

2 August 2023

## **MEDIA RELEASE**

### **Subject: Ombudsman’s Investigation – Lessons in Lawfulness**

Today the Commonwealth Ombudsman, Iain Anderson, published a statement regarding his Office’s investigation, ‘Lessons in Lawfulness’ into *Services Australia’s and the Department of Social Services’ response to the question of the lawfulness of income apportionment before 7 December 2020.*

The Office examined Services Australia’s and the Department of Social Services’ (DSS) ‘income apportionment’ practices which misinterpreted and unlawfully applied the *Social Security Act 1991* from at least 2003 until 7 December 2020, when the law changed. This approach resulted in some Centrelink customers’ employment income being assessed in the wrong fortnight and potentially affected a significant number of Centrelink payments made before 7 December 2020. Services Australia advised the Office it paused its review of approximately 13,000 debts while it obtained legal advice and identified around 87,000 other files which may be affected by unlawful or incorrect income apportionment calculations.

This investigation considered the steps Services Australia and DSS took to seek legal advice and reach positions on how to lawfully approach recalculations. It found that the agencies generally took appropriate steps to approach legal counsel but could have acted more quickly to finalise the resulting advice. The Ombudsman also found that there remains a significant difference in legal opinion that should be resolved and identified that instructions for Services Australia decision-makers need further development.

The Office’s investigation resulted in 4 recommendations and a suggestion, aimed at assisting the agencies to come to clear and lawful positions on how to address these historical calculation issues. Mr Anderson said, *“I am pleased Services Australia and DSS accepted or partially accepted all 4 recommendations and the suggestion made.”*

‘Income apportionment’ is not ‘income averaging’ – the practice that was at the heart of Robodebt.

Mr Anderson made it clear that, while an important and significant issue, people reading the statement should be careful not to confuse income apportionment with the approach used under the ‘Robodebt’ scheme. He said *“This issue may draw comparisons to Robodebt, because it involves the calculation of income which may lead to debts. However, as I make it clear in my statement, the income apportionment issue we investigated is not related to Robodebt.*

*I am satisfied that, unlike the Robodebt scheme – which was initiated and continued without legislative changes the agencies knew were required – the incorrect and unlawful use of income apportionment arose due to the agencies genuinely holding an incorrect understanding of relevant legislative provisions.”*

The statement includes lessons which apply to all Australian Government agencies, including:

- Ensuring government policy positions are lawful and defensible by seeking timely resolution of ambiguities or differences in legal advice.
- Developing clear agency policy positions, based on legal advice, to support reasonable, appropriate and lawful decision-making.
- Ensuring policies do not conflict with legislation or prevent decision-makers exercising discretion – including by expressing an expectation of how a decision-maker will take relevant considerations into account.

- Encouraging cooperation with relevant stakeholder through developing written strategies and plans to achieve goals.
- Being transparent and forthcoming with information with other agencies, to enable open communication and collaboration to meet shared goals.

Mr Anderson said, *“Good public administration should be at the centre of everything all Australian Government agencies do. While the issue we investigated may appear to be a discrete issue affecting only 2 agencies, I encourage all agencies to learn from the findings of this investigation and look for improvements in their own practices.”*

The Office’s second investigation into income apportionment, examining the administration of income apportionment-affected payments, is ongoing.

The statement can be found on the [Commonwealth Ombudsman website](#).