# ADMINISTRATIVE LAW AND WELFARE RIGHTS: A 40-YEAR STORY FROM *GREEN V DANIELS* TO 'ROBOT DEBT RECOVERY'

***Peter Hanks****

I want to ask a simple question: can administrative law (through its principles and processes) be deployed to vindicate the rights of the members of our community who, from time to time, depend on social security payments for their income? How can administrative law ensure that those rights are not ignored or overridden by politicians, senior officials and decision-makers driven by concern about 'welfare cheats' or demands for expenditure savings — in outlays on transfer payments and in the employment costs involved in administering those payments?

To attempt to answer that question, I will look at two episodes, 40 years apart, where the department responsible for administering social security payments adopted initiatives designed to achieve those ends — initiatives that arguably twisted or ignored the requirements of the governing legislation.

The first initiative was adopted by the Department of Social Services in 1976–77 and was aimed at a common scapegoat: young people — in this case, 'school leavers', who were alleged to be engaged as a class in abusing their entitlement to unemployment benefits.

The second initiative was adopted by the Department of Human Services (DHS) in 2016–17 and was aimed at another favourite scapegoat: social security 'cheats' — people who, it was alleged, had received social security payments beyond their entitlements.[1]

In the first example, the Department's initiative (denying unemployment benefits to all school leavers for up to three months) was found, in a judicial review proceeding brought in the High Court, to flout the Department's obligation to administer the governing legislation — s 107 of the *Social Security Act 1947* (Cth).

The second example is still being played out. It involves assuming that data from the Australian Taxation Office (ATO) on 'customers'' taxable income is a reliable gauge for the income test under the *Social Security Act 1991* (Cth) and demanding that 'customers' prove that the assumed hypothetical debt (based on the ATO data) is incorrect.[2]

On the (as yet untested) assumption that the second example also represents a failure by the department to administer the governing legislation — especially ss 1222A and 1223 of the *Social Security Act 1991* (Cth) — my question is: can administrative law protect the interests of the so-called 'customers' who are being told they have to prove that they do not have an assumed hypothetical debt to the Commonwealth? What are the possible mechanisms for vindicating those interests; and how effective are those mechanisms likely to be?

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**1976–1977: School leavers and unemployment benefits**

In 1976, the Director-General of Social Services, the permanent head of the department that administered the *Social Services Act 1947*, issued new instructions to officers making decisions under s 107 of that Act, which prescribed the conditions of qualification for unemployment benefits (the predecessor of Newstart allowance).

***The legislative framework***

The qualifications fixed by paras (a) and (b) of s 107 were objective and simple: a minimum age of 16, a maximum age of 60 or 65 and Australian residence. Section 107(c) fixed a subjective qualification: that the person satisfy the Director-General of three things — namely, that the person:

> (i) is unemployed …
> (ii) is capable of undertaking, and is willing to undertake, work which, in the opinion of the Director-General, is suitable to be undertaken by that person; and
> (iii) has taken reasonable steps to obtain such work …

***The Government's policy***

The new instructions were, in short, that young people leaving secondary school at the end of the 1976 school year could not qualify for unemployment benefits until after the commencement of the next school year. That instruction was expressed in the 'Unemployment and Sickness Benefit Manual'.[3] After asserting that, in the past, school leaver claimants had been paid unemployment benefits but had later resumed their studies, and had therefore received benefits to which they were not entitled, the manual continued:

> As a general rule, therefore, people who leave school and register for employment within 28 days prior to the end of the school year, or at any time during the long vacation, will not be in a position, until the end of the school vacation, to satisfy the conditions of eligibility for unemployment benefit which require the claimant to be unemployed and to have taken reasonable steps to obtain work.

***The case of one school leaver — Karen Green***

Karen Green was one of thousands of young people who left school at the end of 1976. Karen, who was 16 and had completed year 10, lived in Hobart — an area where a high proportion of young people were unemployed. After registering with the Commonwealth Employment Service (CES) for assistance in finding work on 25 November 1976, Karen returned to the CES on 20 December 1976 and was told no jobs were available and she could not receive unemployment benefit because school leavers in Tasmania would not receive that benefit until 22 February 1977 — the day when the new school year was due to start in Tasmania.

Karen looked for work in December, January and February without success. As she had been instructed, Karen returned to the CES on 22 February 1977 and was told there were no job vacancies. Soon afterwards, Karen received her first unemployment benefit cheque, calculated from 22 February 1977.

***The litigation***

Meanwhile, on 24 December 1976, Karen had issued a writ in the original jurisdiction of the High Court against the Director-General, seeking declaratory relief and invoking that Court's jurisdiction under s 75(iii) of the *Constitution*, her matter being one in which a person being

sued on behalf of the Commonwealth, the Director-General, was a party. The writ was issued in the Melbourne Registry and the matter was heard by Stephen J.

To us in 2017, the choice of the High Court may seem exotic, but I ask you to remember (or for many of you to imagine) late 1976:

- The Federal Court was not to open its doors until 1 February 1977. In any event, the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) had not been enacted. There was no s 39B in the *Judiciary Act 1903* (Cth): s 39B, in its original constrained form (mirroring s 75(v) of the *Constitution*), was added to the Judiciary Act in 1983.[4]
- The Administrative Appeals Tribunal (AAT) had commenced operating on 1 July 1976 but had no jurisdiction to review decisions made under the Social Services Act until 1 April 1980, when the Schedule to the *Administrative Appeals Tribunal Act 1975* (Cth) was amended[5] to allow an application to the AAT for review of a decision of the Director-General affirming, varying or annulling a decision of an officer under the Social Services Act if that decision had been reviewed by the Social Security Appeals Tribunal. (The review process was a triumph of elaboration: three levels of decision-making and review stood between each applicant and access to the AAT.)

### *The result* — Green v Daniels

Returning to our narrative: on 15 April 1977, in a lucid and compelling judgment,[6] Stephen J found that Karen Green (together with very many others) had 'been dealt with in accordance with a general administrative rule intended for just such an ordinary case as hers'.[7] Justice Stephen acknowledged that the Director-General could, 'in the interests of good and consistent administration', provide guidelines for the benefit of delegates, indicating what the Director-General regarded as sufficient to justify the state of satisfaction required by s 107(c) of the Social Services Act, but the Director-General would act unlawfully if the instructions were 'inconsistent with a proper observance of the statutory criteria'.[8]

The effect of the Director-General's instructions was, Stephen J said, that:

> [The two criteria in s 107(c)(i) and (iii)] have had superimposed upon them a requirement which prevents them from being satisfied by any school leaver during the school holidays, a period of about three months, and which, in effect, renders them inoperative during that period.[9]

Justice Stephen said that, in the case of school leavers, the status of being 'unemployed' depended on the former student leaving school with the intention of not returning but entering the workforce and beginning to seek employment. Although ascertaining the school leaver's intention might pose a difficulty, the Director-General had chosen to resolve that difficulty by waiting until the outcome revealed itself at the end of the school holidays, which would ensure that the Director-General was not deceived. However, the Director-General had adopted that approach at the cost of being wrong in the case of all those applicants who had truthfully told him that they had ended their school days — whether they persisted in that intention or changed their minds and returned to school.[10]

His Honour said of the Director-General's approach:

> Any method which produced erroneous results of this magnitude is clearly unacceptable as a means open to the Director-General in satisfying himself as to the subject matter of s 107(c)(i).[11]

Justice Stephen accepted that there was 'considerable scope for the giving of instructions by the Director-General to his delegates as to what is involved in "reasonable steps"' — the

criterion in s 107(c)(iii) — but the Director-General was not entitled 'to impose a quite arbitrary time of almost three months before this criterion is to be regarded as having been complied with'.[12] Moreover, his Honour said:

> it cannot be proper to impose such a period in the case of one class of applicants, those who leave school within twenty-eight days of the end of the school year, while imposing upon no other class of applicant any such requirement relating to a minimum period of job-seeking.[13]

Because Karen Green's claim for unemployment benefit had not been considered in the way that s 107 contemplated it should be, she was entitled to some relief:[14] not the declaration sought on her behalf that she was qualified for the benefit — because that qualification remained for determination by the Director-General or his delegates in the light of s 107(c)[15] — but a declaration that the Director-General's delegate ought to have applied his mind to Karen's eligibility for unemployment benefit, testing it by reference to s 107(c) and 'not … distracted from his task by the requirement laid down in the Manual'.[16]

### *Evaluating* Green v Daniels

The result in *Green v Daniels*, and Stephen J's reasoning, neatly illustrated the strengths and limitations of judicial review as a means of vindicating the interests of individuals against those whose job is to administer the law.

As to strengths, the case shows how judicial review can secure the rule of law — the fundamental proposition that statutory powers and functions must be exercised within the parameters prescribed by the relevant statute, with those parameters determined by the courts.[17] Justice Brennan put the point this way, in a passage quoted by Gleeson CJ in *Plaintiff S157 v The Commonwealth*:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[18]

In line with that conception, Stephen J found that the Director-General had rendered s 107(c)(i) and (iii) of the Social Services Act inoperative during a three-month period, suspended the criteria prescribed by those subparagraphs and applied an erroneous test in determining that Karen Green was ineligible for unemployment benefits until 22 February 1977. The consequence was that the Director-General's delegates had failed to administer the Social Services Act because they had been distracted from that task by the Director-General's directions.[19]

We can also see that *Green v Daniels* demonstrated the capacity of judicial review to deliver a relatively quick and clear correction of unlawful executive action: the case commenced with the filing of a writ on 24 December 1976, was heard between 4 and 9 March 1977[20] and was decided on 15 April 1977. The judgment was identified by Stephen J as having direct implications for 'very many other school leavers',[21] because Karen Green and 'very many others' had 'been dealt with in accordance with a general administrative rule'.[22] The declarations, although framed by reference to Karen Green's claim for unemployment benefits, put an end to any assertion that the general administrative rule was lawful.

As to limitations, the case amply demonstrated that judicial review can only deal with the lawfulness of the exercise of power or the performance of functions: it cannot deal with the merits of that exercise or performance. Justice Brennan, again, put the limitation in the following way in *Attorney-General (NSW) v Quin*:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[23]

In line with that conception, Stephen J said that he could not declare Karen Green entitled to unemployment benefits during the period when the Director-General's delegates had excluded her from that entitlement by following the Director-General's unlawful instructions: that course was not open, Stephen J said, because:

> [It is] to the Director-General or his delegates that [s 107(c)(i) and (iii) of the Social Services Act] assigns the task of attaining satisfaction and the Court should not seek to usurp that function.[24]

But that limitation (the court determines whether power has been exercised lawfully, not whether the result of that exercise is correct) is also a source of the strategic power of judicial review. Because the court does not, in general, focus on the outcome of the exercise of power in a particular case,[25] its conclusion on the lawfulness of that exercise can have consequences that transcend the particular case before the court — as happened in *Green v Daniels*.

**1976–1997: The new age of review of executive action**

The AAT, which had been recommended by the Kerr Committee, commenced operating from 1 July 1976 and quickly accumulated a list of specific review jurisdictions. The AAT followed a model that had been set by the Taxation Boards of Review and other tribunals. Its function was to be administrative, to review decisions within its jurisdiction on the merits, not merely to decide whether the decision under review was infected by error but to make the correct or preferable decision on the material before the AAT.[26]

As I have already noted, the AAT was eventually given jurisdiction to review decisions made under the *Social Services Act 1947* from 1 April 1980 — after review of the primary decision by the Social Security Appeals Tribunal and the Director-General. The AAT quickly demonstrated its capacity to review those decisions by reference to both fact and law, to receive new evidence, to consider and criticise departmental policies and to replace the decisions under review with its own decisions on the merits despite attempts[27] by the Director-General to constrain that review jurisdiction, as in cases such as *Director-General of Social Services v Chaney*,[28] *Director-General of Social Services v Hangan*[29] and *Director-General of Social Services v Hales*.[30]

The Commonwealth Ombudsman, another element in the package of reforms recommended by the Kerr Committee and endorsed by the Bland Committee, was established by the *Ombudsman Act 1976* (Cth). The first Ombudsman, Professor Jack Richardson, commenced operating on 1 July 1977. The Ombudsman Act defined the function of the Ombudsman in s 5: to investigate, either in response to a complaint or on the Ombudsman's own motion, action that relates to a matter of administration by a department or a prescribed authority.[31] The Ombudsman was authorised, by s 15, to report the relevant agency and its responsible Minister where, after investigation, the Ombudsman found that the action was affected by one or more of specified deficiencies, including that it appeared to have been contrary to law; was unreasonable, unjust, oppressive or improperly discriminatory; or was otherwise, in all the circumstances, wrong. (Those essential features remain part of the current Ombudsman Act.)

The Ombudsman's website explains the distinctive nature of the Ombudsman's function:

> We consider and investigate complaints from people who believe they have been treated unfairly or unreasonably by an Australian Government department or agency …
>
> We cannot override the decisions of the agencies we deal with, nor issue directions to their staff. Instead, we resolve disputes through consultation and negotiation, and if necessary, by making formal recommendations to the most senior levels of government.[32]

We also know that, at the Commonwealth level, remedies for individuals affected by official action have been expanded to include access to government information (under the *Freedom of Information Act 1982* (Cth)), a privacy right (under the *Privacy Act 1988* (Cth)) and protection from discrimination on various grounds (in the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth)). In turn, the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988* (Cth) provide for review by the AAT of decisions made under those Acts. Decisions made under the discrimination legislation can be reviewed through the standard judicial review processes; and complaints of discrimination can be ventilated and resolved by the Federal Court through the processes established by div 2 of pt IIB of the *Australian Human Rights Commission Act 1986* (Cth).

In addition, the process of judicial review has been very much improved since 1977 (although we are entitled to ask whether the improved system could match the efficiency and focus that we saw in *Green v Daniels*; perhaps a skilled carpenter can create a masterpiece with the most basic tools):

- In 1977, the ADJR Act introduced a codified form of judicial review in the Federal Court, as recommended by the Kerr Committee, and endorsed by the Ellicott Committee.
- That was followed in 1983 by the addition[33] of s 39B(1) and, in 1997, by the addition[34] of s 39B(1A) to the *Judiciary Act 1903* (Cth), giving the Federal Court a wide judicial review jurisdiction in matters where relief is sought against an officer of the Commonwealth[35] and in matters arising under any law of the Commonwealth.[36]
- The second of those additions is the most expansive; and, for practical purposes, s 39B(1A) provides the broadest and most efficient foundation for invoking the judicial review jurisdiction of the Federal Court: it has none of the complexity (and potential traps) of the ADJR Act[37] or the limited range of s 39B(1).[38]
- However, one must admit that 40 years of litigation under the ADJR Act have demonstrated the ADJR Act's value as well as its limitations. In particular, the enforceable obligation to give reasons and simple 'error of law' as a ground of review add significantly to the efficacy of judicial review.
- Along with the improvements in the process of judicial review, the High Court's power to remit all or part of a matter commenced in that Court has been enlarged. In 1984, subs (2A) was added[39] to s 44 of the Judiciary Act, giving the High Court power to remit to the Federal Court all or part of 'a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party … at any time pending in the High Court' so that, from 1984, the High Court has had the power to remit a matter such as *Green v Daniels* to the Federal Court.

**2016–2017: Overcoming an inconvenient burden of proof to recover 'debts'**

In July 2016, Centrelink (a division of DHS) launched a new method for raising and recovering what Centrelink chose to describe as 'debts'. The scheme is described in detail in a report by the Acting Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, published in April 2017.[40]

***Step 1: Reading the legislation***

It is helpful, first, to consider the legislative framework for the recovery of debts arising under the *Social Security Act 1991* (Cth).[41] Typically, a debt might arise where a person receives a form of payment, such as parenting payment or Newstart allowance, for which the person is not qualified; or a debt might arise where a person receives a form of payment, for which the person is qualified, at a rate higher than the correct rate — because the person's other income was higher than recorded by Centrelink. The income test for Newstart is based on the individual's income (as defined in s 8 of the Act) during the relevant fortnight for which the allowance is paid.[42]

Section 1222A(a) provides that:

> [An amount that has been paid by way of social security payment] is a debt due to the Commonwealth if, and only if … a provision of this Act … expressly provides that it is …

The central provision for the purposes of s 1222A(a) is s 1223(1), which provides that, subject to the other subsections in s 1223:

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

We need not look at the other subsections, apart from s 1223(1AB), which provides a non-exhaustive list of situations in which 'a person who obtained the benefit of a social security payment is taken not to have been entitled to obtain the benefit', including where:

> (a) the person for whose benefit the payment was intended to be made was not qualified to receive the payment;
> (b) the payment was not payable;
> (c) the payment was made as a result of a contravention of the social security law, a false statement or a misrepresentation …

Returning to s 1223(1), it is plain from paragraph (b) that an absence of an entitlement to obtain the benefit of a payment is a precondition to a debt being created, and we are reminded emphatically by s 1222A(a) that a debt to the Commonwealth can *only* arise pursuant to an express provision of the Social Security Act (even if we had forgotten that clear legal authority would be required before an individual becomes a debtor).

So we can also see that the existence of a debt to the Commonwealth is something to be established by the Commonwealth as the entity which asserts the existence of the debt: the Social Security Act cannot be read as requiring that a person who has received a social security payment establish that there is no debt — indeed, s 1222A(a) and s 1223(1) deny any such possibility.

We should also note that s 8 of the *Social Security Administration Act 1999* (Cth) directs the Secretary, '[i]n administering the social security law … to have regard to … (f) the need to apply government policy in accordance with the law'.

***The new 'debt' recovery process***

Against that background (which could hardly be described as arcane), DHS launched what the Acting Ombudsman described as the 'online compliance intervention (OCI) system for raising and recovering debts'. The Acting Ombudsman went on to describe the OCI system:

> The OCI matches the earnings recorded on a customer's Centrelink record with historical employer-reported income data from the Australian Taxation Office (ATO). Parts of the debt raising process previously done manually by compliance officers within DHS are now done using this automated process. Customers are asked to confirm or update their income using the online system. If the customer does not engage with DHS either online or in person, or if there are gaps in the information provided by the customer, the system will fill the gaps with a fortnightly income figure derived from the ATO income data for the relevant employment period ('averaged' data).[43]

The OCI system, then, starts with ATO records of income paid to social security recipients, applied through an automated process, and then requires recipients (described as 'customers') to confirm or update their income. If a recipient does not provide complete information, the recipient's income will be taken from the ATO data and a 'debt' calculated accordingly.

The sample first letter included in the Acting Ombudsman's report,[44] dated August 2016, informed the addressee that the amount of income recorded by the ATO 'is different to the amount you told us' and asked the addressee 'to confirm your employment income information … online' within 20 days; otherwise Centrelink would 'update your details using the enclosed employment income information' — that is, the ATO data.

According to another sample letter included in the Acting Ombudsman's report,[45] also dated August 2016, the process concluded with a decision that the addressee had a debt, including a 10 per cent recovery fee.[46]

The nature of the process undertaken by Centrelink between those two letters is described in the Acting Ombudsman's report.[47] If the addressee did not go online to attempt to enter income information, 'the OCI apportioned the ATO earnings information evenly over the period the employer told the ATO the customer worked for them, to calculate any debt' and generated a debt notice. If the addressee went online and supplied income information, the OCI (that is, an automated program), and possibly a compliance officer, assessed the evidence to decide the outcome — debt or no debt — and the OCI generated any debt notice.

The first of the 'main efficiencies' said to be gained by the OCI system was described in the Acting Ombudsman's report as 'gained by':

> DHS no longer using its information gathering powers [under sections 63, 192 and 195 *Social Security (Administration) Act 1999*] to request information directly from third parties, such as employers. Under the OCI, it is now the customer's responsibility to provide this information …[48]

***Problems with the OCI process***

Putting aside the adequacy of the process where an addressee went online in response to Centrelink's letter, there are major concerns with the process where the addressee did not go online. (In this context, I will limit my comments to an employee who had been paid Newstart allowance — where the income test under s 1068 of the *Social Security Act 1991* (Cth) uses the recipient's income in the particular fortnight of payment of the allowance.)

First, the process was built on the premise that the onus lay on the social security recipient to prove that Centrelink's assumption as to the recipient's income was not correct — whereas the Social Security Act makes the existence of a debt dependent on the Commonwealth establishing the receipt of amounts to which the recipient was not entitled.

Secondly, the process used the ATO earnings information, spread evenly over the period of employment (a period of up to 12 months), despite the social security income test using income received in each fortnight[49] and despite the ATO earnings information using an income definition that differs from the definition in the Social Security Act.[50] The Acting Ombudsman's report highlighted the implications of that difference:

> Under the Social Security Act, a fortnightly income test is applied to determine a daily rate of payment, generally paid in fortnightly instalments. A person's entitlement in any given fortnight will therefore be assessed on the income they earned, derived or received that fortnight. This is different to the tax system (including family payments) which is concerned with assessing annual income. ATO data normally provides an aggregate annual employment income figure and does not provide the detail required to accurately assess fortnightly social security entitlements.[51]

***The Ombudsman's report's recommendations and its omissions***

The Acting Ombudsman proposed, and DHS accepted, a series of changes to the OCI system. The report recommended improvements in DHS's systems and communications;[52] better training for DHS staff and adequate support for people who are not 'digital ready';[53] and that DHS improve its planning for an implementation of new programs such as the OCI — which the report, tellingly, identified as having 'effectively shifted complex fact finding and data entry functions from the department to the individual'.[54]

I say 'tellingly' for two reasons:

- First, the report's few words focus on the radical change to 'debt' recovery involved in the OCI. From a relatively labour-intensive process, in which staff collected information about social security recipients (often using compulsive powers) and compared that information with the information previously used to calculate and pay benefits, in order to determine whether there had been an overpayment,[55] DHS moved to a mostly automated system, which created the presumption of a debt on the basis of dubious information and then demanded that the individual social security recipient displace that presumption. That is, the OCI is revealed as an innovation designed to collect money from individuals (alleged to be debtors of the Commonwealth) with minimum expenditure on the part of DHS: fewer workers and more money recovered will provide a dramatic 'efficiency dividend'.
- Secondly, there is no suggestion in the report that the radical shift of functions imposed by DHS's adoption of the OCI (that is, a shift of functions from DHS to the individual) might lack support in, and possibly contradict the requirements of, the Social Security Act. Perhaps the most striking thing about the report (at least to someone who starts with the simple edict: 'read the Act!') is what it fails to say: although the report offers the disclaimer, 'This report does not comment on the policy rationale behind the OCI process',[56] the report says nothing about the legislative context in which the OCI operates; it does not offer any comment on the question whether a debt *can* be created presumptively; and it does not ask whether DHS *can* shift the function of complex fact-finding to the individual and require the individual to disprove the existence of a debt.

***After February 2017***

Despite (or perhaps because of) the improvements recommended in the report, the OCI system remained fundamentally unchanged at the end of the Acting Ombudsman's investigation. The report summarises the changes made to the original system in the course of the investigation: they include changes to the letters sent to 'customers', improved on-screen communication by those 'customers' with the OCI and an increase in interventions by Centrelink staff.[57]

From February 2017, the initial letter from Centrelink starts with the disclaimer 'This is not a debt letter' but requires the addressee to confirm or update information from the ATO about the addressee's income and warns:

> if you don't confirm or update the information within 28 days, we may apply the employment dates and income from the ATO to your record. This may result in a debt you will need to repay.[58]

A reminder letter confirms those essential elements: it, too, is said to be 'not a debt letter', but failure to confirm or update the ATO-derived information 'may result in a debt you will need to repay'.[59] Where the addressee does not contact Centrelink or the online OCI, a notice of decision letter now reads:

> Because we did not hear from you, we have applied the ATO employment dates and income included with this letter to your record.
>
> This has resulted in a debt of $[total debt for this assessment] …
>
> This is a notice of decision under social security law.[60]

Whatever the terms used in the letters, the OCI remains a system in which DHS uses information from the ATO to create a presumed (even if hypothetical) social security debt, tells social security recipients that they need to prove that the presumed hypothetical debt is wrong and, in the absence of that proof, proceeds to raise a debt based on the ATO information. The OCI system adopts that approach, rather than undertaking (through the compulsive information-gathering powers available to DHS) to collect information from employers, banks or social security recipients themselves.

The appearance of the OCI system placing a reverse onus on social security recipients was raised before the Senate Community Affairs References Committee on 18 May 2017.[61] In its report, published on 21 June 2017, the majority of that committee said:

> The committee is concerned that the department has placed the onus on the individual to demonstrate that a purported debt does not exist … The committee notes that no other party is entitled in law to assert that a debt exists and require the other party to disprove it …[62]

Although that observation comes close to identifying a problem with the OCI system, it does not locate that problem in s 1222A(a) and s 1223(1) of the Social Security Act.

The DHS Secretary maintained (in evidence to the Senate committee) that there has been no change in the assessment of income and calculation of debts; that 'Initial letters are not debt letters'; and that 'No assumptions about debt are made'. However, as the Acting Ombudsman found, the OCI system *has* changed the system for calculating debts by 'effectively shift[ing] complex fact finding and data entry functions from the department to the individual'[63] and proceeds on the assumption that ATO data, unless contradicted or explained by a social security recipient, will support the raising of a debt based on a

presumed overpayment — where, as the Acting Ombudsman also found, the ATO data does not fit with the social security income test.[64]

To my mind, again, there is at least a possibility that the OCI system proceeds on a basis, and adopts a series of steps, that contradicts the requirements of s 1222A(a) and s 1223(1) of the Social Security Act.

***Administrative law remedies?***

For the moment, I ask that you accept that it is possible that the OCI system does not measure up against those provisions. On that premise, what are the administrative law remedies that could protect the interests of the social security recipients who are being pursued by the OCI system? There are at least two ways in which those are likely to be affected by the use of the OCI system: to administrative lawyers, the most obvious way is by the making of a decision, at the end of the process, to raise and recover a debt to the Commonwealth, but the early stages of the process are likely to have a substantial effect on the targeted social security recipients, as the Acting Ombudsman's Report noted;[65] and one can properly ask: why should anyone be subjected to the pressure and distress inherent in the OCI system if that system contradicts the terms of the Social Security Act?

Of course, exploring potential administrative law remedies for arguably unlawful administrative action is itself speculative. Perhaps the exploration is not as speculative as the OCI system itself, but it is nevertheless speculative, because the exact dimensions of the individual case that may end up framing a challenge to the OCI system are unknown at this stage. Leaving those uncertainties aside for now, what are the possibilities?

Apart from the Ombudsman Act, administrative law remedies are designed to review and correct decisions of public agencies rather than communications between those agencies and members of the community.

*Review by the AAT*

Obviously, once DHS (through Centrelink) proceeds to the point of issuing a notice of decision letter,[66] the social security recipient can seek review of that decision in the AAT. The AAT can then examine all the material in the possession of DHS (relevant to the decision to raise the debt) and resolve the full range of issues that affect the decision under review: the statutory foundation for the decision (in particular, what provision of the social security law expressly provides that there may be a debt due to the Commonwealth) and the factual foundation for the decision (typically, the level of the social security recipient's income in each of the relevant fortnights).

It is unlikely that AAT review would set aside the decision to raise the debt on the simple ground that the steps taken by DHS had reversed the burden of proof — because the review will concentrate on whether the decision to raise the debt is the correct or preferable decision and any ultimate decision to set aside the decision to raise the debt is likely to reflect the AAT's factual assessment of the applicant's level of income in each of the applicable fortnights of payment (of Newstart allowance or other social security payment). Although the AAT could well find that, taking into account all the material before the AAT, the existence of a debt as required by s 1222A of the Social Security Act is not established, it is not likely that such a decision would focus on any underlying deficiency in the OCI system or would provide the opportunity to determine whether that system is consistent with the legislative provisions that control the existence of debts due to the Commonwealth.

*The Ombudsman*

At the commencement of the OCI process, where there is no 'decision' capable of supporting an application for review to the AAT, the Ombudsman Act could provide a form of review that would address the question whether the OCI system, as administered by DHS, is consistent with the critical legislative provisions. The steps taken by DHS in writing the initial[67] and reminder[68] letters are plainly within the Ombudsman's remit: they relate to a matter of administration.[69] And the question whether the substance of those letters (particularly, the warning that failure to respond 'may result in a debt you will need to repay') is either 'contrary to law' or 'wrong'[70] would allow the Ombudsman to test and answer the fundamental question whether the OCI process matches, or ignores, the constraints in the Social Security Act.

However, the report published by the Commonwealth Ombudsman's Office in April 2017 offers little reassurance that the investigation and report processes of that office can deal with that fundamental question: as I have already noted,[71] Report No 2/2017 says nothing about the legislative context in which the OCI operates. It is, of course, possible that the Acting Ombudsman thought about that issue and actually came to a conclusion; however, if the Acting Ombudsman did that, there is not the least hint in Report No 2/2017 that he did; nor is there anything in Report No 2/2017 that would allow the reader to understand what the claimed legal basis for the OCI system might be or to critique that basis. The report's failure to identify the legislative foundation (or to consider whether that foundation was absent) remains a serious weakness of Report No 2/2017.

*Judicial review*

What of the potential of judicial review to interrogate the legitimacy of the OCI system? As with AAT review, review by the Federal Court under s 5 of the ADJR Act must wait on DHS actually making a decision to raise a debt. However, s 6 of the ADJR Act can provide the basis to challenge the process inherent in the OCS system before any decision is made — because the steps taken by DHS[72] amount to conduct in which a person is engaging for the purpose of making a decision to which the ADJR Act applies (that is, a decision of an administrative character made under an enactment) — namely, a decision to raise a debt due to the Commonwealth under the Social Security Act.

The grounds on which an order of review in respect of that conduct could include that 'the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision'[73] and that 'an error of law … is likely to be committed in the making of the proposed decision'.[74]

If one of the prescribed grounds of review is made out, the Federal Court (or the Federal Circuit Court) could make an order declaring the rights of the parties (the applicant and the respondent) in respect of any matter to which the conduct relates — such as a declaration[75] that the ATO data and the inaction of the applicant (the social security recipient) to engage with the OCI cannot provide a basis for raising a debt due to the Commonwealth under the Social Security Act.[76] Alternatively, the Court could direct the respondent (the DHS Secretary) to refrain[77] from purporting to raise a debt due to the Commonwealth on the basis of the ATO data and the inaction of the applicant.

Substantially similar relief could be sought in a proceeding that invokes the Federal Court's jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) — the 'matter' (or controversy) being one 'arising under [a law] made by the Parliament', the Social Security Act. That jurisdiction will arise where, in order to resolve the controversy between the parties (the 'matter'), the Court must determine whether a law made by the Parliament (here, the Social

Security Act) confers a right asserted by one of the parties — here, the right asserted by DHS to raise a debt due to the Commonwealth on the basis of ATO data and a failure by the applicant to engage with DHS.[78] Declaratory relief could be granted pursuant to the Federal Court's power under s 21 of the *Federal Court of Australia Act 1976* (Cth), there being a real controversy between any recipient of the initial and reminder letters and the DHS Secretary about an issue that is likely (indeed, almost certain) to arise in the future.[79]

I suggest that the critical question presented by the OCI system is a question of law: does DHS have the legal authority to proceed to the raising of a debt by using the OCI system? Judicial review, 'the enforcement of the rule of law over executive action',[80] is the ideal means of answering that question.

In the context of the attempt by DHS to assert the existence of debts based on ATO data and the failure of the putative debtor to displace a presumption founded on that data, a carefully crafted declaration (if made by the Federal Court in the exercise of its jurisdiction under s 6 of the ADJR Act or its jurisdiction under s 39B(1A)(c) of the Judiciary Act) would provide a definitive ruling on the legitimacy of the OCI system. That is, judicial review could produce a definitive ruling on a precise question of law in the way that it did 40 years ago in *Green v Daniels*.

**Endnotes**

1 The preferred description by the initiative's supporters of its aim was 'ensuring the integrity of the welfare system': Senate Community Affairs References Committee, *Design, Scope, Cost-benefit Analysis, Contracts Awarded and Implementation Associated with the Better Management of the Social Welfare System Initiative* (2017), Coalition Senators' Dissenting Report (Senate Committee Dissent), para 1.2.
2 The initiative's defenders deny that any assumption is made about debt or that the initiative has reversed the burden of proof onto recipients: Senate Committee Dissent, para 1.14, quoting the Secretary of the Department of Human Services. I maintain that the defenders are mistaken.
3 The terms in which the manual was expressed are set out in Stephen J's reasons for judgment in *Green v Daniels* (1977) 13 ALR 1, 6; 51 ALJR 463, 466.
4 By the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth).
5 By the *Administrative Appeals Tribunal (Social Services Act) Regulations 1980* (Cth) (No 62 of 1980).
6 *Green v Daniels* (1977) 13 ALR 1; 51 ALJR 463.
7 (1977) 13 ALR 1, 8; 51 ALJR 463, 467.
8 (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
9 Ibid. The two criteria were that the person was 'unemployed' and had 'taken reasonable steps to obtain such work'.
10 (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
11 (1977) 13 ALR 1, 10; 51 ALJR 463, 467–8.
12 (1977) 13 ALR 1, 10; 51 ALJR 463, 468.
13 Ibid. Justice Stephen also criticised the premise of 'abuse' on which the new instructions were based: where a school leaver changed her or his intention and returned to school in the new school year, there was (until the change of intention) no abuse to be cured: ibid.
14 (1977) 13 ALR 1, 12; 51 ALJR 463, 469.
15 (1977) 13 ALR 1, 10; 51 ALJR 463, 470.
16 (1977) 13 ALR 1, 12; 51 ALJR 463, 469.
17 As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37 (*Quin*), the question 'what is the law' that prescribes the limits and governs the exercise of power 'must be answered by the court'.
18 The passage is from *Church of Scientology v Woodward* (1982) 154 CLR 25, 70, and is quoted by Gleeson CJ in *Plaintiff S157 of 2002 v The Commonwealth* (2003) 211 CLR 476, [31].
19 (1977) 13 ALR 1 at 12; 51 ALJR 463 at 469. Earlier, Stephen J had said if the Director-General issues instructions that 'are inconsistent with a proper observance of the statutory criteria he acts unlawfully': (1977) 13 ALR 1, 9; 51 ALJR 463, 467.
20 Karen Green was represented by Ken Gifford QC and Tony Hooper — two highly reputed local government and planning counsel; the defendant, Laurie Daniels, was represented by the current, and a future, Solicitor-General — Maurice Byers QC and Gavan Griffith.
21 (1977) 13 ALR 1, 7; 51 ALJR 463, 467.
22 (1977) 13 ALR 1, 8; 51 ALJR 463, 467.
23 (1990) 170 CLR 1, 35–6.
24 (1977) 13 ALR 1, 12; 51 ALJR 463, 468.

25 One exception, recognised by Brennan J in *Quin*, is where the court judges the exercise of power to have been so unreasonable that no reasonable repository of the power could have exercised the power in that way: (1990) 170 CLR 1, 36. Now, as we know, that quality may also be found where a decision involves 'a disproportionate exercise of an administrative discretion'; or 'lacks an evident and intelligible justification': *Minister for Immigration v Li* (2013) 249 CLR 332, [30], [76].
26 *Drake v Minister for Immigration* (1977) 46 FLR 463, 419.
27 Plainly, the Director-General saw the cases as strategic: in the first case (*Chaney*), Chester Porter QC and Priscilla Fleming appeared for the Director-General (Michael McHugh QC and Charles Waterstreet appeared for Ms Chaney); in the second case (*Hangan*), GL Davies QC and IC Diehm appeared for the Director-General (Ms Hangan appeared in person); in the third case (*Hales*), Michael Black QC and Alan Myers appeared for the Director-General (Alastair Nicholson QC and Peter Vickery appeared for Ms Hales).
28 (1980) 47 FLR 80.
29 (1982) 70 FLR 212.
30 (1983) 78 FLR 373.
31 Under the current version of the *Ombudsman Act 1976* (Cth), the function remains essentially as it was in 1976 — with the addition of the possible function of performing functions under an arrangement made, with the consent of the Minister, to act as Ombudsman in accordance with the conditions of licences or authorities granted under an enactment: s 5(1)(c).
32 Commonwealth Ombudsman, *Office of the Commonwealth Ombudsman* <http://www.ombudsman.gov.au/about/office-of-the-commonwealth-ombudsman>.
33 By the *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth), s 3 and sch 1.
34 By the *Law and Justice Legislation Amendment Act 1997* (Cth), s 3 and sch 11.
35 That is, a person appointed to an office created by a law of the Commonwealth, including (for example) a judge of the Federal Court, a Commonwealth minister, a Commonwealth public servant or a member of the Fair Work Commission.
36 That is, where it is necessary for the Court to determine whether the law of the Commonwealth confers the rights or the protection that one of the parties claims in the proceeding: *Transport Workers Union v Lee* (1998) 84 FCR 60, 65–6.
37 Which requires a 'decision', made or contemplated, 'under an enactment', being a decision 'of an administrative character', and is subject to a substantial number of specified exceptions.
38 The jurisdiction is only available against a natural person who holds an office created by a law of the Commonwealth; it is not available against a body corporate: *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (1986) 61 ALJR 124, 127; *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 500.
39 By the *Statute Law (Miscellaneous Provisions) Act (No 1) 1984* (Cth).
40 Commonwealth Ombudsman, *Centrelink's Automated Debt Raising and Recovery System*, Report No 02/2017 (2017) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/43528/Report-Centrelinks-automated-debt-raising-and-recovery-system-April-2017.pdf>.
41 Something that the Acting Ombudsman did not include in Report No 2/2017.
42 See *Social Security Act 1991* (Cth), s 1068, Module G.
43 Commonwealth Ombudsman, above n 40, p 1.
44 Ibid, pp 54–5.
45 Ibid, p 61.
46 The recovery fee is prescribed by s 1228B of the *Social Security Act 1991* (Cth).
47 Commonwealth Ombudsman, above n 40, pp 34–5.
48 Ibid, p 5.
49 It is obvious that, given the high level of casual and part-time employment in Australia, many employees do not enjoy constant levels of fortnightly income.
50 The Commonwealth Ombudsman's Report No 2/2017 explores those mismatches: Commonwealth Ombudsman, above n 40, pp 41–3. Some of the problems are addressed if the social security recipient enters her or his income data online (see p 41); but they are not addressed where the social security recipient does not do that, compounding the likely errors in the calculation of a 'debt'.
51 Commonwealth Ombudsman, above n 40, p 42.
52 Ibid, pp 9–10, 11–14, 19–20.
53 Ibid, pp 15–19. The report does not attribute the term 'digital ready' to DHS. Perhaps the Acting Ombudsman is the inventor.
54 Commonwealth Ombudsman, above n 40, p 23. However, the report did not consider whether that transfer of complex functions contradicted the applicable provisions of the Social Security Act.
55 Commonwealth Ombudsman, above n 40, p 31, notes that, before introduction of the OCI, the standard means of investigating a possible overpayment was to send formal notices under the *Social Security (Administration) Act 1999* (Cth), requiring the recipient to produce specified information.
56 Commonwealth Ombudsman, above n 40, p 4, para 1.3.
57 Ibid, pp 35–8.
58 Ibid, p 63.
59 Ibid, p 68.
60 Ibid, p 75.
61 Senate Community Affairs References Committee, above n 1, para 4.74.

62 Ibid, paras 4.76–4.77. In their dissenting report, the Coalition senators disputed that the OCI had reversed the burden of proof, relying on evidence from the DHS Secretary that 'No debt is raised until we have attempted to contact a person and give them the opportunity to explain differences': Senate Committee Dissent, para 1.14.
However, to my mind, that evidence glosses over the reality that DHS uses ATO data as the basis for inviting social security recipients to prove their actual income over an extended period; and, if a social security recipient does not or cannot do that, DHS carries through with its stated intention to raise a 'debt' based on the ATO data.
63 Commonwealth Ombudsman, above n 40, p 23.
64 Ibid, p 42.
65 Ibid, pp 11–22, recounts the experiences of several recipients in attempting to engage with the OCI system — experiences that were characterised by confusion and frustration.
66 As reproduced in Commonwealth Ombudsman, above n 40, p 75. See the text at n 60 above.
67 Commonwealth Ombudsman, above n 40, pp 63–4.
68 Ibid, pp 68–9.
69 *Ombudsman Act 1976* (Cth) s 5(1).
70 Ibid, s 15(1)(a)(i) and (v).
71 See text at n 56 above.
72 As described in the text at nn 58–60 above.
73 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 6(1)(d).
74 Ibid, s 6(1)(f).
75 Ibid, s 16(2)(a).
76 Despite the threat in the initial and reminder letters quoted in the text at n 58 and n 59 above.
77 *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(2)(b).
78 *Transport Workers' Union v Lee* (1988) 84 FCR 60, 65–7 (Black CJ, Ryan and Goldberg JJ).
79 See the succinct summary of the current state of the law on the availability of declaratory relief in *CGU Insurance Ltd v Blakeley* (2016) 327 ALR 564, 589 [102] (Nettle J).
80 As Brennan J put it in *Church of Scientology v Woodward* (1982) 154 CLR 25, 70, quoted by Gleeson CJ in *Plaintiff S157 of 2002 v The Commonwealth* (2003) 211 CLR 476, [31]. See the text at n 18 above.