



Welfare Rights Centre

A community legal centre specialised in social security law and its administration by Centrelink

# Centrelink Debts & Prosecutions

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## Administrative & Criminal Aspects

22 July 2015



# Social Security Law and Policy

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Social Security Act 1991

Social Security Administration Act 1999

Social Security (International Agreements) Act 1999

Guide to Social Security Law – Department of Social Services Policy

<http://guides.dss.gov.au/guide-social-security-law>



# Obligation to report

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The calculation of the correct rate of Centrelink payments is a complex process.

Rate can be affected by, among other things:

- Income
- Assets
- Age
- Caring responsibilities
- Relationships
- Living situation
- Study
- Activities

Centrelink customers must report **any change of circumstances** within 14 days so that Centrelink can ensure they are receiving the correct rate

Legal obligation to inform Centrelink about anything that may affect current rate of payment. **No obligation to inform about past periods.**



# Centrelink debts

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If Centrelink wasn't aware of all of someone's circumstances, they may have been overpaid

Overpayments will result in a debt

A debt is not a fine, or a penalty → it is simply Centrelink claiming for return of the amount of the overpayment

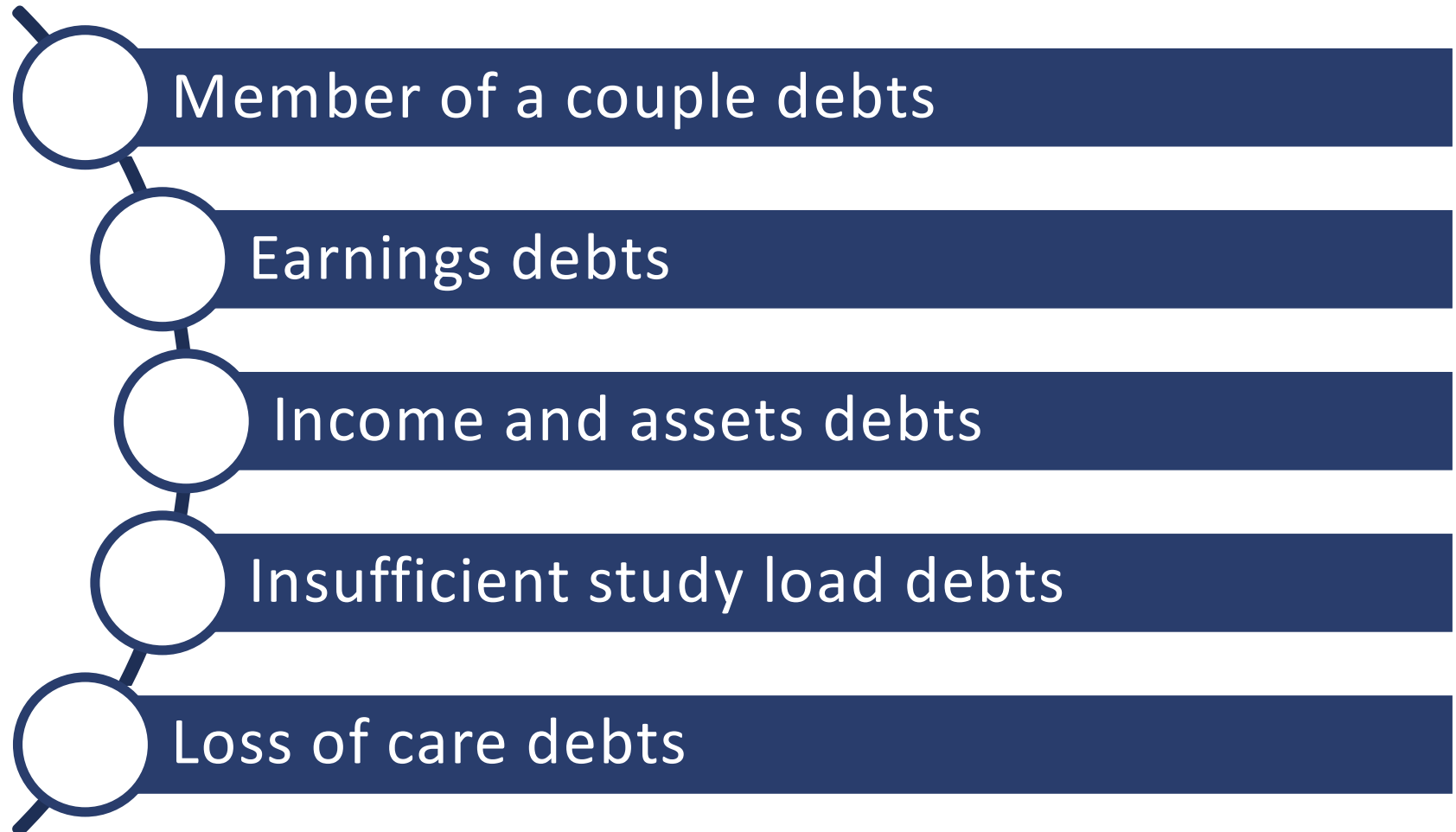
A debt **does not necessarily** imply an allegation of fraud or wrongdoing.

- eg. Debts can be raised if someone receives lump sum compensation, or even if the overpayment was mostly Centrelink's own fault



## Examples of common debts

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# Centrelink debts - fraud

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If Centrelink thinks that the overpayment occurred because of fraudulent behaviour by the customer, it can do two other things:

- Add 10% recovery fee to the debt; and
- Refer a brief to the Commonwealth Department of Public Prosecutions



## Centrelink Debts – 10% penalty

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Centrelink may impose a 10% recovery fee onto a debt if Centrelink thinks that the overpayment was the result of the customer's:

- Refusal or failure (without reasonable excuse) to provide information when required to; OR
- Knowing or reckless provision of false information

in relation to the person's income from personal exertion (incl earnings, salaries, wages, commissions, fees, bonuses, superannuation allowances, retiring allowances and retiring gratuities, allowances and gratuities).

→ Will only be added if Centrelink speaks with customer – eg. if they don't answer, no 10% penalty



# Centrelink Debts – prosecution

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If Centrelink thinks that the overpayment occurred because the person deliberately failed to provide information to Centrelink, or deliberately provided incorrect information to Centrelink, then it may refer a brief to the CDPD for prosecution under the Criminal Code.

Commonly used offences are:

s.134.1(1) Criminal Code – obtaining property by deception

s.134.2(1) Criminal Code – obtaining a financial advantage by deception

s.135.1(5) Criminal Code – general dishonesty – causing a loss

**s.135.2(1) Criminal Code – obtaining a financial advantage**

The team that investigates debts for prosecution is called **Serious Non-Compliance**.





# Will a debt be prosecuted?

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Although DHS **may** refer any debt it believes to have been incurred fraudulently (or even fraudulent behaviour that did not result in an overpayment) in practice there are 2 factors that will commonly determine if a debt is referred:

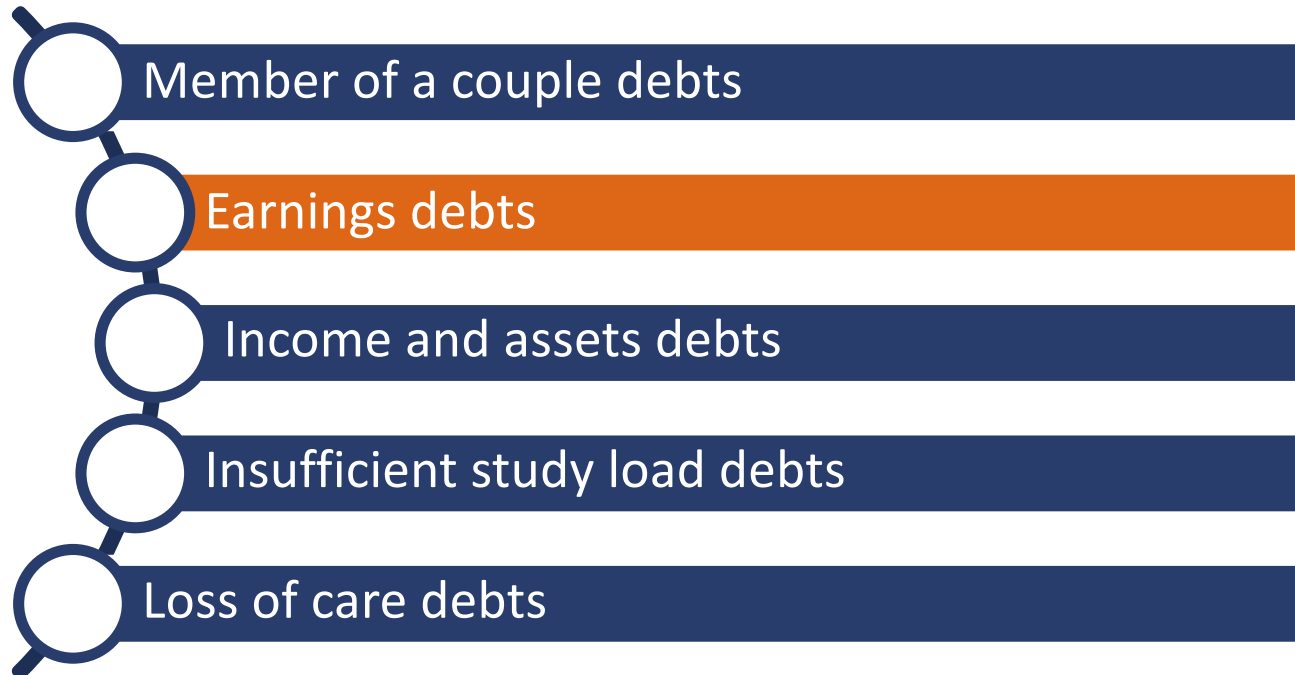
1. The debt or debts amount to \$10,000 or more; and
2. The debt was incurred as a result of undeclared or under-declared employment income.

In our experience, if the debt/debts meets both of these criteria, it will likely be referred regardless of whether it is being repaid.



# Will a debt be prosecuted?

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Due to in large part not to the seriousness of these debts but to the ease of prosecution:

→ Payslips + Reporting history + Centrelink letters = easy conviction



# Taped Interview

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If DHS is considering referring a debt for prosecution, the first indication will generally be **an invitation to attend a formal record of interview.**

There is no obligation to attend, and no obligation to answer every question if you do elect to attend.

Things your client says can be used against them in criminal proceedings.



# Taped Interview – to go or not to go?

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## Example 1

*Client is mother of three kids, single since she left a violent relationship with her ex. She works casually at Woolworths and gets Parenting Payment Single. She would always report correctly but a couple of years ago her son got sick and she has been in hardship since then. Every now and again, when she needed a little extra money for school or medical bills, she would tell Centrelink that she had earned a bit less just so she could get by for that fortnight. She has a debt of \$18,000 but is happy to repay all of the money.*

**Should she go to the interview?**



# Taped Interview – to go or not to go?

- Lots of “special circumstances” – single mother, domestic violence, sick child
- Willing to repay the money

**No.** She should not go to the interview.

If your client’s explanation for the debt is **mitigating** then it will nearly always amount to an admission. They should not attend the interview.

Repaying the debt has little to no effect at this stage.



# Taped Interview – to go or not to go?

The interview is an opportunity to shore up the case for the prosecution. It should not be viewed as an opportunity for your client to tell their side of the story.

Client will not be asked for a story. All questions are typed out in advance:

- Is this your signature here?
- Is this your correct address?
- Did you receive this letter?
- All things that the prosecution won't have to prove later



# Taped Interview – to go or not to go?

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## Example 2

*Client has a mild intellectual disability. He receives Newstart Allowance and works in a library 5 hours per week. Sometimes during school holidays and when he is able to, he increases his hours. He failed to tell Centrelink about this and now he has been overpaid \$15,000.*

OR

*Centrelink has compelled pay information from the employer and the employer has made a mistake and given the wrong person's pay information. The client did not work at all during the debt period.*

**Should he go to the interview?**



# Taped Interview – to go or not to go?

**No.** He should not go to the interview **BUT** he (you) should write to Serious Non-Compliance.

If your explanation is **exculpatory** then it is generally preferable to put that on at the first opportunity.

Because of the risks in attending the interview, it is best to control the process by writing to Serious Non-Compliance with evidence of the intellectual disability.

If the debt has already been referred (client will receive a letter), write to the CDPP instead.





# Taped Interview – to go or not to go?

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## Example 3

*Client has diagnosed depression and anxiety. Was in severe stress during debt period which exacerbated mental health conditions. Knew he had to report and thought he was doing so correctly, does not really know what happened. Has a debt of \$24,000.*

**Should he go to the interview/write to SNC?**



# Taped Interview – to go or not to go?

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**No - probably not.**

Mental health, unless extremely severe, will generally not go to capacity and therefore will usually be **mitigating** and not **exculpatory**.

SNC approach is generally “you were well enough to be maintaining your employment so you were well enough understand and comply with your reporting obligations”

- Obviously not always true, but fairly strong argument
- Attempting to persuade SNC with “borderline” cases somewhat futile



# What can be done?

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If the matter is referred for prosecution, short of defending the criminal charges, two things may be done:

1. Appeal the debt
2. Make representations to the CDPP



# Appeals

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# Appeals

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All (nearly) Centrelink decisions can be appealed.

Usually a 13 week de facto time limit applies for appeals to ARO and AAT SSCSD, but it does not apply to debts – there is **no time limit** to appeal a debt.

An appeal can seek three things:

1. That the debt be **set aside** if you can establish that no overpayment occurred
2. That the debt be **waived** if there are grounds
3. That the 10% penalty be lifted

**NB.** *Can also seek temporary write-off and can appeal rate and mode of recovery but these won't help with prosecution*



# Set Aside

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Remedy for a wholly incorrect debt, ie. When in fact no overpayment occurred

Eg. Member of a couple debt raised when person was in fact single.

Unusual for prosecution – very rare that earnings debts are incorrect

If the debt is wholly incorrect, that explanation should be put to SNC/CDPP as soon as possible



# Waiver

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Waiver is the most common ground for appealing a debt

Concede the fact of the overpayment but argue that it is unfair that the debt be repaid (wholly or partly)

Two grounds:

1. Sole administrative error + payments received in good faith
2. Special circumstances + no knowing false statement/representation



# Waiver

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1. Sole administrative error + payments received in good faith
  - Difficult to demonstrate “sole” admin error → any contribution by customer will negate (even if customer was put on notice of CLK error and did not act)
  - If sole admin error established, debt **must** be waived





# Waiver

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2. Special circumstances + no knowing false statement/representation
  - More common than sole admin
  - Can get partial waiver
  - Financial hardship generally necessary but not sufficient
  - Difficult to get special circumstances waiver for income debt → true debt
  - Admin error not amounting to 'sole admin error' can be special circumstance



# Waiver

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Waiver under either ground will be very helpful with prosecution because it necessarily involves a finding of “not knowingly”

- even if only a small percentage of the debt is waived, you can send this decision to SNC / CDPP
- Prosecution not automatically dropped but almost certainly



# Risks in Appealing

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**But the opposite is also true:** a Tribunal finding that your client knowingly misled Centrelink will probably make prosecution more likely.

Appealing a debt is **not** risk-free

- If no prosecution, and debt is earnings debt of \$10,000 or more, consider any appeal very carefully as appeal may increase prosecution risk.
- If matter referred to CDPP already, appealing to ARO not risky but continuing to Tribunal is.

Must make your own “knowingly assessment” before advising.



# Representations to CDPP

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In determining whether to proceed with a prosecution, the CDPP applies their *Prosecution Policy*.

Policy amounts to a two-prong test:

1. There must be **sufficient evidence** to prosecute the case; and
2. It must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the **public interest**.



# Representations to CDPP

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Instead of or in addition to an appeal, you can make representations directly to the CDPP to try to persuade them not to proceed with the prosecution.

Those representations should argue that it is against the *Prosecution Policy* to proceed. That is, one or both of the following:

1. Representations regarding the merits of the prosecution's case ie. There is not **sufficient evidence** for a prima facie case; and
2. Representations that it is contrary to the **public interest** to prosecute.



# Representations to CDPP

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1. Representations regarding merits of CDPP's case
  - Less common than public interest representatives
  - Prosecution only needs to be satisfied of a *prima facie* case to proceed, and there will nearly always be a *prima facie* case
  - Possible gap between “not knowingly” and mens rea required for Criminal Code offences, eg. belief in reconciliation at end of F/Y
  - Ideally raised in defence, practical reality is tiny % are defended



# Representations to CDPP

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2. Public interest representations.
  - Public interest factors not exhaustive, policy includes factors around special circumstances of offender as well prevalence of offence and need for deterrence
  - Most commonly used by WRC: administrative error, domestic violence, severe mental health, high caring responsibilities



# Freedom of Information Requests

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Given the potential risks in all of this, good practice to do FOI to check your client's story:

Eg. "Reporting net not gross", "reporting weekly not fortnightly", "I have no idea what happened".

→ All of these claims are easily verified/refuted by the file





# Freedom of Information Requests

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Generally ask for:

- the debt or overpayment file for the overpayment corresponding to the relevant period (if you know it)
- debt schedule or earnings apportionment tool
- Family Assistance screens if relevant [FISD, FTI, FIPY screens]
  - FA screens can be useful because most people on SS estimate their annual income to get FTB paid fortnightly.
  - FTB annual estimates do not get taken into account for SS rate calculation → these debts can and usually should be appealed (admin error/special circumstances waiver)
- Plus anything specifically relating to your client's story



# Prosecution statistics

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Centrelink (DHS) refers the largest number of briefs to the CDPP of any agency – about 38% (compared to 3% referred by ATO)

- In 2013/2014 most common charge was s135.2(1) with 2808 charges
- Next most common is 644 charges for s134.2(1) Obtaining a financial advantage by deception → also social security fraud
- Nearly all other offence charges amount to well under 100



# Prosecution statistics

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In 2013/2014 there were 950 successful social security prosecutions out of a total of 2399 = 40%

Total CDPP conviction rate is 98% → social security estimated higher than that

Less than 5% of all summary offences are defended → social security estimated lower than that (partly a reflection of sentencing discount for guilty plea)



# Sentencing Outcomes

In 2013/2014 out of 950 social security fraud convictions, the following penalties were imposed\*:

Highest penalty	Total number
Gaol	110
Gaol (fully suspended)	263
Fine	61
CSO/CBO	254
Periodic Detention	0
Recognisance Order	259
Other	3

\* Most severe penalty. More than one penalty may be imposed.



# Sentencing Outcomes

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Known aggravating factors:

- Large debts
- Prolonged fraudulent behaviour
- Existence of any previous debts
- Any attempts at identity fraud
- Any false statements made or any positive attempts to deceive



# “Should I come clean?”

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Your client has been under-declaring their income to Centrelink over a period of time. No debt has been raised as yet. What should they do?

- No legal obligation to inform Centrelink about past periods
- If you have been declaring that income to ATO then it is very unlikely that Centrelink won't discover it
- If you haven't been, it is unlikely that they will
- If it is over \$10,000 (you can do some rough calculations), or if you have had previous debts, then you will be at risk of prosecution
- Being the one that admits to the overpayment **may** make it less likely that you are prosecuted and it **may not**.
- If you are prosecuted it will probably be a mitigating factor at sentencing.
- **Do not admit to fraud:** “I think I have been overpaid. Here are my payslips.”



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## Questions?

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*\*\*The information provided in this presentation is for information only. It must not be relied upon as legal advice. If you require legal advice or information about your own or your client's particular circumstances, please contact Welfare Rights Centre directly and speak with a solicitor or caseworker.\*\**



# Welfare Rights Centre

A community legal centre specialised in social security law and its administration by Centrelink

102/55 Holt Street,  
Surry Hills NSW 2010

- **Phone** 02 9211 5389
- **Toll Free** 1800 226 028

- **Fax** 02 9211 5268
- **TTY** 02 9211 0238

[sydney@welfarerights.org.au](mailto:sydney@welfarerights.org.au)  
[www.welfarerightscentre.org.au](http://www.welfarerightscentre.org.au)