Disputes with Centrelink

Options: to Settle or Challenge

A paper by Mark Robinson SC for the Toongabbie Legal Centre 10 Year Anniversary Seminar Series

Introduction

In 2015-16 the Commonwealth Department of Human Services (**"DHS"**) raised 2.4 million social welfare debts totalling $2.8 billion, of which $1.54 billion was actually recovered (Department of Human Services, Annual Report 2015-2016, 118). During this period there was a $1.26 billion discrepancy between debts accrued and debts recovered in 2015-16. More recently, the DHS launched its controversial online compliance intervention system (**"OCI"**) for raising and recovering debts, apparently increasing welfare fraud detections from 20,000 per year to 20,000 per week (James Purtill, 'Students Accused of Welfare Fraud Say Centrelink's Sums Are Wrong' (*ABC News*, online,17 December 2016). However, as highlighted by the $1.26 billion discrepancy above, not all overpayments will constitute a 'debt'.

This paper explores the circumstances where it is best for one to settle or to challenge a Centrelink dispute, and the implications / potential consequences of settling or challenging.

What is a debt?

A debt to the DHS can only be raised within the operation of the social security law. That law is defined in section 4 of the *Social Security Act 1991* (Cth) (**"the 1991 Act"**) as being the 1991 Act, the *Social Security (Administration) Act 1999* (Cth) and any other Act that is expressed to form part of the social security law. These essentially are, the *Social Security (International Agreements) Act 1999* (Cth), the *A New Tax System (Family Assistance) Act 1999* (Cth) and
A New Tax System (Family Assistance) (Administration) Act 1999 (Cth).

The notion of a debt in relation to social security law is expressly defined in section 1235 of the 1991 Act as:

> (a) a debt recoverable by the Commonwealth under Part 5.2; or
> (b) a debt under the 1947 Act (now, the present Act); or
> (c) a debt due to the Commonwealth under a scheduled international social security agreement; or

> (d) a debt under the *Social Security (Fares Allowance) Rules 1998* (Cth).
>
> Note: Overpayments under section 1228 are not debts for the purposes of Part 5.2.

Chapter 5 of the 1991 Act refers to a "debt" as being a social security payment that was made to a person who obtained the benefit of the payment and was not entitled to obtain that benefit for any reason. Where an overpayment has occurred, a debt might not necessarily accrue, and not all debts arising from social security law are recoverable under the 1991 Act.

Centrelink's power

It is first crucial to examine where the power to raise and recover a debt originates. Social Security Law has undergone numerous reforms, often in an attempt to make the provisions easier to understand and more accessible to individual recipients. Changes have also been initiated in response to budget and labour market initiatives. As a result of the numerous redrafting and reconstruction of the legislation, this area of law is perceived as overwhelmingly dense and complex.

Currently, Social Security Law consists of five separate Acts. This paper will focus on Chapter 5 of the 1991 Act, which addresses overpayments and debt recovery, and Part 6 of the *Social Security (Administration) Act 1999* (Cth) (**"the 1999 Act"**), which addresses offences relating to false or misleading claims for social security.

Chapter 5 of the 1991 Act empowers the Commonwealth to recover debts and overpayments owed to it under various circumstances. Primarily, section 1223 of the 1991 Act provides:

> "Subject to this section, if:
>
> (a) a social security payment is made; and
>
> (b) a person who obtains the benefit of the payment was not entitled for any reason to obtain that benefit;
>
> the amount of the payment is a debt due to the Commonwealth by the person and the debt is taken to arise when the person obtains the benefit of the payment."

Plainly, in circumstances where a person receives a payment or rate of payment that they are not entitled to, either the whole or part of that payment will be considered a debt owed to the Commonwealth.

Chapter 5 of the 1991 Act provides 25 circumstances where persons are not entitled to receive payment (for example section 1222(2) of the 1991 Act), and includes, for example,

debts arising from prepayments (section 1223AA of the 1991 Act), any debt which arises under the Act (section 1223AA of the 1991 Act), and debts in relation to student start-up loans (section 1223ABF of the 1991 Act).

If an overpayment has been made and it is deemed by DHS to be a debt, it will not necessarily be considered an offence under the 1991 Act. Genuine mistakes are not prescribed as offences under the 1991 Act. Rather, offences occur when there is some intentionally misleading or reckless act or omission in connection to claims and information requests from the DHS (section 212 of the 1999 Act). For example, a person who receives a social security payment, and knows that the payment is not payable at all or in part, will commit an offence under section 215 of the 1991 Act.

A person who commits an offence under a provision in Division 2 of the 1991 Act could be convicted and sentenced to 12 months imprisonment (section 217 of the 1999 Act). Further, they can be ordered to pay a penalty and repay an amount equal to any social security payment that was made because of their act, failure or omission that constituted the offence.

The methods by which the Commonwealth is empowered to recover debts and overpayments include deducting an agreed amount from social security payments, through the commencement and prosecution of legal proceedings, garnishee notices, and repayments by instalments (section 1222 of the 1991 Act).

Claimants' duties and rights

Under the 1999 Act, any person receiving, or who has made a claim for, a social security benefit must provide information about circumstances, changes of circumstances, and undergo medical examination if requested by the DHS (Part 3, Division 6 of the 1999 Act). A failure to comply with the notification requirements in Part 3, Division 6 of the 1991 Act will result in the claimant being disqualified for the benefit (section 64(1) and 64(5) of the 1999 Act).

A person affected by a decision of an officer under social security law may apply to the Secretary to a review the decision (section 129(1) of the 1999 Act), except in certain circumstances (see section 129(3) and 129(4) of the 1999 Act). The circumstances in which

the Secretary cannot review the decision of an officer are set out in section 129(3) and (4) of the 1999 Act as follows:

> (3) If:
>
> (a) an officer makes a decision under the social security law in relation to pension bonus or essential medical equipment; and
>
> (b) notice is given to the person concerned;
>
> the person is not entitled to make an application under subsection (1) for review of the decision more than 13 weeks after the giving of the notice.
>
> (4) A person may not apply under subsection (1) for review of:
>
> (a) a decision made by the Secretary himself or herself; or
>
> (c) a decision made by the Employment Secretary:
>
> (i) under section 28 of the 1991 Act; or
>
> (ii) approving a course of study or a labour market program
>
> (iii) Exempting a person from the application of a provision of the social security law;
>
> ……

In circumstances where a person cannot apply to the Secretary or they want to have the Secretary's decision reviewed, affected persons have the right to apply to the Administrative Appeals Tribunal (**"AAT"**).

Where can decisions by the DHS – Centrelink be reviewed?

On 1 July 2015, the Social Security Appeals Tribunal (**"SSAT"**), in addition to the Migration Review Tribunal (**"MRT"**) and the Refugee Review Tribunal (**"RRT"**), were amalgamated into the Commonwealth Administrative Appeals Tribunal ("**AAT**") in an attempt to create a "one-stop shop for the independent review of a wide range of decisions made by the Australian Government". The work that was undertaken by the former SSAT is now done under the Social Services & Child Support Division of the AAT, and any review of decisions in relation to social services law will be heard there.

Challenging decisions:

When challenging a decision of Centrelink, a person may challenge whether the overpayment is a debt owed to the Commonwealth at all. If it is found that no debt has accrued from the overpayment, and the person was entitled to the payment, that person will not be required to repay DHS.

If a debt is found to have accrued, Part 5.4 of the 1991 Act provides the Secretary (and flowing on from that the member of the AAT) has a discretion to write off a debt due to the Commonwealth pursuant to section 1236(1) of the 1991 Act.

Section 1236(1) of the 1991 Act provides that Secretary may write off a debt on behalf of the Commonwealth subject to section 1236(1A). Thus, the general discretion given to the Secretary to write off debts is constrained to circumstances where:

(a) The debt was irrecoverable at law; or

(b) The debtor has no capacity to repay the debt; or

(c) The debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or

(d) It is not cost effective for the Commonwealth to take action to recover the debt.

In circumstances where the debt is (or is likely to be) less than $200 and it is not cost effective to recover the debt, and the debt is at less than $50 and is not recoverable through deductions from the debtor's social securities, the Secretary must waive the right to recover the debt (section 1237AAA of the 1991 Act).

Where "special circumstances" (other than solely financial hardship) exist and the debtor's actions were bona fide, section 1237AAD of the 1999 Act provides the Secretary discretion to waive the right to recover all or part of the debt when it is more appropriate to waive than to write of the whole or part of the debt.

Alternatively, if the whole or a portion of an accrued debt is "attributable solely to an administrative error made by the Commonwealth and if the debtor received the payment, or payments that gave rise to the proportion of debt, in good faith, the debt can be waived (section 1237A(1) of the 1991 Act).

Challenging whether a debt has accrued at all

Whether or not an overpayment is considered a debt will depend on the circumstances of the overpayment. For example, in *Woods v Secretary, Department of Social Services (Social Services Second Review)* [2016] AATA 1092, the applicant was receiving a single carer's payment and New Start allowance for a period of three years. While receiving social security benefits, Mr Woods met s Philippine woman online, they married on 29 June 2011 in the Philippines, and he then returned to his home in Australia alone. In 2013, Ms Woods applied for a partner visa in 2013, which was granted in January 2014, and she then moved to Australia to live with Mr Woods, the applicant. DHS – Centrelink decided that once married, Mr Woods was presumed to be "a member of a couple", and as such, he had received an

overpayment during the relevant period, 2011 - 2015. DHS – Centrelink raised a debt against MR Woods of $22,353.14.

Mr Woods successfully disputed the decision in the AAT, contending that he had not been a "member of a couple" for the purposes of the 1991 Act. It was held that there was a "special reason" to treat Mr Woods as "not a member of a couple" for the purposes of the 1991 Act. Namely, that "by the very nature of their relationship" the couple would not have shared a household which would allow financial burdens to be shared. Rather, Mrs Woods was still residing in the Philippines, and, on the occasions she visited him, the applicant actually incurred greater costs greater costs as he was now supporting an additional person. This was because Mrs Woods only had a tourist visa and was not permitted to work in Australia. It was thus held that the proper officer had erred as the applicant was not a "member of a couple" for the purposes of social security law.

So, not all overpayments will be considered a debt. This depends on the circumstances of the overpayment and will be determined on a case by case basis.

Challenging a debt arising from Administrative Error

Section 1237A of the 1991 Act requires the Secretary to waive the right recover the proportion of a debt that is solely attributable to an administrative error made by the Commonwealth, if the debtor received the payment or payments that gave rise to proportion of the debt in good faith.

If the Commonwealth raises a debt again a person under social security law, and the debtor believes that the debt accrued is solely attributable to an administrative error made by the DHS, and the debtor received the impugned payment in good faith, the debtor may apply to the Secretary (and subsequently the AAT) to have the debt waived. It is important to note that challenging a debt under section 1237A of the 1991, where the real issue is whether to waive the debt, the validity of the debt is assumed (see *Sekhon v Secretary, Department of Family and Community Services* (2003) 132 FCR 126 (**"Sekhon"**) at [12]).

In *Sekhon*, the appellant, Ms Sekhon, was seriously injured in a motor vehicle accident and received $50,681.95 in social security benefits while her claim for compensation was pending. The appellant received judgment from her personal injuries claim in 1989 and received damages for past and future loss. DHS- Centrelink was aware the litigation, and had in 1993 and 1994 notified the insurer of its obligations under section 1179 of the Act

(Centrelink must be repaid in personal injury matters). However, in 1998 the Secretary mistakenly advised the insurer and Ms Sekhon that no compensation charge was claimed, and that the insurer could make payment to the appellant.

The appellant received compensation and spent it in good faith. However, in 1999, a decision was made to raise a debt against the appellant pursuant to section 1166(2) of the 1991 Act. Ms Sekhon challenged this decision and was successful in the then SSAT and later the AAT. At first instance, the primary Judge found that the debt was not solely attributable to the administrative error of the Commonwealth. His Honour considered a situation where the debt would have been solely attributable to the DHS – Centrelink at [37] – [44]:

> … it is possible to imagine a case in which a debt created under s 1166 is attributable solely to an administrative error made by the Commonwealth. For example, assume that, in the present case, a notice had been given to GIO requiring it to pay to Centrelink an amount of money equal to the compensation debt and GIO had paid that amount to Centrelink; but, nevertheless, through some misunderstanding, the Secretary had given a notice under s 1166, and thereby erroneously created a debt …

His Honour then considered the case before him and found that the act of giving the notice was not in itself an administrative error:

> The debt in the present case was fundamentally attributable to two circumstances. First, Ms Sekhon had received both a lump sum payment and compensation affected payments for the lump sum preclusion period. These receipts exposed Ms Sekhon to potential liability for repayment of the Social Security Payments, whether by a deduction by GIO from her damages payment or by a notice under s 1166. The receipts also satisfied the preconditions of exercise of the Secretary's s 1166 power. Second, the Secretary made a discretionary decision to exercise that power, by giving the requisite notice…

In her appeal, Ms Sekhon contended that once it was accepted that "but for" the error of the Secretary, which involved informing the insurer that no compensation charge was claimed, it necessarily followed that the debt accrued against her (rather than the insurer) was attributable solely to that error (see *Sekhon* at [34]).

The Full Court rejected this submission and held at [43] that the "but for" test was inappropriate; while the "but for" test is used to determine causation, it only can only determine a cause not the sole cause.

The question before the Full Federal Court of Australia was again, whether the debt was solely attributable to an administrative error. In considering the meaning of the phrase "attributable solely to an administrative error" the Court found that at [35]:

> The ordinary or usual interpretation of the phrase "attributable solely to" is that it refers to the single or sole cause of the relevant act or event. The word "attributable" means "capable of being attributed". It involves an objective assessment of causation. The words "a debt attributable solely to an administrative error" can be paraphrased as meaning that the only cause that objectively can be ascribed to the relevant debt is an administrative error.

The primary judge's decision was upheld in the Full Court, where Justice Selway held at [39] that in cases where:

(a) the relevant notice under section 1166 of the 1991 Act is issued for the wrong amount; or

(b) where the amount has already been recovered from another party but a notice is issued anyway

through administrative error, the debt is still valid notwithsta nding the error.

His Honour accepted that this does not necessarily mean the debt will be required to be paid, suggesting a variety of other avenues for debtors, including bringing a merits review of the decision to issue the notice.

In considering *Sekhon*, it is plain that where there are any other circumstances which contribute to the error, the debtor will find no relief.

Further guidance is provided by *The Guide to Social Security Law* 2016 (online, published by the Commonwealth Government) at [6.7.3.30] which states:

> In general, wherever a mistake has been made in administering a payment, the debt will arise 'solely to an administrative error' providing the recipient's conduct has not contributed to the debt in any way.
>
> Examples of administrative error include mistakes in:
>
> - Calculating the amount of a payment,
> - Determining which social security payment/s a person is entitled to be paid, and
> - Correctly actioning information provided by the recipient.
>
> The requirement that part of the debt must have arisen 'solely' from administrative error means that there must have been no other factors that caused the debt to arise or contributed to the debt arising. The part of the debt must have arisen as a result of administrative error alone.

When considering whether to challenge a decision (say, in the AAT) under section 1237A(1) of the 1991 Act, it is imperative to ensure that no other factors, irrespective of whether the debtor was or was not in error, contributed to the administrative error of the Commonwealth.

Challenging a debt: Special Circumstances

If a debtor believes that they are affected by exceptional or uncommon circumstances which would result in the action of recovering the debt unfair or inappropriate, they may seek to have the debt waived (see section 1237AAD of the 1991 Act). If the circumstances are merely financial hardship alone, the debt will not be waived under section 1237AAD(b) of the 1991 Act.

To successfully have the debt waived the applicant must prove pursuant to 1237AAD that:

1. The debtor or another person did not knowingly make a false statement or representation, nor did they fail to comply with a provision of the 1999 and 1991 Act; and
2. There are special circumstances (other than financial hardship alone); and
3. It is more appropriate for the Commonwealth to waive the debt, rather than write off the debt in full or in part.

"Knowingly" is not defined in the legislation. However, judicial consideration (see, for example, *Re Callaghan and Secretary; Department of Social Security* (1996) 45 ALD 435, [48] cited with approval in *Breen and Secretary, Department of Social Services (Social Services Second Review)* [2015] AATA 689) which held that nothing in the legislation in relation to section 1237AAD would imply that the word "knowingly" should be given any other meaning other than that:

> a person has actual knowledge, rather than constructive knowledge, that he or she is making a false statement or representation or that he or she is failing or omitting to comply with a provision of the Act.

"Special circumstances" has been considered extensively by the Federal Courts and the AAT in the context of social security law. Broadly, it is accepted that for circumstances to be considered special they must be "unusual, uncommon or exceptional", "markedly different from the usual run of casts", "special", or "out of the ordinary", and they must also include "events which would render the strict application of the rule in question unfair or

inappropriate" (see *YKBJ v Secretary, Department of Social* Services [2015] AATA 65 at [57]).

In considering the exceptionality of the circumstances, it is important to note that such circumstances might still be considered "special" even if they apply to more than one person or a class of persons, so long as they are not universally applicable (see *Fischer v Secretary, Department of Families, Housing, Community Services & Indigenous Affairs* (2010) 185 FCR 52 at [65]).

In *Sylvia Pizarro v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AATA 9 (**"*Pizarro*"**), the applicant received single parent payments after receiving an income protection benefit in October. She contended that she notified Centrelink that December, and she doubted that they recorded her notification properly.

During the relevant period the applicant continued to receive notices which indicated that her income calculation did not include the income protection payments.

The Tribunal was not satisfied that the applicant had properly notified the DHS – Centrelink and the overpayments she received from single parent benefit were accrued as a debt to the Commonwealth.

The applicant contended that her circumstances were "special" under the Act, and that it would be unfair or inappropriate for the Commonwealth to recover the debt. The applicant had recently been made redundant and was advised by recruiters that she would most likely struggle to find new employment as she had a "unique job". Further, Ms Pizarro's ex-husband was not paying court ordered support payments as he had absconded to Chile. As a result of this she defaulted on her mortgage repayments and the forced sale only secured enough proceeds to pay off the mortgage. The applicant submitted that her ex-husband's parents were interfering with her children and as such they were on the airport watch list, and she was forced to move them to a new school and incurred further expenses. Both the applicant's children suffered from heart problems, and one had learning difficulties; again resulting in further expenditure. She submitted that there was no evidence that her circumstances would improve.

The Tribunal, while sympathetic to the applicant's circumstances held at [30]:

> Notwithstanding that I have not found special circumstances in the Applicant's case, the Respondent should be particularly mindful of the financial and other pressures upon the Applicant when it fixes a repayment rate. The rate at which overpayment is recovered from the Applicant is a matter which is within the provenance of Centrelink and not this Tribunal, however, the Respondent must be careful not to impose upon the Applicant, and more particularly her children, a crushing burden which detrimentally affects their quality of life.

A person who wishes to challenge a decision under 1237AAD of the 1991 Act should be mindful that the courts have placed a high bar on what is considered "special" in the context of the Act. It is extremely difficult to be successful on this ground.

Settling with Centrelink

Another option available to debtors is to settle with Centrelink direct by negotiation and to gradually pay back the debt.

Part 5.3 of the 1991 Act provides for methods of debt recovery, and importantly, section 1231(1AA) of the 1991 Act provides that the Secretary must not make a determination which would reduce the payment to nil if it places the debtor in severe financial hardship.

The case in *Pizarro* also tells a lesson that when negotiating repayment options and settlement, the DHS – Centrelink must have regard to any potential detrimental effect the rate of repayment will have on the debtor's quality of life. It must not be crushing.

Conclusion

The decision whether to settle with Centrelink or to challenge a particular decision must be determined according the individual circumstances of each person's circumstances. If challenging the decision based on an administration error, that error must be solely attributable to the DHS – Commonwealth. Regardless of the applicant's lack of error, any other factors which attributed to the error will be fatal to such a challenge.

If the applicant wishes to challenge the debt on the basis of special circumstances, he or she must be aware that the circumstances, whether occurring at the time the debt was incurred or only in existence now, must be so significant/severe that it is properly considered to be special. In considering *Pizarro*, it is plain that satisfying the Tribunal of such circumstances is extremely difficult.

Challenging decisions made by the DHS – Centrelink is not the only option, and settlement can often be an easier and less stressful approach to resolving the issue.

Other Issues

Take note that the Commonwealth manages a scheme that deals with acts of grace, waiver of debt requests, and ex gratia proposals. It is called the "CDDA Scheme", the Scheme for Compensation for Detriment caused by Defective Administration.

It is procedurally quite elaborate, but it can be used to obtain some relief when all else fails.

Dealing with prosecutions involves a wholly different strategy to that dealt with in this paper. One has to get cunning.

Thank You

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