HIGH COURT OF AUSTRALIA

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### Details of Filing

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| File Number: | M92/2025 |
| File Title: | Chaplin v. Secretary, Department of Social Services & Anor |
| Registry: | Melbourne |
| Document filed: | Form 27D - First Respondent's submissions |
| Filing party: | Respondents |
| Date filed: | 03 Feb 2026 |

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

**MATTHEW CHAPLIN**
Appellant

**SECRETARY, DEPARTMENT OF SOCIAL SERVICES**
First Respondent

and

**LEGAL AID NSW**
Second Respondent

# FIRST RESPONDENT'S SUBMISSIONS

## PART I: FORM OF SUBMISSIONS

1 These submissions are suitable for publication on the internet.

## PART II: ISSUES

2 The proceeding concerns the proper interpretation of points 1067G-H1 and 1067G-H23 of the *Social Security Act 1991* (Cth) (**SSA**), which apply in working out the effect of a person's ordinary income on their entitlement to Youth Allowance, in the context of a debt raised under s 1223 of the SSA. Two issues arise on the grounds:

3 **Issue 1**: In circumstances where the evidence available to an administrative decision-maker establishes that a certain amount of employment income paid in arrears was "*received"* in a particular fortnight, but not the particular days on which that income was "*earned*", did point 1067G-H1 require the Secretary to take that income into account in the fortnight in which it was *received* because it was not "*appropriate*" to apply the "*first earned, derived or received*" rule in point 1067G-H23 (J[195]-[198])? Or did point 1067G-H23 preclude that income being taken into account (as the appellant contends)?

4 **Issue 2**: In raising a debt in respect of past overpayment of Youth Allowance, did s 1223 require the Secretary to be affirmatively satisfied of the amount of employment income *earned* by a person in each relevant fortnight (as Kennett J held: J[242], [251])?

5 One further issue arises on the Secretary's Notice of Contention (**Issue 3**): Does the rule in point 1067G-H23 itself require income to be taken into account in the fortnight in which it was "*first received*" in circumstances where the available evidence does not establish when it was "*first earned*" or "*first derived*"?

## PART III: SECTION 78B NOTICE

6 No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

## PART IV: MATERIAL FACTS

7 The appellant received Youth Allowance payments between 10 July 2014 and 24 June 2015 (**the debt period**). Those payments were made in arrears by reference to fortnightly instalment periods determined by the Secretary under s 43 of the *Social Security (Administration) Act 1999* (Cth) (**Administration Act**): J[71].

8 The fortnightly instalment periods commenced on a Thursday and ended on the second Wednesday that followed. During the debt period, the appellant received employment income from a casual job. His wages from that job were paid weekly on Thursdays, in arrears, for the

hours he had worked between Monday and Sunday of the preceding week. As such, the payroll periods did not align with the fortnightly instalment periods. Further, the days and hours on which the appellant worked varied: J[70].

9 At the end of each instalment period, the appellant was required to report the amount of money he had earned during the instalment period: J[72]. The amount of Youth Allowance paid to the appellant in respect of each instalment period was calculated by the Secretary based on that reported income.

10 The overpayment of Youth Allowance, and therefore the debt arising under s 1223 of the SSA, that is in issue came about because the appellant consistently and erroneously reported his after-tax **net** income to the Secretary, even though he had been expressly instructed on several occasions that he was required to report his pre-tax **gross** income: J[72]-[75], [90], [163], [246].

11 The Secretary discovered the appellant's consistent under-reporting on 8 April 2019, when the Australian Taxation Office (**ATO**) provided him with information showing that the appellant's gross income during the debt period was higher than the amount that the appellant had reported to the Secretary: J[4]; T[3]. The next day, on 9 April 2019, the Secretary requested information from the appellant about his income during the debt period: J[77]; First Respondent's Book of Further Materials (**RBFM**), pp 4-5. On 11 June 2019, the appellant provided the Secretary with weekly payslips that recorded his income and the total hours he had worked, but not the particular dates on which the work occurred: J[78].

12 On the basis of that information, on 1 October 2019, a delegate of the Secretary made a decision to "*raise a debt*" against the appellant for the overpayment of Youth Allowance, in the sense of recognising and asserting against the appellant that a debt was payable in respect of the overpaid amounts by operation of s 1223 of the SSA: J[143]. That decision was communicated to the appellant on 2 October 2019.

13 The appellant applied for internal review of the delegate's decision on 23 March 2020. An Authorised Review Officer in the Department affirmed the decision on 28 April 2020: J[89]. The appellant then waited more than three years before seeking further review of the decision in the Administrative Appeals Tribunal (the **Tribunal**) on 19 May 2023: J[91]. The Social Services and Child Support Division of the Tribunal (**AAT1**) gave its decision on 8 January 2024. As is usual practice in the Tribunal, the Secretary did not participate in the AAT1 review. He applied for review of the AAT1 decision in the General Division of the Tribunal (**AAT2**) on 7 February 2024. In the context of the AAT2 proceeding, on 28 February

2024, the Secretary issued a notice to the appellant's former employer under s 196 of the Administration Act requiring the production of documents recording the particular dates and hours worked by the appellant during the debt period: J[95]; T[47]; RBFM, pp 8-10. By the time of the notice, the appellant's former employer advised that it no longer held such records: J[95]; T[47]; RBFM, p 11.[1] On the basis of the evidence before it, the AAT2 decided that the appellant owed a debt in the amount of $806.16 (T[190]) for reasons that the Secretary did not seek to defend in the Full Court.

## PART V: ARGUMENT ON APPELLANT'S APPEAL GROUNDS

### Key legislative provisions

14 ***Statutory context – the social security law:*** The SSA and the Administration Act each form part of an integrated social security law.[2] The scheme has beneficial purposes,[3] including the provision of a basic level of income for those who are unable to receive sufficient income to provide for themselves. Consistent with that purpose, entitlements including Youth Allowance are income tested so that payments are reduced for those who have sufficient income.[4] In administering the social security law, the Secretary is required to have regard to the desirability of achieving the delivery of services under the law in a fair, courteous, and cost-efficient manner, and is required to establish procedures to ensure that abuses of the system are minimised.[5]

15 The Administration Act contemplates that a person will make a claim for that payment (s 11(1)), which will then be determined by the Secretary (ss 36(1) and 37). As noted above, payments are made in arrears and by reference to instalment periods (s 43(1)). The amount paid as an instalment is calculated by reference to the daily rate of payment applicable to each day in the instalment period (s 43(3)). The Secretary's determination of a rate of social security payment continues in effect until a further determination or the payment becomes payable at a lower rate under automatic rate variation provisions (ss 98–100, 123(3)).

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1 At AS[11] and [41], it is suggested that, by the time information was requested of the appellant in April 2019, the appellant's former employer no longer held his timesheets. That submission is wrong. The evidence did not establish *when* the timesheets ceased to be available, noting the three year delay in seeking merits review.

2 Administration Act ss 3(3) and 4; SSA s 23(17).

3 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1 at [29] (French CJ, Crennan, Kiefel and Keane JJ); *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [41] (per curiam).

4 *Secretary, Department of Employment and Workplace Relations v Richards* (2008) 168 FCR 438 at [39] (French, Moore and Lindgren JJ); *Secretary, Department of Social Security v Garvey* (1989) 22 FCR 132 at 136 (Morling, Hartigan and Lee JJ); *Read v Commonwealth* (1988) 167 CLR 57 at 69 (Brennan J).

5 Administration Act s 8(a)(iii) and (v), among a number of "*principles of administration*" stated in s 8.

16 Persons who have claimed or been granted a social security payment are under a general obligation to inform the Department of events or changes of circumstances that might affect the payment (s 66A). The Secretary may give a person a notice requiring them to inform the Department of events or changes in circumstances or provide statements about matters that might affect the payment (s 68). A failure to comply with such reporting requirements has consequences for the application of automatic rate adjustment provisions that occurs when it is discovered that a person's rate of entitlement has been calculated on the basis of incorrect information (ss 99 and 100).[6]

17 ***Rate calculator in s 1067G of the SSA****:* Chapter 2 of the SSA establishes a number of pensions, benefits and allowances. Part 2.11 of that chapter establishes Youth Allowance. Section 556 provides that "*the rate of a person's youth allowance is to be worked out in accordance with the Youth Allowance Rate Calculator in section 1067G*".

18 Section 1067G is found within Chapter 3 of the SSA, which contains general provisions relating to payability and rates as well as rate calculators for the various entitlements established by the SSA. At the relevant time, Part 3.10 within Chapter 3 contained general provisions relating to the "*ordinary income test*" in Module H of the Youth Allowance rate calculator (and the income tests for other entitlements).

19 Point 1067G-A1 provides that the rate of youth allowance is a daily rate, worked out by dividing the fortnightly rate calculated according to the Youth Allowance Rate Calculator by 14. That point contains a "*Method statement*" that explains the steps to be followed in working out the rate of a person's Youth Allowance. The starting point in that process is the identification of a maximum basic rate, which is then increased or decreased by reference to supplements, allowances and income and means tests to arrive at the rate of allowance that is paid. Relevantly, for present purposes, Step 12 requires the Secretary to "*[a]pply the income test using Module H below to work out the person's income reduction*". The income reduction is then capable of being used at Step 13 of the calculation, which relevantly requires the Secretary to "*[t]ake away from the maximum payment rate the greatest of the following that apply*", with one of the three following reduction types being "*the person's income reduction*".

20 To apply the income test, the Secretary must turn to Module H in the Youth Allowance Rate Calculator, which contains a further "*Method statement*". Step 1 of the income test at

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[6] At AS[24], footnote 9 suggested that "*the Secretary did not submit below that s 100 had any application to the case, nor did the majority so hold*". That submission is wrong: see the Secretary's submissions below at [20]-[22] and [31], and the majority's reasons at J[147].

point 1067G-H1 contains a critical command that requires the Secretary to: "*[w]ork out the amount of the person's ordinary income on a fortnightly basis (where appropriate, taking into account the matters provided for in points 1067G-H2 to 1067G-H25)*". The provisions that follow at points 1067G-H2 to 1067G-H25 address specific matters that may or may not be relevant in working out the amount of a person's ordinary income depending upon the circumstances and nature of the income.

21 Point 1067G-H23, as it applied at the relevant time, provided that, subject to certain presently inapplicable provisions, "*ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received*". The concept of "*ordinary income*" is defined in s 8 of the SSA, and is informed by the further definitions of "*income*" and "*income amount*". The meaning of the phrase "*earned, derived or received*" is also informed by s 8(2).

22 ***Section 1223 of the SSA****:* Chapter 5 of the SSA concerns overpayments and debt recovery. Section 1223(1) provides that, subject to s 1223, if a social security payment is made and 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.

23 Some of the circumstances in which a person will not be entitled to the benefit of a payment are identified in s 1223(1AB), and s 1223(9) makes clear that the reference to a "*social security payment*" includes part of a payment. Importantly, under s 1223(1), a debt is taken to arise when the person obtains the benefit of the social security payment. While administrative processes are undertaken to "*raise*" or recognise the existence of a debt and recover it (referred to as "*debt decisions*"), the debt arises as a result of the operation of s 1223(1) rather than as a result of any decision of the Secretary.[7]

24 ***Amendments to the SSA since the debt period****:* Since the debt period, there have been two significant sets of amendments to the income test provisions in the SSA. *First,* on 7 December 2020, the SSA was amended such that point 1067G-H23 applied to "*ordinary income (except employment income)*" (emphasis added). At that time, general rules in Pt 3.10 of the SSA were also amended. As a consequence, the issues of statutory construction in this proceeding could only ever affect the calculation of social security entitlements by reference to employment income from more than half a decade ago. *Secondly,* on 5 December 2025 (after the grant of special leave in this matter), the SSA was again amended to provide that any future

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7 *Director General of Social Services v Hangan* (1982) 45 ALR 23 at 26 (Fox J), 31 (Toohey J) and 45 (Fitzgerald J); *Director General of Social Services v Hales* (1982) 47 ALR 281 at 307 (Lockhart J); *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 at 218 (von Doussa J).

decisions concerning historic assessments of entitlement by reference to such income would be made according to a new methodology set out in s 1117D of the SSA and not the provisions at issue in this proceeding. That would include any further decision by the Administrative Review Tribunal regarding the appellant's own matter in the event that he succeeded in this appeal and obtained the order for remitter that he seeks from this Court.[8]

**Approach taken by majority in the Full Court**

25 The appellant distorts the way in which the majority characterised the decision faced by the Tribunal (standing in the shoes of the Secretary). This distortion constitutes a critical flaw.

26 At AS[25]-[26], the appellant suggests that the majority contemplated a debt being raised on the basis of a mere lack of satisfaction on the part of the Tribunal that the appellant had been entitled to the particular amounts of Youth Allowance he had received during the debt period. However, contrary to what the appellant says at AS[26], the majority explained that the first and most significant in the "*series of decisions*" that are in effect challenged by the appellant in this proceeding was the "*ascertainment*" or "*reassessment*" of the appellant's Youth Allowance entitlement during the debt period: J[114], [147]. That was a positive decision, based on calculations relying on the best information available to the decision-maker, as to the true amount of the appellant's entitlements.

27 The knowledge that the amounts of Youth Allowance paid to the appellant had been calculated on the basis of the appellant's under-reporting of his employment earnings was relevant to the administrative decision for two reasons. *First*, the ATO information concerning the appellant's gross annual income was what prompted the "*reassessment*" of his entitlement to Youth Allowance. *Secondly*, once the Tribunal had confirmed the true position based on evidence provided by the appellant and his employer as to the income he had "*earned*" and "*received*" during the debt period, it could not reasonably conduct an assessment or determination of the appellant's entitlement that simply excluded that income: J[158], [185]-[187]. The appellant's case was and is that his entitlement should have been reassessed without taking that income into account, even if the appellant quibbles with the idea that this would involve the Tribunal "*ignoring*" his known income: AS[29].

28 In that context, the majority noted that the purpose of the overall scheme of the Youth Allowance Rate Calculator was to compute a figure for Youth Allowance on a fortnightly basis

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[8] See in particular s 1117D(2), (3) and (14) of the SSA, as amended by the *Social Security and Other Legislation Amendment (Technical Changes No. 2) Act 2025* (Cth).

that is appropriate having regard to the particular circumstances of the relevant person, by increasing the rate with allowances and supplements by reference to need and reducing it by reference to means: J[191].

29 The majority found that the purpose of point 1067G-H23, in particular, was to allocate income to a particular fortnight for the purpose of the requirement in point 1067G-H1 to work out a person's income on a fortnightly basis, and to ensure that income that is earned or derived before it is received, or vice versa, was only counted once: J[192], [198]. Parliament should not be taken to have intended that point 1067G-H23 would exclude income known to have been earned shortly before it was received because it could not be determined whether it was earned in the same fortnight it was received or in the preceding fortnight: J[194], [196], [197].

30 Contrary to the Secretary's submissions before the Full Court (as explained in further detail below), the key textual aspect of the provisions in question relied on by the majority was the use of the phrase "*where appropriate*" in Step 1 of the Module H Method statement in point 1067G-H1: J[195]. If the rule in point 1067G-H23 was not "*appropriate*" to the purpose of calculating the reduction in a fortnightly instalment of Youth Allowance on the basis of an amount of ordinary income earned, derived or received during that period, the majority reasoned, it would not be applied: J[196]. A decision-maker in those circumstances would "*revert to Point H1*": J[198].

**Approach taken by Kennett J in dissent**

31 Justice Kennett, in dissent, approached the issues below by reference to what a court might be expected to do in debt recovery proceedings ultimately brought against the appellant by the Secretary: J[15]. In such a proceeding, as noted at AS[30], the Secretary would bear an onus of proof: J[249].

32 This aspect of Kennett J's reasoning is evidently the provenance of the appellant's assertion that the approach of the majority "*reversed the onus*" (AS[35]), though in truth it is unhelpful to speak of an "*onus*" in administrative review proceedings.[9] Indeed, in the context of the application for special leave in this proceeding, the appellant adopted Legal Aid NSW's concession that "*[s]trictly speaking, no onus of proof arises in the making of administrative decisions under the Act*": see SLA in M63/2025 at [22]; SLA in M65/2025 at [16]. In any event, it should be observed that the appellant's arguments about "*onus*" only have purchase if

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[9] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [40] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), referring to *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 358 (Woodward J).

points 1067G-H1 and 1067G-H23 are construed as he urges. Once it is accepted that those provisions contemplated taking into account income that is known to have been received in a particular fortnight notwithstanding that it cannot be known when it was earned, there can be no concern about the Tribunal failing to be satisfied as to the appellant's entitlement to each specific instalment of Youth Allowance: cf AS[33].

33 Justice Kennett also emphasised that there was an objective, "*single correct answer*" to the question of how much Youth Allowance the appellant had been entitled to: J[226]. Again, much is made of this in the appellant's submissions. The majority did not deny this proposition, and it was common ground below that the appellant's debt (if any) arose by the operation of the social security law: J[53], [226]. Further, Kennett J himself accepted that there was nothing "*unusual or unacceptable in the notion that an assessment of the amount of a person's entitlement (by an officer, a tribunal or a court) depends on the state of the evidence before the decision maker*": J[239].

**Ground 1: alleged inversion of the statutory test**

34 ***Context:*** The appellant's Ground 1 is that "*[t]he Full Federal Court erred in holding that the 'decision' under review was a decision to ascertain the appellant's entitlement to youth allowance under the [SSA]. In doing so, it wrongly placed the 'onus of proof' on the appellant in respect of that decision.*" The Ground is premised upon a misreading of the majority's reasons and should be rejected.

35 The decision that was the genesis of the appellant's application to the Tribunal was a decision made on 1 October 2019 by the Secretary's delegate to demand $911.98 on the basis that the appellant had been overpaid Youth Allowance in that amount. The 2 October 2019 notice that recorded the decision is set out at J[85]-[86]. It stated that Centrelink had: *"used the information you told us to assess the amount of payments you received from us in the past"* and asserted that the appellant owed an amount of $911.98. That decision was the subject of an application for internal review that resulted in a decision of an authorised review officer on 28 April 2020 "*to ask you to repay a Youth Allowance debt of $911.98 for the period 10 July 2014 to 24 June 2014*" (J[89], [140]) which was made on the basis of a recalculation of the appellant's entitlement based on information he provided.

36 In each case, the crux of the decision was a reassessment of the appellant's Youth Allowance entitlements, of the kind described at J[144](a), based on the additional information about the appellant's income during the debt period that he had provided in the form of his weekly payslips: RBFM, pp 6-7; J[149]-[150].

37 In the statutory language of s 1223 of the SSA, the 2 October 2019 notice recorded a decision in which the delegate formed the view that a debt was due to the Commonwealth and made a demand in respect of its repayment,[10] because the appellant had not been entitled to obtain (part of) the social security payments that had been made to him. That much was common ground between the majority and Kennett J below: see J[140]-[145], [213], [217].

38 ***The Full Court did not "invert the statutory test":*** Under Ground 1, the appellant advances a range of complaints about the way in which the Full Court conceived of the delegate's decision, aspects of which are difficult to reconcile with the ground in respect of which leave was granted.

39 The heart of the appellant's argument (and despite the drafting of Ground 1) appears to be a fundamental contention that the Full Court endorsed a construction of s 1223 of the SSA that permitted a decision-maker to assert and demand payment for a social security debt merely because the decision-maker "*failed to be satisfied on the available material that the person was entitled to the whole of a payment that the person received in the past*": AS[38] (emphasis original). The appellant contends that the Full Court "*inverted the statutory test*", which in fact required the decision-maker to be affirmatively satisfied that the person was "*not entitled*" to the payment they had previously received: AS[40] (emphasis added). That contention is not made out.

40 The majority below proceeded on the basis that the "*decision*" challenged by the appellant involved a "*series*" (J[109]) or "*continuum*" (J[143]) of "*'decisions' (used in a broad sense)*": (a) "*reassessing*" or *"ascertaining"* what the appellant's Youth Allowance entitlement had been during the debt period; (b) "*calculating how much the appellant had been overpaid by subtracting the amounts of his entitlement from the amounts he had been paid*"; and (c) "*deciding whether, as a first step in a process of recovery, the Department should demand repayment*". This typology was stated at J[14] and restated at J[107], [144] and [168].

41 The majority explained that the reassessment or ascertainment of the appellant's Youth Allowance entitlement was the "*essential starting point*" from which "*the remaining decisions ensued*": J[114]. It was the "*first step or 'decision' of real significance*" for the delegate and each of the decision-makers, up to and including the Tribunal, who reviewed the delegate's decision: J[147]-[148].

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[10] As to which, see *Administrative Appeals Tribunal Act 1975* (Cth), s 3(3).

42 That is necessarily the case, of course. The ascertainment of a person's true entitlement to a social security payment is, in the majority's typology, logically prior to the calculation of any overpayment and the decision of whether to demand repayment of such overpayment. In any event, in this proceeding, there is no dispute as to how much Youth Allowance the appellant was actually paid: AS[54]. Nor has the appellant suggested that repayment should not be demanded in the event that it is concluded that he was overpaid.[11]

43 In this appeal, the appellant seeks to seize on the majority's remark at J[153] that the calculation of a social security recipient's debt "*was premised on the decision-maker failing to be satisfied that the recipient was entitled to the amount received"*: AS[2], [35], [38]. However, it is abundantly clear from the preceding sentence in J[153] that the "*calculation*" referred to in that remark is the calculation of "*amount received less amount of entitlement*" required at step (b) of the majority's typology. That is, the state of satisfaction referred to was that reached after the process of positively reassessing or ascertaining the recipient's entitlement at step (a). This is confirmed at J[155], where the majority said that "*[h]aving performed that 'reassessment', the decision-maker was satisfied that the appellant was not entitled to the amount he had received but, based on the information available, was satisfied that he was entitled to a lesser amount*" (emphasis added). See also J[146].

44 The contention advanced by the appellant in Ground 1 simply cannot survive a fair reading of the majority's reasons below. There was no "*inversion of the statutory test*".

45 ***Other objections made by the appellant:*** As noted above, the appellant advances sundry other objections, apparently under Ground 1. None of these should be accepted.

46 First, the appellant complains that the majority's supposed inversion of the statutory test "*has the practical effect of requiring recipients to re-establish (and to be continuously ready indefinitely to re-establish) their entitlement to a past payment at random moments in time of the Secretary's choosing (noting there is no limitation period)*": AS[47] (emphasis added). Relatedly, he objects that the reassessment was "*historical*": AS[53]. In the circumstances of this case, the time at which the Secretary's delegate came to reassess his Youth Allowance entitlement was in no way "*random*": cf AS[47]. The appellant consistently under-reported his income despite being informed of his reporting requirements on a number of occasions. The amounts and particulars of the appellant's ordinary income were matters within his knowledge and not the Secretary's. The appellant's under-reporting of his income only became apparent

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[11] As to which, see rule 11 of the *Public Governance, Performance and Accountability Rule 2014* (Cth), made under s 103 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

to the Secretary on 8 April 2019, when information was provided to him by the ATO. It indicated that the information that had previously been provided by the appellant regarding his ordinary income was incorrect. As the majority noted, at J[146], upon receipt of that information "*the Department was required to consider whether Mr Chapman [sic] had been overpaid Youth Allowance*". As noted above at [11], further information was immediately sought from the appellant. After that information was provided, the appellant's entitlement was reassessed. A social security recipient who faithfully complied with their statutory reporting obligations would not have been exposed to such a reassessment.

47 *Secondly*, the appellant complains that the reassessment of his Youth Allowance entitlement was "*approximate*" (AS[38]) or simply an "*estimate*" (AS[53]). That submission is wrong and contrary to the evidence. The relevant calculations are explained at J[81]-[82]. Calculations establishing the appellant's daily and fortnightly entitlements and the amounts he was paid were before the Tribunal and were explained by a senior officer of Services Australia: RBFM, pp 32-59. There is no dispute about the dates on which the appellant received his weekly payments of employment income and the amounts received on those dates. Some of the weekly payroll periods to which payments related fell entirely within a fortnightly instalment period. Those payments were therefore taken into account in the fortnightly instalment period within which the payroll period fell (and therefore when the income was "*earned*"). Where the appellant's weekly payroll periods spanned two fortnightly instalment periods, the Secretary deduced the particular date on which income had been earned from available information about allowances and loadings paid to the appellant, where that was possible, and took such income into account in the fortnightly instalment period in which it was "*earned*". Where that was not possible, the Secretary took account of income in the fortnightly instalment period within which the income was "*received*". These were not "*estimates*" or "*approximations*". Rather, the Secretary applied certain methods of taking into account the appellant's income across the debt period according to point 1067G-H23 and the available evidence. Indeed, that is the basis for the issue articulated by the appellant at AS[4], although that issue is taken no further in the body of his submissions.

48 *Thirdly*, the appellant objects in various senses to the way in which the majority dealt with the prospect of the appellant obtaining a windfall if the SSA was construed such that he retained the benefit of his own consistent under-reporting of income during the debt period only because income he was known to have received could not be taken into account in reassessing his actual entitlements: AS[42]-[46]. In particular:

(a) The appellant suggests (at AS[43]) that under-reporting need not, in particular circumstances, result in a discrepancy in entitlement to Youth Allowance. However, he ultimately and correctly concedes (at AS[45]) that his pattern of incorrectly reporting his net rather than gross income in fortnightly periods across the debt period meant that he had "*likely received a somewhat greater total amount of youth allowance in the relevant period*". Of course, the calculations that were in evidence established that there were overpayments regardless of which methodology was adopted by the Tribunal. The Tribunal's preferred "*earnings*" based methodology yielded the same debt amount as the Secretary's "*hybrid*" methodology: J[8].

(b) The appellant says the windfall he stands to obtain is "*unspecified*" (AS[44]) and "*vaguely conceived and undefined*" (AS[46]), but of course the potential windfall is precisely defined in this proceeding. It is the amount of $806.16 that is due to be repaid to the Commonwealth if either of the bases on which the Secretary defends the Full Court's decision are accepted by this Court.

(c) The appellant says that the prospect of obtaining a windfall benefit for under-reporting of income may simply be "*a consequence of the legislature having chosen to enact a regime in which overpayments arise by operation of the Act and consequently may require proof*": AS[46]. However, the windfall in prospect in this proceeding would follow not from the requirement of proof that a person had been paid more than they were entitled, but rather from: (a) a construction of Module H that frustrates the command that a decision-maker "*[w]ork out the amount of the person's ordinary income on a fortnightly basis*"; and (b) the circumstance that the appellant consistently under-reported his income by failing to heed the instruction that he should report his gross income (see s 1072, SSA).

**Ground 2: alleged failure to focus on particular fortnightly payments**

49 The appellant's Ground 2 is that the Full Court erred in holding that a debt could arise under s 1223 of the SSA "*only because the Secretary was satisfied that: (a) it was unlikely that the recipient was entitled to the total amount of some aggregate of fortnightly payments; and (b) the relevant payment formed part of that aggregate*". It fails for the simple reason that the majority of the Full Court held no such thing. Like Ground 1, this ground relies on a distortion of the majority's reasoning.

50 At AS[58], the appellant says that s 1223 of the SSA "*operates on individual payments*" of Youth Allowance. In fact, as the majority itself observed, s 1223 operates on a payment of Youth Allowance or, as s 1223(9) makes clear, any part of such a payment: J[51]. That is because what s 1223 countenances is the assessment of what a social security recipient was entitled to receive and the calculation of whether that actual entitlement was less than what had actually been paid to the recipient in the instalments contemplated by s 43 of the Administration Act.

51 At the heart of Ground 2 is an attempt to read the majority's statement at J[14](c) that "*[n]o decision-maker acting reasonably could have been satisfied that the appellant was entitled to the whole of the payments he had received*" selectively and entirely out of context: AS[58]. As explained above in relation to Ground 1, the majority repeatedly explained that the central task of the relevant decision-makers was the ascertainment of the appellant's Youth Allowance entitlement consistent with the SSA and the Administration Act. For example, at J[14](a), in the same paragraph as the statement at J[14](c) that the appellant now seeks to misconstrue at AS[58], the majority noted that the decision under review involved "*calculating how much Mr Chaplin had been overpaid by subtracting the amounts of his entitlement from the amounts he had been paid*" (emphasis added). Indeed, even in J[14](c), the words "*the whole of the payments*" (emphasis added) make clear that the majority was not focussed upon the establishment of some "*aggregate*" amount. If there were any doubt about this, it would be dispelled by what the majority said at J[14](d), the immediately following sub-paragraph. There, the majority explained that "*[t]he extent of the appellant's entitlement had to be ascertained taking into account the 'income reduction' provided for in Module H*" of the Youth Allowance Rate Calculator set out in s 1067G of the SSA. Step 1 of the income reduction methodology in Module H provides for a person's income to be worked out "*on a fortnightly basis*": point 1067G-H1.

52 The appellant also seeks to distort what the majority said at J[154], [157] and [159]. As is made clear at J[159], what the majority meant in these passages was that the Secretary's knowledge that the appellant had consistently under-reported his income was what prompted the reassessment of his Youth Allowance entitlements, and that the reassessment then conducted by each successive decision-maker on the relevant fortnightly basis contemplated by Module H in s 1067G inexorably reached the conclusion that the appellant had been overpaid as a consequence of his under-reporting in relevant fortnightly periods.

53 In any event, there is no doubt that the actual calculations that were before the Full Court were conducted on the granular, fortnight-by-fortnight basis required by Module H. The calculations by which the Secretary had contended before the AAT2 for a total debt in the sum $806.16 are set out at RBFM, pp 24-31. Take the fortnightly instalment period running between 28 May 2015 and 10 June 2015 as an example. It can be seen on page 31 that the Secretary took account of $967.07 of employment income in that fortnight, which consisted of the sum of $323.42 *received* on the appellant's Thursday 4 June 2015 payday (because the relevant payroll period for that payment, running from Monday 25 May 2015 to Sunday 31 May 2015, straddled two fortnightly instalment periods: see payslip on RBFM, p 22), and $643.65 which was *earned* during the payroll period running from Monday 1 June 2015 to Sunday 7 June 2015 which fell entirely within the single, relevant fortnightly instalment period (but was paid in the following instalment period on 11 June 2015). The way in which the Module H income test was applied in the fortnightly instalment period ending 10 June 2015 on the basis of that $967.07 of employment income, producing a calculation that the appellant was entitled to $117.88 of social security benefits in that period, can then be seen on page 27. The Secretary's calculations on page 30 compared that entitlement with the amount of $158.68 in social security that the appellant had actually been paid in that fortnightly instalment period, reaching a conclusion that the appellant had been overpaid $40.80 in that period. The total debt amount of $806.16 is the sum of the overpayments calculated in the same way in respect of each fortnightly instalment period within the debt period, as recorded on pages 28-30. It could not seriously be suggested that expressing a demand by reference to a total figure that represented the sum of each individual overpayment somehow revealed error.

**Ground 3: alleged error in the construction of points 1067G-H1 and 1067G-H23**

54 The appellant's Ground 3 is that the Full Court "*erred in holding that, for the purposes of calculating the appellant's entitlement to youth allowance under the Act, "ordinary income" which was known to be "earned" before being "received" could be taken into account when it was "received" under Step 1 of the method statement in s 1067G-H1*".

55 In essence, the appellant's argument under this ground is that, if income was earned before it was received, but the precise date when it was earned is not known on the available evidence, point 1067G-H23 requires the decision-maker to disregard that income in the application of the income test in Module H of s 1067G. That is so even when, as is the case here, there is no dispute that income answering the statutory description of "*ordinary income*" was *received* on a particular date.

56 ***Point 1067G-H23 provides a temporal rule as to <u>when</u> income is to be counted:*** The basic difficulty with the appellant's argument is that there is no basis in the text of point 1067G-H23 to suggest that it should operate as a rule *excluding* certain income from being taken into account for the purposes of the income test in Module H of s 1067G. In terms, point 1067G-H23 contemplates that "*ordinary income <u>is to be taken into account</u>*" at a particular time. As the majority below held at J[192], the rule's evident purpose is to provide an instruction about *when* income is to be taken into account, in order to prevent double counting of income that is earned, derived and/or received at different times. The appellant does not cavil with that. He identifies no reason why Parliament should have intended that point 1067G-H23 operate as a rule precluding income being taken into account in the absence of particular, granular evidence as to the particular day on which it was earned, or tolerate that outcome in the pursuit of the purpose of avoiding double-counting.

57 ***The statutory context is inconsistent with the appellant's construction:*** The statutory context pertaining to point 1067G-H23 is consistent with the construction adopted by the Full Court (or, in the alternative, that advanced by the Secretary below and on his notice of contention). Point 1067G-H23 is applied in the course of satisfying the overarching command in point 1067G-H1 to "*[w]ork out the amount of the person's ordinary income on a fortnightly basis*". That is in service of the overarching purpose of the income test in Module H of limiting the expenditure of finite public resources to those who stand in need of the benefits for which the SSA provides. These purposes are not advanced—and are indeed frustrated—by a construction of points 1067G-H1 and 1067G-H23 that disregards income that has plainly (and admittedly) been obtained by a social security recipient. In the present case, the consequences of the adoption of the construction advanced by the appellant would be that: (a) income answering the statutory description of "*ordinary income*" would be disregarded in working out the appellant's ordinary income on a fortnightly basis; and (b) the appellant would thereby obtain a windfall benefit as a result of his own erroneous under-reporting of income: J[166].

58 For his part, the appellant suggests that three features of the statutory context favour his construction: AS[64]. None of these three points are compelling.

59 *First*, the appellant says that his construction is consistent with the proposition, emphasised by Kennett J at J[238], that the SSA contemplates a "*single correct answer*" as to a person's social security entitlement. The Secretary does not deny that proposition. Nor, as noted above, did the majority below: J[53], cf [226]. But it does not advance the appellant's construction. It is an inevitability of administrative decision-making that attempts to discern

the correct answer to a statutory question will involve the evaluation of evidence before a decision-maker. As the majority observed, that would be so no matter how point 1067G-H23 was construed. A change in the available evidence would have the same effect whether it occurred promptly after an initial decision or after the effluxion of considerable time: J[202]. Indeed, as noted above, Kennett J himself accepted that there was nothing "*unusual or unacceptable in the notion that an assessment of the amount of a person's entitlement (by an officer, a tribunal or a court) depends on the state of the evidence before the decision maker*": J[239]. With respect, that is correct, and it is not at all clear how this could mean (as His Honour held at J[238]) that the *content of the test* being applied by the decision-maker is affected by the availability of evidence. Properly construed, point 1067G-H23 provides for the application of an accounting methodology that yields a single and certain answer on the evidence available.

60 *Secondly*, the appellant says that unless his construction is adopted, it is possible that "*anomalous*" results might arise in certain future cases where debts might be incorrectly raised only because evidence that substantiates the true position has been lost through the effluxion of time. What the majority said at J[154] makes clear why that is not true even in principle. More fundamentally, however, there can be no future cases in which the raising of debts under s 1223 of the SSA is affected by this Court's approach to the construction of s 1067G-H23 as regards employment income. That is because the amendments to the SSA described above at [24] mean that any future decisions about the historic class of entitlements to which the constructional issues raised in this case are relevant are to be made according to a new legislated methodology set out in s 1117D of the SSA, rather than according to (any construction of) point 1067G-H23.

61 *Thirdly*, the appellant says that his construction is consistent with the requirement under s 8 of the Administration Act that "*in administering the social security law*", the Secretary is to have regard to the desirability of achieving results including "*the delivery of services under the law in a fair, courteous, prompt and cost-efficient manner*" (emphasis added). Plainly enough, this requirement goes to the way in which the Secretary is to administer s 1067G, once it is properly construed. In any event, it is not clear how a construction that would in this case countenance a windfall benefit to the appellant would be "*fair*", and the Secretary's approach to reliance on evidence of "*received*" income where granular evidence as to when it was "*earned*" is not available is entirely consistent with the injunction to administering the social security law in a "*fair*", "*prompt"* and "*cost-efficient*" manner. Nor is it clear how an approach that involved the Secretary repeatedly pressing social security recipients (and potentially also

their employers) for granular payroll information in respect of each instalment period, would support the "*fair*", "*prompt*" and "*cost-efficient*" administration of the social security law. As the majority noted at J[204], "*[t]here is nothing unusual in a statutory scheme for social security which permits payments being made in reliance on information provided by social security claimants, without necessarily examining the various aspects of each fortnightly claim in detail as and when such claims are made. Social security needs to be delivered quickly and efficiently at a reasonable administrative cost.*"

62 ***The majority did not provide for point 1067G-H23 to be "ignored":*** In reaching their construction of the provisions in question, the majority below placed emphasis on the words "*where appropriate*" in Step 1 of point 1067G-H1. In light of those words, their Honours concluded that a decision-maker was required to attempt to apply the temporal rule in point 1067G-H23. Where, as here, there was no work for that rule to do because the evidence did not establish the particular fortnight in which relevant income was earned before it was received, the decision-maker would "*revert to*" the critical command in point 1067G-H1 nonetheless to "*work out*" a person's income on a fortnightly basis by reference to the receipt of income in the relevant fortnightly instalment period.

63 The appellant attacks the majority's reliance on the words "*where appropriate"* in point 1067G-H1 by claiming that their Honours' approach wrongly provided for point 1067G-H23 to be "*ignored*". While (as explained below) the Secretary emphasised a different textual basis for the result ultimately reached by the majority, which he now maintains in the alternative on a notice of contention, the criticisms of the majority's approach articulated by the appellant are not persuasive.

64 The key point to be appreciated about the majority's reasoning is their Honours' finding that "*[t]he word 'first' in Point H23 is intended to ensure that income is taken into account only once and directs that income is to be allocated to the earliest fortnight in which the income can be identified as being 'first earned, derived or received' on the available material*": J[198] (emphasis added). This understanding of the specific operation of the rule in point 1067G-H23 is important. Contrary to AS[72], the majority did not proceed on the basis that the rule applied wherever a person earned income before he or she received it, even if the fortnight in which it was earned was not known. Two points follow from this.

65 *First*, contrary to AS[71] and [73], the majority's use of "*where appropriate*" in no sense involved the conferral of an "*administrative discretion*" much less a "*constructional choice*" on the Secretary (or any other decision-maker) administering the income test in Module H. At

AS[73], the appellant objects to the majority's reference at J[196] to this Court's construction of the word "*appropriate*" in *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219. *Vella* was cited for the proposition that "*the word 'appropriate' denotes 'effective' or 'fitting' for a particular purpose".* It is not to the point that the relevant purpose in *Vella* called for a discretionary exercise. The purpose of taking into account a person's income for the purposes of the income test in Module H of s 1067G does not: J[198]. Nor, in a similar vein, did the words "*where appropriate*" authorise a decision-maker to "*pick and choose between different parts of the Youth Allowance Rate Calculator*" or to "*apply only part of the 'income test' in Module H*": contra AS[68]. What was contemplated, rather, was that the decision-maker would apply the income test according to the best available evidence, a quotidian feature of all manner of administrative decision-making, as Kennett J himself acknowledged at J[239].

66 *Secondly*, the appellant's submission at AS[71] that the words "*where appropriate*", properly construed, mean that points 1067G-H2 to 1067G-H25 should be taken into account "*where they are applicable on their terms to the facts of the particular case*" can, broadly speaking, be embraced. Indeed, at J[196], the majority said that "*[i]f Point H23 is not capable of being applied, then it might be thought that it is not applicable and not "appropriate" to take the rule in Point H23 into account in working out the fortnightly income under Step 1 of the H1 Method statement.*" On the majority's reasoning, where a decision-maker cannot, on the available evidence, identify more than one fortnightly instalment period in which income was earned, derived or received, it is not "*appropriate*" to apply point 1067G-H23 because that point is not *"applicable*", in the sense that it has no work to do.

## PART VI: ARGUMENT ON SECRETARY'S NOTICE OF CONTENTION

67 The Secretary contends that the outcome reached by the majority below could equally be reached by his alternative approach to the text of point 1067G-H23, which emphasises the role of the word "*first*" preceding the words "*earned, derived or received*".

68 *First*, as noted above, it is point 1067G-H1 that contains the critical command to "*[w]ork out the amount of the person's ordinary income on a fortnightly basis*". Point 1067G-H23 provides a rule that tells the Secretary *when* to take into account an amount of ordinary income in the course of carrying out the command in 1067G-H1. That is consistent with the overall approach taken by the majority: J[192], [196].

69 The appellant now contends that point 1067G-H1 contained merely "*an 'overall description' of, or a guide to, the provisions that follow*": AS[74]. But s 1062(2) of the SSA, on which he relies, does not say this. Rather, it says that "*[t]he overall rate calculation*

*process is usually described in an early Module of the relevant Rate Calculator*". In the context of the Youth Allowance Calculator, that is Module A, which expressly sets out the "*overall rate calculation process*". Module H is concerned with the income *test* that is one component of that overall process, referred to at Step 12 of point 1067G-A1. In any event, neither the method statement at point 1067G-A1 nor at point 1067G-H1 merely describes the effect of other provisions. Rather, they provide for the key calculations that are to be conducted. In the absence of point 1067G-H1, points 1067G-H2 through 1067G-H33 would describe or elaborate upon the statutory concepts of "*ordinary income*", "*partner income free area*", "*partner income excess"*, "*partner income reduction*" and would supply particular rules relevant to the test. However, those provisions would not explain what calculations are conducted by reference to those concepts to produce the "*person's income reduction*" that is itself a key component of the calculations set out in the method statement at point 1067G-A1 that ultimately produce a person's rate of Youth Allowance entitlement. That is, on their own, points 1067G-H2 through 1067G-H33 are insufficient to yield the requisite income test integers that are necessary in order to derive a rate of entitlement. A decision-maker must apply point 1067G-H1 according to its terms for the test to work.

70 *Secondly*, it is significant that (as was common ground before the Full Court) *"earned, derived or received*" is a conjunctive expression.[12] This conjunctive expression appears throughout the Act and has a long history in Commonwealth social security legislation,[13] and before that in colonial and State taxation[14] and welfare[15] statutes.[16] In *Read v Commonwealth* (1988) 167 CLR 57 at 69, Brennan J observed that the definition of "*income*" in the *Social Security Act 1947* (Cth) (**1947 Act**), which incorporated the conjunctive phrase, was "*couched in the widest terms, presumably to ensure that public expenditure is directed to those who stand in actual need of the periodic support which income-related pensions provide*". Similarly, in *Inguanti v Secretary, Department of Social Security* (1988) 80 ALR 307 at 310,

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12 See *Saravinovski v Saravinovska* [2017] NSWCA 85 at [33]-[34] (Leeming JA; Beazley ACJ agreeing); *Questions of Law Reserved (Nos 1 and 2 of 2023)* [2024] SASCA 82 at [189] (per curiam).

13 *Invalid and Old-age Pensions Act 1908* (Cth) s 4; *Social Security Act 1947* (Cth); s 18; *Veterans Entitlements Act 1986* (Cth) s 5H; *Child Support (Assessment) Act 1989* (Cth) s 66A(4).

14 See, eg, *Income Tax Act 1895* (Vic) s 14(3); *Income Tax Act 1896* (Vic); ss 4(a) and 12(d); *Income Tax Act 1902* (Qld) ss 4, 21(iv), 39(3); *Income Tax Act 1903* (Vic) s 12(1); *Income Tax Act 1914* (Vic) ss 4 and 12; *Income Tax Act 1915* (Vic) ss 4, 44(3), 47(1), 61(1)(d); *Income Tax Amendment Act 1920* (Qld) s 14(iii); *Income Tax Act 1924* (Qld) s 4; *Income Tax Act 1928* (Vic) ss 4, 23(1), 51(3), 54(1), 68(1)(d).

15 See, eg, *Old-age Pensions Act 1901* (Vic) s 2; *Old-age Pensions Act 1908* (Qld) s 2.

16 At AS[76] it is suggested that the phrase "*first earned, derived or received*" was "*first introduced in 1994*". However, the phrase had been used in the context of the Newstart calculator since 1991: see *Social Security (Rewrite) Amendment Act 1991* (Cth) sch 2, s 1068-G7A.

Sheppard J observed of the cognate 1947 Act definition that "*[t]he definition uses a number of nouns and the three verbs to which I have referred, the intention being to catch a wide range of accruals and receipts which are to be treated as income for the purposes of the Act*". It has been said that the definition was "*framed to cast a very wide net*",[17] which encompasses "*as wide a range of categories and sources of income as possible*".[18]

71 *Thirdly*, in light of the above, the preferable reading of the text of point 1067G-H23 is that, if it is not possible to determine when an income amount was "*first earned"*, it may be possible to determine when it "*first*" came to attain the status of one of the other aspects of the conjunctive phrase. That is, here, while the evidence does not establish the fortnight in which disputed amounts of the appellant's income were "*first earned*", point 1067G-H23 still has work to do because the evidence does indicate the fortnight in which that income was "*first received*". That is a construction which honours both the command at the beginning of point 1067G-H23 that income "*is to be taken into account*" and the command in point 1067G-H1 to "*[w]ork out the amount of the person's ordinary income*". It is consistent with the conjunctive nature of the phrase "*earned, derived or received*" and the role that phrase plays in furthering the statutory purpose of bringing the full extent of a person's income to account in the application of the income test in Module H of s 1067G.

## PART VII: ESTIMATE OF TIME

72 Approximately 2 hours will be required to present the Secretary's oral submissions.

3 February 2026

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[17] *Marsh v Secretary, Department of Social Security* (1986) 12 FCR 100 at 102 (Burchett J); see also *Iguanti v Secretary, Department of Social Security* (1988) 80 ALR 307 at 310; S*ecretary, Department of Social Security v McLaughlin* (1997) 81 FCR 35 at 42 (French J); S*ecretary, Department of Employment and Workplace Relations v Richards* (2007) 98 ALD 310 at [32] (Collier J); *Re Kolodziej and Secretary, Department of Social Security* (1985) 7 ALD 660 at [11] (Senior Member Kiosoglous); *Re Zolotenki and Secretary, Department of Social Security* (1986) 12 ALD 349 at [28] (Fisher J, Deputy President Layton and Member Williams).

[18] *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241 at 243 (Lockhart, Gummow and Einfeld JJ).

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

BETWEEN: **MATTHEW CHAPLIN**
Appellant

**SECRETARY, DEPARTMENT OF SOCIAL SERVICES**
First Respondent

and

**LEGAL AID NSW**
Second Respondent

## ANNEXURE TO THE FIRST RESPONDENT'S SUBMISSIONS

| No. | Title | Version | Provisions | Reason for providing this version | Applicable date |
|---|---|---|---|---|---|
| 1. | *Administrative Appeals Tribunal Act 1975* (Cth) | Compilation No. 46 | s 3 | As in force at the time a delegate of the Secretary made the debt decision | 2 October 2019 |
| 2. | *Public Governance and Accountability Rule 2014* (Cth) | Compilation No. 62 | r 11 | As currently in force | 1 January 2026 |
| 3. | *Social Security Act 1991* (Cth) | Compilation No. 139 | ss 8, 556, 1067G, 1067G-A1, 1067G-H1 to 1067G-H33, 1072, 1223 | As in force during the relevant period | 24 June 2015 |
| 4. | *Social Security (Administration) Act 1999* (Cth) | Compilation No. 99 | ss 8, 11, 36, 37, 43, 66A, 68, 98, 99, 100, 123, 196, | As in force during the relevant period | 24 June 2015 |

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|---|---|---|---|---|---|
| 5. | *Social Security and Other Legislation Amendment (Simplifying Income Reporting and Other Measures) Act 2020* (Cth) | Compilation No. 1 | Schedule 1, items 11, 12, 37 | Amending provisions commencing 7 December 2020 | 7 December 2020 |
| 6. | *Social Security and Other Legislation Amendment (Technical Changes No. 2) Act 2025* (Cth) | Compilation No. 1 | Schedule 1, items 1, 2 | Amending provisions commencing 5 December 2025 | 5 December 2025 |