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IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No. VID611/2019

BETWEEN **DEANNA AMATO**
Applicant

AND

THE COMMONWEALTH OF AUSTRALIA
Respondent

WRITTEN SUBMISSIONS OF THE APPLICANT

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1 Summary of issues

1. Under ss 1222A(a) and 1223(1) of the *Social Security Act 1991* (Cth) (the **SS Act**), "a debt due to the Commonwealth" can arise "if, and only if", a person was "not entitled … to obtain th[e] benefit" of a social security payment that the person obtained.

2. At material times in 2018 and 2019:

   2.1 s 1222A of the SS Act relevantly provided that:[1]

   > If an amount has been paid by way of social security payment … the amount is a debt due to the Commonwealth if, and only if:
   >
   > (a) a provision of this Act … expressly provides that it is …

   2.2 s 1223(1) relevantly provided that:[2]

   > 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.

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1 Emphasis added.

2 Emphasis added.

2.3 s 1223(1AB)(c) provided that s 1223(1)(b) would be satisfied if, among other things, "the payment was not payable".[3]

3. The **central issue** raised by this case is whether it was unlawful for the Commonwealth to demand from the applicant an alleged "debt due to the Commonwealth", where the Commonwealth's determination that a debt had arisen was:

3.1 based only on a predictive and speculative judgment that, by reason of the applicant's income over an irrelevant and arbitrary period (a financial year, which was a period that the SS Act did not make relevant to the applicant's entitlements to the social security payments she had received, and a period that the Commonwealth selected arbitrarily), there was some chance that the applicant had been entitled to lower social security payments in relevant periods (that is, fortnightly periods, which were the periods specified by s 1067L of the SS Act as the periods that were relevant to the applicant's entitlements to those payments) than the payments she had received; and

3.2 not based on any real evaluation of the evidence before the decision-maker concerning the applicant's entitlements to payments in the relevant fortnightly periods (evidence that included the amounts reported by the applicant as her income for the relevant fortnightly periods), nor on corroborating information from the applicant's employer that the Commonwealth could have obtained, but did not obtain, before raising the alleged debt.

4. If a demand made in those circumstances is unlawful, the notices that the Commonwealth purportedly issued to the applicant on 2 March 2018 and 6 March 2019 were not valid notices for the purposes of s 1229 of the SS Act.

5. The Commonwealth admits that it determined that the applicant owed a debt by reference only to "Pay-As-You-Go" (**PAYG**) income data that the Commonwealth apportioned evenly over the entire financial year in which the income was received.[4] The Commonwealth also admits that, before demanding the alleged debt, it excluded from consideration the evidence before the decision-maker that was most relevant to the assessment as to whether the applicant owed a debt – namely, the amounts the

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3 Emphasis added. "Not payable" is defined to include being not payable under the *Social Security (Administration) Act 1999* (Cth), but is not otherwise defined: s 23(1) (definition of "not payable") and s 23(16) of the SS Act.

4 Commonwealth's Response to Points of Claim, paragraphs 7 and 13(b)-(d).

applicant reported as her income for each of the fortnightly periods that s 1067L of the SS Act specified as the periods that were relevant to the applicant's entitlements to social security payments.[5] Only after commencement of this proceeding did the Department use its powers to obtain information from the applicant's employer.

6. The Commonwealth purported to exercise various powers that the SS Act vested in it to recover debts due to the Commonwealth based only on its predictions and speculation that:

    6.1 the fortnightly amount of the apportioned PAYG data equated to the amount of income that the applicant actually earned in each of the fortnights for which she had received a social security payment;

    6.2 the applicant did not correctly report her income to the Department of Human Services[6] (the **Department**) for each of those fortnights;

    6.3 therefore, the applicant received the benefit of social security payments to which she was not entitled; and

    6.4 as a result, the applicant owed a "debt due to the Commonwealth" in the amount of the alleged overpayments.

7. The central issue in this case has **two sub-issues**:

    7.1 First, was it arbitrary, and inconsistent with the requirements of the SS Act, for the Commonwealth to determine that the applicant had a debt due to the Commonwealth in respect of payments the applicant had received from the Commonwealth by making only a predictive and speculative judgment, and without the Commonwealth:

        (a) determining whether the data about an irrelevant and arbitrary yearly period was probative of (or capable of grounding any inference about) income received in the fortnightly periods that were relevant to the applicant's entitlements to the payments she received for those fortnights (that is, determining whether the Commonwealth's prediction was anything more than speculation); or

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5 See Statement of Agreed Facts (**SOAF**), paragraphs 14.4, 14.5.2, 24-32, 45.

6 Now called "Services Australia".

(b) reviewing evidence that showed the applicant's income during each relevant fortnightly period (that is, the period specified by s 1067L as the period relevant to the applicant's entitlement to each payment that was the subject of the alleged debt)?

7.2 Secondly, and if the first sub-issue is answered "yes", was it unlawful for the Commonwealth to demand that the applicant pay that alleged debt?

8. The case raises **two further issues**:

8.1 whether it is unlawful for the Commonwealth, under s 1228B of the SS Act, to add a penalty to an alleged debt that is raised and demanded on the basis outlined in paragraph 7 above, where the person does not respond to preliminary correspondence and telephone calls from the Commonwealth about PAYG data, or does not otherwise provide information to verify that the person reported her or his income correctly; and

8.2 whether it is unlawful for the Commonwealth, under s 1230C of the SS Act, to garnishee a person's tax return to recover such an alleged debt and penalty, where the Commonwealth has not successfully contacted the person about the alleged debt and penalty.

2 Summary of facts and submissions

9. In June 2012, the Commonwealth paid to the applicant a total of $2,882.20 in Austudy payments for five fortnights commencing on 4 April 2012 and ending on 26 June 2012.[7] The payments were made based on the amount of income that the applicant reported she had earned for each of those five fortnights.[8]

10. From on or about 11 February 2017, the Department implemented a compliance program known as the "Employment Income Confirmation" (**EIC**) program, which replaced a similar program known as the "Online Compliance Intervention".[9] From around November 2018, the EIC program was replaced with the "Check and Update

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7 SOAF, paragraphs 29 and 31; Annexure SOAF-X at page 343. The total amount of the payments shown in the document in Annexure SOAF-X is $2,882.20, but the document itself shows a total figure of $2,882.19. The applicant has used the former figure.

8 SOAF, paragraph 32.

9 SOAF, paragraph 8.

Past Income" program, which also uses apportioned PAYG data to raise social security debts.[10] However, only the EIC program was applied in the applicant's case.[11]

11. Under the EIC program, using processes that are described in more detail in paragraph 22 below, the Department:[12]

    11.1 obtained PAYG data from the Australian Taxation Office (the **ATO**) about the income of persons who had previously received social security payments;

    11.2 apportioned the PAYG data as described in paragraph 5 above, producing speculative predictions about the amount of income the person earned in each fortnight for which the person received a social security payment;

    11.3 apparently made determinations that the speculative predictions based on the PAYG data, which concerned the income that the person earned during an irrelevant period, were:

        (a) probative of the person's actual income during the relevant fortnightly period(s); and

        (b) more probative of the person's actual income during the relevant fortnightly period(s) than the person's reports about the person's income during those relevant fortnightly period(s); and, on the basis of those apparent determinations,

    11.4 demanded the repayment of alleged debts.

12. On 2 March 2018, the Commonwealth sent a letter demanding that the applicant pay to the Commonwealth $3,215.38, made up of an alleged debt of $2,924.28 (the **Alleged Debt**) and a penalty of $291.10.[13] The Alleged Debt was raised and demanded in accordance with the EIC program.[14]

    12.1 The Alleged Debt was calculated using PAYG data relating to the applicant's income from her employer, Well Baked Cafe Pty Ltd (**Well Baked**), for the period 1 July 2011 to 30 June 2012. The PAYG data was apportioned evenly

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10 SOAF, paragraph 20.

11 SOAF, paragraph 21.

12 SOAF, paragraphs 9-15.

13 SOAF, paragraph 49; Annexure SOAF-O at page 313.

14 SOAF, paragraphs 34-45.

over that period to produce a daily amount, which was multiplied by 14 to produce a fortnightly amount, then the fortnightly amount was applied to (that is, assumed by the Commonwealth to be equivalent to the income actually earned in) the fortnights for which the applicant had received Austudy (and, in error, to one fortnight for which the applicant did not receive Austudy, as explained in paragraph 14 below), replacing the amounts that the applicant had reported.[15]

12.2 The penalty was added in the circumstance described in paragraph 8.1 above – that is, the applicant did not respond to preliminary correspondence and telephone calls from the Commonwealth about the PAYG data, because the correspondence was sent to an address at which the applicant no longer resided and the applicant did not answer the telephone calls.[16]

12.3 On 3 September 2018, the Commonwealth garnisheed $1,709.87 from the applicant's tax refund (the **Garnisheed Amount**), being the total amount of the tax refund that the applicant would otherwise have received for the 2017-2018 financial year.[17] The garnishee occurred in the circumstances described in paragraph 8.2 above – that is, the Commonwealth did not successfully contact the applicant about the Alleged Debt and penalty before applying the garnishee.[18]

13. On or about 25 January 2019, the applicant became aware that her tax return had been garnisheed. Prior to that date, she was not aware that the Commonwealth had raised the Alleged Debt and penalty against her.[19]

14. The applicant contacted the Department about the garnishee on 21 February 2019.[20] After she did so, the Department undertook a "quality compliance check" and determined that the Alleged Debt had been calculated on the basis that the applicant had been paid Austudy from 21 March 2012, when in fact she had only been paid from 4 April 2012.[21] The Compliance Officer corrected that error, but otherwise left the debt and penalty

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15 SOAF, paragraph 48.

16 SOAF, paragraphs 43-44, 59.

17 SOAF, paragraph 56.

18 SOAF, paragraphs 56, 59.

19 SOAF, paragraph 59.

20 SOAF, paragraph 60.

21 SOAF, paragraphs 62.

intact.[22] Accordingly, on 6 March 2019, the Commonwealth sent a letter to the applicant notifying her that a reassessment of the Alleged Debt had been completed and that the total quantum of the debt had been amended to $2,754.82, comprising an alleged debt of $2,504.42 (the **Reassessed Alleged Debt**) and a penalty of $250.40.[23]

15. The manner in which the Commonwealth calculated the Alleged Debt and penalty and the Reassessed Alleged Debt and penalty, based on the apportioned PAYG data about the applicant's income for the period 1 July 2011 to 30 June 2012, is vividly illustrated by considering:

    15.1 the PAYG data: Annexure SOAF-M at page 309;

    15.2 the Adex Debt Schedule produced by the Department when raising the Alleged Debt: Annexure SOAF-N at page 311;

    15.3 the Adex Debt Schedule produced by the Department when revising the Alleged Debt to become the Reassessed Alleged Debt: Annexure SOAF-X at page 343; and

    15.4 paragraph 48 of the Statement of Agreed Facts (the **SOAF**).[24]

16. The applicant submits that:

    16.1 the Commonwealth's demands that she pay the Alleged Debt and the Reassessed Alleged Debt were unlawful, and not valid notices under s 1229(1) of the SS Act, because:

        (a) it was arbitrary, and therefore unlawful, for the Commonwealth to demand payment of the Alleged Debts, and then to purport to add a penalty and to garnishee the applicant's tax return, without any proper assessment as to whether the preconditions to the existence of a debt were present. The apportioned PAYG data did not provide any rational, and therefore lawful, basis on which the relevant Compliance Officers could have determined that the applicant owed "a debt due to the Commonwealth" within the meaning of ss 1222A(a) and 1223(1) of the

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22 SOAF, paragraphs 62-63.

23 SOAF, paragraphs 62-64.

24 In the SOAF, the Alleged Debt is defined as the "Alleged March 2018 Debt" and the Reassessed Alleged Debt is defined as the "Alleged Reassessed March 2019 Debt". They are termed the "Alleged Debt" and the "Reassessed Alleged Debt" in these submissions for simplicity.

SS Act. In particular, the apportioned PAYG data could not provide a rational basis for a determination that the applicant had obtained the benefit of social security payments[25] to which she was "not entitled" for the purposes of s 1223(1) because the payments were "not payable" for the purposes of s 1223(1AB)(c);

(b) alternatively, none of the preconditions to the existence of a "debt due to the Commonwealth", as prescribed by ss 1222A(a) and 1223(1), was present, so as to authorise the making of the demands as notices under s 1229(1) of the SS Act;

16.2 the penalties were unlawfully added to the Alleged Debt and the Reassessed Alleged Debt because:

(a) for the reasons in paragraph 16.1 above, there was no "debt due to the Commonwealth" for the purposes of s 1228B(1) of the SS Act;

(b) there was no basis for the Compliance Officers to consider that the Alleged Debt or the Reassessed Alleged Debt had arisen wholly or partly because the applicant had:

(i) "refused or failed to provide information in relation to" her income "when required, under a provision of the social security law, to provide" such information, within the meaning of s 1228B(1)(c)(i) of the SS Act; or

(ii) "knowingly or recklessly provided false or misleading information in relation to" her income, within the meaning of s 1228B(1)(c)(ii) of the SS Act;

(c) alternatively, none of the preconditions to the addition of a penalty set out in s 1228B(1)(c)(i) and (ii) was present; and

16.3 the garnishee notice was unlawfully issued because:

(a) for the reasons in paragraph 16.1 above, there was no "debt due to the Commonwealth" for the purposes of s 1230C(1) and (2);

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25 "Social security payment" includes a "social security benefit", which includes an "Austudy payment": s 23(1) of the SS Act. "Austudy payments" are, and were in 2012, provided for in Pt 2.11A of the SS Act.

(b) at the time of the garnishee, the Commonwealth had not made genuine and sufficient attempts to reach a payment arrangement with the applicant, such that the requirement in s 1230C(2)(a) of the SS Act – that the Commonwealth "has first sought to recover the debt by means of", relevantly, a payment arrangement – was not satisfied; and

(c) the Commonwealth did not, and could not, "establish" that the applicant had "failed" to enter a payment arrangement for the purposes of s 1230C(2)(b)(i) of the SS Act.

17. In short, making a determination that the applicant was not entitled to amounts that the Commonwealth had paid to her by way of Austudy, based only on apportioned PAYG data, was irrational.

17.1 The Commonwealth had no reason to determine that apportioned PAYG data correctly show the amounts of income that a person earned, derived or received in various fortnights in a particular period.

17.2 Evidence about the applicant's income during an irrelevant and arbitrary period (that is, the PAYG data) cannot be probative of the applicant's income during a different period (that is, a relevant fortnightly period) because the data related to the wrong time period and there was no evidence showing that the PAYG data provided a reliable basis for an inference to be drawn about any relevant fortnightly period.

18. Further:

18.1 The SS Act impliedly requires that an officer of the Commonwealth determine (and thus, have a rational basis for determining) that the statutory elements for the creation of a debt exist, before demanding the debt.

18.2 Given that evidence concerning the applicant's income during an irrelevant and arbitrary period (that is, the PAYG data) is not probative of the applicant's income during a different period (a relevant fortnightly period), that evidence cannot establish that a person owes a debt to the Commonwealth. Thus, the effect of the EIC program is impermissibly (that is, without any statutory authority) to reverse the burden of proof established by the SS Act, so as to require a person who received social security payments in the past to prove to the Commonwealth that she or he was entitled to those payments.

18.3 The SS Act and the *Social Security (Administration) Act 1999* (Cth) (the **SS Administration Act**), which together are part of the "social security law", provide ample powers for the Commonwealth to obtain accurate and reliable information about the amounts of income that a recipient of social security payments earned in particular fortnights.[26] There is no good reason for the Commonwealth to rely on apportioned PAYG data instead of exercising those powers to obtain accurate and reliable information that would allow a lawful determination to be made about whether the recipient owes a debt to the Commonwealth. That Parliament has positively provided for powers to obtain probative information to determine a person's entitlements under the social security law indicates that that law does not permit the Commonwealth to use non-probative, speculative information in order to (purport to) make that determination.

18.4 In various provisions, the SS Act provides for apportionment of income over periods longer than a fortnight.[27] Those provisions have specific purposes and operate in specific circumstances (which were not present in this case). That is, Parliament expressly identified the specific and limited purposes for which the Commonwealth was permitted to use apportioned data. In contrast, the SS Act does not permit the Commonwealth to use apportioned data to determine whether the preconditions to either s 1067L or s 1223 of the SS Act are satisfied. It is therefore inconsistent with the scheme of the SS Act for the Commonwealth to raise a debt by apportioning a person's income over a period that is longer than a fortnight, where the SS Act does not provide for, and implicitly precludes, that apportionment.

19. On 21 August 2019, the Commonwealth informed the applicant that a further review had been undertaken of the Alleged Debt and the Reassessed Alleged Debt. On the basis of information that the Commonwealth had obtained from the applicant's employer and bank using its statutory powers, the Department determined that the applicant did not owe a debt to the Commonwealth.[28]

20. On 28 August 2019, the Commonwealth repaid the Garnisheed Amount to the applicant. The applicant submits that she is entitled to interest, pursuant to s 51A of the *Federal*

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26 See paragraphs 54-55 below.

27 See paragraphs 56-58 below.

28 SOAF, paragraphs 68-70.

Court of Australia Act 1976 (Cth) (the **Federal Court Act**), on the Garnisheed Amount for the period that the Garnisheed Amount was held by the Commonwealth. Her claim for interest is not affected by the fact that the Commonwealth repaid the Garnisheed Amount after the proceeding commenced.[29] To decide whether the applicant is entitled to interest, the Court must first determine the issues identified at paragraph 16 above, which are the principal issues in the proceeding.

3 Outline of further facts

21. The applicant emphasises the following aspects of the SOAF, on the entirety of which the applicant relies.

22. The EIC Program operated in two stages.

    22.1 In the **first stage**, the Department would obtain PAYG data from the ATO, showing a person's total income for a particular financial year and compare the amount shown by the ATO data with the amount of income the person reported to Centrelink during that financial year, in the manner described in paragraph 9.2 of the SOAF. If the person had received social security benefits for only part of the year (say, 25%), the Department would multiply the PAYG data by that percentage before performing the comparison. If there was a discrepancy between the two amounts (the **Initial Discrepancy**), the Department would send a letter (the **Initial Letter**) by Registered Post, addressed to the person at the address that was last known to the Department as the person's address (the **Last Known Address**). The letter had the content described in paragraph 9.4 of the SOAF.

    22.2 The process described in paragraph 22.1 above was partly automated.[30] Aspects of the process are described in a "Detailed Requirements Document" and a "Program Protocol", which are Annexures SOAF-A and SOAF-B respectively.[31]

    22.3 In the **second stage**, a Compliance Officer was assigned to determine whether to raise a debt against the person, if the person had not provided relevant

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29 *State Bank of New South Wales v Commissioner of Taxation (Cth)* (1995) 62 FCR 371 at 384-385 (Wilcox J); *Elsinora Global Ltd v Commissioner of Taxation* (2006) 155 FCR 413 at 423 [49] (Young J; Gyles and Stone JJ agreeing).

30 SOAF, paragraph 10.

31 SOAF, paragraph 11.

information or contacted the Department within 28 days of the date of the Initial Letter.[32] The Compliance Officer was instructed to follow a highly prescriptive process, using a computer, to determine whether to raise a debt based on the PAYG data.[33] The instructions were set out in an "Operational Blueprint" (the **Blueprint**), which is found at Annexure SOAF-C. In particular, the instructions were set out in Table 11 of the Blueprint, which needs to be read with the defined terms used in the Blueprint: see Annexure SOAF-C at pages 152-164 and 181-184.

22.4 The Compliance Officer was instructed to perform a "Provisional Assessment", by applying the PAYG data to the person's record. The PAYG data was automatically apportioned in the manner described in paragraphs 14.1 and 48 of the SOAF. That is, the PAYG data was apportioned evenly over the period of the person's employment within a particular financial year by:

(a) taking the total amount of income shown in the PAYG data and dividing it by the number of days in the employment period; and

(b) multiplying the result of that calculation by 14 to produce an average amount of fortnightly income for the employment period.

22.5 If the Provisional Assessment resulted in a debt of more than $50 because of a "discrepancy" between the apportioned PAYG data and the income amounts that the person had reported when receiving the relevant social security payments (the **Discrepancy**), the Compliance Officer was instructed to "check the customer record" for "information that may explain the discrepancy".[34] In essence, the purpose of that check was to determine whether the Department had previously raised or waived debts for the person in respect of the same period, or had previously verified the income reported by the person against documents such as the person's payslips.[35]

22.6 If the Discrepancy was not "fully explained" by the checking process, the Compliance Officer was, in substance, instructed to apply the apportioned

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32 SOAF, paragraph 14.

33 SOAF, paragraph 14.

34 Annexure SOAF-C at page 153.

35 SOAF, paragraph 14.3.

PAYG data to the person's record so as to raise a debt.[36] The Compliance Officer was instructed to use "suitable information" in order to determine whether a debt existed, but the Compliance Officer was specifically instructed not to regard the income that the person had previously reported to the Department as "suitable information", unless the Department had previously verified that income.[37] By contrast, the Compliance Officer was instructed that the apportioned PAYG data could be "suitable information".[38] The obvious result was that, in many cases, the apportioned PAYG data would be applied to the person's record in substitution for the income the person had reported.

22.7 The Compliance Officer was then instructed to make two attempts to contact the person by telephone, in order to ask the person for information that would explain the Discrepancy. In short, the person was to be required to provide evidence of the income that the person had reported to the Department, or to otherwise provide a "satisfactory verbal explanation".[39] It is apparent that a verbal explanation such as "I reported my income correctly and the apportioned PAYG data does not establish that I have a debt" would not have been "satisfactory".[40] The purpose of the process established by the EIC program was to require the person to provide documents or other verifiable information showing the amounts of income the person had earned, derived or received in various fortnights while receiving social security benefits.

22.8 If the Compliance Officer was unable to contact the person by telephone, or the person was contacted but did not provide further information to "explain" the Discrepancy, the Compliance Officer was instructed to raise a debt by treating the apportioned PAYG data as a correct statement of the person's income for the relevant fortnightly periods.[41]

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36 SOAF, paragraph 14.4.

37 SOAF, paragraphs 14.4 and 14.5.2. See also Annexure SOAF-C at page 181:

> Information previously provided by the customer via the online workflow, should only be used where the information can be verified during the customer conversation. Where the information can be verified, the CO must read the declaration to the customer. Where this is not possible, this information cannot be used.
>
> Documentation provided by the customer, can be used where the documents are deemed sufficient to enable an update.

38 SOAF, paragraph 14.5.2.

39 SOAF, paragraph 14.6.

40 See Annexure SOAF-C at pages 137-138; Annexure SOAF-D at pages 273-275.

41 SOAF, paragraph 14.7.

23. The Blueprint also instructed the Compliance Officer to add a 10% penalty to the debt if "the customer has not met their obligations. For example, customer failed to provide information relating to their employment income confirmation".[42] The phrase "employment income confirmation" refers to the process described in paragraph 22 above. That is, after the Department had attempted to contact the person to ask for an explanation of (i) an Initial Discrepancy and then (ii) a Discrepancy, a penalty would be added to a debt raised against the person, unless the person provided information to the Department to prove the amounts of income the person had earned, derived or received in the relevant period.

24. Importantly, the Last Known Address and telephone number used by the Department were not necessarily current. As the applicant's case demonstrates, debts under the EIC program could be raised for periods several years in the past, in circumstances where it was very possible that the contact details held by the Department were out of date.[43]

25. In the applicant's case:

    25.1 On 19 September 2017, the Department sent an Initial Letter addressed to the applicant, but sent it to an address at which the applicant had not lived for approximately three years (the **Northcote address**).[44] The applicant had not been receiving social security payments in that three-year period and had no obligation to update her address with the Department.[45] The Initial Letter was sent by registered post and the Department received a notification from Australia Post that the letter had been delivered to the Northcote address, but the notification did not indicate whether the applicant had received the letter.[46] In fact, she did not receive it.[47]

    25.2 On 6 October 2017, the Department sent a further letter by registered post, again addressed to the applicant at the Northcote address. That letter was returned to the Department on 10 October 2017 marked "return to sender".[48] Despite receiving the "return to sender" notification, the Department continued

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42 Annexure SOAF-C at page 159.

43 No limitation period applies to debt recovery actions under the SS Act: s 1234B.

44 SOAF, paragraphs 36-37,

45 SOAF, paragraphs 33, 37.

46 SOAF, paragraph 38; Annexure SOAF-H at page 296.

47 SOAF, paragraph 59.

48 SOAF, paragraph 39.

to send the applicant a stream of letters by ordinary (not registered) post over the course of the next year, including letters demanding that the applicant pay the Alleged Debt and penalty and a letter stating that the applicant's tax return would be garnisheed.[49]

25.3 It should be inferred that the Department took no steps to confirm the applicant's address after it received the "return to sender" notification on 10 October 2017.[50] The only other attempts the Department made to contact the applicant were three telephone calls made by the Department to the applicant's mobile telephone on 27 February, 28 February and 20 March 2018.[51] The applicant did not answer those calls. In the first two calls, the Compliance Officer left a message for the applicant to call back. In the third call, the Compliance Officer did not leave a message. Nothing in the records of the calls, made by the Compliance Officers, indicates that they said anything about a debt, or a potential debt, in the messages they left for the applicant.[52]

25.4 On 27 February 2018, immediately before the call made on that date, a Compliance Officer applied the PAYG data about the applicant's income for the 2011-2012 financial year to conduct a Provisional Assessment, which produced a provisional debt.[53] After the call made on 28 February 2018, the Compliance Officer recorded: "Because customer failed to answer both attempts, match data will be applied …".[54] "Match data" refers to the PAYG data. The Compliance Officer followed the process set out in the Blueprint, which produced the Alleged Debt and penalty.[55] The Alleged Debt was calculated in the manner set out in paragraph 48 of the SOAF.

26. On 2 March 2018, the Department sent a letter addressed to the applicant at the Northcote address, demanding payment of the Alleged Debt and penalty by 2 April 2018.[56]

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49 SOAF, paragraphs 40, 49, 51, 53-55.

50 Even after the applicant updated her address with the Department, on 13 September 2018, the Department did not resend any of the letters referred to above or otherwise seek to contact the applicant at her updated address: SOAF, paragraphs 57-58.

51 SOAF, paragraphs 43-44, 50.

52 Annexure SOAF-L at pages 306-307; and Annexure SOAF-P at pages 316-317.

53 SOAF, paragraph 42.

54 SOAF, paragraph 44.

55 SOAF, paragraph 45.

56 SOAF, paragraph 49, Annexure SOAF-O at page 313.

27. On 31 August 2018, the Department sent a letter addressed to the applicant at the Northcote address, stating that a decision had been made to garnishee the applicant's tax return.[57]

28. When a Compliance Officer reassessed the Alleged Debt on 21 February 2019, the Compliance Officer identified that the applicant had not been paid Austudy for the fortnight from 21 March to 3 April 2012, notwithstanding that the applicant had been entitled to payment for that fortnight.[58] The Compliance Officer removed the amount in respect of that fortnight from the Alleged Debt to produce the Reassessed Alleged Debt, but did not set off the underpayment against the alleged overpayments that comprised the Reassessed Alleged Debt.[59]

29. Similarly, when a delegate of the Secretary reviewed the Alleged Debt and the Reassessed Alleged Debt on 21 August 2019, the delegate identified that the applicant had been underpaid $482.83 for the fortnight from 21 March to 3 April 2012.[60] However, when the delegate's decision was communicated to the applicant, she was told only that she had been found to owe a debt of $1.48 (for the fortnight from 4 to 17 April 2012), which had been waived.[61]

30. The applicant does not contend in this proceeding that the Commonwealth should pay her the net amount of Austudy that she was underpaid. The applicant simply notes (for context) that, when the Department reviewed the applicant's Austudy payments against information about her employment income obtained by the Department from the applicant's employer and bank, the result was that:[62]

    30.1 subject to two very slight variations (an overpayment of $1.48 and an underpayment of $3.81), the applicant was entitled to the Austudy payments she had received in 2012; and

    30.2 due to an error on the part of the Department, the applicant was in fact underpaid a net amount of $485.16 in Austudy payments, to which she was entitled.

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57 SOAF, paragraph 55; Annexure SOAF-T at page 330.

58 SOAF, paragraphs 27, 69.1.

59 SOAF, paragraphs 63-64.

60 SOAF, paragraph 69.1.

61 SOAF, paragraph 70; Annexure SOAF-AC at pages 363-366.

62 SOAF, paragraph 69.

4 The demands for payment of the Alleged Debt and the Reassessed Alleged Debt were unlawful

31. The applicant submits that:

31.1 prior to using statutory powers to demand a debt that is said to arise under ss 1222A(a) and 1223(1) of the SS Act, an officer of the Commonwealth must determine that a debt has arisen and must do so lawfully (that is, according to law and not arbitrarily);

31.2 apportioned PAYG data provides an arbitrary basis, and therefore does not provide a lawful basis, to establish that a debt has arisen;

31.3 s 1229 of the SS Act does not alter that position;

31.4 accordingly, the demands that the applicant pay the Alleged Debt and the Reassessed Alleged Debt were unlawful, and the letters demanding the Alleged Debts were not valid notices for the purposes of s 1229; and

31.5 alternatively, should the Court hold, contrary to the submissions outlined at paragraphs 31.1 to 31.4 above, that the validity of a notice under s 1229 depends only on the objective existence of "a debt by a person to the Commonwealth under the social security law", without reference to any determination by an officer of the Commonwealth that a debt exists, the purported s 1229 notices were invalid because none of the relevant preconditions to the existence of a debt, as prescribed by ss 1222A(a) and 1223(1), was present.

4.1 The legislative scheme

4.1(a) Entitlement to Austudy under the SS Act

32. Under the SS Act, as it applied at the relevant times in 2012, the rate of a person's entitlement to an Austudy payment for a given fortnight was to be worked out in accordance with the Austudy Payment Rate Calculator in s 1067L.[63] Under s 1067L, the person's rate of payment for the fortnight was calculated by subtracting the person's "income reduction" from the person's fortnightly "maximum payment rate".[64] The main

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63 s 581 of the SS Act (as in force on 4 April 2012).

64 See the method statement in s 1067L-A1 of the SS Act (as in force on 4 April 2012).

integer of the person's "income reduction" was the person's "ordinary income" for the fortnight.[65] The "rate of payment" calculated under s 1067L was a daily rate, but the daily rate was "worked out by dividing the fortnightly rate calculated according to this Rate Calculator by 14".[66] Subject to some matters that are not presently material, the person's ordinary income was "to be taken into account in the fortnight in which it is first earned, derived or received".[67] "Ordinary income" was defined to include "an income amount earned, derived or received by the person for the person's own use or benefit".[68]

33. Under the SS Administration Act, as it applied at the relevant times in 2012, Austudy was to be paid "in arrears" and "by instalments relating to such periods (not exceeding 14 days) as the Secretary determines".[69] The amount of each instalment was to be calculated by reference to the payment rate that was applicable to each day in the instalment period, which was to be worked out in accordance with the Austudy Payment Rate Calculator.[70] In practice, Austudy was, and is, paid in fortnightly instalments.[71] Further, in 2012, as now, the Secretary of the Department could require a person who was receiving an Austudy payment to give information to the Secretary.[72] In practice, a person who was receiving Austudy payments was generally required to report to the Department the income that he or she earned, derived or received for a particular fortnight before being paid an Austudy payment (if any) for that fortnight.[73]

4.1(b) Relevant authority on raising and demanding debts under social security legislation

34. While s 1223 creates a debt due to the Commonwealth, the Commonwealth has power to recover that debt only if the Commonwealth first makes a determination that a debt is due to the Commonwealth. Although ss 1222A and 1223 are central to the regime under the SS Act for the recovery of debts, their operation has not been the subject of detailed

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65 See the method statement in s 1067L-D1 of the SS Act (as in force on 4 April 2012).

66 s 1067L-A1 of the SS Act (as in force on 4 April 2012).

67 s 1067L-D19 of the SS Act (as in force on 4 April 2012).

68 s 8(1) of the SS Act (as in force on 4 April 2012).

69 s 43(1) of the SS Administration Act (as in force on 4 April 2012). Austudy is, and was, a "social security periodic payment" because it is a "social security benefit": s 1(1) of sch 1 to the SS Administration Act (definition of "social security periodic payment"); s 23(1) of the SS Act (definition of "social security benefit").

70 s 43(3) of the SS Administration Act (as in force on 4 April 2012).

71 SOAF, paragraph 7.

72 s 63(2)(d) of the SS Administration Act (as in force on 4 April 2012).

73 As the applicant did: SOAF, paragraphs 27-32.

consideration by any Court. However, their predecessors in the *Social Security Act 1947* (Cth) (the **1947 Act**) and the SS Act are the subject of authority.

34.1 In particular, s 140(1) of the 1947 Act, as it stood in the early 1980s, is the direct ancestor of the current s 1223. Section 140(1) was renumbered as s 181(1) in 1987,[74] then renumbered again as s 246(1) in 1988,[75] before being "re-enacted" in different, but materially similar, terms in the SS Act in 1991.[76]

34.2 Section 1223 is now the central provision of the SS Act for the creation of debts to the Commonwealth by reason of overpayments of social security benefits.

35. Judicial decisions on the predecessors to s 1223 establish that, although the SS Act does not expressly require or authorise an officer of the Commonwealth to decide that a debt exists under s 1223, such a decision is impliedly required by the SS Act before the Commonwealth can demand payment of the debt.

36. In *Director-General of Social Services v Hangan* (***Hangan***),[77] the Director-General of Social Services argued that the Administrative Appeals Tribunal (the **AAT**) did not have jurisdiction to review a decision of the Director-General that the respondent had been overpaid child endowment, that a debt had therefore arisen under s 140(1) of the 1947 Act, and that the debt should be recovered. Section 140(1) relevantly provided:[78]

> Where ... in consequence of a failure or omission to comply with any provision of this Act, an amount has been paid by way of … endowment … which would not have been paid but for the … failure or omission, the amount so paid shall be recoverable in a court of competent jurisdiction … as a debt due to the Commonwealth.

The Director-General submitted that s 140(1) was "self-operating" and that therefore there had been no "decision" for the purposes of the *Administrative Appeals Tribunal Act 1975* (Cth).[79]

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74 *Social Security Amendment Act 1987* (Cth).

75 *Social Security (Review of Decisions) Act 1988* (Cth). See also *Secretary, Department of Social Security v Greenwood* (1992) 26 ALD 554 at 563-564 (French J).

76 *Ridley v Secretary, Department of Social Security* (1993) 42 FCR 276 at 277-278 (Spender, Gummow and Lee JJ). Various amendments to the SS Act have subsequently been made, but it is clear that s 1223 of the present Act fulfils materially the same function as s 140(1) of the 1947 Act.

77 (1982) 70 FLR 212.

78 *Hangan* (1982) 70 FLR 212 at 219. In 1985, s 140(1) was amended to provide that "the amount so paid is a debt due to the Commonwealth" (emphasis added): *Social Security and Repatriation (Budget Measures) Amendment Act 1985* (Cth); and see *Kalwy v Secretary, Department of Social Security* (1992) 38 FCR 295 at 298.

79 *Hangan* (1982) 70 FLR 212 at 219.

37. The Court unanimously rejected that submission. Justice Toohey said:[80]

> Let it be assumed that the recoverability of an overpayment as a debt due to the Commonwealth does not depend upon a decision by the Director-General and that such a debt may not be waived by him. It does not follow that a decision by the Director-General is not a pre-requisite to any action taken for that recovery. Indeed, as a matter of administration, it is hard to see how such recovery could be effected without a decision by the Director-General or some other officer competent to make it …
>
> …
>
> In my view there was a decision by the Director-General … that endowment that had been paid was not payable … and that it should be recovered.

Justice Fitzgerald said:[81]

> ... any duty which the Director-General may have to recover a debt which is recoverable under s 140(1) cannot sensibly be made dependent on the objective existence of the statutory elements of liability but must be related to a determination by the Director-General … that the conditions of recoverability exist …
>
> … Indeed, it is difficult to accept that it could really be the contention of the Director-General that the existence or absence of a duty to recover an amount overpaid can be separated from his determination of whether or not there is a recoverable amount, so that he breaches his duty whenever he acts in accordance with a determination which is incorrect ...
>
> In my opinion, although the recoverability of overpaid endowment under s 140(1) depends on whether or not the specified circumstances in fact exist, the Director-General's determination that they do exist and that an amount is recoverable is an administrative pre-requisite to any duty to recover that amount. Given such a duty, the Director's determination that an amount is recoverable will inexorably lead to a decision to recover as part of the administrative process leading to recovery …

Justice Fox determined the issue similarly.[82]

38. *Hangan* has been repeatedly approved and applied, including in respect of the early successors to s 140(1) of the 1947 Act in the SS Act.[83]

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80 *Hangan* (1982) 70 FLR 212 at 220-221.

81 *Hangan* (1982) 70 FLR 212 at 233-234.

82 *Hangan* (1982) 70 FLR 212 at 213-215.

83 See *Director-General of Social Services v Hales* (1983) 78 FLR 373 at 400 (Lockhart J), 408 (Sheppard J); *Secretary of the Department of Social Security v Alvaro* (1994) 50 FCR 213 at 218 (von Doussa J; Spender and French JJ agreeing); *Re Registrar, Social Security Appeals Tribunal; Ex parte Townsend* (1995) 69 ALJR 647 at 648 (Toohey J); *Lee v Secretary of Department of Social Security* (1996) 68 FCR 491 at 500-501 (Davies J; Cooper J agreeing at 508), 510 (Moore J).

39. Although *Hangan* dealt with the jurisdiction of the AAT, it authoritatively determines the operation of s 1223, as the successor to s 140(1). *Hangan* stands for the proposition that, while s 1223 creates a debt, a decision that a debt exists and should be recovered is impliedly required by s 1223 as a precondition to recovery of the debt. It follows that the correctness of a decision, that a debt exists and should be recovered, is a "matter … arising under" a law made by the Parliament within s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), that law being s 1223 of the SS Act.

40. The *Hangan* view of the operation of the SS Act is further supported by *Kalwy v Secretary, Department of Social Security* (***Kalwy***),[84] where the Full Court considered s 246(1) of the 1947 Act (the renumbered s 140(1)). The Full Court said:[85]

> It follows, in our view, that it was an essential ingredient of the operation of s 246(1) in the present case that the Secretary demonstrate that the amounts in question were paid to Mr Kalwy. Only by identifying the recipient of the payments in question was it possible to have the statutory debt to the Commonwealth created in any effective sense.

41. *Kalwy* was not a case about the jurisdiction of a tribunal. The issue for decision was whether there was a "debt due to the Commonwealth" within the meaning of s 246(1) so as to authorise the giving of a notice to a third party (a bank) to recover that debt (in effect, a garnishee). *Kalwy* therefore reinforces the proposition that, before seeking to recover a debt said to arise under social security legislation, a decision-maker acting on behalf of the Commonwealth must "demonstrate" that the debt exists in order to "create" the debt in an "effective sense".

42. The reasoning developed in *Hangan* and *Kalwy* can also be seen in *Hazim v Secretary, Department of Family and Community Services* (***Hazim***),[86] where Gray J said:[87]

> An understanding of the nature of the decision under review must be derived from the terms of the statutory provision pursuant to which the decision is made. In the present case, the source of the power to make the decision was s 1224 of the Act.
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> …

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84 (1992) 38 FCR 295.

85 *Kalwy v Secretary, Department of Social Security* (1992) 38 FCR 295 at 299-300 (Beaumont, Hill and O'Connor JJ) (emphasis added).

86 (2002) 116 FCR 533.

87 *Hazim v Secretary, Department of Family and Community Services* (2002) 116 FCR 533 at 543 [31], 550 [55]-[56] (emphasis added).

> A decision to treat a recipient of social security payments as being indebted pursuant to s 1224 in respect of those payments cannot be made without regard to the terms of the section …
>
> In failing to identify the decision under review correctly, and in failing to deal with the requirements of s 1224 of the Act for the creation of a debt, the Tribunal erred in law.

Thus, Gray J concluded that "raising a debt" and "the making of a demand" for that debt were decisions made pursuant to s 1224.[88] That was so notwithstanding that s 1224 "does not, in its terms, empower any person to make a decision" and that, if the Commonwealth were to sue to recover a debt that it alleged had arisen under s 1224, the question for the Court would be whether the statutory criteria for the creation of the debt were met, rather than whether an officer of the Commonwealth had made a decision that the debt existed.[89]

43. Similar reasoning appears in *Secretary, Department of Family and Community Services v Hocking*, where Beaumont J confirmed that "the first issue" for a decision-maker considering whether to demand a debt under the SS Act was "whether a debt to the Commonwealth had been created by virtue of the operation of" a provision of the SS Act.[90] His Honour said that the SS Act conferred on the decision-maker "jurisdiction to so find", notwithstanding that the SS Act did not expressly require such a decision.[91]

4.1(c) Section 1229 of the SS Act

44. Section 1229 of the SS Act was enacted in 2001.[92] It does not alter the position articulated in *Hangan*, *Kalwy* and the other cases discussed immediately above.

44.1 Section 1229(1) relevantly provides: "If a debt by a person to the Commonwealth under the social security law has not been wholly paid, the Secretary must give the person a notice specifying" certain details of the notice and the debt.

44.2 Section 1229(2) provides: "The outstanding amount of the debt is due and payable on the 28th day after the date of the notice."

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88 *Hazim* (2002) 116 FCR 533 at 544 [34].

89 *Hazim* (2002) 116 FCR 533 at 544 [34]

90 [2002] FCA 1328 at [49]; see also at [52].

91 [2002] FCA 1328 at [52].

92 *Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Act 2001* (Cth).

45. Section 1229 does not confer a power to determine – conclusively, or so as to cast the burden of proof on the recipient of a notice to prove to the contrary – that a debt exists. Rather, the Secretary's obligation to give a notice under s 1229 is triggered only "If a debt" exists.[93] As such, s 1229 is an expression of the general principle that Commonwealth entities should pursue recovery of debts owed to the Commonwealth.[94] Neither s 1229(1) nor s 1229(2) is capable of creating an obligation to pay a debt if that debt has not arisen upon a lawful determination made under (relevantly) s 1223, and thus by the operation of (relevantly) s 1223(1). Rather, as the relevant explanatory memorandum states, the purpose of s 1229 is advisory:[95]

> New subsection 1229(1) provides for a notice to be sent to a person who has a debt due to the Commonwealth. The notice will advise the person of the outstanding amount of the debt. It will also advise the person that the debt is due and payable on the 21st day after the date on the notice.

46. Therefore, the obligation to issue a notice under s 1229(1) is triggered, relevantly, if a decision-maker determines (that is, determines lawfully) that a debt exists under s 1223. Section 1229(2) does not impose an obligation to pay the amount shown in a notice issued under s 1229(1). It simply provides a date by which "the debt" – that is, a debt that has arisen under s 1223 – becomes "due and payable", as opposed to merely "due".

47. In no sense is s 1229 similar or equivalent to statutory provisions concerning the assessment and recovery of income tax.

    47.1 Critically, neither the SS Act nor the SS Administration Act contains a provision analogous to the former s 177(1) of the *Income Tax Assessment Act 1936* (Cth), now replaced by s 350-10(1), item (2), of sch 1 to the *Taxation Administration Act 1953* (Cth) (the **TAA**).

    47.2 Section 177(1) provided, and s 350-10(1), item (2), now provides, that a notice of assessment under a taxation law is "conclusive evidence that … the amount and all the particulars of the assessment are correct", except in proceedings under Part IVC of the TAA, in which proceedings a taxpayer may prove the

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93 Section 1229(1).

94 See s 15 of the *Public Governance, Performance and Accountability Act 2013* (Cth) and r 11 of the *Public Governance, Performance and Accountability Rule 2014* (Cth).

95 Family and Community Services and Veterans' Affairs Legislation Amendment (Debt Recovery) Bill 2000 (Cth), Explanatory Memorandum at 9 (emphasis added). The period in s 1229(2) was originally 21 days. It is now 28 days.

correct amount of tax that the taxpayer has become liable to pay by the operation of the tax statutes.[96]

48. Section 1229 has no such far-reaching operation or consequences. Rather, s 1229 merely formalises the administrative process that already existed. That process was, and is, that a decision-maker would:

48.1 decide that a debt had arisen under the SS Act (or the 1947 Act before the enactment of the SS Act) and should be recovered; and

48.2 contact the person who owed the debt (or alleged debt) to advise the person of the existence of the debt and to seek payment of the debt.

4.2 The first sub-issue: The apportioned PAYG data did not enable the Compliance Officers to establish the existence of a "debt due to the Commonwealth"

49. The demands for the Alleged Debt and the Reassessed Alleged Debt were unlawful because the apportioned PAYG data did not enable the Compliance Officers to form any opinion (other than an arbitrary opinion) that the applicant owed the Commonwealth a debt in respect of any Austudy payment. There are several reasons why that is so.

49.1 First, the PAYG data related to the applicant's income for the entire 2011-2012 financial year. The applicant received Austudy payments for only five fortnights in that year. There was no basis for the Compliance Officers to form the view, or to assume, that the applicant earned exactly the same amount of income in each fortnight of the 2011-2012 financial year. Still less was there a basis to form the view, or to assume, that the applicant earned exactly the same amount of income on each day of the 366 days in the financial year. Despite that obvious limitation of the PAYG data, that is how the PAYG data was apportioned under the EIC program.[97]

49.2 Secondly, the contrary inference was much more likely to be correct. For a person to be eligible for Austudy as a student, the person must be studying full-time, as the applicant was.[98] It is more likely that a person studying full-time

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96 See, generally, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 154-157 [16]-[24],166 [64]-[65] (Gummow, Hayne, Heydon and Crennan JJ); *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221 at [69] (Kyrou, McLeish and Niall JJA).

97 SOAF, paragraph 48.1.

98 SOAF, paragraphs 7, 23.

would earn different amounts in different fortnights of a financial year than that the person would earn exactly the same amount in each of the 26 fortnights of the financial year – especially where the person receives Austudy for only part of a financial year, as the applicant did. There is no reason to think that a person would earn exactly the same amount both in: (a) fortnights in which the person was receiving Austudy (and therefore studying full-time); and (b) fortnights in which the person was not receiving Austudy.

49.3 Thirdly, the fact that the applicant did not respond to the Department's letters and telephone calls in 2017 and 2018 does not provide any basis for inferences that the apportioned PAYG data was correct and the income reported by the applicant in 2012 was incorrect. In its Response to Points of Claim,[99] the Commonwealth contends that the Compliance Officers were entitled to infer, from the lack of response from the applicant, that the applicant "did not dispute" those matters. It is unclear precisely what the Commonwealth means by "did not dispute".

(a) If the Commonwealth means that an inference could be drawn that the applicant accepted the correctness of the apportioned PAYG data, there was no basis for that inference. The only conclusion to be drawn from the fact that the applicant had not contacted the Department was that the applicant had not contacted the Department. To the extent that the Commonwealth relies on the notification from Australia Post that the Initial Letter was delivered, that notification did not confirm that the applicant had received the letter and, in any event, it was quickly followed by the "return to sender" notification that the Department received when it sent the next letter.[100] To infer, in those circumstances, that the applicant accepted that the apportioned PAYG data was correct, and that the income reported by the applicant in 2012 was incorrect, is fanciful.

(b) If the Commonwealth means simply that the applicant had not disputed the apportioned PAYG data, without any implication that she had become aware of it, the inference was correct. The applicant had not disputed the PAYG data, because she had not become aware of it. The

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99 Commonwealth's Response to Points of Claim, at paragraph 13(c).

100 See paragraph 25 above.

Commonwealth's next contention is telling. It contends that, because the Compliance Officers were entitled to infer that the applicant "did not dispute" the correctness of the apportioned PAYG data, the Compliance Officers were also able to form an opinion that the relevant Alleged Debts had arisen.[101] That is a clear reversal of the burden of proof imposed by ss 1222A(a) and 1223(1) of the SS Act, as confirmed by the cases referred to at paragraphs 36-43 above. The SS Act requires an officer of the Commonwealth to form an opinion that a debt exists before demanding a debt. The Commonwealth's argument appears to be that, if a person does not prove to the Department that a debt does not exist, the Department may assume that the debt does exist. That is contrary to the statute.

49.4 Fourthly, the "income" shown in the PAYG data and the "income" that affected the applicant's Austudy payments were not the same. The PAYG data showed the gross amount that Well Baked paid to the applicant in the 2011-2012 financial year, not the amount that the applicant "earned, derived or received" in that period. While the applicant was receiving Austudy, she was required to report to Centrelink the amounts she earned for each fortnight – that is, the amounts she became entitled to for the hours that she worked. So, for example, income that the applicant earned in the fortnight ending 26 June 2012 would be reportable to the Department but, if that income was paid to the applicant after 30 June 2012, that income would be shown in the PAYG data for the applicant for the following (2012-2013) financial year.

4.3 The second sub-issue: The demands for the Alleged Debt and the Reassessed Alleged Debt were unlawful

50. There are several ways of characterising the obvious absurdity of the conclusion, expressed in the Alleged Debt and the Reassessed Alleged Debt, that the apportioned PAYG data correctly showed the amounts of income that the applicant had actually earned in each relevant fortnight.

50.1 The conclusion was not based on findings or inferences of fact supported by logical grounds, rendering it irrational.[102]

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101 Commonwealth's Response to Points of Claim, at paragraph 13(d).

102 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

50.2 It was also legally unreasonable, both in the sense that the statutory power conferred by s 1223 had been abused and in the sense that no reasonable decision-maker could, on the basis only of the PAYG data and by making only a speculative and predictive judgment, have reached it.[103]

50.3 Even if, as the Commonwealth contends, a notice can be issued under s 1229 notwithstanding that the decision-maker "made an error in calculating the amount of the debt",[104] it does not follow that s 1223 or s 1229 authorise decision-makers to make arbitrary, irrational or unreasonable decisions. Decisions under the SS Act, like all decisions made under statute, must be made "according to the rules of reason and justice" and must be "legal and regular, not arbitrary, vague and fanciful".[105] Because a notice issued under s 1229 is not conclusive – or indeed, any – evidence that the decision was so made, the fact that a notice was issued to the applicant is irrelevant to the issue of whether the decision made under s 1223 in respect of the applicant was made lawfully.

51. The conclusion also demonstrated an error of law, in that the Compliance Officers, under the EIC program, were effectively directed to reach the conclusion on the grounds that the applicant "did not dispute" the correctness of the apportioned PAYG data (even though the applicant had not, in fact, been given any opportunity to raise any such dispute).

51.1 In doing so, the EIC program directed attention away from the question posed by s 1223(1)(b) of the SS Act: had the applicant obtained the benefit of social security payments to which she was not entitled?

51.2 The EIC program therefore required a process that was "inconsistent with a proper observance of the statutory criteria", rendering the conclusions of the Compliance Officers "vitiated" because the conclusions were affected by errors of law.[106]

51.3 In short, the use of apportioned PAYG data, as required by the EIC program, was contrary to the statute.

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103 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

104 Response to Points of Claim, paragraph 10(e).

105 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at 3-4 [5] (Allsop CJ).

106 *Green v Daniels* (1977) 13 ALR 1 at 9 (Stephen J).

4.4 The demands for the Alleged Debt and the Reassessed Alleged Debt were unlawful

52. As there was no basis for the Compliance Officers to conclude that the Alleged Debts existed, the demands by the Commonwealth for repayment of those debts were unlawful.

52.1 The Commonwealth contends that the demands – that is, the letters of 2 March 2018 and 6 March 2019 – were notices under s 1229 of the SS Act;[107] and, it seems, that the giving of those s 1229 notices had the effect of making lawful the Commonwealth's demands.[108]

52.2 As submitted in paragraph 45 above, s 1229(1) is not a source of power to determine that a debt exists. It merely imposes a requirement on the Secretary to issue a notice if, relevantly, an officer of the Commonwealth has lawfully determined that a debt exists under s 1223(1).

52.3 Because no lawful determination was made that the applicant owed a debt, the letters were not valid notices for the purposes of s 1229.

53. In the alternative, if the precondition to the issuing of a notice in s 1229 is that there is, objectively, "a debt by a person to the Commonwealth" under a statute, without a decision-maker being required to "raise" a debt by determining that a debt exists under s 1223, the precondition was not met in this case. It was not met because, on the information before the relevant Compliance Officers, and as confirmed by the review performed on 21 August 2019, none of the preconditions to the existence of a debt under ss 1222A(a) and 1223(1) was met so as to create any debt. Because there was no debt, the letters of 2 March 2018 and 6 March 2019 were not valid notices for the purposes of s 1229.

4.5 Further matters indicating that the demands were unlawful

4.5(a) The Secretary's power to obtain information

54. The arbitrary nature of the Commonwealth's determination that the applicant owed the Commonwealth a debt is highlighted by the fact that the social security law provides ample power for the Secretary to obtain information and documents to confirm the

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107 Commonwealth's Response to Points of Claim, paragraphs 2(b) and 6(b).

108 Commonwealth's Response to Points of Claim, paragraphs 9, 10(e), 13(e), 17(e).

amounts of income that a person earned in various fortnights while receiving social security payments – a power that the Department chose not to use to obtain information about the applicant's income, preferring to rely on speculation and on an attempt to shift the burden of proof to the applicant: see paragraphs 18.2 and 49.3(b) above.

54.1 For example, under s 192(c) of the SS Administration Act, the Secretary has power to require a person to give information or produce a document that the Secretary considers may be relevant to matters including "the question whether a social security payment was payable to a person who has received the payment".

54.2 That power was exercised to obtain information from the applicant's employer and bank in this case (after the applicant commenced this proceeding).[109]

54.3 That is the mechanism that the social security law gives to the Department to obtain information about a person's income, so that the Department can examine the information and determine whether the person owes a debt to the Commonwealth.

54.4 The Commonwealth's reliance only on the speculative and predictive judgment outlined in paragraphs 22, 25 and 49 above, its refusal to employ any real evidential judgment, and the reversal of the burden of proof that is effected by the EIC program are each inconsistent with that statutory scheme.

55. The Secretary also has a power, under s 69 of the SS Administration Act, to give "a person who is not receiving a social security payment but to whom a social security payment … has at any time been paid" a notice requiring the person to "give the Department a statement about a matter that might have affected the payment to the person of the social security payment".[110]

55.1 However, pursuant to s 69(6), a notice can only impose such a requirement if the "matter" arose less than 13 weeks before the giving of the notice.

55.2 The EIC program effectively circumvents the limitation imposed by s 69(6) by requiring persons to provide information to prove they correctly reported their income to the Department in the past.

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109 SOAF, paragraph 68.

110 s 69(1) and (2)(b) of the SS Administration Act.

55.3 That is another reason to consider that the Commonwealth's demand for the payment of the Alleged Debt, which was made as part of the EIC program, is unlawful and contrary to the statutory scheme.

4.5(b) Provisions of the SS Act with respect to the use of apportioned income

56. The SS Act provides no statutory authorisation for the Commonwealth to use the arbitrary, speculative and predictive judgments outlined in paragraphs 22, 25 and 49 above in order to make determinations about whether a debt is due to the Commonwealth. It is noteworthy that, in certain defined circumstances, the SS Act permits certain types of income to be apportioned over various periods other than a fortnight for the purpose of calculating entitlements under the SS Act. Those provisions do not support apportionment of the kind done under the EIC program. At the relevant times in 2012 (as now):

56.1 Section 1072 provided a general rule that "[a] reference in this Act to a person's ordinary income for a period is a reference to the person's gross ordinary income from all sources for the period".

56.2 Section 1073(1) relevantly provided that, if a person received certain types of amounts – but not "ordinary income from remunerative work undertaken by the person" – the person was "taken to receive one fifty-second of that amount as ordinary income of the person during each week in the 12 months commencing on the day on which the person becomes entitled to receive that amount". Essentially, s 1073(1) provided a way of dealing with certain lump sum payments.

56.3 Section 1073A provided for certain amounts earned by social security pensioners to be averaged over a period of up to a year. As the relevant explanatory memorandum states, this is a "special rule for social security pensioners" that is intended to allow certain "lump sums" to be spread over a period determined by the Secretary, but "[i]t is not the intention of the provision to spread casual earnings over a period greater than a fortnight".[111]

56.4 Section 1073B provided for averaging of income earned by a person receiving social security payments over an "instalment period". An "instalment period"

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111 Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Bill 2002 (Cth), Explanatory Memorandum at 57-58.

could not exceed 14 days.[112] The effect of s 1073B was to produce an average daily rate of income for each day in the instalment period. Section 1073C then provided that "(a) the rate of the person's employment income on a fortnightly basis for that day may be worked out by multiplying that amount by 14; and (b) the rate of the person's employment income on a yearly basis for that day may be worked out by multiplying that amount by 364". Sections 1073B and 1073C do not authorise apportionment of the kind done under the EIC program. They simply provide a mechanism for working out "the rate of the person's employment income on a yearly basis" where it is relevant, under the SS Act, to calculate the rate on a yearly basis. The relevant period for Austudy payments was a fortnight, not a year. As the relevant explanatory memorandum states, the main purpose of ss 1073B and 1073C was to facilitate the "working credit" rules in the SS Act, the function of which "is basically to allow a person's ordinary income to be reduced before it is put through [the] income testing process".[113] The working credit rules provided for the calculation of "the participant's rate of employment income on a yearly basis" for the purpose of working out the effect on working credit balances of social security pensioners.[114] The working credit rules did not apply to Austudy recipients.[115]

56.5 For certain specific items of income, the Austudy Payment Rate Calculator provided for apportionment over periods longer than a fortnight. For example, if a person received a "leave payment or termination payment" that was "in respect of a period longer than a fortnight", the person was "taken to receive in a payment fortnight or part of a payment fortnight an amount calculated by: (c) dividing the amount received by the number of days in the period to which the payment relates (**daily rate**); and (d) multiplying the daily rate by the number of days in the payment fortnight that are also in the period."[116]

57. Sections 1073, 1073A, 1073B and 1073C serve specific purposes and do not provide any general power for the Department to apportion a person's income over a particular

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112 See SS Act, s 23(1) (definition of "instalment period") and SS Administration Act, s 43(1).

113 Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Bill 2002 (Cth), Explanatory Memorandum at 45.

114 s 1073H of the SS Act (as in force on 4 April 2012).

115 s 1073D(d) of the SS Act (as in force on 4 April 2012); and see s 23(1) (definition of "student income bank") and s 1067L, Module E.

116 s 1067L-D11 of the SS Act (as in force on 4 April 2012).

period for the purpose of determining the person's entitlements to social security payments.

57.1 The Commonwealth has not relied on those provisions to support the EIC program, nor could it.

57.2 However, their presence in the SS Act – providing, as they do, for apportionment for certain purposes and in certain circumstances – points strongly against the permissibility of apportionment as carried out under the EIC program.

57.3 Those provisions indicate that, where Parliament has intended to authorise apportionment, it has said so, and it has done so for specific purposes that are unrelated to debt recovery.

57.4 The apportionment provisions in the Austudy Payment Rate Calculator also indicate that, where Parliament has intended to authorise apportionment in respect of Austudy, it has said so.

58. As relevantly applied to the facts of this case, ss 1072 and 1073 provide that a reference to a person's ordinary income in a fortnight for the purpose of working out the person's entitlement to Austudy for that fortnight means "the person's gross ordinary income from all sources for the period" (that is, the fortnight) and that "ordinary income from remunerative work" is not subject to apportionment over a period of a year.

58.1 Apportionment under the EIC program is inconsistent with those provisions.

58.2 As specific provisions that authorise apportionment in certain cases, subject to specific limitations, the provisions indicate that a general "power to apportion" is not available under s 1223(1).[117]

5 The penalties were unlawfully added to the Alleged Debts

59. It was unlawful for the Commonwealth, under s 1228B of the SS Act, to add a penalty to the Alleged Debt and the Reassessed Alleged Debt.

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117 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] (Gummow and Hayne JJ).

60. Section 1228B relevantly provided that "An amount by way of penalty is added to a debt due to the Commonwealth under this Chapter by a person in relation to a social security payment if" certain conditions were met, including, by s 1228B(1)(c), that:

> … the debt arose wholly or partly because the person had:
>
> (i) refused or failed to provide information in relation to the person's income from personal exertion; or
>
> (ii) knowingly or recklessly provided false or misleading information in relation to the person's income from personal exertion;
>
> when required, under a provision of the social security law, to provide information in relation to the person's income from personal exertion.

61. The penalty was to be an amount equal to 10% of the debt and, when added to the debt, became part of the debt.[118]

62. It was unlawful for the Commonwealth to demand a penalty from the applicant, for either of two reasons.

63. **First**, for the reasons given above, there no "debt due to the Commonwealth".

    63.1 The Commonwealth's position on the issue of the penalties appears to be different to, and inconsistent with, its position on the issue of the garnishee notice.

    63.2 In the Response to Points of Claim, the Commonwealth says that, as at 31 August 2018, there was "a debt due to the Commonwealth" for the purpose of s 1230C(2) of the SS Act, so as to authorise the garnishee notice.[119]

    63.3 But in relation to penalty, the Commonwealth says that, on the dates when the penalties were added to the Alleged Debts (2 March 2018 and 6 March 2019), there was not "a debt due to the Commonwealth" for the purposes of s 1228B(1) of the SS Act, to which a penalty could be added.

64. The inconsistency is perplexing and highlights the contortions that are necessary to justify the course of conduct engaged in by the Department in this case. Contrary to the Commonwealth's apparent position, the phrase "a debt due to the Commonwealth" should be given a consistent interpretation in Part 5.2 of the SS Act, in which the phrase

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118 s 1228B(2) and (2A) of the SS Act.

119 Response to Points of Claim, paragraph 17(e).

appears many times.[120] The term "debt" is relevantly defined, for the purposes of Chapter 5 of the SS Act, to mean, relevantly, "a debt recoverable by the Commonwealth under Part 5.2", further indicating that the term "debt" should be given a consistent interpretation throughout Part 5.2. But in any event, the applicant agrees that no "debt due to the Commonwealth", within the meaning of s 1228B(1), had lawfully been raised, or existed; and, for that reason, an essential precondition to the addition of a penalty was not met.

65. **Secondly**, there was no basis to consider that either the precondition in s 1228B(1)(c)(i) or the precondition in s 1228B(1)(c)(ii) was satisfied.

66. In relation to the first precondition:

66.1 The fact that the applicant had not provided information in response to the Commonwealth's ineffective attempts to contact her does not provide any rational basis for the imposition of a penalty. The Blueprint for the EIC program directed decision-makers to apply a recovery fee if the "customer failed to provide information relating to their employment income confirmation".[121] It is therefore apparent that, where (as in the applicant's case) the Department had not been able to contact the "customer" about the relevant PAYG data, a penalty would be added to any debt raised against that person on the basis that the person had "failed to provide information", for the purposes of s 1228B(1)(c)(i), in response to the Department's attempts to contact the person.

66.2 The error in that policy is that there is no provision of the social security law that requires a person to provide information in response to an Initial Letter, or other attempts by the Department to contact a person about PAYG data. As discussed at paragraphs 54 to 55 above, the SS Administration Act provides for a range of ways in which the Secretary can, by issuing statutory notices, require a person to provide information. But there is no general requirement for a person who receives a letter from the Department (or, as in this case, does <u>not</u> receive such a letter) to respond to the letter or to provide information in response to the letter. Initial Letters, such as that sent to but not received by the applicant, are not, and do not purport to be, notices under the SS Administration Act, which

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120 See, for example, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 FCR 473 at 477 [3] (Allsop CJ), and the cases there cited.

121 Annexure SOAF-C at page 159.

imposes a range of formal requirements and substantive limitations with respect to such notices.

66.3 Further, for the reasons given in paragraph 71.3 below, the word "failed", in s 1228B(1)(c)(i), should not be interpreted as applying to a situation where a person has not been successfully contacted by the Department, and therefore does not know that the Department is seeking "information" from her or him.

66.4 Finally, even if, contrary to the submissions above, the applicant "failed to provide information in relation to [her] income … when required, under a provision of the social security law", to do so, the Alleged Debt did not arise "because" of that failure, in any relevant sense. Had the apportioned PAYG data been accurate, the debt would have arisen because the applicant (on that hypothesis) would have incorrectly reported her earnings in 2012.

67. In relation to the second precondition:

67.1 Perhaps because of the matters outlined in paragraph 66 above, the Commonwealth has not, in its Response to Points of Claim, relied on s 1228B(1)(c)(i) at all. Instead, the Commonwealth relies on s 1228B(1)(c)(ii) to contend that, on the information before the decision-makers, the Alleged Debt and the Reassessed Alleged Debt had arisen because the applicant had "knowingly or recklessly provided false or misleading information" in relation to her income from personal exertion. Presumably the "information" to which the Commonwealth refers is the information about the applicant's income that the applicant reported to the Commonwealth when receiving Austudy in 2012.

67.2 There is no basis for that contention. As submitted in paragraph 17 above, there is no rational basis to consider that PAYG data, apportioned as it was under the EIC program, is probative of the actual amounts earned by a person in fortnights for which the person received social security payments. Still less does that data provide a rational basis to consider that, where the person has reported different amounts for those fortnights, the person has "knowingly or recklessly provided false or misleading information". Such a conclusion attracts the principles in *Briginshaw v Briginshaw*[122] and should not be reached lightly or arbitrarily. The arbitrary nature of the conclusion in this case is illustrated by the fact that, as the Department's reconsideration of the Alleged Debts on 21 August 2019

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122 (1938) 60 CLR 336.

demonstrated, the applicant was entitled to the Austudy payment she received in 2012.

67.3 In any event, the Compliance Officers in this case applied the policy set out in the EIC program.[123] Under that policy, penalties were to be added "where the person has not provided information relating to their employment income confirmation".[124] Therefore, it should be inferred that the Compliance Officers added the penalties by purporting to apply the criteria in s 1228B(1)(c)(i), not s 1228B(1)(c)(ii). The Commonwealth's contention regarding the latter provision is irrelevant to the decisions that were actually made.

68. Therefore, the Commonwealth's demands that the applicant pay the penalties that were imposed with the Alleged Debt and the Reassessed Alleged Debt were not lawfully made because there was no basis to consider that either precondition in s 1228B(1)(c) was present. In any event, the decision-makers purported to apply the first, not the second, precondition.

6 The garnishee notice was unlawfully issued

69. When the Commonwealth garnisheed the applicant's tax return, s 1230C(2) of the SS Act relevantly provided that "a debt due to the Commonwealth under this Act" was recoverable by garnishee notice:

> … only if the Commonwealth:
>
> (a) has first sought to recover the debt by means of a method mentioned in paragraph (1)(a), (b) or (c); and
>
> (b) can establish that the person who owes the debt:
>
> (i) has failed to enter into a reasonable arrangement to repay the debt; or
>
> (ii) after having entered into such an arrangement, has failed to make a particular payment in accordance with the arrangement.

70. The "method" of recovery in "paragraph (1) … (c)" was repayment by instalments under an arrangement entered into under s 1234 of the SS Act.

71. It was not lawful for the Commonwealth to issue the garnishee notice for any of three reasons.

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123 SOAF, paragraphs 45.6, 62-63.

124 SOAF, paragraph 14.8.

71.1 **First**, as submitted above, there was no "debt due to the Commonwealth", for the purposes of s 1230C(1) and (2), so as to authorise the issuing of the garnishee notice.

71.2 **Secondly**, the Department's attempts to contact the applicant, prior to the issue of the garnishee notice, did not constitute "seeking to recover the debt" by that method.

(a) Although the Commonwealth's letters referred to payment arrangements, the Commonwealth had received no confirmation that the applicant had become aware of those letters.

(b) To the contrary, the Commonwealth had received the "return to sender" notification on 10 October 2017, which put the Commonwealth on notice that the applicant might not have received any of its letters.

(c) Nor had the Department successfully contacted the applicant by telephone.

(d) In those circumstances, the Commonwealth had not "sought to recover the debt by means of" a payment arrangement for the purposes of s 1230C(2)(a).

71.3 **Thirdly,** the Commonwealth could not "establish" that the applicant had "failed to enter into" a payment arrangement.

(a) The word "fail" has been the subject of judicial exposition in various different contexts. It "frequently, and perhaps normally, connotes some default", but in some circumstances "it may mean no more than 'omits' or 'does not'".[125]

(b) Even in the latter circumstances, however, it is an "extreme" interpretation to construe "fail" such that it "impose[s] upon the person concerned so onerous a duty as that of avoiding the unavoidable".[126]

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125 *Victoria v The Commonwealth* (1975) 134 CLR 81 at 146 (Gibbs J), referring to *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279 at 295 (Taylor), 305 (Owen J); see also *Deputy Commissioner of Taxation v Ganke* (1975) 1 NSWLR 252 at 257-258 (Nagle J; Street CJ and Begg J agreeing); *R v Monroe* [2003] NSWSC 168 at [17].

126 *Comptroller General of Customs v Zappia* (2018) 92 ALJR 1053 at 1061 [35] (Kiefel CJ, Bell, Gageler and Gordon JJ), quoting *Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279 at 291 (McTiernan J).

(c) The word "failed" in s 1230C(2)(b)(i) should be understood as requiring "some default". So much is clear from the requirement that the Commonwealth must "establish" that the person "failed" to enter into a reasonable payment arrangement. It would make a nonsense of the provision, and undercut the protection it is clearly intended to afford, if it were read as requiring no more than that the Commonwealth establish that a person "has not" entered into a payment plan.

(d) Still less should the provision be given the "extreme" interpretation of imposing upon a person what is, in effect, an impossible obligation. In this case, the Commonwealth purported to "establish" that the applicant had "failed" to enter into a payment plan when she did not know, and the Commonwealth had no basis to consider that she did know, that the Alleged Debt had been raised. It was impossible for the applicant to enter a payment arrangement to pay a debt of which she had not been made aware by the Commonwealth. At a minimum, for s 1230C(2)(b)(i) to be satisfied, an officer of the Commonwealth needs to establish that a person who is alleged to owe a debt knows about that debt.

72. For those reasons, the garnishee notice was not lawfully issued by the Commonwealth.

7 Interest

73. The Commonwealth retained the money that it received pursuant to the garnishee notice between 3 September 2018 and 28 August 2019.[127] For the reasons given above:

73.1 the Alleged Debt was not validly raised, and did not exist;

73.2 the penalty that was added to the Alleged Debt was not validly added; and

73.3 the garnishee notice was not validly issued.

74. Accordingly, the applicant is entitled to interest, pursuant to s 51A(1) of the Federal Court Act. It is well-established that, where a party commences a proceeding for the recovery of money and, after the commencement of the proceeding, the respondent repays that

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127 SOAF, paragraphs 56, 71.

money, the Court nevertheless has power to order interest on the money in respect of the period for which the respondent retained it.[128]

8 Relief

75. The Court should make the declarations and orders set out in the amended originating application (making the alternative declarations in paragraphs 2 and 6 if required to reflect the Court's findings), save that the order set out in paragraph 4 should be for interest only.

Date: 11 November 2019

Peter Hanks, Kateena O'Gorman and Glyn Ayres

Counsel for the Applicant

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128 *State Bank of New South Wales v Commissioner of Taxation (Cth)* (1995) 62 FCR 371 at 384-385 (Wilcox J); *Elsinora Global Ltd v Commissioner of Taxation* (2006) 155 FCR 413 at 423 [49] (Young J, Gyles and Stone JJ agreeing). See also *SCI Operations Pty Ltd v The Commonwealth* (1996) 69 FCR 346 at 355-361 (Beaumont and Einfeld JJ); *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 300-301 [24]-[28] (Gaudron J).