

## SOCIAL SECURITY

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The majority of people experiencing homelessness will be recipients of social security benefits. This chapter examines the Australian social security system by giving an overview of common payments, benefits and allowances as well as guidance on the potential problems that clients may face in a social security context.

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## **1. Introduction**

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### **1.1 Social security**

The majority of people experiencing homelessness will be recipients of social security benefits or payments. Social security payments are provided by Centrelink, a federal government agency, for the purpose of assisting individuals to become self-sufficient (for example, Youth Allowance) and to support individuals in the community in need (for example, Disability Support Payment).

The amount of such social security payments has been criticised by many for being inadequate, as often people receiving such payments will struggle to pay for the bare necessities of life.

### **1.2 Scope of chapter**

This chapter gives an overview of the legal issues arising under Australia's social security system and provides:

- a brief summary of common payments, benefits and allowances and their eligibility requirements;
- guidance on the potential problems that clients may face in a social security context; and
- an outline of the appeal processes.

In particular the chapter addresses the following topics:

- pensions and other payments;
- what can go wrong for clients receiving Centrelink payments;
- the appeal processes to facilitate resolution of problems; and
- the complaints processes available within Centrelink.

## **2. Pensions and Payments**

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### **2.1 Overview**

There is a multitude of social security payments, benefits and allowances for which clients may be eligible. The payments etc range in their scope, their amount, their regularity and their qualification requirements.

This chapter begins by setting out the social security benefits for which people experiencing homelessness or who are at risk of homelessness are most likely to qualify. The chapter outlines what is required to qualify for each benefit and what action (if any) is required to continue to receive the benefit.

## 2.2 Income and assets tests and residency requirements for pensions etc

Before looking at the common pensions received by clients (specifically the Age Pension and the Disability Support Pension), this chapter sets out the income and assets tests and the residency requirements that apply to a number of pensions and other payments.

The income and assets tests commonly change, so it is important to check the amounts currently applicable to each payment. Additionally, a client's marital, family and residential situations will often be relevant under the tests.

### **Income test**

A recipient of the Age Pension will have their pension reduced if they earn a prescribed level of income. The income level differs according to the recipient's marital status, whether they have dependent children or whether they are blind.

For every dollar of income by which the pensioner exceeds the prescribed level (set as a fortnightly value), the pension is reduced by a certain amount. The calculations differ according to the status of the pensioner and are set out in full in the tables in section 1064 of the SS Act.

There is no detailed list of amounts that will constitute income for the purposes of the test. The definition of **income** in the SS Act is broad and includes 'income earned, derived or received by the person for the person's own use' and periodical payments or gifts.<sup>1</sup>

Section 8(8) of the SS Act lists payments that are not counted as income. They include loans, payments from a relative or emergency relief.

### **Assets test**

A recipient of the Age Pension will have their pension reduced if the total net value of their property and assets exceeds a prescribed level. The level differs according to the recipient's marital status, whether they own a home or whether they are blind. Unlike the income test, there is no adjustment to the level according to whether the recipient has dependent children.

The following table sets out the current basic limits:

<b>Homeowner status</b>	<b>Asset limit for a single person</b>	<b>Asset limit for a couple (combined)</b>
Homeowner	\$166 750	\$236 500
Non-homeowner	\$287 750	\$357 500

The pension will be reduced by \$1.50 a fortnight for every \$1000 the pensioner is over the limit (or 75 cents each for a member of a couple). The value of an asset is to be calculated according to its current market value, less any debt owed on it.

When calculating a person's assets, the value of their principal home is disregarded.<sup>2</sup> While the definition of a **principal home** is complex, it includes a situation in which a person has entered 'residential care' or a 'care situation'.<sup>3</sup>

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<sup>1</sup> SS Act, s 8(1).

Section 1118 of the SS Act sets out other assets that are exempt from the assets test.

Further, if it is not reasonable or possible for a person to realise the value of their asset, or to use it as security for borrowing, then it will not be counted as an asset under the test.<sup>4</sup>

A person can apply to Centrelink to use the hardship rules. The **hardship rules** essentially involve Centrelink disregarding the value of assets for the purposes of the assets test, on the basis that they do not produce income for their owners (and the owners do not have other sources of income).

Generally, Centrelink will not use the hardship rules if the hardship has come about through some action of the person making the application (for example, if the person has sold an asset at much less than its market value). To qualify for severe financial hardship, a person's total income (including pension) must be less than the maximum rate of pension and the person must have less than \$6000 (or \$10,000 in the case of a couple) in readily available funds.<sup>5</sup>

Even if the hardship provisions apply, a recipient's pension may be reduced by virtue of the income that could be derived from the recipient's use of an asset.<sup>6</sup>

### **Residency requirements**

A person seeking to claim the Age or Disability Pension must have qualifying Australian residence or a qualifying residence exemption.<sup>7</sup> A **qualifying Australian residence** requires a person to have been an Australian resident for at least 10 years continuously, or for a number of periods that in aggregate exceed 10 years (and at least one of the periods must have been for five years or longer).<sup>8</sup>

A person who resides in Australia and is either a refugee or a former refugee (or a family member of a refugee or former refugee) is entitled to a **qualifying residence exemption**.<sup>9</sup> This has the effect of putting the refugee (or family member) in the same position as if they had satisfied the Australian residency requirements above.

### **Citizenship**

Australian citizenship has little effect on qualification; the test is residency-based. However, it provides an exemption to waiting period requirements (see below).

### **Waiting periods**

Certain payments have a two-year (104-week) waiting period before a newly arrived resident can qualify (that is, a person who has arrived in Australia or been granted permanent residence after 1997). There are numerous exceptions to the waiting period requirement.

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<sup>2</sup> SS Act, s 1118(1).

<sup>3</sup> SS Act, s 11A.

<sup>4</sup> SS Act, ss 11(12), 11(13).

<sup>5</sup> Centrelink, *Fact Sheet — Information you need to know about your claim for Age Pension*, [http://www.centrelink.gov.au/internet/internet.nsf/filestores/ci006\\_0711/\\$file/ci006\\_0711en\\_p.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/ci006_0711/$file/ci006_0711en_p.pdf), 9.

<sup>6</sup> SS Act, ss 1129, 1130.

<sup>7</sup> SS Act, s 43(1).

<sup>8</sup> SS Act, s 7(5).

<sup>9</sup> SS Act, ss 7(6), 7(6AA).

## 2.3 Pensions

### *Age Pension*

In order to qualify for the Age Pension, a man must be aged over 65.<sup>10</sup> A woman born after 1 January 1949 must also be 65.<sup>11</sup> For women born earlier than 1949, a sliding age scale is in place to determine eligibility.<sup>12</sup>

If a person, immediately before reaching pension age, was receiving a Widow B Pension, a Widow Allowance, a Mature Age Allowance or a Partner Allowance, then they may qualify for the Age Pension on reaching pension age.<sup>13</sup>

The Pension Bonus Scheme provides a lump sum bonus to people who defer claiming the Age Pension and stay in the workforce. The recipient must not have received any income support payments since reaching pension age.

### *Disability Support Pension*

In order to qualify for a Disability Support Pension, a person must be over 16 years of age.<sup>14</sup> Further, the person must be permanently blind<sup>15</sup> or have a physical, intellectual or psychiatric impairment that is measured at 20 points or more on the tables found in Schedule 1B to the SS Act.

Additionally, the person must have a **continued inability to work**. This is defined in section 94(2) to mean that the person cannot, because of the impairment, work or train independently of a program of support for the next two years. **Work** means to work for at least 15 hours per week.

If a person sustained the impairment while they were not an Australian resident, then they will be unable to claim the pension until they reside in Australia for 10 years, unless they were a dependent child of an Australian resident at the time they first developed a continued inability to work.

## 2.4 Other payments and allowances

This section of the chapter considers a number of different payments and allowances commonly received by clients. When considering a client's situation, it is important to note that payments interact with each other in different ways. For example, a recipient of any social security benefit will be unable to access a Special Benefit payment and Rent Assistance will require the receipt of some other form of social security. It is also important to check the eligibility criteria for payments and their payment rates when you are assisting clients.

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<sup>10</sup> SS Act, s 23(5A).

<sup>11</sup> SS Act, s 23(5D).

<sup>12</sup> SS Act, s 23(5C).

<sup>13</sup> SS Act, s 43(c).

<sup>14</sup> SS Act, s 94(1)(d).

<sup>15</sup> SS Act, s 95.

### ***Carer Payment***

A person may receive a Carer Payment if they provide constant care, in the disabled person's own home, to one of the following:<sup>16</sup>

- a disabled adult with a score of at least 25 under the Adult Disability Assessment Tool (**ADAT**) (if one person is providing care);
- a disabled adult with a score of at least 80 under the ADAT (if more than one person is providing care);
- a disabled adult with a score of at least 20 under the ADAT if the carer is also caring for a dependent child under 16 years of age (if the child is over six, then a Carer Allowance will also be payable for the child);
- two or more disabled children aged under 16; or
- one profoundly disabled child (as defined in section 197 of the SS Act).

The Carer Payment is subject to the income test and the assets test in the same way as the Newstart Allowance (see below).

### ***Carer Allowance***

Carer Allowance is a fortnightly payment that can supplement a Carer Payment. It is not means or assets-tested.

In order to qualify for a Carer Allowance with respect to an adult, the carer:

- must be a family member of the person receiving care;
- the person receiving care must score below 30 on the ADAT;
- the care given must relate to bodily functions or sustaining the receiver's life (if the care giver and receiver do not share a home);
- the care must be given on a daily basis and for a total of at least 20 hours per week; and
- the care must be received in a private home.<sup>17</sup>

The qualifications are modified if the care receiver is hospitalised.<sup>18</sup>

A person seeking a Carer Allowance in respect of a child must have a dependent child under 16 or a dependent full-time student child aged between 16 and 21. The child must be disabled. A **disabled child** is defined in section 953 of the SS Act.

### ***Newstart Allowance***

The Newstart Allowance is income support for unemployed people who are seeking work. It is also the benefit provided to people who no longer qualify for other payments (such as the Disability Support Pension) due to their more restrictive eligibility criteria.

#### **(i) Qualification**

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<sup>16</sup> SS Act, s 198.

<sup>17</sup> SS Act, ss 954, 954A.

<sup>18</sup> SS Act, s 955.

In order to qualify for the Newstart Allowance, a person must satisfy the following requirements:<sup>19</sup>

- the person must be unemployed;
- the person must satisfy the activity test, or be exempt from it; and
- the person must sign an Activity Agreement (if required), and comply with one.

Further, the person must not be unemployed by reason of industrial action.<sup>20</sup> A person must also be an Australian resident and in Australia.

**(ii) Activity test**

The activity test requires the person seeking Newstart Allowance to demonstrate that they are actively seeking, and willing to undertake, suitable paid work.<sup>21</sup> The criteria surrounding the suitability of work are set out in section 601(2A) of the SS Act.

Some people seeking Newstart Allowance may be exempt from the activity test. The list of exemptions is long and can be found at Part 2.12 of the SS Act. Some criteria that may prove relevant are whether the person has suffered domestic violence,<sup>22</sup> has a disabled child<sup>23</sup> or if there are other special circumstances.<sup>24</sup> This special circumstances exemption may include homelessness.

**(iii) Activity Agreement**

An Activity Agreement, negotiated between the Job Network Provider and the recipient, will set out steps that the recipient must satisfy in order to continue to receive Newstart Allowance.<sup>25</sup>

A failure to comply with an Activity Agreement may constitute a 'participation failure', which may lead to the suspension or revocation of a Newstart Allowance. For further detail on the many circumstances in which a participation failure may occur, see sections 624–630 of the SS Act and section 3.2 of this chapter.

**(iv) Assets and income tests**

Section 611 of the SS Act sets out the assets limits (adjusted for CPI increases) for a person to receive the Newstart Allowance. The limits will differ according to the person's partnership status, whether or not their partner is receiving the allowance and whether the person (or their partner) is a homeowner.

The income tests set out in sections 1067 and 1068 of the SS Act may operate to reduce the amount paid under the Newstart Allowance.

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<sup>19</sup> SS Act, s 593.

<sup>20</sup> SS Act, s 596.

<sup>21</sup> SS Act, s 601.

<sup>22</sup> SS Act, s 602B.

<sup>23</sup> SS Act, s 602C.

<sup>24</sup> SS Act, s 603A.

<sup>25</sup> SS Act, ss 605–606.

## **Parenting Payment**

The Parenting Payment is paid to an Australian resident who is a parent of a young child. A person will not receive the Parenting Payment if they are already receiving a social security benefit. The Parenting Payment differs between single and partnered parents.

### **(i) Qualification**

For a single parent, the person must have a dependent child under eight years of age and the person must be the principal carer of the child.<sup>26</sup>

For a couple, the person receiving the payment (as only one person can receive a payment in relation to a child) must have a dependent child under six years of age and the person must be the principal carer of the child.<sup>27</sup> The definition of what constitutes a **couple** is complex.<sup>28</sup>

### **(ii) Participation requirements**

A person may be required to enter into, and comply with, a Parenting Payment Activity Agreement (similar to an Activity Agreement for the Newstart Allowance).<sup>29</sup> Common information required to be provided to Centrelink may include a person's living arrangements and current personal relationships.

### **(iii) Assets and income tests**

The assets and income tests apply to Parenting Payments in the same way as for pension payments. However, for couples there may also be a reduction in payment depending on the circumstances of the partner of a recipient.

## **Youth Allowance**

Youth allowance is paid to an Australian resident of Youth Allowance age who satisfies the requirements of an activity test.

### **(i) Qualification**

If the person is not currently studying full-time, then the Youth Allowance age is 18 to 20 years. If they are studying full-time, then the Youth Allowance age is 16 to 25 years. However, 17 or 18 year olds who are experiencing homelessness may be exempt from the full-time study requirement: see section 543A of the SS Act.

In some circumstances a parental means test is a qualifying factor for Youth Allowance. The amount of the test differs according to whether the recipient of Youth Allowance is dependent and living at home, dependent and required to live away from home or independent.

A recipient will be **independent** if they fulfil the requirements of section 1067A of the SS Act. For example, a person will be considered **independent** if they cannot live at home because of unstable accommodation or if there is a serious risk to the person's mental or physical well-being due to violence.

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<sup>26</sup> SS Act, s 500D(2).

<sup>27</sup> SS Act, s 500D(1).

<sup>28</sup> SS Act, s 4(3).

<sup>29</sup> SS Act, s 500A.

If a recipient is independent, then there is no parental means test: rather, there is a personal means test. If a person has assets that exceed a prescribed level, then they will not qualify for Youth Allowance.<sup>30</sup>

**(ii) Participation requirements**

A recipient of Youth Allowance will need to satisfy an activity test. This will differ in individual circumstances but may involve the recipient studying full-time, training full-time, working in paid employment or complying with an Activity Agreement.

Additionally, a recipient will be required to report their income fortnightly. If their income exceeds prescribed levels, then their Youth Allowance payment will be reduced accordingly.

**Rent Assistance**

Rent Assistance may be paid to pensioners and people receiving other social security benefits (such as the Parenting Payment, Newstart Allowance, Youth Allowance or Special Benefit payments).

A person will qualify for Rent Assistance only if they pay rent. However, a person who pays rent for public housing will not be eligible for Rent Assistance.

**Special Benefit (Crisis Payment)**

The Special Benefit is designed to be a 'catch-all' provision, covering people who do not qualify for another social security benefit but who cannot earn a sufficient livelihood.

**(i) Qualification**

If a person does not qualify for another social security benefit and is unable to earn a sufficient livelihood for themselves or their dependants because of 'age, physical or mental disability or domestic circumstances or for any other reason', then they may qualify for a Special Benefit payment.<sup>31</sup>

Common situations that may qualify a person for a Special Benefit payment include:

- being forced to leave home because of domestic violence;
- remaining at a home after the person is removed because of domestic violence;
- recent release from prison; or
- arrival in Australia on a humanitarian visa.

Section 729(2) also sets out a number of circumstances that may disqualify a person from receiving a Special Benefit.

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<sup>30</sup> SS Act, s 547C.

<sup>31</sup> SS Act, s 729(2).

**(ii) Activity test**

In certain circumstances, such as for holders of particular visas, Centrelink may impose a requirement to abide by an activity test.<sup>32</sup>

**(iii) Assets and income tests**

An assets test, identical to the one used for Newstart Allowance (see above), applies to the Special Benefit. Further, a strict income test applies: for each dollar of income earned, the benefit is reduced by one dollar.

## 2.5 Centrepay

Centrepay is a voluntary, direct bill-paying service offered to customers receiving payments from Centrelink. Recipients of Centrelink payments can choose to pay bills by having a regular amount deducted from their Centrelink payment. Bills, including private rent, utilities and court fines, can be paid by Centrepay provided the recipient of the payment offers Centrepay as a bill-payment option.

A client can change or cancel their Centrepay deduction at any time by advising Centrelink.

Centrelink advises that if a person moves from one type of Centrelink payment to another, then the deduction will continue without the recipient needing to take any action.<sup>33</sup> In addition, clients should be sent a letter whenever deductions are changed, suspended or cancelled.

### ***Involuntary cancellation of deductions***

There have been instances where clients have arranged to have court fines paid using the Centrepay service, but those payments have ceased without notice when their Centrelink payments have changed.

At the enforcement agency stage, when someone defaults on their payment plan the enforcement agency must advise them of this.<sup>34</sup> However, this requirement does not apply at the Infringement Court stage; at this stage a warrant may be issued without notice.<sup>35</sup> Clients in these circumstances have first been alerted to the problem on receiving a letter from the sheriff advising them that a warrant has been issued for failure to make payments.

In one instance, a successful outcome was achieved through writing to the Infringements Court explaining the involuntary cancellation of Centrepay and requesting that:

- the instalment plan be re-activated;
- any additional fees that were imposed since the payments ceased be waived; and
- the sheriff not take any steps against the client.

You should ensure that if your client arranges to pay a court fine using the Centrepay system, then the instalment plan is not affected if their Centrelink details change.

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<sup>32</sup> SS Act, s 729(2B).

<sup>33</sup> For more information, see Centrelink, *Centrepay* <http://www.centrelink.gov.au/internet/internet.nsf/services/centrepay.htm>.

<sup>34</sup> *Infringements Act 2006* (Vic), s 52.

<sup>35</sup> *Infringements Act 2006* (Vic), s 78.

See chapter 5 of this Manual for further information about the infringements system.

### 3. What Can Go Wrong

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#### 3.1 Overview

This section of the chapter covers the more common problem areas of social security law for clients of the Clinic — namely, participation failures, Centrelink debts and their recovery.

#### 3.2 Participation failures and serious failures

The SS Act prescribes certain conditions and ongoing obligations that must be satisfied before an individual can receive Newstart Allowance, Youth Allowance, Austudy Payment, Parenting Payment (single or partnered) or Special Benefit.

##### *What is a participation failure?*

A **participation failure** occurs if an individual fails, without reasonable excuse, to undertake activities required by Centrelink.

A participation failure may apply if a person:

- refuses to engage in or does not provide evidence of job search activities when requested;
- refuses a job interview, or does not attend a job interview without a reasonable excuse;
- does not carry out activities as set out in the Activity Agreement;<sup>36</sup> or
- does not attend an appointment with Centrelink or a provider of Australian Government employment services.

The definition of **participation failure** varies according to the type of allowance being received.<sup>37</sup>

All the definitions make it clear that there will be no participation failure if a person has a reasonable excuse for the failure.<sup>38</sup> What constitutes a **reasonable excuse** is not defined by the SS Act. However, Centrelink's policy guidelines contain a number of factors that will be taken into consideration:<sup>39</sup>

- homelessness or unstable accommodation;
- lack of literacy and language skills;
- psychiatric problems or mental illness;

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<sup>36</sup> Activity Agreements are written agreements negotiated between Centrelink and a recipient of activity-tested payments that require the person to undertake certain activities to improve their chances of obtaining employment. In practice, the agreements are negotiated with Job Network providers.

<sup>37</sup> See, eg, Austudy **participation failure** has the meaning given by s 576 of the SS Act; Newstart **participation failure** has the meaning given by s 624; **parenting payment participation failure** has the meaning given by s 500ZA; **special benefit participation failure** has the meaning given by section 740; **youth allowance participation failure** has the meaning given by s 550.

<sup>38</sup> See for example s 624(2) SS Act in relation to a **Newstart participation failure**.

<sup>39</sup> Guide to Social Security Law, [3.2.13.10].

- drug or alcohol dependency;
- any illness, impairment or condition that requires frequent treatment (including those that are episodic or unpredictable);
- cognitive or neurological impairment;
- unforeseen family or caring responsibilities;
- the death of an immediate family member;
- recent release from prison (if the person has spent at least 14 days in prison in the last 41 days);
- physical illness of self or child;
- unexpected caring requirements;
- unexpected clash with paid employment;
- the person had work on that day;
- the person had a job interview;
- an interpreter was needed but was not available;
- lack of availability of transport;
- any difficulty reading or understanding correspondence;
- lack of availability of child care; and
- lack of awareness of the requirement (for example, not receiving correspondence).

### ***Consequences of a participation failure***

The consequences of a participation failure will depend on the nature of the failure. For a first or second participation failure, clients will generally be given an opportunity to avoid a penalty by meeting the requirement they initially failed to meet. If the client does re-engage, then they will incur no loss of payment. However, that participation failure will be noted on their record for the purpose of determining whether or not an eight-week penalty (suspension of payments) should apply for a third participation failure in a 12-month period.

A first or second participation failure can also result in payment being stopped without backpay until a person re-engages with Centrelink or their provider of Australian Government employment services.

Centrelink policy guidelines state that a participation penalty will not be imposed until Centrelink has spoken to the person and considered their reasons for failing to meet their requirements. Centrelink policy guidelines state that Centrelink must make two attempts over two days to talk to the person.<sup>40</sup>

Centrelink guidelines indicate that in the event of an eight-week suspension a client will be sent a letter two weeks before the end of the eight-week period to remind the client to contact Centrelink if they want their payments re-started.

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<sup>40</sup> The Social Security Handbook, Ch 43, [10.3.5].

### ***What is a serious failure?***

**Serious failures** will be where a job seeker:

- refuses a suitable job offer or accepts but fails to commence a suitable job;
- voluntarily leaves employment;
- is dismissed from employment due to their own misconduct; or
- fails, without reasonable excuse, to commence, complete or participate in an approved program of work for income support payment that the person is required to undertake.

For serious failures and where a third participation penalty is recorded against a person in a 12-month period, an immediate eight-week non-payment period will be imposed.<sup>41</sup>

### ***Miscellaneous***

#### **(i) Financial case management**

In some circumstances, affected individuals may be eligible for 'financial case management' so that certain approved bills can be paid during the eight-week non-payment period. Financial case management may be available if the imposition of an eight-week non-payment period is likely to cause hardship to children or other vulnerable dependants or if the customer is considered exceptionally vulnerable. Customers receiving financial case management will have their essential expenses paid up to the limit of the income support they would otherwise have received. This is not a scheme with a statutory base and arrangements can be made only with Centrelink itself.

#### **(ii) Right to appeal**

Clients who feel they have incurred a penalty have the right to request that the decision be reviewed by an authorised review officer within Centrelink. For further detail, see section 4 of this chapter.

### **3.3 Debts to Centrelink**

Overpayment and lack of qualification to receive a payment are just some of the reasons why an individual may incur a debt to Centrelink.

Debts may be incurred through no fault of the individual or through the result of deliberate fraud. For further detail on fraud, see sections 3.6 and 3.11 below.

#### ***Debts due to the Commonwealth***

If a person obtains the benefit of a social security payment, and was not entitled for any reason to obtain that benefit, then the SS Act provides that the amount of that benefit is a debt due to the Commonwealth.<sup>42</sup> The SS Act deems the debt to arise when the person obtains the benefit of the payment.<sup>43</sup>

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<sup>41</sup> See eg SS Act, s 745, see also Guide to Social Security Law, [3.2.13.10].

<sup>42</sup> SS Act, s 1223(1). This section of the chapter focuses on the recovery of debts incurred under the SS Act. Many debts incurred before 1 October 1997 may not be 'debts due to the Commonwealth' for the purposes of the SS Act. See the Social Security Handbook, [3.1], [3.3].

<sup>43</sup> SS Act, s 1223(1).

### ***When is a person not entitled to the benefit of a social security payment?***

Without limiting the reasons why a person is not entitled to the benefit of a social security payment, section 1223(1AB) provides that, if one or more of the following occurs, a person is deemed to not have been entitled to obtain the benefit of the payment:

- the payment was made by mistake as a result of a computer or administrative error;
- the person for whose benefit the payment was intended to be made was not qualified to receive the payment;
- the payment was not payable;
- the payment was made as a result of contravention of a social security law, a false statement or misrepresentation;
- the payment was made in purported compliance with a direction or authority that had been revoked or withdrawn before the payment was made; or
- the payment was intended to be made for the benefit of someone else who died before the payment was made.

### ***Practical steps to take when notice of a Centrelink debt is received***

Centrelink must send a letter demanding repayment of the debt within 28 days from the date the letter is sent. You should take the following steps to be certain that Centrelink's decision to raise and recover a debt incurred by your client is correct.<sup>44</sup>

- Consider obtaining a copy of the client's Centrelink file (including any separate 'debt' file) through a freedom of information (FOI) request. Check the file to be sure that Centrelink has not made a mistake on the facts of the individual's case or incorrectly applied the law.
- Verify the assumptions and calculations that Centrelink has used to determine the amount of the debt. If Centrelink has applied a penalty amount to the debt, then ensure that this penalty has been correctly applied and calculated.
- Immediately seek to negotiate an instalment plan or request that Centrelink waive or write off the client's debt under the mechanisms in Part 5.4 of the SS Act (see further at sections 3.8 and 3.9 below).
- Consider completing a 'Statement of Financial Circumstances' form (or draw up an equivalent statement) with the client, listing all fortnightly income and expenditure, and then consider giving this to Centrelink. Usually this will demonstrate the difficulties of the debtor's financial circumstances and may assist with a request for a waiver or instalment plan.
- Consider appealing Centrelink's decision to recover the debt, as well as the amount of the debt itself. For further detail on appeals see section 4 below.

## **3.4 Penalties that may be added to a debt**

Centrelink is entitled to apply a 10% penalty to an individual's debt in the following circumstances:

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<sup>44</sup> See National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at [http://www.welfarights.org.au/Factsheets/fs\\_debts.doc](http://www.welfarights.org.au/Factsheets/fs_debts.doc).

- if the person refused or failed to provide information in relation to their income from **personal exertion** (generally, this refers to income received as an employee); or
- if the person knowingly or recklessly provided false or misleading information about their income from 'personal exertion'.<sup>45</sup>

However, Centrelink is not entitled to add the 10% if the Secretary is satisfied that the person has a 'reasonable excuse' for not providing the information;<sup>46</sup> if the person was not notified of the requirement to provide the information; if the person was under 16 at the time of the overpayment or if the debt is in respect of Family Tax Benefits, Child Care Benefit, Age Pension or Carer Payment and Carer Allowance.<sup>47</sup>

Penalty interest can also be charged (at the rate of 3% per annum) pending the negotiation of a repayment agreement. However, certain notification requirements must be met by Centrelink before this penalty interest can be charged.<sup>48</sup> The interest will stop accruing when the debtor either agrees to pay reasonable instalments or resumes making repayments to which they have previously agreed.<sup>49</sup>

### 3.5 Debt recovery

If the money paid to the person does not fall within one of the specified debt categories in the SS Act, then it is not a 'debt' and, therefore, cannot legally be recovered.<sup>50</sup>

If a person's debt arises under Part 5.2 or section 1135 of the SS Act, then Centrelink must seek to recover that debt in accordance with Chapter 5 of the SS Act.<sup>51</sup> Debts that result from overpayment under certain other Acts and schemes may also be recovered in accordance with Chapter 5.<sup>52</sup>

#### **Overview of methods of recovery**

The methods of recovery available to Centrelink depend on the particular type of debt, and are comprehensively summarised in the table set out in section 1222(2) of the SS Act.

Section 1230C allows Centrelink to take one or more of the following actions to collect the debt, depending on the type of debt that is incurred:

- if the person who owes the debt is receiving social security payments — deductions from those payments;
- in certain circumstances, deductions from another person's social security payment;
- repayment by instalments;
- legal proceedings; or
- garnishee notice.

<sup>45</sup> SS Act, s 1228B; see the Social Security Handbook, Ch 43, [5.3].

<sup>46</sup> SS Act s 1228B(4).

<sup>47</sup> See National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at [http://www.welfarerights.org.au/Factsheets/fs\\_debts.doc](http://www.welfarerights.org.au/Factsheets/fs_debts.doc).

<sup>48</sup> See the Social Security Handbook, Ch 43, [5.2].

<sup>49</sup> See the Social Security Handbook, Ch 43, [5.2].

<sup>50</sup> Social Security Handbook, Ch 43, [3.1]. See generally Ch 43, [3.1]–[3.7] of the Social Security Handbook for a detailed explanation of the different categories of debt and the methods of calculation.

<sup>51</sup> See *Walker v SDSS* (1995) 56 FCR 354.

<sup>52</sup> See SS Act, s 1222(1)(c).

We briefly discuss each of these actions below.

### ***Recovery by deductions***

Centrelink is able to recover the debt by deductions directly from the debtor's social security payments.<sup>53</sup> The debt must be recovered by deductions unless the debt is waived or written off (see below) or recovered by another provision of Chapter 5 of the SS Act, or under Part 4 of *A New Tax System (Family Assistance Act) 1999* (Cth).<sup>54</sup>

### ***Amount deducted***

There is a general principle that Centrelink must not cause financial hardship through recovery of a debt.<sup>55</sup> The Secretary is given the power to determine the amount of the deduction,<sup>56</sup> and must consider the debtor's financial circumstances when determining the appropriate rate of recovery.<sup>57</sup>

Typically, Centrelink deducts 14% of an individual's payment each fortnight.<sup>58</sup> The amount of the deduction may be modified according to changes in the debtor's financial circumstances.<sup>59</sup>

### ***Recovery from payments of a third party***

Centrelink may also seek to recover certain debts (as set out in section 1234A(1) of the SS Act) from the social security payments of a person other than the debtor. However, Centrelink must seek this third party's consent before doing so,<sup>60</sup> and the third party consent may be revoked at any time.<sup>61</sup>

### ***Time limits***

As a general rule, recovery by deductions cannot be commenced after the end of the period of six years starting on the day on which the debt or overpayment arose.<sup>62</sup>

### ***Repayment by instalments***

An individual is able to enter into an agreement with the Secretary to pay all or part of their debt by instalments.<sup>63</sup> If a client has difficulty repaying a debt, then an important first step for their lawyer is to telephone the Centrelink debt recovery hotline (12 63 30) and negotiate a repayment arrangement or instalment plan.

The Secretary has the discretion to terminate or modify an instalment plan:

- at the request of the debtor;
- after giving 28 days notice to the debtor of the proposed alteration or modification; or

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<sup>53</sup> SS Act, s 1231.

<sup>54</sup> SS Act, s 1231(2).

<sup>55</sup> Social Security Handbook, Ch 43, [6.3].

<sup>56</sup> SS Act, s 1231(1A).

<sup>57</sup> Guide to Social Security Law, [6.7.2.30].

<sup>58</sup> This excludes Rent Assistance and other extras: see National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at [http://www.welfarerights.org.au/Factsheets/fs\\_debts.doc](http://www.welfarerights.org.au/Factsheets/fs_debts.doc).

<sup>59</sup> Guide to Social Security Law, [6.7.2.30].

<sup>60</sup> SS Act, s 1234A.

<sup>61</sup> SS Act, s 1234A(3).

<sup>62</sup> SS Act, s 1231(2A). See the Guide to Social Security Law, [6.7.2.30] for detail of modifications and extensions to the six-year limitation period; Social Security Handbook, Ch 43, [4.1].

<sup>63</sup> SS Act, s 1234.

- without notice if satisfied that the debtor failed to disclose material information about their true capacity to repay the debt.<sup>64</sup>

The debtor is able to appeal if the repayments are set too high. You should ensure that your client has not agreed to repayment amounts that they cannot afford.

### 3.6 Legal proceedings

The Commonwealth has the ability to initiate legal proceedings to recover the debt.<sup>65</sup> If a court is satisfied that there is a debt, then Centrelink can seek court orders to enforce its repayment. Such orders can include the forced sale of property.<sup>66</sup>

#### ***Time limits***

Court proceedings to recover a debt cannot be commenced after the end of the period of six years starting on the day on which the debt or overpayment arose.<sup>67</sup>

#### ***Prosecution in the case of fraud***

As well as proceedings to recover a debt, a criminal prosecution may also occur if the debt arose out of fraud.

Centrelink will conduct an investigation to determine if the matter should be referred to the Commonwealth Director of Public Prosecutions (**DPP**) for prosecution. Part of this investigation may consist of a prosecution interview with the person suspected of fraud. At this interview a warning should be provided that any information provided by the person might be used to prove offences against them.<sup>68</sup>

Following the investigation, the decision whether or not to prosecute will be made by the DPP. The Prosecution Policy of the Commonwealth<sup>69</sup> indicates which factors will be taken into account. Primarily, they include whether the DPP is satisfied that there is sufficient evidence available and that the prosecution would be in the public interest.

The overlap between the welfare fraud provisions in the Administration Act and the general federal offence provisions contained in the *Crimes Act 1914* (Cth) means prosecuting authorities have a discretion as to which provisions to use. The general rule is that the provisions of the specific Act (that is, the Administration Act) are to be relied on unless to do so would not adequately reflect the criminal conduct disclosed by the evidence.<sup>70</sup>

The maximum penalty for the offence of intentional misrepresentation is one year of imprisonment.<sup>71</sup> This maximum penalty is likely to be imposed only in the most serious cases of fraud or where the person has previous convictions. The court may also order

<sup>64</sup> SS Act, s 1234(4).

<sup>65</sup> SS Act, s 1232.

<sup>66</sup> Social Security Handbook, Ch 43, [6.5].

<sup>67</sup> SS Act, s 1232(2). See the Guide to Social Security Law, [6.7.2.40] for detail of modifications and extensions to the six-year limitation period.

<sup>68</sup> National Welfare Rights Network, *Fact Sheet — Prosecution of Social Security Offences*, at [http://www.welfarerights.org.au/Factsheets/fs\\_prosecution.doc](http://www.welfarerights.org.au/Factsheets/fs_prosecution.doc).

<sup>69</sup> Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>.

<sup>70</sup> Prosecution Policy of the Commonwealth, 2.22.

<sup>71</sup> Administration Act, s 217.

that the amount wrongly paid to the person be repaid to the Commonwealth.<sup>72</sup> Centrelink may recover an amount by various other means (see above), whether or not the person is convicted of a social security offence.<sup>73</sup>

Offences prosecuted under the *Crimes Act 1914* (Cth) are indictable (that is, tried before a jury) but may, with the consent of both the prosecutor and the defendant, be heard and determined summarily. The quantum of the alleged overpayment appears to be the major factor on which the DPP determines in which court indictable charges will be prosecuted.

### ***Tips for handling matters that may lead to prosecution***

- You can obtain access to the file held by Centrelink by a FOI request. You can make the request by using the form available on the Centrelink website or via a letter or a statement over the counter, mailed or faxed to any Centrelink Customer Service Centre. Centrelink will reply within 30 days from when the request is received.
- Decisions leading to prosecutions may also be the subject of an appeal. For further detail, see section 4 below. You need to think carefully about the advantages and disadvantages of continuing with a Social Security Appeals Tribunal (**SSAT**) appeal while a prosecution is pending. Admissions and statements made by the client in the course of the hearing may be used against them in the prosecution.<sup>74</sup>
- Fraud matters are dealt with by the Centrelink Fraud Group. You should be attentive in your dealings with this group and take the normal precautionary measures of obtaining receipt numbers for calls.

### ***Garnishee notice***

A garnishee notice to recover a debt may be issued to any person who:

- owes money to the Centrelink debtor;
- holds or may subsequently hold money for or on account of the debtor or on account of some other person for payment to the debtor; or
- has authority from some other person to pay money to the debtor.<sup>75</sup>

For example, garnishee can be used to obtain the following:<sup>76</sup>

- money in a bank account belonging to the person who has the debt;
- wages owed by an employer to the person who has the debt;
- money owed for goods or services provided by the person who has the debt;
- proceeds of a property settlement;
- a compensation payment; or
- a tax refund.

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<sup>72</sup> Administration Act, s 218.

<sup>73</sup> SS Act, Part 5.2.

<sup>74</sup> Social Security Handbook, Ch 49, [4.3].

<sup>75</sup> SS Act, s 1233; Guide to Social Security Law, [6.7.2.50].

<sup>76</sup> This information is sourced from the Social Security Handbook, [6.4]–[6.5]. See especially 'Table 43.3: Garnishee Guidelines' in the Social Security Handbook.

The Department of Families, Housing, Community Services and Indigenous Affairs (**the Department**) policy indicates that 'garnishee can only be used after all other recovery options have failed'.<sup>77</sup> If the recipient of the garnishee notice receives social security payments, then they have a 'safety amount', equivalent to four weeks of their payment, which must be left in an account being garnisheed.<sup>78</sup>

Should the recipient of the garnishee notice fail to comply with its terms, then the amount specified in the notice is still recoverable from the debtor via legal proceedings, or a fresh garnishee notice to another party.<sup>79</sup>

### **3.7 Recovery through private debt collection agencies**

Centrelink has contracted with private debt collection agencies, such as Dun & Bradstreet Pty Ltd, to recover debts in certain circumstances. Typically, debt collection agencies are engaged if a person receives income other than, or in addition to, their social security payments.<sup>80</sup>

Private debt collection agencies must comply with Centrelink's Collection Guidelines. Importantly, that means they must allow the debtor an opportunity to negotiate an instalment plan.<sup>81</sup>

### **3.8 Waiver of debts**

When a debt is waived under Part 5.4 of the SS Act, Centrelink permanently gives up its rights to recover the part of the debt that has been waived.<sup>82</sup> You and your clients should have particular regard to the waiver on the basis of special circumstances (see below).

Debts eligible for waiver must have arisen on or after 1 January 1996.<sup>83</sup> Even if a debt has been partially or fully recovered, waiver may still be considered.<sup>84</sup>

Individuals can appeal Centrelink's decision to refuse to waive a debt.

The Secretary is authorised under section 1237(1) of the SS Act to waive debts arising from six categories:

- debts arising from administrative error;
- debts relating to an offence;
- small debts;
- waiver in relation to a settlement;
- waiver on the basis of the debtor's partner's entitlement; and
- waiver in special circumstances.

The remainder of this section will focus on the more common grounds for waiver.

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<sup>77</sup> Guide to Social Security Law, [6.7.2.50].

<sup>78</sup> Social Security Handbook, Ch 43, [6.5].

<sup>79</sup> SS Act, s 1230.

<sup>80</sup> Social Security Handbook, Ch 43, [6.9].

<sup>81</sup> Social Security Handbook, Ch 43, [6.9].

<sup>82</sup> See Social Security Handbook, Ch 43, [7.5].

<sup>83</sup> SS Act, s 1236A.

<sup>84</sup> Guide to Social Security Law, [6.7.3.20].

### ***Waiver of debts arising from administrative error***

If the individual was overpaid solely because of a Centrelink administrative error, and the overpayment was received in good faith, then the Secretary must waive the debt under section 1237A of the SS Act. However, this ground of waiver is applicable only if Centrelink raises the debt more than six weeks from the debt's commencement.<sup>85</sup>

**Administrative error** is generally a mistake in administering a payment, provided that the debtor's conduct has not in any way contributed to the mistake.<sup>86</sup>

### ***Waiver on the basis of special circumstances***

Waiver of whole or part of a debt is authorised under section 1237AAD if the Secretary is satisfied that:

- the debt did not result wholly or partly from the debtor or another person knowingly making a false statement or false representation, or failing or omitting to comply with a provision of the SS Act or the Administration Act;
- there are special circumstances (other than financial hardship alone) that make it desirable to waive the debt; and
- it is more appropriate to waive the debt than to write it off.

If financial hardship alone is the only relevant 'special circumstance', then the write-off provisions discussed below in section 3.9 are more appropriate.

The meaning of **special circumstances** is broad, and each case must be considered on its own merits. The Department notes that:

circumstances which, on their own, might not be 'special', could combine with other circumstances to create a situation which is, overall, special within the meaning of the Act.<sup>87</sup>

The Department also notes that the Secretary must assess not only the person's individual circumstances but also the 'general administration of the social security system'.<sup>88</sup>

### ***Waiver of a 'small debt'***

Pursuant to section 1237AAA, the Secretary must waive the right to recover a debt that is, or is likely to be, less than \$200, if it is not cost effective for the Commonwealth to take action to recover the debt. This ground of waiver does not apply if the debt is greater than \$50 and could be recovered by making deductions from the debtor's social security payments.<sup>89</sup>

When deciding the cost effectiveness of the debt recovery, the Secretary must consider the amount of the debt, the cost of departmental investigation, the cost in terms of staff

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<sup>85</sup> See further Social Security Handbook, Ch 43, [7.6].

<sup>86</sup> *Allinson and SDSS* (1994) 34 ALD 430; *Lohner and SDSS* (1994) 85 SSR 1241. See further and for an explanation of what constitutes **good faith**: Guide to Social Security Law, [6.7.3.30].

<sup>87</sup> Guide to Social Security Law, [6.7.3.40]. See also *Beadle and D-GSS* (1984) 1 AAR 362; *SDSS v Hulls* (1991) 13 AAR 414.

<sup>88</sup> Guide to Social Security Law, [6.7.3.40]. See further *Davy v Secretary to the Department of Employment and Workplace Relations* (2007) AATA 1114.

<sup>89</sup> SS Act, s 1237AAA(2).

resources in calculating the debt and communicating with the debtor and the overall prospects of recovery.<sup>90</sup>

### 3.9 'Write off' of debts

Writing off a debt is to be distinguished from waiver of a debt, since writing off a debt does not extinguish it. As explained in *L and SDSS* (1995) 21 AAR 412:

The debt remains enforceable, but a decision is made not to pursue it, either indefinitely or for set periods. In either case, the decision can be reversed and enforcement proceedings commenced at any time in response to any changes in circumstances.

The Secretary may write off a debt under section 1236(1A) of the SS Act only if:<sup>91</sup>

- the debt is irrecoverable at law (this includes situations where there is no proof that the debt exists, the debtor has died and there is no estate or Centrelink raised the debt outside the relevant limitation period);
- the debtor has no capacity to repay the debt (if the debtor is receiving social security payments, then they must establish that severe financial hardship would result from deductions from those payments);
- Centrelink cannot ascertain the debtor's whereabouts, following all reasonable efforts to locate them;
- it is not cost effective for the Commonwealth to take debt recovery action.

Individuals can appeal Centrelink's refusal to write off a debt.

### 3.10 Reducing the rate of repayment or deferring recovery

You should also consider negotiating with Centrelink for a reduction in the rate of repayment of the debt, either indefinitely or for a specific period.<sup>92</sup> Another option available to Centrelink, although only for short periods of time (for example, weeks or a few months), is the deferral of recovery in the case of a short-term crisis or while Centrelink is investigating or negotiating the debt.<sup>93</sup>

### 3.11 Bankruptcy

The rules surrounding Centrelink's ability to recover debts from debtors who become bankrupt are complex. In general terms, the debtor is not required to repay the debt to Centrelink for the duration of the bankruptcy period. Centrelink is unable to recover the debt via the methods discussed above (that is, deductions, instalment payments, garnishee, or legal proceedings) because the debt is no longer 'due to the Commonwealth' for the purposes of the SS Act.<sup>94</sup>

Following the bankruptcy period, Centrelink can recover debts only if they were incurred through fraud: see section 3.5 above.

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<sup>90</sup> See Guide to Social Security Law, [6.7.3.60].

<sup>91</sup> National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at [http://www.welfarights.org.au/Factsheets/fs\\_debts.doc](http://www.welfarights.org.au/Factsheets/fs_debts.doc).

<sup>92</sup> See further Social Security Handbook, Ch 43, [7.2].

<sup>93</sup> Social Security Handbook, Ch 43, [7.3].

<sup>94</sup> National Welfare Rights Network, *Fact Sheet — Debts — What to do if you have a social security debt*, at [http://www.welfarights.org.au/Factsheets/fs\\_debts.doc](http://www.welfarights.org.au/Factsheets/fs_debts.doc).

### 3.12 Other issues

#### ***Change of circumstances***

The previous sections of this chapter illustrate the importance of informing Centrelink when a person's circumstances change, so that they continue to receive the most appropriate type and amount of social security payment.

The 10% penalty that can be added to a person's Centrelink debt (see section 3.4 above) can be triggered by a person's failure to provide information, or by their provision of false or misleading information. It is especially important to avoid the application of this 10% penalty by informing Centrelink of any changed circumstances.

#### **Centrelink must be informed within 14 days if a person:**<sup>95</sup>

- changes address;
- marries, separates, reunites or starts to live in a de facto relationship with their partner;
- experiences a change in their amount of rent, board or lodgings;
- leaves Australia, permanently or temporarily;
- changes their childcare arrangements, or if children leave or come into that person's care;
- receives a lump sum payment, payment for leave entitlements or a redundancy payment;
- receives income from any other source, or if the person's assets change;
- changes their caring arrangements (if paid by Centrelink as a carer); or
- has a child that ceases studies or begins to earn income above the allowable limit.

If you become aware of changes in your client's circumstances that might affect their social security payments, then you should advise your client to contact 13 10 21 to make an appointment with a Centrelink officer.

#### ***Circumstances constituting fraud***

A failure to report changes may sometimes constitute fraud.

Part 6, Division 2 of the Administration Act deals with matters that will amount to **fraudulent conduct**. These include where a person:

- deliberately receives an allowance, pension or other benefit that they know they are not entitled to receive;
- knowingly or recklessly completes a form incorrectly, or gives false or misleading information to Centrelink;
- intentionally misrepresents their circumstances in order to obtain a payment that the person knew they were not entitled to; and

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<sup>95</sup> Centrelink, *Avoiding a Centrelink Debt*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co166\\_0709/\\$file/co166\\_0709en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co166_0709/$file/co166_0709en.pdf), 3.

- fails to notify Centrelink about changes in circumstances that affect the payment the person is receiving.

Following an investigation, if Centrelink suspects fraudulent activity then it can refer the matter to the DPP for investigation (see section 3.5 above).

## 4. Appeal Processes

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### 4.1 Overview

Any decision made by Centrelink can be appealed. The legislative framework for appealing decisions is located in Part 4 of the Administration Act, although the internal review process is to some extent dictated by Centrelink policy.

The appeal procedure is, briefly:

- internal review by an authorised review officer (**ARO**);
- external review by the SSAT;
- merits review by the Administrative Appeals Tribunal (**AAT**); and
- appeal on a point of law to the Federal Court and High Court.

This process is set out in a flowchart in section 8 below.

Complaints may also be made to Centrelink directly or to the Commonwealth Ombudsman (**the Ombudsman**).

This chapter focuses mostly on the first two steps in the appeal process.

### 4.2 Internal appeals

If a client is unhappy with any Centrelink decision, then they may request that an ARO review the decision.

#### ***Legislative basis for right of appeal***

A person affected by a decision of an officer under social security law may apply to Centrelink for a review of that decision.<sup>96</sup>

If a person makes such an application, then an ARO must review the decision and either:<sup>97</sup>

- affirm the decision;
- vary the decision; or
- set aside the decision and substitute a new decision.

#### ***Steps to initiate a review***

##### **(i) How to request an appeal**

The client may request a review by telephone or in person at a Centrelink office.

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<sup>96</sup> Administration Act, s 129(1).

<sup>97</sup> Administration Act, s 135(1).

Ideally, the request should be made in writing by the client or by you (the lawyer) on the client's behalf.

The letter should include the following:<sup>98</sup>

- client's name, contact details and customer reference number;
- details of the decision the client is appealing;
- the reasons the original decision is wrong; and
- any evidence supporting the client's position.

A form entitled 'Review of Centrelink Decision' is available from the Centrelink website (<http://www.centrelink.gov.au>). However, completion of this form is not required for a review to be validly requested.

There is no charge for appealing the decision.

**(ii) Review by original decision-maker**

There is no requirement that the original decision-maker review a decision. Unless there is a manifest error or the client has additional facts that may be compelling, this type of review is unlikely to result in a changed outcome.<sup>99</sup> Accordingly, particularly if the client has concerns regarding their contact with the initial decision maker, it may be preferable to insist that the decision be reviewed by an ARO.

**(iii) Time limits**

There is no time limit for an appeal of a decision.

However, practically speaking, it is preferable that the appeal is lodged within 13 weeks of the decision. This is because section 137 of the Administration Act operates to prevent payments being backdated to the date of the decision if the appeal to the ARO was made more than 13 weeks after the initial decision. Instead, the payments will be backdated only to the date of the appeal.

If the appeal relates to a debt to Centrelink, then this time period does not apply.

**Steps during the review process**

**(i) What the ARO does<sup>100</sup>**

The ARO may seek to contact the client, although they are not required to do so. For this reason, it is extremely important that all relevant facts are communicated to the ARO.

It may also be helpful for you to contact the ARO by telephone or to arrange for an interview.

AROs are bound to follow Centrelink policy and, as a result, engaging in arguments about policy is unlikely to be helpful. However, you should consider

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<sup>98</sup> National Welfare Rights Network, *Fact Sheet — Appeals — How to appeal a Centrelink Decision*, at [http://www.welfarerights.org.au/Factsheets/fs\\_appeal.doc](http://www.welfarerights.org.au/Factsheets/fs_appeal.doc).

<sup>99</sup> Social Security Handbook, Ch 48, [2.1].

<sup>100</sup> This information in this section is sourced from the Social Security Handbook, Ch 48, [3].

requesting a copy of any policy document on which Centrelink is basing its decision.

**(ii) Continuing payments during the appeal**

Centrelink can continue payments while an appeal to an ARO (or to the SSAT) is pending.<sup>101</sup> This can occur if the decision is one involving the exercise of a discretion or holding of an opinion.

If the decision relates to the imposition of an eight-week no-payment period due a compliance failure, then Centrelink **must** continue payments if an appeal is lodged.<sup>102</sup>

You and your client may need to be persistent about applications for payments to continue. The chances are better if an application is made as quickly as possible after (or at the same time as) the appeal.<sup>103</sup>

You should be aware that there have been cases of payments being suspended pending determination of whether a participation failure has occurred. Due to criticism in a recent report by the Ombudsman, Centrelink has agreed to cease this practice.<sup>104</sup>

**Decision**

The ARO must give written notice of the decision to the client.<sup>105</sup> The letter should be signed by an ARO, otherwise the appeal right to the SSAT may not have crystallised.

The ARO should also inform the client of the reasons for the decision.<sup>106</sup>

The decision cannot be appealed by Centrelink as the decision of the ARO becomes the decision of Centrelink.

**4.3 External appeals — SSAT**

If an unfavourable decision is made by an ARO, then the client may appeal to the SSAT which will fully review the decision of Centrelink.

**Legislative basis for right of appeal**

If a decision has been affirmed, varied or set aside pursuant to a review by an ARO under sections 126 or 135, then a person affected by the decision of the ARO may apply to the SSAT for a review of that decision.<sup>107</sup>

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<sup>101</sup> Administration Act, ss 131 (ARO review), 145 (SSAT review).

<sup>102</sup> *Social Security (Payment Pending — ARO Application for Review (DEWR) Guidelines 2007* (Cth), *Social Security (Payment Pending — ARO Application for Review (FaCSIA) Guidelines 2007* (Cth), *Social Security (Payment Pending — ARO Application for Review (DEST) Guidelines 2007* (Cth), *Social Security (Payment Pending — SSAT Application for Review (DEWR) Guidelines 2007* (Cth), *Social Security (Payment Pending — SSAT Application for Review (FaCSIA) Guidelines 2007* (Cth) and *Social Security (Payment Pending — SSAT Application for Review (DEST) Guidelines 2007* (Cth) which have been made pursuant to powers in ss 132 and 146 Administration Act.

<sup>103</sup> Social Security Handbook, Ch 49, [2.4].

<sup>104</sup> Commonwealth Ombudsman, *Application of penalties under Welfare to Work*, Report No 16 (2007), at [http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2007\\_16/\\$FILE/penalties\\_welfare\\_to\\_work.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2007_16/$FILE/penalties_welfare_to_work.pdf).

<sup>105</sup> Administration Act, s 136.

<sup>106</sup> Centrelink, *Fact Sheet — Reviews and Appeals*, at [http://www.centrelink.gov.au/internet/internet.nsf/filestores/co438\\_0704/\\$file/co438\\_0704en.pdf](http://www.centrelink.gov.au/internet/internet.nsf/filestores/co438_0704/$file/co438_0704en.pdf).

<sup>107</sup> Administration Act, s 142(1).

There are various limitations to this right.<sup>108</sup> For example, the following decisions cannot be reviewed:

- about when and where a form was lodged;<sup>109</sup>
- to continue payments during an appeal;<sup>110</sup>
- to give a notice requiring a person to give information;<sup>111</sup> or
- to obtain information regarding a debt owed to Centrelink.<sup>112</sup>

The SSAT must:<sup>113</sup>

- affirm the decision;
- vary the decision; or
- set aside the decision and substitute a new decision.

The exception to this is if the decision relates to the terms of an activity agreement. In that case, the SSAT must either affirm the decision or set aside the decision and refer the matter back to Centrelink for review of the terms, which must be in accordance with any recommendations of the SSAT.<sup>114</sup>

### ***Steps to initiate appeal***

A person may make an appeal to the SSAT in writing, by telephone or at an office of the SSAT or Centrelink.<sup>115</sup>

Centrelink will generally include a form with the correspondence that set out the decision of the ARO. This form can be used to make the application to the SSAT; however, there is no requirement that this be used. It is not necessary to set out the reasons for the appeal or supporting evidence as this will be canvassed in the hearing.

Once the SSAT has received the application, it must notify Centrelink and the applicant.<sup>116</sup> Within 28 days of receiving notice, Centrelink must send a statement of reasons for making the decision and any relevant documents to the SSAT.<sup>117</sup> The statement of reasons should then be forwarded to the applicant.<sup>118</sup>

As is the case for reviews by an ARO, although there is no time limit on making an appeal to the SSAT, in practice it is preferable to make the application before 13 weeks after the decision of the ARO is received. This is because section 152 of the Administration Act operates to prevent payments being backdated to the date of the decision if the appeal to the SSAT was made more than 13 weeks after the decision of the ARO. Instead, the payments will be backdated only to the date of the appeal.

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<sup>108</sup> See Administration Act, ss 143, 144.

<sup>109</sup> Administration Act, s 144(f).

<sup>110</sup> Administration Act, s 144(m).

<sup>111</sup> Administration Act, s 144(k).

<sup>112</sup> Administration Act, s 144(n).

<sup>113</sup> Administration Act, s 149(1).

<sup>114</sup> Administration Act, s 150.

<sup>115</sup> Administration Act, s 154(1).

<sup>116</sup> Administration Act, s 157(2).

<sup>117</sup> Administration Act, s 157(3).

<sup>118</sup> Administration Act, s 158.

### ***Steps before the hearing***

#### **(i) Gathering further information**

You may wish to consider making a FOI request for the client's Centrelink file.

You should also consider what further information may be helpful to support the client's case. This may include:<sup>119</sup>

- details and proof of relevant income and expenditure;
- medical reports;
- reports by welfare workers about personal or family circumstances; and
- statements by relatives or friends about relevant facts.

If the decision concerns the application of a Centrelink policy, then Centrelink should provide a copy of that policy (or, at least, the relevant section of that policy).<sup>120</sup>

#### **(ii) Effect of any simultaneous prosecutions**

Clients may be prosecuted for breaches of the social security law. For further detail, see sections 3.6 and 3.11 of this chapter. The decisions leading to these prosecutions may also be the subject of an appeal to the SSAT.

You need to think carefully about the advantages and disadvantages of continuing with an SSAT appeal while a prosecution is pending. If the SSAT outcome is favourable, then the prosecution may be discontinued; however, equally, admissions and statements made by the client in the course of the hearing may be used against them in the prosecution.<sup>121</sup>

#### **(iii) Continuation of payments during the appeal**

Payments may continue while an appeal is in process (see section 4.2 above).

An added benefit of obtaining a decision to continue payments is that the SSAT must then take reasonable steps to ensure the decision is reviewed as quickly as possible.<sup>122</sup>

### ***Hearing***

The SSAT is an independent tribunal whose decisions are binding. It is not bound by Centrelink policy.

Its objective is to provide a fair, just, economical, informal and quick review mechanism.<sup>123</sup>

The SSAT is not bound by legal technicalities and rules of evidence.<sup>124</sup> Submissions may be made either orally or in writing.<sup>125</sup> You may wish to prepare a summary of the client's case to be sent to the SSAT before the hearing.<sup>126</sup>

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<sup>119</sup> Social Security Handbook, Ch 49, [4.4].

<sup>120</sup> Social Security Handbook, Ch 49, [4.4].

<sup>121</sup> Social Security Handbook, Ch 49, [4.3].

<sup>122</sup> Administration Act, s 159(2).

<sup>123</sup> Administration Act, s 141.

<sup>124</sup> Administration Act, s 167.

<sup>125</sup> Administration Act, s 161.

Hearings are held in private.<sup>127</sup> If a hearing occurs, then it is usually held around a table rather than in a court-style room and generally takes about one hour.<sup>128</sup> Interpreters can be arranged if necessary.

All parties bear their own costs. The SSAT may determine that the Commonwealth pay the reasonable costs of a party for travel and accommodation to attend a review hearing.<sup>129</sup>

Appeals are usually heard within a couple of months of making the application and a decision is given about two weeks after the hearing.<sup>130</sup> If a client is suffering severe financial hardship, then the SSAT may expedite the appeal, but this is a matter for the SSAT's discretion.<sup>131</sup>

### **Decision**

If the SSAT varies a decision of Centrelink or sets aside a decision, then the new decision takes effect from the date on which the decision under review had effect (the exception to this being decisions about Activity Agreements).<sup>132</sup> However, the SSAT has the power to specify that a decision is not to come into operation until a later day.<sup>133</sup>

The SSAT will forward a statement setting out its decision and the reasons for making the decision to each party to the review.<sup>134</sup>

The decision is binding on Centrelink (subject to its right of appeal).

If the SSAT makes a decision favourable to a client, then Centrelink's Service Recovery Team (also known as the Administrative Law Section) will consider whether Centrelink will appeal the decision.<sup>135</sup> It has 28 days to do so.<sup>136</sup>

If Centrelink decides not to appeal the decision, then the local office will be notified that it must implement the decision.<sup>137</sup>

If Centrelink decides to appeal the decision, then it must still implement the decision, unless it successfully applies for a stay order (see section 4.4).<sup>138</sup>

If the decision is unfavourable to the client, then Centrelink will be able to implement the decision immediately. The client will have 28 days to apply to the AAT for review, and may apply for a stay order (see section 4.4 below).

If a client is experiencing delays in receiving a decision from an ARO or in implementing a decision, then you may wish to lodge a complaint with Centrelink or the Ombudsman (see section 5 below).

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<sup>126</sup> For further information on what such a summary should contain see the Law Handbook, Ch 49, [4.7].

<sup>127</sup> Administration Act, s 168.

<sup>128</sup> Social Security Handbook, Ch 49, [1.4].

<sup>129</sup> Administration Act, s 176.

<sup>130</sup> Social Security Handbook, Ch 49, [1.4].

<sup>131</sup> Social Security Handbook, Ch 49, [2.5].

<sup>132</sup> Administration Act, ss 152 (1), 143.

<sup>133</sup> Administration Act, s 152 (2).

<sup>134</sup> Administration Act, s 177.

<sup>135</sup> Social Security Handbook, Ch 49, [6.3].

<sup>136</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 29(2).

<sup>137</sup> Social Security Handbook, Ch 49, [6.3].

<sup>138</sup> *Administrative Appeals Tribunal Act 1975*, s 41(1).

#### 4.4 Further appeals

The information below sets out the preliminary steps in an application for review to the AAT and some of the factors to consider in advising a client on the value of making such an application.

##### **AAT appeals**

**(i) Legislative basis for right of appeal**

As long as a decision has been reviewed, affirmed, varied or set aside by the SSAT, people whose interests are affected by the decision<sup>139</sup> can apply to the AAT for review of that decision.<sup>140</sup>

**(ii) Time limits**

A party will have 28 days to apply to the AAT for review.<sup>141</sup>

**(iii) Stay orders**

Any party to an application before the AAT may apply for a stay order.<sup>142</sup> The AAT will grant such an order if it is of the opinion that it is desirable to do so after taking into account the interests of any persons who may be affected by the review.<sup>143</sup>

**(iv) Costs**

Clients applying for a review of a social security decision do not have to pay an application fee.<sup>144</sup> Parties to proceedings in the AAT generally bear their own costs.

**(v) Nature of review**

The AAT will undertake a full review of the merits of the SSAT's decision. It has all the powers and discretions of the original decision-maker.<sup>145</sup>

The AAT procedures and their longer time frames may make it easier for you and your client to present your case. For example, the client may have access to documents from Centrelink that they did not obtain before the SSAT hearing.

**(vi) Timing**

Cases can take between six and nine months to finalise.<sup>146</sup>

##### **Appeals to higher courts**

Appeals may be made by parties to the Federal Court (and, subsequently, to the Full Court of the Federal Court and, possibly, the High Court), but only on questions of law.<sup>147</sup>

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<sup>139</sup> *Administrative Appeals Tribunal Act 1975*, s 27(1).

<sup>140</sup> *Administration Act*, s 129(1).

<sup>141</sup> *Administrative Appeals Tribunal Act 1975*, s 29(2).

<sup>142</sup> *Administrative Appeals Tribunal Act 1975*, s 41(2).

<sup>143</sup> *Administrative Appeals Tribunal Act 1975*, s 41(2).

<sup>144</sup> *Administrative Appeals Tribunal Regulations 1976*, reg 19(2), Sch 3.

<sup>145</sup> *Administrative Appeals Tribunal Act 1975*, s 43(1).

<sup>146</sup> *Social Security Handbook*, Ch 50, [1.3].

<sup>147</sup> *Administrative Appeals Tribunal Act 1975*, s 44(1).

## 5. Complaints

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### 5.1 Overview

Clients can quickly and easily make complaints to Centrelink or to the Ombudsman. However, you should be aware of the potentially limited practical effect of pursuing these avenues.

### 5.2 When to complain

Because of the powers that AROs and the SSAT have, it is almost always appropriate to exhaust those appeal avenues before considering making a complaint.

However, in some cases, launching an appeal may not be appropriate or possible. For example:

- a client may not want a decision changed, but is unhappy with the behaviour of a Centrelink officer; or
- a decision may not be capable of being appealed (for example, a decision about not continuing payments during an appeal to an ARO or the SSAT).

Further, complaints may be made about conduct during the appeals process, such as:

- delay in receiving an ARO's decision; or
- delay in implementing a decision of an ARO or the SSAT.

In these cases, you may wish consider assisting your client with making a complaint to either to Centrelink itself or to the Ombudsman.

### 5.3 Complaints to Centrelink

Clients can lodge complaints about Centrelink in any of the following ways:

- in person;
- on the Internet;
- by telephone; or
- in writing.

Centrelink will always respond to the complaint (unless, of course, the client wishes to complain anonymously).<sup>148</sup> In that respect, an acknowledgement from Centrelink that, for example, an officer has been impolite, may be of considerable value to the client.

However, the problem with making a complaint directly to Centrelink is that it is unlikely to achieve practical results.

### 5.4 Complaints to the Ombudsman

The Ombudsman is set up to consider and investigate complaints about government agencies.

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<sup>148</sup> Centrelink, *Fact Sheet — Complaints*, at <http://www.centrelink.gov.au/internet/internet.nsf/ea3b9a1335df87bccca2569890008040e/0f8b594e2c878295ca2572ec000a7ce!OpenDocument&Highlight=2,complaints#handling>.

Clients can also complain to the Ombudsman in person, online, by telephone or in writing. Note that the Ombudsman has a discretion *not* to investigate complaints if (among other circumstances):

- a complainant has not first complained to the authority in question;<sup>149</sup>
- a complainant has exercised, or may exercise, a right of internal review or review by a court or tribunal in respect of the complaint;<sup>150</sup> or
- the complaint may be more appropriately dealt with by another agency (for example, the Privacy Commissioner).<sup>151</sup>

Two possible beneficial outcomes of complaining to the Ombudsman are:

- the Ombudsman can make recommendations to Centrelink about the client's individual circumstances (for example, request that a decision be expedited); and
- if the Ombudsman receives a number of complaints relating to similar circumstances, then the office may undertake a full investigation and make broad recommendations regarding Centrelink practice and policy.

A recent example of the latter circumstance is the Ombudsman's report into the application of welfare to work penalties.<sup>152</sup>

## 6. Further Information

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Centrelink is the primary administrator of social security in Australia. Its website (<http://www.centrelink.gov.au>) provides a number of helpful fact sheets about the payments it administers.

Social security in Australia is primarily regulated by the following legislation:

- the *Social Security Act 1991* (Cth) (**the SS Act**); and
- the *Social Security (Administration) Act 1999* (Cth) (**the Administration Act**).

The legislation is complex and frequently amended, so take care to refer to the relevant sections.

You can obtain useful guidance from:

- the Department of Families, Housing, Community Services and Indigenous Affairs' *Guide to Social Security Law* (2007) (**Guide to Social Security Law**), at [http://www.facsia.gov.au/guides\\_acts/ssg/ssg-rn.html](http://www.facsia.gov.au/guides_acts/ssg/ssg-rn.html);
- the *Independent Social Security Handbook* (**the Social Security Handbook**) (to which the Homeless Persons' Legal Clinic (**the Clinic**) has online access);<sup>153</sup> and
- Fitzroy Legal Service's *The Law Handbook* (**the Law Handbook**).<sup>154</sup>

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<sup>149</sup> *Ombudsman Act 1976* (Cth), s 6(1A).

<sup>150</sup> *Ombudsman Act 1976* (Cth), ss 6(1C)(2), 6(1C)(3).

<sup>151</sup> *Ombudsman Act 1976* (Cth), ss 6(4A), 6(4D), 6(4G), 6(6), 6(9), 6(13), 6(16), 6(17), 6(20).

<sup>152</sup> Commonwealth Ombudsman, *Application of penalties under Welfare to Work*, Report No 16 (2007), <[http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports\\_2007\\_16/\\$FILE/penalties\\_welfare\\_to\\_work.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2007_16/$FILE/penalties_welfare_to_work.pdf)>.

<sup>153</sup> National Welfare Rights Network, *Independent Social Security Handbook* (2008) <http://www.welfarerights.org.au>.

<sup>154</sup> Fitzroy Legal Service, *The Law Handbook 2008* (2007).

## **7. Disclaimer**

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This Manual is intended to be used as a resource that introduces different areas of law and provides guidance on how an issue might be addressed. The Manual is not intended to be advice on any particular matter. Readers should not act on the basis of any material in the Manual without obtaining advice relevant to your own particular situations. The authors and publishers expressly disclaim any liability to any person in respect of any action taken or not taken in reliance on the contents of this Manual.

The law in this edition of the Manual is correct as at 30 June 2008

8. Flowchart - Appeals Process

