainants are left with.
- 8.5 In some cases, complainants who had already had the decision confirmed or explained by the ODM, were advised that, in order to request a review by an Authorised Review Officer, they had to again contact the Original Decision Maker. Such arrangements discourage complainants from exercising their rights to administrative review and unduly delay the administrative review processes.

Delays in the review process



- 8.6 Many complainants who did access the review process complained of unreasonable delays at various stages in the process. These included:
- delays of a week or more in getting to talk to the ODM;
 - delays in getting to discuss the matter with an ARO or in having the case referred to an ARO. In some cases the ARO had reviewed the case without contacting the person and the person was unaware that their case has been referred to the next stage of review.
 - delays (sometimes many weeks) in implementing a decision to set aside a breach penalty (ie: the person has been notified of the decision to overturn the original breach but there is a delay in restoring or increasing payment and/or paying arrears).
- 8.7 Delays were sometimes very lengthy after a SSAT or AAT decision. The Act allows the Secretary a period of 28 days to lodge an appeal against a tribunal decision. However in most cases it should not be necessary to delay implementation of a decision for that period. In some cases, the 28 day period was significantly exceeded.
- 8.8 One factor that appears to contribute to delays in the review and appeal process is arrangements for appointments in some offices. In some instances, complainants have been required to wait for up to two weeks for an appointment with an ODM. The Ombudsman's office has also previously raised concerns with Centrelink about an apparent practice in some offices to require an appointment for the lodgement of an appeal request.



Recommendations

R24. If there is any contact from a person after a breach decision (eg. to seek an explanation of or to complain about the decision) the Centrelink officer should ask the person if they wish to apply for a review of the decision. If the person indicates they do, that contact should be recorded as the date of request for the review.

R25. All requests for review of a breach decision should be allocated to an ARO. As part of their review process the ARO can ask the ODM to reconsider their decision and report the outcome of their reconsideration.

- If the ODM reconsideration results in revoking the breach, the ODM or ARO should then advise the person of this decision in writing and the review may then be regarded as finalised.
- If the ODM reconsideration affirms the breach decision, the ARO should then review the decision prior to advising the person of their decision in writing.
- Written notice of advice to the person should include advice of the right to seek an independent review by the SSAT and give advice on how to do so.

Alternatively the person should be given a choice of review by ODM or ARO and advised that either way they have the right to a written notice of the decision. The notice of decision (whether by ARO or ODM) should include advice of right to seek independent review by the SSAT. There should be no necessity for the person who receives a notice of decision from an ODM to have the case further reviewed by the ARO.

R26. Appointments for an ODM reconsideration or for an ARO review should be available with a week of request. It should not be necessary for any person to make an appointment to lodge a request for reconsideration, review or appeal. These should be able to be taken over the telephone or by e mail.

R27. The process outlined at Attachment B should be implemented by FaCS and Centrelink, to ensure that SSAT decisions are implemented, without undue delay, and in compliance with legislative requirements.



Recommendations

R28 Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)

R29 FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.

R29.1 As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



PERFORMANCE MANAGEMENT ISSUES

Targets for Breaching?

- 9.1 In the Ombudsman's 2000-01 Annual Report we reported on our investigation into media reports suggesting that Centrelink had entered into an agreement with the Department of Employment, Workplace Relations and Small Business (DEWRSB) with a condition that Centrelink would affirm at least 85% of breach penalties recommended by DEWRSB job network providers.
- 9.2 These reports raised concerns, at the time, that Centrelink might not be applying due consideration and proper processes to breach decisions and may, in effect, be rubber-stamping job network provider recommendations.
- 9.3 We requested access to the contract between Centrelink and DEWRSB, and met with Centrelink to discuss this situation. We were advised that the contract contained a performance indicator that "at least 85% of Work for the Dole activity and administrative breaches incurred are imposed". A similar indicator in relation to job network provider breach recommendations provided that "at least 60% of all possible breach notifications actioned are applied."
- 9.4 We reported that we had accepted Centrelink's assurances that the media had got it wrong, and that this indicator was actually directed towards job network providers, and was intended to be an accountability measure for the quality of their recommendations to apply breach penalties. We were assured that such an indicator would not lead to pressure on Centrelink decision-makers to sustain the bulk of Job Network provider recommendations.
- 9.5 That discussion in our 2000/01 Annual Report concluded with an indication of our intention to monitor the situation to ensure that Centrelink's original decision-makers are properly considering all breach recommendations before imposing penalties.
- 9.6 The issue of breach targets received some further media coverage following the release of the report of the Independent Review. That report raised more general concerns about numerical performance measurement in this area, the emphasis Centrelink places on its "contracts" with client departments and the risk that this emphasis might override or subvert legislative and policy requirements and goals. The report also referred to information given to the Independent Review suggesting that Centrelink's performance measurement activities had included comparisons of the incidence of breach penalties between various offices and areas.
- 9.7 In view of the further discussion of the impact of performance management practices and our examination of breach complaints and samples (which indicated that in a significant proportion of cases the requirements of legislation and policy appeared to be being



ignored), we decided to make further inquiries in relation to Centrelink's performance management arrangements for breaching. Our aim was to consider whether the relevant performance indicators or associated performance management activities may help to explain the level of non-compliance with policy and procedural guidelines we had identified.

- 9.8 Our discussions with Centrelink on this matter initially focused on gaining an understanding of the performance indicators that had been included in its business agreements with its client departments.
- 9.9 Centrelink advised that performance measures relating to breaching have existed in both the FaCS and DEWRSD/DEWR Business Partnership Agreements (BPA) with Centrelink.

FaCS performance indicators and measurements

- 9.10 Although, as previously noted, FaCS has policy responsibility for breach decisions, there are no identified key performance indicators (KPI), relating to breaches, in the FaCS-Centrelink BPA. However, the previous FaCS agreement (1998-2001) required that Centrelink monitor:

customers' compliance with Activity Test requirements, with those who do not meet requirements being breached.

- 9.11 The current FaCS agreement (2001-2004) uses the number of Activity Test and Administrative breaches for all unemployed customers as a measure in relation to this requirement. There is no benchmark or target in relation to this measure.
- 9.12 Centrelink reports to FaCS quarterly on employment service matters. These reports include tables showing the number of breach penalties imposed and revoked for various breach categories in each month. The report also shows (and may include comment on) the changes in breach numbers compared to the same period a year ago and the proportion of total breach penalties that each of the breach categories represent.
- 9.13 The reports and agreements give no indication of working towards any goal or desired trend in the incidence of breaches. For example, a decline in total breach numbers is simply noted with no indication of whether this is regarded as a positive or negative performance outcome.

DEWR/ DEWRSD performance indicators and measurements

- 9.14 The breach performance indicators included in Centrelink's BPA with DEWR/DEWRSD have changed significantly over recent years.



1999-2000 Centrelink/DEWRSB BPA

9.15 Centrelink's 1999-2000 agreement with DEWRSB included the following key performance indicators:

KPI 6: Breach Action

Benchmark:

At least 60 per cent of all possible breach notifications actioned are applied, and at least 75 per cent of these are maintained.

KPI 12: Work for the Dole Breach Action

Benchmark:

At least 85 per cent of Work for the Dole Activity breaches incurred are imposed.

At least 85 per cent of Work for the Dole Administrative breaches incurred are imposed.

9.16 It was these performance measures that led to the concern and criticism reported in the media in June 2000; that this effectively applied a quota on Centrelink in relation to breach decisions that was inconsistent with their responsibility to consider each possible breach notification, in light of the individual circumstances and in accordance with the legislation.¹

9.17 In our discussions with Centrelink at that time, we were advised that these indicators were not regarded as a quota but were meant to provide a benchmark that would give an indication of the quality of notifications provided by job network providers and Community Work Coordinators and the quality of Centrelink's decision making on breaches. We were advised that this was the shared understanding of those indicators between Centrelink and DEWSB. Centrelink acknowledged that the indicators could have been better expressed and the indicators have been changed significantly in the subsequent BPAs.

2000- 01 Centrelink/DEWRSB BPA

9.18 The KPIs relating to breaches were altered in the 2000-2001 DEWRSB/Centrelink BPA. The indicators relating to the proportion of breaches applied by Centrelink (for job network provider reports) were removed and new indicators on the timeliness of Centrelink's actions were included.

KPI 6: Centrelink Actioning of Job Network Participation Reports

The proportion of all participation reports that are actioned within the required time frame, and the proportion of breaches that are maintained.

(As reported to the Department by Centrelink on a monthly basis)

Benchmarks:

¹ ABC Radio news report 23 June 2000



At least 75 per cent of all breaches are maintained.
Action on at least 80 per cent of all participation reports is completed within ten working days
of electronic notification being received from Job Network members.

KPI 11: Centrelink Actioning of Work for the Dole Participation Reports

The proportion of all CWC participation reports that are actioned within the required time
frame, and the proportion of breaches that are maintained.

(As reported to the Department by Centrelink on a monthly basis)

Benchmarks:

At least 75 per cent of all breaches are maintained.

Action on at least 80 per cent of all participation reports is completed within ten working days
of electronic notification being received from CWCs.

2001-02 & 2002-03 Centrelink/DEWR BPA

9.19 Centrelink advised that the current DEWR BPA (2001-2002) included only one KPI
relating to breach matters.

KPI 4 Participation Requirements

Benchmark:

90 percent of all participation reports are actioned within 15 working days of receipt.

9.20 This single KPI was removed in July 2002. The 2002-03 agreement does not include any
KPI on breach processing but both DEWR and Centrelink have indicated that processing
times will continue to be monitored.

Risks involved in timeliness benchmarks – the need for a balance

9.21 The Independent Review alluded to some concerns that a focus on the timeliness of
decision making might lead to compromises on the quality of decision making and
shortcuts in the investigation process.

*Problems have also arisen in relation to measures of speed of processing (without
due regard for quality)..²*

9.22 These concerns would certainly appear to be valid in relation to the previous timeliness
benchmark of 10 days. (It is unlikely that 10 days would be sufficient in any case where it
was necessary to write to the person to give them an opportunity to give reasons for
apparent non-compliance.) In our view a benchmark of 15 days should be able to be
achieved, in the required percentage of cases, without compromising the investigation
processes we have identified as appropriate in breach decisions.

² Making it work- The Report of the Independent Review of Breaches and Penalties in the Social
Security System – page 97



- 9.23 However, if achievement of this benchmark is unduly emphasized, there is some risk that officers will seek to achieve the required benchmark by deciding the matter without an adequate investigation. As a general principle of performance management, performance indicators on quantity and timeliness need to be balanced by indicators of quality and/or accuracy. FaCS and Centrelink have recognised this in specifying performance indicators for the processing of allowance claims. While timeliness of processing of claims is a primary indicator, an accuracy standard is also specified as a performance requirement.
- 9.24 It is, therefore, important that Centrelink and FaCS institute measures to regularly monitor the quality of investigation and decision making in breach cases. FaCS should specify minimum standards (procedures) to apply to breach investigations, measure compliance with those standards through sample testing and report on those measurements alongside measurements of timeliness.

Management emphasis in monitoring performance

- 9.25 In light of concerns and suggestions that the administration of breaches was being unduly directed to maximising the incidence of breach penalties, we sought further information from Centrelink on their performance management activities. Our aim was to examine the extent to which maximising the incidence of breach penalties had been a focus in Centrelink's performance management activities.
- 9.26 The effective management of program delivery performance is a responsibility of line managers at all levels within the Centrelink network: national, area (regional) and local. However our inquiries focused on activities at the national level. We assumed that if there had been a concerted and coordinated "management push" within Centrelink on maximizing the incidence of breaches this would certainly be reflected in the activities, discussions and records of that agency's two top level committees with responsibility for management of the agency's performance; the Centrelink Board and the "Guiding Coalition" and in the performance reports being produced nationally. We sought and obtained copies of any records, reports or papers of those committees and samples of performance management reports relating to breach issues.
- 9.27 The Centrelink Board receives regular reports on Centrelink's overall performance in the form of a "balanced scorecard" report. One element of the balanced scorecard report is a report of performance outcomes against all of the KPIs specified in the BPAs (including KPIs relating to breaching). Our examination of a sample of balanced scorecard reports indicates that measures against the breach KPIs have simply been reported without any commentary. Centrelink has also advised that there has been no discussion at board meetings about breach performance, other than when reporting or responding to media comments and external reports. This suggests that there has not been a particular focus on breach numbers as a performance issue at the Centrelink Board level.
- 9.28 Similarly, Centrelink advises that there has been no discussion of breach performance issues at the Guiding Coalition.



Centrelink internal performance management activities

9.29 At the national level, as part of its internal performance management activities, Centrelink produces performance reports on various aspects of its operations, including breaching. Centrelink advised that:

Performance against the BPAs has been reported to the Centrelink network, Area Managers, monthly via the National Scorecards. Performance against the breach KPIs is reported against the Client partnership Outcomes section of the scorecard.

Lower level reports against KPIs were also produced monthly and circulated to the Area Activity Test Coordinators. This included:

- *KPIs for Activity Test measures (FaCS BPA), and*
- *Breach KPIs (DEWRSB BPA)*

(Centrelink advised that these lower level reports have not been produced since the first half of 2001, but the relevant performance information is now made available to Centrelink staff on the Centrelink intranet.)

9.30 Relevant Centrelink staff were also provided with reports comparing performance outcomes for their area and local office with national averages.

9.31 As noted above, the balanced scorecard reports appear to contain no commentary on breach indicators to indicate the performance emphasis. However our examination of a sample of the lower level, monthly report on DEWRSB breach indicators identified a number of concerns, in terms of the performance emphasis.

- The reports based on the 1999/2000 DEWRSB indicators do appear to show that the indicator relating to the proportion of possible breach notifications which lead to an actual breach penalty was being viewed as a performance requirement for Centrelink and not simply a measure designed to improve job network provider performance.

For instance, the April 2000 report includes the following commentary:

Information contained in Table 2 provides details of Centrelink's performance against part one of the Key Performance Indicator (KPI), **the requirement for Centrelink to 'achieve an initial applied rate of 60% for all possible breach notifications determined'**. For April, Centrelink achieved an initial applied rate of 56.0%, which is equivalent to March's result and equals the highest achievement for the financial year. The delivery of breach training to JNMs plus the implementation of guidelines to assist both Centrelink CSOs and JNMs in the breach process **should help Centrelink achieve target** in the near future.³

- There is a strong emphasis in the commentary on the need for Centrelink to "improve breach performance" by increasing the proportion of breaches applied.

³ (Bolding and underlining added)



- Reports against the previous indicator on the timeliness of breach processing (80% completed within 10 days) include an emphasis on maximising those processed within 7 days and the “performance improvement” indicated appears to be driven by an emphasis on this very quick turnaround of breach decisions. There is a significant risk that this was achieved through shortcuts in the investigation process.

9.32 Copies of the “DEWRSB Monthly Reports - Breach Outcomes” are provided for information at Attachment C.

Conclusion

- 9.33 It is possible that the inappropriate design of the former DEWRSB KPIs relating to breaching and associated performance management activity within Centrelink contributed to some Centrelink staff adopting inadequate investigation practices when considering breach decisions. Those performance management practices appear to have been in place over the period from late 1998 to early 2001. That period coincides with the substantial rise in the incidence of breach penalties. As discussed in Chapter 6 this performance emphasis may have been reinforced by some of the training and guidelines provided for Centrelink staff.
- 9.34 The appropriate application of breach penalties can have an important impact on the effectiveness and efficiency of employment assistance programs such as the job network. It is important that job seekers are encouraged to cooperate and comply with measures designed to improve their prospects of employment. It is also important that job network providers, who provide reports to Centrelink on possible breaches, can be confident that those reports will be actioned promptly and appropriately. However, policy responsibility for breaching lies with FaCS and it would, therefore, seem appropriate that any performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/Centrelink agreement. FaCS should ensure that any performance indicators relating to breaching are appropriately specified and take into account DEWR concerns in relation to the effective operation of employment assistance programs. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.



Recommendations

- R28** Performance indicators for Centrelink relating to breaching should appear in the FaCS/Centrelink BPA rather than the DEWR/ Centrelink agreement. (FaCS should consult with DEWR to ensure that their interests, in relation to the processing of advices from employment service providers about possible breaches, are adequately addressed.)
- R29** FaCS should ensure that any performance indicators relating to breaching are appropriately designed and specified. Indicators should be designed to ensure a balance of timeliness/quantity and accuracy/quality considerations, with an overriding requirement for any actions and decisions to be in accordance with the legislation and principles of procedural fairness.
- R29.1** As an interim measure, FaCS and Centrelink should agree on a measure of the quality of breach decision making (based on sample testing against defined investigation and decision making standards) to be reported in conjunction with the current breach timeliness indicator.



Abbreviations

AAT	Administrative Appeals Tribunal
ACOSS	Australian Council of Social Services
ARO	Authorised Review Officer
BPA	Business Partnership Agreement
CEO	Chief Executive Officer
CES	Commonwealth Employment Service
DEWRSB	Department of Employment Workplace Relations and Small Business
DEWR	Department of Employment and Workplace Relations
FaCS	Department of Family and Community Services
Independent Review	The Independent Review of Breaches and Penalties in the Social Security System
KPI	Key Performance Indicator
NSA	Newstart Allowance
ODM	Original Decision Maker
SSAT	Social Security Appeals Tribunal
the Act	The Social Security Act 1991
the Administration Act	The Social Security (Administration) Act 1999
YA	Youth Allowance



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Appendix 1



Appendix 2

Notes on Ombudsman Complaint Data and Sample

- a. Examination of complaints about breaches has required identification and retrieval of case details from the Ombudsman's case management systems. These systems store reasons for complaints using a series of key words. Basic statistics and case details can be obtained by searching the database using the relevant key words. This facility provides a good basis for broad estimates of (and trends in) complaint numbers on a particular issue. However, like any statistical database, it is subject to variations in the recording practices of users.
- b. While there is a specific reason code for Newstart and Youth Allowance breaches, such complaints may also be recorded in other ways. There is a range of other key words that might be used as reasons in breach complaints. (For instance a third activity test breach might simply be recorded as a Newstart cancellation or suspension.) This means that the number of complaints recorded as relating to breach penalties is likely to be understated. However trends and movements in numbers of complaints over time should be reliable indicators.
- c. Because of changes to the nature of breach penalties and changes to key word codes within the system, statistics can only be readily extracted for complaints received from the beginning of 1998.
- d. Examination of the Ombudsman's case management records indicates that there has been an increase in complaints received about Newstart and Youth Allowance breach decisions over recent years. (See Table 1.) This increase has been particularly marked over the last two years. The total number of complaints recorded as involving a breach decision increased by over 140% between 1999 and 2000 and has remained at that higher level (around 50 breach complaints a month).

Table 1: Ombudsman complaints recorded as involving breach penalty

	1998	1999	2000	2001
Youth Allowance			52	69
Newstart	209	258	561	564



Appendix 2

Total	209	258	613	633
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- e. The initial sample of 100 breach complaints was drawn from complaint details recorded on the case management system as at 1 July 2001 and included complaints received in the years 2000 and 2001. Details of the complaints and any subsequent investigations recorded by the investigation officers were examined. The majority of complaints did not result in a full investigation by the Ombudsman's office because, in most cases the complainants had not yet fully utilised their available rights of administrative review. However in all cases some initial inquiries had been made with Centrelink to confirm details provided by the complainant and determine whether further review was available.
- f. Following examination of the initial sample, investigation officers were requested to forward certain categories of breach complaints to the centralised Social Support Unit. These individual complaints were then investigated by that unit and added to the sample of breach complaints. A further 52 complaints were identified in this way and added to the original complaint sample.
- g. A sample of 150 breach cases was also obtained from Centrelink. The sample was drawn by random selection from a listing of breach decisions recorded during the 2001 calendar year.



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Appendix 3

DEWRSB Monthly Report - JNM/WFD Breach Outcomes (February 2001)

KPI 6 - Breach Action

The proportion of all participation reports that are actioned and applied, and the proportion of those that are maintained.

(As recorded on, and sourced from, IES and ISIS)

Benchmarks:

- ☒ at least 75 per cent of all breaches are maintained.
- ☒ 80 per cent of participation reports are completed within ten working days of electronic notification being received from Job Network members.

Data in table 1 provides details of performance against part one of the KPI, 'that at least 75% of all breaches are maintained'. For the month of February 2001, Centrelink's maintained rate was **75.6%** which is above the benchmark target.

Table 1: Percentage (%) Breaches Maintained (Percentage of current number of breaches applied against initial number): July 2000 - February 2001

Month	% Breach Maintained
July	77.8%
August	79.9%
September	77.4%
October	76.5%
November	78.1%
December	76.0%
January	79.1%
February	75.6%

Source: IES

The data in table 2 below provides details on timeliness of processing 'electronic' JNM participation reports and indicates that, for the month of February 2001, **80.4%** were actioned within 10 working days and meets the KPI benchmark target.

Table 2: Percentage (%) JNM Participation Reports Actioned within 7 & 10 working days (July 2000 - February 2001)

Month	Participation Reports actioned	Within 7 working days	Within 10 Working Days	% within 7 working days	% within 10 working days
July	11,790	5,743	7,202	48.7%	61.1%
August	14,551	8,023	10,054	55.1%	69.1%
September	13,137	7,845	9,687	57.1%	70.5%
October	15,013	9,411	11,725	62.7%	78.1%
November	15,121	10,043	12,326	66.4%	81.5%
December	10,996	6,101	7,530	55.5%	68.5%
January	14,245	9,245	11,459	64.9%	80.4%
February	13,704	8,897	11,037	64.9%	80.5%



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Summary

For the month of February a total of 16,028 JNM participation reports were actioned by Centrelink, 9,691 were initially applied of which 7,327 (75.6%) had breach penalties maintained.

Centrelink has continued to meet both requirements of KPI 6 thus positively reflecting on the strategies in place to ensure consistent decision making processes are in place when actioning JNM participation reports.

KPI 12 - Work for the Dole Breach Action

The proportion of Work for the Dole participation reports incurred that are imposed and revoked. (As recorded on, and sourced from, IES)

Benchmarks:

- ☒ at least 75 per cent of applied breaches are maintained.
- ☒ 80 per cent of participation reports are completed within ten working days of electronic notification being received from Community Work Coordinators.

Data in table 1 (below) provides details of performance against part one of the KPI, 'that at least 75% of all breaches are maintained'. For the month of February 2001, Centrelink maintained an applied rate of **75.8%**, which is a slightly below January's result but still above the KPI benchmark target.

Table 1: Percentage (%) Breaches Maintained (Percentage of current number of breaches applied against initial number) - July 2000 - February 2001

Month	% Breach Maintained
July	78.9%
August	73.4%
September	71.9%
October	75.0%
November	74.0%
December	73.2%
January	77.9%
February	75.8%

Source: IES

The data provided by IES (in table 2) on the timeliness of actioning CWC participation reports indicates that, for the month of February **81.5%** of all CWC breach notifications were actioned within 10 working days. This is a slight decrease on January's performance but still exceeds the KPI benchmark target.

Table 3: Percentage (%) CWC Participation Reports Actioned within 7 & 10 working days (July 2000 - February 2001)

Month	Breaches Actioned	Within 7 Working Days	Within 10 working days	% within 7 working days	% within 10 working days
July	804	477	561	59.3%	69.8%
August	4,524	2,822	3,428	62.4%	75.8%



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September	5,983	3,645	4,474	60.9%	74.8%
October	7,541	5,071	6,175	67.2%	81.9%
November	7,848	5,693	6,810	72.8%	86.8%
December	5,499	3,355	4,011	61.0%	72.9%
January	6,588	4,440	5,404	67.4%	82.0%
February	6,568	4,409	5,350	67.1%	81.5%

Summary

For the month of February a total of 6,568 CWC participation reports were actioned by Centrelink, 3,821 were initially applied, of which 2,895 (75.8%) had breach penalties maintained.

Achievement of both benchmark targets for the month of February 2001 indicates that the range of strategies put in place to assist processing of participation reports in a timely manner and initially getting the decision right, which will ultimately result in higher maintained rates, are having their desired effect.



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DEWRSB Monthly Report - JNM/WFD Breach Outcomes (April 00)

KPI 6 - Breach Action

The proportion of all possible breach notifications that are actioned and applied, and the proportion of those that are maintained.

(As recorded on, and sourced from, IES and ISIS)

Benchmarks: At least 60 per cent of all possible breach notifications actioned are applied, and at least 75 per cent of these are maintained.

The percentage of total breaches applied (final outcome) for April of 45% is the second highest achieved for this financial year. The total number of breaches received and applied by Centrelink in April is significantly higher than March's figures and represents the highest level of breach action since the inception of the Job Network. Whilst an increase was expected due to Round 2 providers commencing duties from 28 February 2000, it was not anticipated that it would reach this level so early after training was provided.

Table 1: Employment Market Breaching from June 99 to April 00 - Final Outcome

Breaches	July	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr
Applied Breaches	3,671	4,233	5,067	5,035	5,486	3,765	3,352	2,591	4,667	7026
% Breaches Applied	36.0%	38.9%	42.7%	42.5%	42.7%	43.1%	42%	42%	46%	45%
Rejected Breaches	n/a	4845	5583	5289	5811	4108	3712	2923	4411	6864
Revoked Breaches	6,518	1808	1208	1519	1552	869	918	655	1069	1716
% Breaches Rejected & Revoked	64.0%	61.1%	57.3%	57.5%	57.3%	56.9%	58%	58%	54%	55%

Source: IES

Information contained in Table 2 provides details of Centrelink's performance against part one of the Key Performance Indicator (KPI), the requirement for Centrelink to 'achieve an **initial applied** rate of 60% for all possible breach notifications determined'. For April, Centrelink achieved an initial applied rate of 56.0%, which is equivalent to March's result and equals the highest achievement for the financial year. The delivery of breach training to JNMs plus the implementation of guidelines to assist both Centrelink CSOs and JNMs in the breach process should help Centrelink achieve target in the near future.

Table 2: Employment Market Breaching: April 2000 - Initial Decision

Breach	Total	Number applied	% Applied	
			Apr 00	Mar 00
Job Matching	822	343	42%	44%
Job Search Training	2,561	1,219	48%	53%
Intensive Assistance	12,223	7,177	59%	58%
TOTAL	15,606	8,739	56%	56%

Source: IES

Data in table 3 provides details of performance against part two of the KPI, '**that at least 75% of these decisions are maintained**'. For the month of April, Centrelink achieved a maintained rate of 80.4%, a slight decrease on March's result but still significantly higher than the required standard.



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Centrelink has achieved this benchmark for the last six months and the recent round of breach training should facilitate the continued achievement of this target.

Table 3: Percentage (%) Breaches Maintained (Percentage of current number of breaches applied against initial number) - April 2000

Breach Type	% Breach Maintained	
	Apr 00	Mar 00
Job Matching	73.8%	79.5%
Job Search Training	85.4%	81.1%
Intensive Assistance	79.7%	81.0%
Total	80.4%	81.7%

Source: IES

The level of Third Party breach activity continues to increase, with April providing the highest number of 'actioned' breaches to date. The amount of breach training being conducted in the network has placed Centrelink in a strong position to ensure JNM breach notifications are actioned in the correct manner.

Breach training was initially targeted at 'new' Round 2 providers, but provision was made for continuing JNM organisations to send some of their staff for refresher training. At most training sessions, Centrelink CSOs and Authorised Review Officers (AROs) were in attendance to provide expert advice on local procedures and job seeker's appeal rights. 'Transition' arrangements were incorporated for the electronic breach notification process into the breach training package, to assist JNMs understand the concept of using comments screens to record details supporting their possible breach notification.

Feedback from Centrelink CSCs indicates this 'transition' has been reasonably trouble free, with consultation occurring between both parties to ensure suitable documentation is provided (electronically) to allow Centrelink to determine the breach. This smooth transition augurs well for the new 'online' notification process post July 2000.

KPI 12 - Work for the Dole Breach Action

The proportion of Work for the Dole activity and administrative breaches incurred that are imposed and revoked. (As recorded on, and sourced from, IES)

Benchmarks:

- At least 85 per cent of Work for the Dole Activity breaches incurred are imposed.
- At least 85 per cent of Work for the Dole Administrative breaches incurred are imposed.

Activity test breach 'percentage (%) maintained' levels for April have declined against the previous month's results, but Administrative breach 'percentage (%) maintained' levels have remained consistent with previous achievements. Centrelink NSO is about to commence further 'quality assurance' checks on WFD breach revoke reasons to identify the more common reasons why breach revoke levels remain high. It is anticipated that the outcomes will be used to develop strategies to ensure the '% maintained' rate improves, including the tightening of procedures to accommodate post July changes.



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As part of the March release, a new 'activity test' breach code (BAW) was introduced to replace the previous administrative breach code to tighten call-in procedures to reflect the nature of the interview, ie. to negotiate an activity agreement.

A new code, BWS, was introduced in March for Administrative breaches to cater for those situations where CSC's are unable to interview the job seeker immediately to negotiate an activity agreement, to date, 1286 breaches have been applied using this code with 844 being maintained.

Table 1: Administrative Breaches Applied for Work for the Dole

Month	Applied Breach	Maintained Breach	% Breaches Maintained	Revoked Breach	% Applied Breaches Revoked
January	3,484	2,151	61.7%	1,333	38.3%
February	3,746	2,302	61.4%	1,444	38.5%
March	3,440	2,171	63.1%	1,269	36.9%
April	4,543	2,891	63.6%	1,652	36.4%
Total fin yr to date	31,856	21,077	66.2%	10,777	33.8%
98/99 fin yr total	26,110	20,134	77.1%	5,976	22.9%

Source: ISIS

Table 2: Activity Test Breaches Applied for Work for the Dole

Month	Applied breach	Maintained breach	% Breaches Maintained	Revoked Breach	% Applied Breaches Revoked
January	1,305	981	75.2%	324	24.8%
February	1,581	1,149	72.7%	432	27.3%
March	1,262	953	75.5%	309	24.5%
April	1,528	1,088	71.1%	323	30.2%
Total fin yr to date	12,288	8,861	72.1%	3,424	27.9%
98/99 fin yr total	6,793	4,799	70.6%	1,994	29.4%

Source: IES



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Issues to be investigated in breaching decisions

Every case of a possible breach (whether an activity test or administrative breach) will require investigation and consideration of the following matters:

- whether the action or failure to comply did actually occur;
- whether the requirement imposed on the jobseeker was reasonable in the circumstances (including whether the person was informed of the requirement); and
- any reasons for the person's actions or failure to comply.

The requirements of the legislation determine the criteria against which the reasons for the person's actions or failure are to be assessed and whether there are additional (broader) considerations to be addressed.

“without a reasonable excuse”

The following breach provisions indicate that the reasons for the actions or failure should be assessed against the criteria of whether they constitute a “reasonable excuse”

- *Failure to attend a job interview*
[Social Security Act reference – 601A(1) for NSA and 550A for YA]
- *Refuse an offer of employment*
[Social Security Act reference – 630(1) for NSA and 550A for YA]
- *Failure to commence or complete a Work for the Dole program*
[Social Security Act reference – 601A(3) for NSA and 550A for YA]
- *Voluntarily leaving or dismissal from a labour market program*
[Social Security Act reference – 601A(2) for NSA and 550A for YA]
- *Failure or refusal to provide information about earnings*
[Social Security Act reference – 630AA(1)(a) for NSA and 550A for YA]
- *Administrative Breach (Failure to attend interview, to contact department, provide information etc)*
[Social Security Administration Act reference – 63(5) for NSA and 63(4)(e) for YA]
[Social Security Act reference – s631 for NSA and 558(1) for YA]



Attachment A

Broader considerations

“fails to take reasonable steps to comply with a requirement”

The following breach provisions indicate that the persons actions should be assessed the criteria of whether the person has taken reasonable steps to comply with a requirement.

- *Failure to undertake suitable paid work or to participate in:*
 - *Work for the Dole;*
 - *vocational training;*
 - *an approved labour market program;*
 - *a rehabilitation program;*
 - *the Community Support Program or*
 - *any other activity approved by the Secretary,*
when required to do so.[Social Security Act reference – s601 for NSA and s541 for YA]
- *Failure to comply with the terms of an activity agreement*
[Social Security Act reference – s601 & s626 for NSA and s541 for YA]
- *Failure to provide completed Employer Contact Certificates*
[Social Security Act reference – s601 for NSA and s541C for YA]

The Act provides guidance on what constitutes “reasonable steps” but the definition is different for NSA and YA.

For NSA a person is regarded as taking reasonable steps:

-unless the person has failed to comply and:
- (a) the main reason for failing to comply involved a matter that was within the person's control; or
 - (b) the circumstances that prevented the person from complying were reasonably foreseeable by the person.

For YA a person is regarded as taking reasonable steps:

-unless the Secretary is satisfied that the person has not attempted in good faith and to the best of his or her ability to comply with the requirement.

Additional considerations for Activity Agreements

Where a person fails to comply with one of the terms of an activity agreement, the AAT has taken the view that the circumstances of (any reasons for) non-compliance need to be taken into account and the person’s overall compliance with the range of terms included in agreement need to be taken into account in deciding if the person could be said to have failed to comply.



Attachment A

Unreasonably delaying

Where a person fails to attend an interview for the purposes of negotiating an activity agreement (or respond to correspondence about the negotiation or refuses to agree to reasonable terms) it is necessary also to determine that the person is “unreasonably delaying” entering into the agreement before a breach is established

[Social Security Act reference – s607 for NSA and 544C for YA]

Other considerations

The Act also provides, in the case of some breach types that other matters need to be considered when determining if a breach has occurred. For instance:

- the Requirement to provide completed *Employer Contact Certificates* does not apply if there are *special circumstances* in which it is *not reasonable to expect the person to comply* with the requirement,
[Social Security Act reference – s601 for NSA and s541C for YA]
- a person who becomes unemployed voluntarily should not be breached unless *the Secretary is not satisfied that the voluntary act was reasonable*.
[Social Security Act reference – s628 for NSA and s550A for YA]
- the Act provides some guidance on the circumstances in which particular requirements can be regarded as reasonable or unreasonable. (For example there is detailed guidance on when work is to be regarded as not suitable for the person)



RECOMMENDED PROCESS FOR IMPLEMENTING SSAT DECISIONS

We recommend that a simple two-stage approach be adopted.

Stage 1

The SSAT decision is referred to a Centrelink officer (could be either the advocate or the business leader). This officer would be responsible for classifying the matter into one of the following categories (within 7 days).

A) No Appeal to be considered

The case would be immediately referred back to relevant Centrelink office with instructions that the decision should be implemented immediately. We would expect that a significant majority of SSAT decisions would be in this category.

B) Decision to be implemented but appeal to be further considered.

The relevant Centrelink office would be instructed that the decision should be implemented immediately. The case would be referred to FaCS legal area for consideration of an appeal to the AAT.

C) Implementation decision to be delayed pending consideration of appeal and stay application.

The case would be referred to FaCS legal area for consideration of an appeal and application for stay order to the AAT.

FaCS would be responsible for providing guidance to these Centrelink officers, based on the type of decision (eg. matters based on opinion formed on the basis of facts of the individual case would not be appealed) and possibly subject matter areas. Guidance could be updated regularly. FaCS would monitor regular summary reports of SSAT decisions to identify trends that may need to be addressed. FaCS would also monitor the timeliness of this stage and could undertake quality assurance through sample checking.

Stage 2

A FaCS legal officer would examine cases in category B and C above. This officer would be responsible for classifying the matter into one of the following categories (within 7 days).

B (i) no appeal warranted

returned to Centrelink for immediate implementation of the SSAT decision



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Attachment B

B (ii) *AAT appeal to proceed*

It would be desirable to notify the client of the intent to appeal at this time

C (i) *no appeal and stay warranted*

returned to Centrelink for immediate implementation of the SSAT decision

C (ii) *AAT appeal to proceed and stay application to be made*

It would be desirable to notify the client of the intent to appeal and apply for a stay at this time.

The FaCS legal officer could, where necessary consult with the relevant “program” area in deciding this matter.

(In general case details should be referred electronically. It should only be necessary to obtain paper records once a decision to appeal has been made.)

Adoption of this approach should result in better service to clients as well as more effective use of resources within both FaCS and Centrelink.