

Lessons in lawfulness

Own motion investigation into Services Australia's and the Department of Social Services' response to the question of the lawfulness of income apportionment before 7 December 2020

Statement by the Commonwealth Ombudsman, Iain Anderson

Highlights



WHY DID WE INVESTIGATE?

- In February 2023, Services Australia and the Department of Social Services (DSS) told our Office there was an issue with how Services Australia had been apportioning income to calculate social security payment rates before 7 December 2020, when the law changed.
 - ‘Income apportionment’ is different to ‘income averaging’ that was at the heart of Robodebt.
 - The Administrative Appeals Tribunal (AAT) sent some debts back to Services Australia to be recalculated. This raised concerns about whether income had been lawfully calculated.
 - Services Australia advised it paused approximately 13,000 debt reviews while the agencies sought legal advice. Another 87,000 files which may become debts were also potentially affected by unlawful or incorrect income apportionment calculations.
 - Given the scale, significance and potential impact, the Ombudsman decided to conduct two investigations into income apportionment:
 - Investigation 1 – lawfulness of the agencies’ approach to income apportionment.
 - Investigation 2 – examining the agencies’ administration of income apportionment decisions, communication with customers, and handling of complaints, internal reviews and AAT or Federal Court appeals.
 - [This statement relates to Investigation 1.](#) Investigation 2 is ongoing.
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WHAT DID WE FIND?

- Since at least 2003, Services Australia (and its precursor the Department of Human Services), was unlawfully apportioning customers’ income across two or more Centrelink instalment periods. This in turn likely affected social security payment rates and may have lead to unfair debts against customers.
 - Since becoming aware of the issue in October 2020, the agencies took steps to seek legal advice, but could have acted quicker to finalise advice.
 - There is an unresolved and significant difference of opinion between some of the legal advices.
 - The General Instructions that DSS developed to guide how decision-makers should recalculate the approximately 100,000 actual and potential debts need further development.
 - The agencies could have acted quicker to inform us of this issue, particularly since Services Australia knew our Office had investigated some of the affected complaints.
 - The agencies are still determining how much the known and potential debts are affected – that is, how much payment rates went up or down because of unlawful or inaccurate income apportionment calculations. It is unknown how many other customers may have been impacted by unlawful or inaccurate debts or underpayments.
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WHAT DID WE RECOMMEND?

- We made four recommendations (one with two options) and one suggestion for the agencies to establish clear and lawful positions on income apportionment, and to foster cooperation with other Commonwealth agencies to resolve other outstanding issues.
 - DSS and Services Australia undertook to implement all four recommendations (partially accepting one and accepting the other three) and the suggestion. We will monitor their progress.
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NEXT STEPS

- The Solicitor-General advised, in the first instance, the agencies should see if a clear legal position can be reached by the legal professionals who provided advice. The agencies agreed to pursue this.

Lessons in lawfulness

Ombudsman investigation into Services Australia's and the Department of Social Services' response to the question of the lawfulness of income apportionment before 7 December 2020

In July 2023, the Office of the Commonwealth Ombudsman (the Office) finalised an investigation into Services Australia's and DSS's response to the question of the lawfulness of income apportionment.

The Ombudsman, Mr Iain Anderson, issued a formal report to both agencies and the Ministers for Government Services and Social Services, providing the findings of the investigation and making four recommendations (recommendation 1 had two options), one suggestion and two comments.

The report includes details about legal advice sought by the agencies about this matter. Owing to the need to protect privilege attached to that advice, the Ombudsman decided not to release the report publicly. Instead, we are publishing this statement to provide visibility of the investigation's findings and recommendations and the agencies' response.

Background to the investigation

On 29 October 2020, at Senate Estimates, then-Senator Rex Patrick raised concerns with Services Australia about the lawfulness of its approach to apportioning income when calculating Centrelink payment rates. The Guardian Australia reported on the Senator's questions and AAT reviews of debts in November 2020¹ and March 2021², respectively.

In February 2021, the AAT made two decisions requiring Services Australia to recalculate debts that related to income apportionment. The AAT identified issues in how Services Australia was applying section 1073B of the *Social Security Act 1991* (the Social Security Act) to apportion income. Section 1073B was in force between 2003 and 7 December 2020.

Around March 2021, the Office began receiving complaints about delays in Services Australia reviews. Between then and January 2023, we investigated or made preliminary inquiries about these individual complaints. Services Australia did not inform us, as part of these investigations, that these review delays were affected by this underlying legal issue.

In January 2023, Services Australia approached the Office to offer a briefing on income apportionment. At that briefing, on 17 February 2023, Services Australia and DSS told us that, in the period between becoming aware of the issue and advising our Office, they:

- obtained several draft and final advices from multiple legal providers
- identified approximately 13,000 requests for reviews of debts that may be impacted by income apportionment – they placed these reviews on hold while the agencies considered how best to approach them, and
- identified another approximately 87,000 potential debts which may be affected by income apportionment.

¹ The Guardian online, Luke Henriques-Gomes, [More welfare debts under scrutiny after tribunal rulings cast doubt on Services Australia methods](#), 10 November 2020, accessed 15 July 2023.

² The Guardian online, Luke Henriques-Gomes, [Centrelink must review welfare debts after tribunal casts further doubt on income averaging, senator says](#), 6 March 2021, accessed 15 July 2023.

Our investigation also found:

- This issue impacted payment calculations from at least 2003 and continued until an (unrelated) amendment to social security law took effect from 7 December 2020.
- A range of social security payment types were affected by income apportionment – either indirectly or directly – as outlined in Figure 2 below.
- Due to the number of payment types affected, and the length of time these income apportionment issues were occurring, there may be more customers affected than the 100,000 reviews and debt matters already identified.

Figure 2 – social security payment types affected by income apportionment, before 7 December 2020

Benefits and allowances	Pensions	Ceased payments subject to formal reviews	Indirectly affected payments
Newstart Allowance* JobSeeker Payment Youth Allowance ABstudy Austudy Special Benefit	Age Pension Parenting Payment Disability Support Pension Carer Payment	Partner Allowance Widow Allowance Sickness Allowance	Supplementary payments where income may preclude eligibility, including Family Tax Benefit and Coronavirus Supplement, may be affected.
*Newstart Allowance ceased as of 20 March 2020			

Our investigation considered two key questions regarding the agencies’ approach to engaging with the question of the lawfulness of income apportionment:

- Once aware of the issues, did Services Australia and DSS take appropriate steps to seek legal advice and develop lawful positions on income apportionment issues?
- Have Services Australia and DSS reached lawful and clear positions on income apportionment?

Once aware, did Services Australia and DSS take appropriate steps to seek legal advice, and develop lawful positions, on income apportionment issues?

We found that, overall, Services Australia and DSS took appropriate steps to seek legal advice on income apportionment issues. Their selection of legal professionals was clearly explained, defensible and otherwise appropriate in all the circumstances. However, we consider the agencies took an unreasonably long time to finalise the advice from the first firm while it sought advice from the second.

Additionally, there are still several issues our Office considers are not yet legally resolved. We made recommendations to assist the agencies to resolve these expeditiously, noting they have been aware of these issues since 29 October 2020 and income apportionment is likely to affect a large number of people.

Comment 1

There was an unreasonable delay in establishing legal positions about income apportionment issues after the agencies first became aware of them in October 2020.

DSS created ‘General Instructions’ to provide guidance to Services Australia decision-makers on how to process and review potential debts by Services Australia which were potentially miscalculated due to unlawful application of income apportionment provisions. The General Instructions represent the policy position for how to calculate income apportionment debt-raising processes. Currently, they do not cover any potential underpayments which may have been caused by income apportionment practices.

We concluded that the General Instructions need further development to enable the agencies to provide assurance that its position on income apportionment is lawful and clear.

The agencies correctly reported income apportionment as a significant legal issue to the Office of the Legal Services Coordination as required under the *Legal Services Directions 2017*. However, we observed there was some uncertainty between the agencies about who should hold responsibility for reporting this issue.

Suggestion 1 – Decide responsibility for future significant legal issues reporting

We suggest Services Australia and DSS collaborate to decide whether to report further to the Office of Legal Services Coordination about broader section 1073B issues. The decision should also include which agency will be responsible for future reporting on this matter.

Our investigation also revealed that, despite pausing most debt reviews affected by income apportionment from mid-2021, the agencies did not contact our Office until January 2023 to offer a briefing about this issue. This impeded our ability to provide complainants who approached us about these delays with clear and timely outcomes and comprehensive responses to their concerns.

Sharing information about income apportionment at an earlier stage with our Office would have provided valuable context for our investigations, improved outcomes for individuals, and likely reduced the workload of both our agencies by minimising inefficiencies associated with investigating numerous individual complaints about the same issue.

The Office has unique visibility of systemic issues across the wider APS, and experience in monitoring what solutions work when agencies encounter administrative problems. Engaging earlier with our Office could also have enabled us to provide Services Australia and DSS with assistance and/or guidance to resolve this serious systemic issue more effectively and efficiently.

Comment 2

Services Australia failed to act in a timely manner to inform us of income apportionment issues, despite us engaging with them on complaints related to this, which impacted agency customers and Ombudsman's Office complainants. The agency conduct in this regard fell short of our general expectations of Australian Government agencies.

Have Services Australia and DSS reached lawful and clear positions on income apportionment?

The fact that s 1073B of the Social Security Act did not permit Services Australia to apportion income across two or more Centrelink fortnights also gave rise to the following legal issues which our investigation considered:

- What evidence should be relied on to lawfully assess rates of social security benefits and pensions for payments made before 7 December 2020. Evidence includes payslips which may or may not show days and hours income was earned.
- Whether, under section 126 of the *Social Security (Administration) Act 1999* (SS (Admin) Act), there is a positive obligation on the Secretary of DSS and delegated decision-makers to review past decisions which may be incorrect due to income apportionment.
- The impact unlawful income apportionment calculations have on past and future criminal prosecutions for social security debts.

Using evidence to calculate social security benefits and pensions

We found there is a significant difference in the preferred views of different legal providers about how to apportion income for social security benefits for payments made before 7 December 2020.

We found Services Australia and DSS could do more to settle this difference in legal opinion.

Services Australia and DSS adopted a position (in the General Instructions) on how to calculate social security benefits and social security pensions prior to 7 December 2020, and what evidence to rely on. However, since the AAT has not commented on this methodology in any detail in recent relevant decisions, we consider there is a risk of legal challenge at the AAT or the courts.

To assist the agencies to reach a clear and lawful legal position for how to calculate and apportion income for both pensions and benefits, we recommended:

Recommendation 1 – Option A – SOLICITOR-GENERAL OPINION

We recommend DSS, in consultation with Services Australia, seeks Solicitor-General opinion, through an Attorney-General referral under the *Law Officers Act 1964*, on two issues.

Recommendation 1 – Option B – REFER QUESTION OF LAW TO FEDERAL COURT

We recommend DSS and Services Australia seek Federal Court opinion, through referral by the Administrative Appeals Tribunal, under the *Administrative Appeals Tribunal Act 1975*.

Whether there is a positive obligation on the Secretary to review decisions which used income apportionment.

Under section 126 of the SS (Admin) Act, the Secretary of DSS and delegated decision-makers have the power to review a social security decision where there is a 'sufficient reason' to do so.

The General Instructions developed by the agencies for addressing income apportionment decisions have the effect that the agencies will only recalculate income apportionment affected decisions if a customer requests a review of a debt decision. The General Instructions state it is not expected that the Secretary will initiate administrative reviews of historical debt decisions.

We consider the position adopted by DSS and Services Australia in the General Instructions is not appropriate. It is inflexible and, on its face, while it does not prohibit reviews, appears to inhibit delegates from considering factors which may be relevant to applying their discretionary power to review historical debts.

This is inconsistent with the principle of discretionary power and may lead to unfair outcomes for customers.

Figure 4 shows what happens when Services Australia would apportion income in line with the payslip dates and across two Centrelink fortnights. In this case, Services Australia divided the \$1,400 by the 14 days in the payslip period to come to daily rate of \$100. $\$1400/14 = \100 . This is now known to be unlawful.

Figure 4 – Apportioning income across two Centrelink fortnights



Figure 5 shows the lawful apportionment of income within each Centrelink fortnight. In this example, income has been accurately calculated and apportioned within the Centrelink fortnight it was earned. In this example, Services Australia may have sought further information about hours worked (and income earned) from the customer or their employer.

The example shows that in Centrelink fortnight 1, Services Australia came to the daily rate of $\$1,120/14 = \80 . For Centrelink fortnight 2 – the daily rate is $\$280/14 = \20 .

Figure 5 – Apportioning income within the Centrelink fortnight it was earned



The apportioned daily rate of income would be used to determine the social security payment rate. In Figure 4 above, Services Australia was applying a higher rate of income to Centrelink fortnight 2 which may have reduced the customer’s JobSeeker rate for that Centrelink fortnight.

While these calculations may not involve significant changes to social security entitlement rates in any one Centrelink fortnight, over time the amounts could become significant – particularly because the customers are reliant upon social security benefits or pensions in addition to any employment income. In addition, perceived overpayments can lead to action by agencies to recover monies or to refer individuals for prosecution, both of which have a significant impact on affected individuals.

The law allowed Centrelink to apportion income across Centrelink fortnights when people worked regular hours and received regular amounts of income. However, where income was not dependably regular Centrelink should not have apportioned income across multiple Centrelink fortnights – and to do so was unlawful.

From 7 December 2020, a change to the law meant Services Australia now assesses income in the fortnight it is paid, instead of earned, derived or received. Our investigation only considered how the unlawful practice of apportioning ‘earned, derived or received’ income affects debts accrued prior to these legislative changes on 7 December 2020.

Appendix B – Summary of agency responses to Ombudsman recommendations and suggestion

Ombudsman recommendations and suggestion	Summary of DSS and Services Australia’s joint response
<p>Recommendation 1 – Option A – SOLICITOR-GENERAL OPINION We recommend DSS, in consultation with Services Australia, seeks Solicitor-General opinion, through an Attorney-General referral under the <i>Law Officers Act 1964</i>, on two issues.</p>	<p>ACCEPTED DSS and Services Australia approached the Solicitor-General. The Solicitor-General declined to provide advice, stating Services Australia and DSS should first share the different legal advices between the legal professionals involved to see whether the legal professionals can agree. The agencies have shared all legal advices with the legal professionals and are in discussions to see whether the different views can be bridged by discussion.</p>
<p>Recommendation 1 – Option B – REFER QUESTION OF LAW TO FEDERAL COURT We recommend DSS and Services Australia seek Federal Court opinion, through referral by the Administrative Appeals Tribunal, under the <i>Administrative Appeals Tribunal Act 1975</i>.</p>	<p>PARTIALLY ACCEPTED DSS and Services Australia have a strong preference to resolve the issue using recommendation 1 – Option A. They estimate that Option B would take up to 24 months to implement. However, Services Australia and DSS will continue to monitor the AAT caseload to identify a test case. They will also make relevant inquiries to the Federal Court and AAT.</p>
<p>Recommendation 2 – DEVELOP POLICY POSITION ON SECRETARY-INITIATED REVIEWS We recommend DSS, in consultation with Services Australia:</p> <ul style="list-style-type: none"> • amend paragraph 2 of the General Instructions to ensure delegates are not inhibited from exercising discretion to consider whether to review historical debts, and • develops a new policy position on the Secretary’s obligation to initiate a review under section 126 of the SS (Admin) Act of decisions affected by errors in applying section 1073B, including: <ul style="list-style-type: none"> o factors to consider when determining when the sufficient reason threshold is met, and o how to identify, seek and weigh up relevant factors. <p>The policy position should be consistent with legal advice and include consideration of debts accrued in periods prior to 7 December 2020, as well as potential historic underpayments.</p>	<p>PARTIALLY ACCEPTED The agencies do not accept the General Instructions inhibit a decision-maker’s discretion. However, the agencies will amend the General Instructions to clarify the discretion is not fettered. The agencies advised they will progress this recommendation, as part of its review of the General Instructions guidance on historical reviews of debt decisions.</p>
<p>Recommendation 3 – DEVELOP STRATEGY IN CONSULTATION WITH CDPP We recommend Services Australia, in consultation with DSS and the CDPP, develops a strategy for how agencies will approach historic, current and future criminal prosecutions associated with administrative debts involving income apportionment under section 1073B of the <i>Social Security Act 1991</i>. The strategy should include an agreed policy position on evidence required to prove administrative debt amounts and the impact this will have on prosecutions and convictions.</p>	<p>ACCEPTED DSS and Services Australia will consult with the CDPP to develop a strategy.</p>
<p>Recommendation 4 – PROVIDE DOCUMENTS TO THE CDPP We recommend Services Australia and DSS provide the CDPP with copies of:</p> <ul style="list-style-type: none"> • Any Solicitor-General’s opinion they obtain in response to Recommendation 1. • All draft and finalised legal advices on section 1073B Social Security Act 1991 for social security benefits. • Our finalised investigation report, including any formal responses from DSS and Services Australia. 	<p>ACCEPTED DSS and Services Australia agreed to all elements of the recommendation, noting they have already provided copies of the Solicitor-General’s response, and other legal advices to the CDPP. They have undertaken to provide any future relevant legal advices, and a copy of our final report.</p>
<p>Suggestion 1 – Decide responsibility for future significant legal issues reporting We suggest Services Australia and DSS collaborate to decide whether to report further to the Office of Legal Services Coordination about broader section 1073B issues. The decision should also include which agency will be responsible for future reporting on this matter.</p>	<p>ACCEPTED DSS and Services Australia will consider, in consultation with the Office of Legal Services Coordination, what further reporting needs to occur.</p>