

Appealing Centrelink Debts



This fact sheet summarises the Ask LOIS webinar on this topic, presented Jessica Raffal, Lawyer, Women's Legal Service NSW on 7 July 2016.

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This factsheet looks at:

- How do Centrelink debts get raised?
- When can Centrelink debts be appealed?
- How can I help a client to appeal a Centrelink debt?
- When should a Centrelink debt NOT be appealed?
- What to do if your client is being prosecuted for Centrelink fraud?

Social Security Law and Policy

- 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

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. There is a **legal obligation** to inform Centrelink about anything that may affect current rate of payment (current fortnight). There is **no legal obligation** to inform Centrelink about things that do not affect the current rate of payment – eg. Past income.

If Centrelink wasn't aware of all of someone's circumstances, they may have been overpaid. Overpayments will result in a debt. A debt can be for all of the Centrelink payment someone received, or only part of it (eg. Entire amount because of retrospective cancellation vs part of amount because of recalculation of entitlement based on undeclared income).

Centrelink Debts

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 arrears of periodic compensation, or even if the overpayment was mostly Centrelink's own fault.

Common debts include:

- Earnings debt
- Income debt
- Asset debt
- Member of a couple debts
- Insufficient study load debts
- Loss of care debts

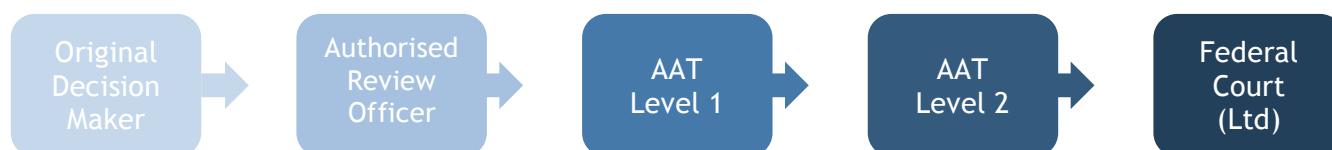


Appeals

All (nearly) Centrelink decisions can be appealed.

Usually a 13 week de facto time limit applies for appeals to Authorised Review Officer (ARO) and AAT Level 1 (also called AAT Social Services and Child Support Division), but it does not apply to debts – there is no time limit to appeal a debt. A 28 day time limit applies to all decisions appealed to AAT Level 2 (also called AAT General Division).

Appeal chain



Appeals to the Federal Court are limited because they will only be successful if the AAT has made an **error of law**. This is rare, and unlike all the other stages which are **free of charge** the Federal Court can be expensive, particular if an appeal is unsuccessful. For this reason it is crucial to get legal advice before appealing any decision to the Federal Court.

Grounds for appeal

A debt can be appealed on several grounds:

1. The calculation of the debt
2. The rate of recovery of the debt
3. The imposition of a 10% penalty
4. The existence of the debt – *set aside*
5. The recovery of the debt - *waiver*

Calculation

Appealing on this ground essentially amounts to conceding the fact of an overpayment but disputing the exact calculations

Rate of recovery

Centrelink should not recover the debt at a rate that puts someone into hardship. The default recovery rate of 15% is too high for most social security recipients, \$10 - \$20 a fortnight more reasonable and usually accepted by Centrelink. Call Centrelink debt recovery 1800 076 072 and negotiate, then appeal to ARO if Debt Recover Unit will not engage. It is also possible to appeal Centrelink's use of Debt Collection Agency in some circumstances

10% Penalty

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

Existence of debt

If the facts that Centrelink based the debt upon are incorrect, there may have been no overpayment. If this can be proved on appeal, the debt will be set aside Eg. Member of a couple debt raised when person was in fact single.

Recovery - waiver

Waiver is the most common ground for appealing a debt.

Appealing and seeking waiver is tantamount to conceding the fact of the overpayment but arguing that it is unfair that the debt be repaid (wholly or partly).

There are two grounds for waiver:

1. Sole administrative error
2. Special circumstances

Waiver – administrative error

There are three requirements:

1. The debt is **solely attributable** to administrative error
2. The payments were received **in good faith**
3. The debt raised more than 6 weeks after overpayment occurred

It is difficult to demonstrate “sole” admin error because **any contribution** by the customer to the error will negate (even if customer was put on notice of the error and did not act to tell Centrelink about it). For this reason administrative error is rare. If sole admin error established, the debt **must** be waived ie. Not discretionary.

Waiver – special circumstances

There are two requirements:

1. The debt cannot have been “knowingly” incurred
2. Circumstances must be “special”

“Knowingly”

A debt can only be waived if it was not caused by the person **or** any other person:

- knowingly telling Centrelink the incorrect information or
- knowingly failing to tell Centrelink certain information.



Eg. If you were telling Centrelink about your income from work but you were deliberately telling them the incorrect amount, your debt cannot be waived because you fail the “knowingly” requirement.

Eg. You told Centrelink about your new job, but they kept paying you as though you weren’t working and didn’t ask about your income again. You knew you were being overpaid but didn’t say anything.

“knowingly” = *actually realised* at the time that you were giving incorrect information or failing to give the required information

→ **not** *should have* realised

→ A *subjective test*, not an *objective* one (but proof is an issue)

“Special Circumstances”

There is no definition of special circumstances in the law., it is **anything** making the case different or unusual

Usually needs to be something quite significant, ideally multiple circumstances including financial hardship. Because Centrelink money is “public money”, there is a high bar to have the debt waived on this basis. A debt will generally not be waived on “special circumstances” if it was an income debt, or if the person is not in financial hardship – even if there are other special circumstances.

The circumstances can be from the time debt was incurred or from when it is being appealed.

Administrative error that is significant but does not rise to the level of “sole administrative error” can be considered a special circumstance.

What to do if you want to appeal: step-by-step

1. Begin repaying the debt

- Debts must be repaid even if they are being appealed
- Success on appeal may or may not mean amounts repaid are refunded
- Centrelink will usually send “account payable” giving a due date in 28 days
- This is **not** a due date for repayment, only for contacting Centrelink and making a reasonable repayment plan → make sure you do this or the debt may be referred to a collection agency

2. Collect evidence

- No time limit to appeal (unless you have already appealed to and lost at AAT Level 1)
- In most cases it is better to take the time to prepare for an appeal and collect evidence
- There can be risks to appealing so consider carefully and get advice before lodging

Usually you should collect evidence about:

- financial situation and any financial problems you have
- health and the health of your family
- anything that affected your ability to understand your obligations (or that might have made you misunderstand them)
- any other personal circumstances impacting negatively on you or your family
- any effect the Centrelink debt is having on your mental or physical health – ask Dr to comment
- Any Centrelink mistakes

Useful to have as much evidence as possible:

- Letter from your GP
- A credit card statement/overdue bills

- Letter of support from a counsellor/support worker
- Documents from Centrelink file showing Centrelink mistakes – FOI or Tribunal papers



3. Lodge Appeal

Appealing is easy and free

Can lodge appeal with ARO over the phone, but good idea to do it in writing including reasons for your appeal

You may be called first by a Subject Matter Expert (SME). SME is not the ARO but can change the decision. If you're unsatisfied with the SME decision – ask them to send it on to ARO. The ARO will generally try and call twice and then go ahead with the decision so try to be available. Appeals can take a long time – sometimes several months. The ARO will write to you giving reasons for the decision. If you don't agree, you can appeal to AAT1. There's no time limit.

Risks to Appealing

Appealing a debt is not risk-free.

A debt can get bigger eg. eg member of a couple (MOAC) debt originally based on finding that MOAC from 2011, on appeal finding that MOAC from 2007 → debt will increase significantly.

An appeal can also make a prosecution more likely.

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

A successful appeal to a Tribunal can also help persuade the CDPP not to continue with a prosecution but an unsuccessful appeal can make matters worse.

Taped Interview

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. **It is almost never a good idea to attend.**

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

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

Case Studies

Case study 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 now has a debt of \$18,000 but is happy to repay all of the money. **Should she appeal?**

No. She should not appeal.

- Lots of “special circumstances” – single mother, domestic violence, sick child
- Willing to repay the money
- But – the debt was knowingly incurred, so the debt **cannot** be waived **and** there is a high prosecution risk

Case Study 2

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?**

There is a legal obligation to report correctly for **current period (fortnight) only**. There is **no legal obligation** to inform Centrelink about past periods – your client does not have to “come clean”. However, there are other factors to consider:

- If your client has been declaring that income to the ATO then it is **very unlikely** that Centrelink won't discover it
- If client hasn't been declaring (eg. cash job), it is unlikely (but possible) that Centrelink will find out
- If it is over \$10,000 (you can do some rough calculations based on income), or if there have been previous debts, then client will be at high risk of prosecution
- If Centrelink was always going to find out about the debt, being the one that admits to the overpayment will probably have no effect on the likelihood of prosecution.
- If your client is prosecuted it may be a mitigating factor at sentencing.
- If your client decides to tell Centrelink, they should not admit to fraud, but just give Centrelink past payslips.

Resources

- Welfare Rights Centre NSW 9211 5300 www.welfarerightscentre.org.au
- Welfare Rights Network www.welfarerights.org.au
- Women's Legal Service NSW 8745 6900 www.wlsnsw.org.au