FEDERAL COURT OF AUSTRALIA

Prygodicz v Commonwealth of Australia (No 2) [2021] FCA 634

SUMMARY

In accordance with the practice of the Federal Court in some cases of public interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the Court's website.

This is a class action brought by six applicants against the Commonwealth of Australia, arising out of the Commonwealth's use of an automated debt-collection system between July 2015 and November 2019, intended to recover social security payments that they alleged had been overpaid, colloquially known as the "**Robodebt system**". In summary, the system attempted to identify overpayments of social security benefits at particular points of time through data matching. That was automatically conducted by:

(a) utilising PAYG income information of social security recipients kept by the Australian Taxation Office (**ATO data**) and evenly apportioning that income over fortnightly increments in the review period (in a process the parties called "income averaging") to determine that person's *notional* or *assumed* fortnightly income; and

(b) comparing the *notional* or *assumed* fortnightly income of the person with the *actual* fortnightly income information provided by the person to Centrelink (which was the basis upon which the level of social security payments had been assessed and paid to the person at an earlier point in time).

Once this process had taken place, the Commonwealth determined whether the person had been overpaid social security benefits, and where that had occurred, it sought to raise and recover that asserted debt.

In the course of the proceeding the Commonwealth admitted that it did not have a proper legal basis to raise, demand or recover asserted debts which were based on income averaging from

ATO data. The evidence shows that the Commonwealth unlawfully asserted such debts, totalling at least $1.763 billion against approximately 433,000 Australians. Then, including through private debt collection agencies, the Commonwealth pursued people to repay these wrongly asserted debts, and recovered approximately $751 million from about 381,000 of them.

The applicants now seek court approval under s 33V of the *Federal Court of Australia Act 1976* (Cth) of a proposed settlement of the class action. In summary, the proposed settlement provides that the Commonwealth will, without admission of liability:

(a) consent to the Court making declarations (**Declarations**) which, in effect, provide that any decision by the Commonwealth:

  (i) that an applicant or group member owed a debt under s 1223 of the *Social Security Act 1991* (Cth) because the person had obtained the benefit of a social security payment to which they were not entitled, where the Commonwealth relied solely on income averaging from ATO data; and

  (ii) did not have other evidence that the person was likely to have earned employment income at a constant fortnightly rate during the period covered by the ATO income information;

  was *not* validly made;

(b) not raise, demand or recover from any of the 433,000 people who had a Robodebt raised debt asserted against them, any invalid debt as described in the Declarations; and

(c) will pay $112 million inclusive of legal costs, which after deduction of Court-approved legal costs, is to be distributed to Category 2 Group Members (approximately 381,000 people, who wholly or partly paid to the Commonwealth or had recovered from them Robodebt raised debts, totalling approximately $751 million) and Eligible Category 3 Group Members (approximately 13,000 people who paid or had recovered from them an amount that was greater than the debt they actually owed) pursuant to a Court-approved Settlement Distribution Scheme (**SDS**).

The proposed settlement of $112 million is on top of a previously announced Commonwealth program under which it promised to withdraw approximately $1.763 billion in debts based on income averaging from ATO data and to refund approximately $751 million it had received or recovered from 381,000 social security recipients in relation to such debts (**Commonwealth-**

recovered amounts). The Declarations made by the Court today give legal effect to the Commonwealth's promises to undertake the withdrawal of these debts and the related refunds.

The proceeding has exposed a shameful chapter in the administration of the Commonwealth social security system and a massive failure of public administration. It should have been obvious to the senior public servants and to the responsible Minister(s) at different points who designed and were charged with overseeing the Robodebt system that many social security recipients do not earn a stable or constant income, and any employment they obtain may be casual, part-time, sessional, or intermittent and may not continue throughout the year. Where a social security recipient does not earn a constant fortnightly wage, does not earn income every fortnight, or only works for intermittent periods in a year, their *notional* or *assumed* fortnightly income based on income averaging is unlikely to be the same as their *actual* fortnightly income. It should have been plain that in such circumstances the automated Robodebt system may indicate an overpayment of social security benefits when that was not in fact the case. Yet, in the absence of further information from social security recipients, that is the basis upon which the Commonwealth raised and recovered debts for asserted overpayments of social security benefits.

Ministers and senior public servants *should* have known that income averaging based on ATO data was an unreliable basis upon which to raise and recover debts from social security recipients. However, it is quite another thing to be able to prove to the requisite standard that they *actually knew* that the operation of the Robodebt system was unlawful. There is little in the materials to indicate that the evidence rises to that level. I am reminded of the aphorism that, given a choice between a stuff-up (even a massive one) and a conspiracy, one should usually choose a stuff up.

It is fundamental that before the state asserts that its citizens have a legal obligation to pay a debt to it, and before it recovers those debts, the debts have a proper basis in law. The group of Australians who, from time to time, find themselves in need of support through the provision of social security benefits is broad and includes many who are marginalised or vulnerable and ill-equipped to properly understand or to challenge the basis of the asserted debts so as to protect their own legal rights. Having regard to that, and the profound asymmetry in resources, capacity and information that existed between them and the Commonwealth, it is self-evident that before the Commonwealth raised, demanded and recovered asserted social security debts, it ought to have ensured that it had a proper legal basis to do so. The proceeding revealed that

the Commonwealth completely failed in fulfilling that obligation. Its failure was particularly acute given that many people who faced demands for repayment of unlawfully asserted debts could ill afford to repay those amounts.

On top of the financial hardship, distress and anxiety caused to a great many vulnerable people and the costs to the public purse of a huge Commonwealth program to identify the debts to be withdrawn and to refund the Commonwealth-recovered amounts, the Commonwealth has now agreed to pay a further $112 million; to meet the substantial costs of the settlement distribution scheme to categorise eligible group members and to pay them a share of that settlement; and to meet its own significant legal costs. That has resulted in a huge waste of public money.

The proceeding advances two broad claims against the Commonwealth:

(a) a claim for unjust enrichment (primarily a claim for monies had and received) alleging that the Commonwealth was unjustly enriched by its recovery of wrongly asserted debts from the applicants and group members; and

(b) a common law tort claim in negligence for damages for economic loss suffered by the applicants and group members as a result of the breach of the Commonwealth's alleged duty of care in raising and recovering wrongly asserted debts, coupled with a claim for damages for stress, anxiety and stigma associated with the request or demand for recovery of the asserted debts (which the applicants called **distress damages**).

In my view it is clear that the proposed settlement is fair and reasonable between the applicants and group members on the one hand, and the Commonwealth on the other. I was though troubled as to whether the proposed settlement was fair and reasonable as between the different categories of group members. That concern arises because, while the proposed settlement provides substantial financial benefits to Category 2 Group Members and Eligible Category 3 Group Members, and some benefit to Category 1 Group Members, it provides no financial benefit to Ineligible Category 3 Group Members and Category 4 Group Members (**Ineligible Group Members**) who comprise approximately 202,000 of the about 648,000 group members. Yet Ineligible Group Members are also bound by the release in the Settlement Deed and thus lose their rights (if any) to sue for claims that are the same or similar to those made in the proceeding.

Ultimately I concluded that it is appropriate to approve the proposed settlement, albeit with some changes to the settlement as initially proposed, including to allow the 680 group members

who filed objections to approval of the proposed settlement an opportunity to opt out of the proceeding at this stage, if they wish to do so.

In summary, the reasons for approving the settlement are as follows:

First, the Court had the benefit of a confidential joint counsels' opinion in which counsel frankly and candidly expressed their opinion as to the fairness and reasonableness of the proposed settlement. Counsel recommended that the Court approve the proposed settlement by reference to a variety of factors, particularly the risks facing the applicants in relation to liability and quantum. It is appropriate to give significant weight to Counsels' Opinion and I have done so.

Second, the Court had the benefit of detailed submissions from Fiona Forsyth QC and Eugenia Levine of counsel (the **Contradictor**), appointed by the Court to represent group members' interests. The Contradictor agreed that the proposed settlement is fair and reasonable as between the parties, describing it as "a very favourable outcome".

The Contradictor however submitted that the proposed settlement is not fair and reasonable as between group members because Category 1 Group Members and Ineligible Group Members will receive no financial benefit under the proposed settlement but will be bound by the release. The Contradictor contended that Category 1 Group Members and Ineligible Group Members, totalling some 254,000 people should be given an opportunity to opt-out, if they so wish. I did not accept this argument but I have allowed those 680 people who filed objections to the proposed settlement to opt-out now if they wish to do so. Those objectors will be told which category they fall into before having to decide whether to opt-out or not.

In summary the view I took of the varying strengths and weaknesses of the different categories of group members is:

(a) Category 1 Group Members cannot in my view succeed in their unjust enrichment claims (or for negligently inflicted economic loss). No asserted debts were recovered from them by the Commonwealth and therefore they have suffered no economic loss and the Commonwealth has not been unjustly enriched at their expense. In those circumstances it is not unfair or unreasonable that they will not receive a share of the Distribution Sum;

(b) Category 2 Group Members and Eligible Category 3 Group Members have good prospects of success in their unjust enrichment claims, it is fair and reasonable that they receive substantial financial benefits under the proposed settlement; and

(c) Ineligible Group Members do not have debts based on income averaging from ATO data; instead their debts were assessed by the Commonwealth from payslips, bank statements and other information they provided. For them to succeed in their unjust enrichment claims (and their negligence claims) they must establish that the debts were somehow "tainted" with illegality because the (accurate) income information upon which their debts were assessed was provided in response to a notice generated by the Robodebt system or in response to a debt based on income averaging from ATO data which was earlier raised. In my view their claims have weak prospects of success and are more likely than not to fail at trial. It is not unfair or unreasonable that they will receive no financial benefit under the settlement.

Third, I consider the negligence claims of the applicants and all categories of group member to be weak. I doubt that the applicants can establish the alleged duty of care. But the negligence claims are something of a distraction because even if (contrary to my view) they are treated as likely to succeed at trial, they add little. They centrally concern the same losses as those claimed in the unjust enrichment claims. To the extent that they extend beyond the unjust enrichment claims by seeking distress damages and aggravated and exemplary damages those claims face significant uncertainty and are attended by considerable risk.

Fourth, because at the point of settlement the Commonwealth had already refunded $707.9 million of the Commonwealth-recovered debts based on income averaging from ATO data, and had promised to refund all such amounts, the potential quantum of the claims in the proceeding are largely concerned with claims for interest, or for the benefit the Commonwealth received by its use of the Commonwealth-recovered amounts (which the parties called "**quasi-interest**"). When regard is had to the different methods by which interest or quasi-interest might be assessed, and to the risks those claims face, the proposed settlement of $112 million inclusive of costs is a very favourable one.

Fifth, prior to the settlement approval hearing 680 group members filed objections to settlement approval (**objections**) both within time and out of time. That comprises only about 0.1% of the approximately 648,000 group members, but it is not clear whether all of the objections were

intended as such. Taking into account the objections that may not have been intended as such, it appears that less than 0.04% of group members filed objections.

One thing, however, that stands out from the objections is the financial hardship, anxiety and distress, including suicidal ideation and in some cases suicide, that people or their loved ones say was suffered as a result of the Robodebt system, and that many say they felt shame and hurt at being wrongly branded "welfare cheats". Some of the objections were heart-wrenching and one could not help but be touched by them. One bereaved mother told the Court that her son had committed suicide after the Commonwealth demanded payment of a social security debt which she says he did not owe, some group members spoke of contemplating suicide, and many spoke of suffering financial hardship and serious anxiety or stress. It is plain enough that many group members continue to feel a great deal of anguish, upset and anger at the way in which they or their loved ones were treated. Even so, for the reasons I explain, the objections do not justify refusing to approve the proposed settlement.

Sixth, I consider the system under the proposed Settlement Distribution Scheme for categorising group members and distributing the Distribution Sum to Category 2 Group Members and Eligible Category 3 Group Members to be fair and reasonable.

Seventh, Gordon Legal conducted the case on a no-win no-fee basis, and provided an indemnity to the applicants against any adverse costs order against them if the case was unsuccessful. I doubt that litigation funding would have been available for the case and it is unlikely the case could have been brought without the firm taking on those risks. That is to the firm's credit.

I appointed an independent Costs Referee to inquire into and to report as to the reasonableness of Gordon Legal's costs in the proceeding and in respect to its work under the SDS. The Costs Referee assessed the applicants' reasonable legal costs of the proceeding at $8.4 million. The Contradictor and the Commonwealth submitted that it is appropriate to adopt the Costs Referee's assessment, and neither the applicants or Gordon Legal opposed adoption. It is appropriate to adopt that assessment. $8.4 million may seem like a huge or excessive amount for those uninitiated in relation to the legal costs incurred in large, complex class action litigation. But such a view would be uninformed having regard to the careful scrutiny given to the costs by the Costs Referee and the Contradictor, and I am satisfied that amount is fair, reasonable and proportionate.

In relation to the costs likely to be incurred by Gordon Legal in the future in performing its functions under the Settlement Distribution Scheme, I take a different view. On the basis of assumptions made by Gordon Legal to the effect that approximately 40,000 group members are likely to contact the firm and the time likely to be taken in dealing with their queries and concerns, the Costs Referee estimated that Gordon Legal's reasonable costs for such future work would be approximately $4.2 million. On that basis the Contradictor submitted it was appropriate to now approve that lump sum amount.

In my view the assumptions upon which that estimate are based are inherently uncertain. At present one simply cannot know how many group members are likely to contact Gordon Legal. I accept that it is necessary to estimate and set aside an amount of costs before distributions can be made to group members, and the assessment cannot be delayed for too long or it will delay distribution of the settlement monies. However, I am not prepared to accept the estimate as sufficiently accurate at present. I have ordered the Costs Referee to confer with Gordon Legal and then to determine the best methods to assess the reasonableness and proportionality of Gordon Legal's costs for performing that work on an ongoing basis and to have those costs paid monthly or two monthly, and to permit the Costs Referee to make an updated and more accurate estimate of the likely future costs.

Finally, for those perpetual critics of the Part IVA class action regime, the present case is one more example where the regime has provided real, practical access to justice. It has enabled approximately 394,000 people, many of whom are marginalised or vulnerable, to recover compensation from the Commonwealth in relation to conduct which it belatedly admitted was unlawful. The proposed settlement demonstrates, once again, that, when properly managed, our class action system works.

I also wish to thank the parties' lawyers for the way they conducted the case. Some of the legal issues in the case were complex and difficult, and the amount in dispute was large. The litigation was strenuously contested yet the solicitors and counsel for both sides conducted themselves appropriately and responsibly while strongly representing their clients' interests; they did not get lost in the fog of the contest.

MURPHY J
11 JUNE 2021
MELBOURNE