

Before the High Court

Evidentiary Burdens and the Recovery of Social Security Debts: *Chaplin v Secretary, Department of Social Services (Cth)*

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Abstract

In *Chaplin v Secretary, Department of Social Services (Cth)*, the High Court of Australia will determine the standard of satisfaction required before the Commonwealth may recover an alleged social security debt. The appeal — the first social security related case to reach the High Court in more than a decade — concerns the construction of a statutory requirement that income be taken into account when ‘first earned, derived or received’, and the consequences where evidence of the earning fortnight is no longer available. In this column, we argue that the approach of the Full Federal Court of Australia majority risks authorising the recovery of debts whenever individuals are unable to substantiate their entitlement, including where original records have been lost or were never maintained. We also examine competing constructions of the provisions across fora, the implications of retrospective legislation purporting to validate the very practice under challenge in this appeal, and whether private law facilitation principles, properly understood, support or undermine the Federal Court majority’s approach to the evidentiary gap.

I Introduction

Chaplin v Secretary, Department of Social Services (Cth) (‘*Chaplin v DSS*’)¹ arises from a decades-long departmental practice now known as ‘income apportionment’. The Australian Government Department of Social Services (‘the Department’) used the practice to allocate employment income across multiple fortnights when

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¹ *Chaplin v Secretary, Department of Social Services (Cth)* (High Court of Australia, Case No M92/2025).

calculating social security entitlements.² In 2023, the Government conceded that the practice was unlawful from at least 2003 to 2020.³ Following that concession, the Department proposed to take income into account when received rather than when earned, adopting what became known as the ‘receipt method’.⁴ When Chaplin (the appellant) challenged the method (his case being one of few to proceed while most affected debts were paused⁵), a majority of the Full Federal Court of Australia (Thawley and Hespe JJ) held the receipt method permissible where evidence of the earning fortnight was unavailable.⁶ However, in the High Court appeal, Chaplin contends that the receipt method is unlawful on its own terms, and that the majority’s reasoning mischaracterises the nature of the decision to raise a debt under the *Social Security Act 1991* (Cth) (‘*SS Act*’).⁷ After the High Court granted special leave to appeal, Parliament enacted the *Social Security and Other Legislation Amendment (Technical Changes No 2) Act 2025* (Cth) (‘*2025 Act*’),⁸ which purports to retrospectively validate both methods — a development examined in Part V of this column.

The appeal raises three issues, as framed in Chaplin’s submissions:⁹

- (1) Whether, to recover a debt under s 1223(1) of the *SS Act*, the Secretary of the Department must be affirmatively satisfied that the recipient was not entitled to a specific payment, or whether it suffices that the Secretary is not satisfied of entitlement.

² Commonwealth Ombudsman, *Lessons in Lawfulness: Own Motion Investigation into Services Australia’s and the Department of Social Services’ Response to the Question of the Lawfulness of Income Apportionment before 7 December 2020* (Statement, August 2023) (‘*Lessons in Lawfulness*’) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0040/299947/Income-Apportionment-Lawfulness.pdf>.

³ *Ibid* 1, 4; Minister for Social Services and Minister for Government Services, ‘Statement on Historic Income Apportionment’ (Joint Media Release, Ministers for the Department of Social Services, 2 August 2023) <<https://ministers.dss.gov.au/media-releases/12031>>. The Department accepts the practice was unlawful from 20 September 2003; whether it was also unlawful from 1991 remains contested: see Senate Community Affairs Legislation Committee, *2024–25 Supplementary Budget Estimates* (6 November 2024) 100 (Mr Flavel, Deputy Secretary, DSS; Ms Worswick, Chief Counsel, DSS); Department of Social Services (Cth), ‘Answer to Question on Notice No IQ25-000022’ (Senate Community Affairs Legislation Committee, Inquiry into the Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025, 16 October 2025) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/TechnicalChangesNo2/Additional_Documents>.

⁴ See *Re Secretary, Department of Social Services and FTXB* [2024] AATA 3021, 39 [93] (‘*AAT2*’).

⁵ Commonwealth Ombudsman, *Accountability in Action: Identifying, Owning and Fixing Errors* (Report, December 2023) 2 [1.13]–3 [1.14] (‘*Accountability in Action*’) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0019/302059/Accountability-in-Action-identifying,-owning-and-fixing-errors.pdf>.

⁶ *Chaplin v Secretary, Department of Social Services* (2025) 311 FCR 44, 85 [197] (Thawley and Hespe JJ) (‘*Chaplin (FC AFC)*’).

⁷ *Social Security Act 1991* (Cth) (‘*SS Act*’). See Matthew Chaplin, ‘Appellant’s Submissions’, Submission in *Chaplin v Secretary, Department of Social Services (Cth)*, HCA Case No M92/2025, 23 December 2025 (‘*Chaplin HCA Submissions*’).

⁸ *Social Security and Other Legislation Amendment (Technical Changes No 2) Act 2025* (Cth) schs 1–3 (‘*2025 Act*’).

⁹ ‘*Chaplin HCA Submissions*’ (n 7) [2]–[4].

- (2) Whether debts may be established by reference to aggregate payments over an extended period, rather than by demonstrating non-entitlement in respect of individual fortnightly payments.
- (3) Whether the Secretary may resort to the fortnight of receipt as a fallback on the proper construction of point 1067G-H23 of the *SS Act*, which required (before amendment in 2020) that ordinary income be taken into account in the fortnight in which it was ‘first earned, derived or received’.

Ultimately, each ground turns on whether the adverse consequences of an evidentiary gap — including where it arises from institutional omissions or the passage of time — should fall on the recipient or the Commonwealth.

The appeal requires the High Court to address directly the fundamental principles underpinning debt-raising in social security law.¹⁰ Its potential systemic impact is also considerable: the Department estimates that up to 1.7 million people were affected by income apportionment between September 2003 and December 2020, with debts totalling approximately \$2.9 billion.¹¹ Sampling studies found that around 64% of employment income debts ‘relied upon’ apportionment; and recalculation of those debts using the receipt method reduced the total debt value by approximately 7%.¹² Although Parliament has purported to resolve the dispute, and the broader consequences of the unlawful practice, through the *2025 Act*, the High Court’s ruling will nonetheless be significant, as the case raises questions that extend beyond, and may even affect the operation of, the *2025 Act*.

Following a factual overview (Part II), we examine the three grounds of appeal (Part III), the broader implications for evidentiary burdens in administrative decision-making (Part IV), and the retrospective legislation and criminal consequences (Part V).

II The Factual and Procedural Background

Before 2020, the *SS Act* required that employment income be taken into account in the fortnight in which it was ‘first earned, derived or received’.¹³ Rather than applying this provision as enacted, however, the Department spread employment income at a daily rate across multiple fortnights based on the period worked.¹⁴ This approach was apparently aimed at preventing recipients from deferring the receipt

¹⁰ Before *Chaplin v DSS*, the most recent social security case to reach the High Court was *Director of Public Prosecutions (Cth) v Keating*, which primarily concerned questions as to the operation of the *Criminal Code (Criminal Code Act 1995 (Cth) sch 1)* rather than the civil administration of social security legislation: *DPP (Cth) v Keating* (2013) 248 CLR 459.

¹¹ Department of Social Services (Cth), ‘Answer to Question on Notice No IQ25-000023’ (Senate Community Affairs Legislation Committee, Inquiry into the Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025, 16 October 2025) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/TechnicalChangesNo2/Additional_Documents>.

¹² Services Australia, *Income Apportionment: Sampling Activity #2 November 2023–February 2024* (FOI release LEX 78943, 8 May 2024) 3 (‘*Sampling Activity #2*’).

¹³ *SS Act* (n 7) s 1067G, Module H, point 1067G-H23 (as in force prior to 7 December 2020: see <<https://www.legislation.gov.au/C2004A04121/2020-11-27/text>>).

¹⁴ *Lessons in Lawfulness* (n 2) 10–11.

of income to a later fortnight.¹⁵ Section 1073B of the *SS Act*, together with point 1067G-H23, permitted daily apportionment of income only within a single instalment period, defined as not exceeding 14 days.¹⁶ Where a payslip covered a longer period, or where a pay period straddled two fortnights, the Department apportioned income across multiple fortnights — a practice now conceded to have been unlawful.¹⁷ When the unlawfulness was recognised, the Department adopted the receipt method, which, when applied in Chaplin’s case, reduced the debt from \$911.98 to \$806.16.¹⁸

Chaplin received Youth Allowance between 10 July 2014 and 24 June 2015 while employed casually at a grocery store.¹⁹ He worked variable hours and was paid weekly on Thursdays for work performed Monday to Sunday of the previous week. Because his pay periods did not align with Centrelink’s fortnightly instalment periods, his weekly wages frequently straddled two instalment periods.²⁰ During the relevant period, Chaplin reported his after-tax income rather than the before-tax income he was required to report — an error that the Administrative Appeals Tribunal found involved no intention to receive payments beyond his entitlement.²¹ In April 2019, Australian Taxation Office data-matching revealed the discrepancy and, in October 2019, a delegate raised a debt of \$911.98.²²

The parties agree that Chaplin earned income before he received it, but no evidence remains to establish in which fortnight he earned it.²³ His payslips recorded the hours worked and amounts paid but not the dates worked. When the Secretary sought additional information in 2019, Chaplin’s employer confirmed it did not retain records of the actual dates worked in the 2014–2015 period in question.²⁴ The evidentiary gap is the crux of the appeal. In which fortnight was Chaplin’s income earned? Converting apparent underreporting into a quantified overpayment requires allocating income to specific fortnights. But where records necessary for that allocation no longer exist (or never existed), the question is whether the consequences will fall on the recipient or the Commonwealth.

Chaplin v DSS is, in one respect, an imperfect vehicle for the broader cohort of recipients impacted by income apportionment: Chaplin’s debt arose from underreporting, whereas sampling studies show that apportionment was applied in 399 of 420 recalculations regardless of the accuracy of recipients’ earning data or

¹⁵ Department of Social Services (Cth), *Guide to Social Security Law* (Version 1.253, 20 March 2019) [4.3.3.05] ‘Employment Income — First Earned, Derived, Received’, archived at Wayback Machine (19 April 2019) <<https://web.archive.org/web/20190419163835/http://guides.dss.gov.au/guide-social-security-law/4/3/05>>. See also Christopher Rudge, Submission No 9 to Senate Standing Committee on Community Affairs, Parliament of Australia, Inquiry into the *Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025* (25 September 2025) 3–4 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/TechnicalChangesNo2/Submissions>.

¹⁶ See *SS Act* (n 7) s 1073B; *Social Security (Administration) Act 1999* (Cth) s 43(1)(b).

¹⁷ *Lessons in Lawfulness* (n 2) 10–11.

¹⁸ *AAT2* (n 4) 6–7 [3]–[4], 26 [59].

¹⁹ *Ibid* 29 [70], 36–8 [89]–[90].

²⁰ *Ibid* 29 [70].

²¹ *Ibid* 22 [46]; ‘Chaplin HCA Submissions’ (n 7) [9].

²² *Chaplin (FCAFC)* (n 6) 47 [4], 61 [76]–[77], 63–4 [85]–[86], 64 [90].

²³ *Ibid* 62 [81]–[82]; ‘Chaplin HCA Submissions’ (n 7) [11].

²⁴ *Chaplin (FCAFC)* (n 6) 66 [95].

reporting, suggesting income apportionment was applied in the overwhelming majority of cases.²⁵ However, as we explain below in Parts III(A)–(B), the reporting of net rather than gross income does not necessarily establish an overpayment in any given fortnight.

A remarkable feature of this litigation has been the divergence of views across fora. By late 2023, the Department had paused debt recovery and review activity for the vast majority of debts potentially affected by income apportionment.²⁶ Chaplin’s matter, which had already been referred to the Tribunal, was among the few to proceed to a hearing. At first instance, Member Byers found that income apportionment was lawful as a fact-finding methodology independent of s 1073B, but rejected the receipt method.²⁷ It was this finding — inconsistent with the Department’s own concession that apportionment was unlawful — that compelled the Department to appeal to the General Division of the Tribunal.²⁸

The matter was then heard by a three-member ‘Presidential’ panel of the General Division of the Tribunal (‘AAT2’), comprising Justice Kyrou (President), Senior Member Kennedy and Senior Member Trotter.²⁹ AAT2 rejected both parties’ approaches. The Tribunal held the receipt method permissible in certain circumstances, but adopted a fresh interpretation of the word ‘earned’, holding that income was earned only when legal entitlement to it crystallised at the conclusion of each pay period.³⁰

On appeal, the Full Federal Court unanimously rejected the interpretation adopted by the Tribunal with respect to the word ‘earned’. Their Honours held that a casual employee earns income upon performance of work, not when legal entitlement crystallises.³¹ The remainder of the decision, however, was marked by sharp disagreement. The majority (Thawley and Hespe JJ), as noted above, held the receipt method permissible where evidence of the earning fortnight was

²⁵ ‘*Sampling Activity #2*’ (n 12). The Commonwealth Ombudsman’s investigation similarly documented cases where confirmed earning evidence was nonetheless apportioned: *Lessons in Lawfulness* (n 2) 10–11.

²⁶ *Accountability in Action* (n 5) 3 [1.14].

²⁷ *Re Chaplin and Secretary, Department of Social Services* (Administrative Appeals Tribunal, Member Byers, 8 January 2024) 4 [21], citing *Inguanti v Secretary, Department of Social Security* (1988) 80 ALR 307.

²⁸ The Department’s appeal is described in *Chaplin (FCAFC)* (n 6) 66 [94]–[95]. See also *Accountability in Action* (n 5) 3 [1.14].

²⁹ AAT2 (n 4).

³⁰ *Ibid* 51–2 [135]–[141]. Unlike a court judgment, a Tribunal finding on statutory construction does not bind the executive. Despite the Tribunal’s finding (at [160]) ‘that the Act does not permit the Secretary to apply his preferred construction of point H23’, the Department announced it would continue to apply its preferred construction of point 1067G-H23: see Justice Emilios Kyrou AO, ‘Notice of Systemic Issue No 1 of 2024’ (Administrative Review Tribunal, President’s Chambers, 16 December 2024) 5 [6(18)], quoting Secretary, Department of Social Services (Cth), ‘Public Statement on Income Apportionment’ (News, 23 October 2024) <<https://www.dss.gov.au/news/public-statement-regarding-income-apportionment>>. The Systemic Issue Notice was issued in response to the Department’s announcement pursuant to s 193(i) of the *Administrative Review Tribunal Act 2024* (Cth): Kyrou at 6 [6(19)]–[6(21)]. It sought an explanation for the Secretary’s decision not to adopt the Tribunal’s reasoning while judicial review was on foot.

³¹ *Chaplin (FCAFC)* (n 6) 80 [172], 81–2 [180] (Thawley and Hespe JJ), 94 [241] (Kennett J). Neither party challenges this finding before the High Court.

unavailable.³² Kennett J dissented, finding this ‘directly contrary to the statutory instruction’.³³

III The Case before the High Court

On 6 November 2025, the High Court granted special leave to appeal in respect of two related proceedings, subsequently consolidated.³⁴

A *The Standard of Satisfaction*

Chaplin’s first ground challenges the Full Federal Court majority’s characterisation of the decision to raise a debt under s 1223(1) of the *SS Act*.³⁵ The majority reasoned that, as ‘the original decision-maker knew Mr Chaplin had not made a correct disclosure of his income’, the ‘real issue was how much Mr Chaplin had been overpaid’.³⁶ Chaplin argues this treated the existence of an overpayment as a premise rather than a conclusion to be established.³⁷ The first respondent (the DSS) defends the Full Court’s reasoning, arguing that debt-raising involves a ‘series’ of discrete steps: first reassessing entitlement, then calculating overpayment, then demanding repayment.³⁸ The majority’s reference to ‘how much Mr Chaplin had been overpaid’, the DSS submits, concerns the calculation step that follows reassessment.³⁹

Chaplin contends that this framing impermissibly assumes the existence of an overpayment without first establishing it. Section 1223(1) of the *SS Act* requires the Secretary to be affirmatively satisfied that the recipient ‘was not entitled’ to a specific payment rather than merely to fail to be satisfied of entitlement.⁴⁰ This distinction has practical consequences. The correct allocation of income to a particular fortnight may affect entitlement in subsequent fortnights: for instance, where no income is earned in a given fortnight, the system provides that credit may accrue to the recipient through the income bank, altering entitlement in the fortnight that follows.⁴¹ Permitting assumptions about the earning fortnight may therefore produce a debt that differs from the amount actually owed.

³² *Chaplin (FCAFC)* (n 6) 85 [197] (Thawley and Hesse JJ).

³³ *Ibid* 93 [236] (Kennett J).

³⁴ *Chaplin v Secretary, Department of Social Services* [2025] HCADisp 262. Special leave was granted in respect of proceedings M63/2025 and M65/2025, subsequently consolidated as M92/2025 (n 1).

³⁵ ‘Chaplin HCA Submissions’ (n 7) [35]–[56].

³⁶ *Chaplin (FCAFC)* (n 6) 76 [155], see also 76 [156] (Thawley and Hesse JJ).

³⁷ ‘Chaplin HCA Submissions’ (n 7) [48]–[56].

³⁸ Secretary, Department of Social Services, ‘First Respondent’s Submissions’, Submission in *Chaplin v Secretary, Department of Social Services (Cth)*, HCA Case No M92/2025, 3 February 2026, [40] (‘DSS HCA Submissions’).

³⁹ *Ibid* [40]–[44].

⁴⁰ ‘Chaplin HCA Submissions’ (n 7) [48]–[56]. The distinction was reflected in the Operation Myrtleford Investigation Report, where a NACC Deputy Commissioner observed that reducing a benefit requires affirmative satisfaction of non-entitlement: National Anti-Corruption Commission (‘NACC’), *Investigation Report: Operation Myrtleford* (2026) 387 [1180], citing *Chaplin (FCAFC)* (n 6) 48–9 [14] for the proposition, though that paragraph recites procedural background rather than establishing legal principle — the proposition accords instead with Kennett J’s dissent at 96 [251].

⁴¹ *SS Act* (n 7) s 1067G, points 1067G-J1 to 1067G-J11 (‘Student Income Bank’). The Student Income Bank allows full-time students to accumulate credits when income falls below the ordinary income

Kennett J agreed with Chaplin’s contention on this general point, holding that ‘an officer should not resolve to seek repayment of any amount unless they are affirmatively satisfied that there has been an overpayment in that amount’.⁴² His Honour observed that there is a ‘single correct answer’ to entitlement in any given fortnight, which is produced by the operation of the *SS Act*, and ‘cannot change later as new evidence becomes available or relevant documents are lost’.⁴³ It follows that where the Secretary cannot establish the correct allocation, the consequence is not that the debt may be approximated, but that the Secretary cannot be satisfied that any debt arose.⁴⁴

B *Aggregate and Individual Payments*

Chaplin’s second ground concerns the unit of analysis under s 1223(1) of the *SS Act*.⁴⁵ The provision operates on individual payments: a debt arises where ‘a social security payment is made’ and the person ‘was not entitled’ to obtain the benefit of ‘the payment’.⁴⁶ Chaplin contends that the Federal Court majority erred by permitting the Secretary to compare the total amount of payments made over a period of almost a year with the total amount of income earned over the same period. The statutory requirement, on this submission, is to determine whether an overpayment occurred in each particular fortnight.⁴⁷

This distinction is not illusory. Underreporting income over a given period does not, of itself, establish that an overpayment occurred ‘in any particular fortnight or at all’.⁴⁸ Whether an overpayment occurred depends on how income is allocated across fortnights — and that allocation cannot be determined where earning records no longer exist. The DSS points to detailed fortnight-by-foortnight calculations, arguing that the Secretary precisely applied the income test to each instalment period using available evidence.⁴⁹ However, the accuracy of those calculations depends on the contested allocation methodology. Chaplin submits that allocating income to one fortnight and not another could alter the income bank credits attaching to either fortnight, potentially changing the debt in every period that follows.⁵⁰ Thus, absent a lawful basis for the allocation, the Secretary cannot satisfy the statutory requirement to establish Chaplin was ‘not entitled’ to any individual payment.

free area; these credits reduce assessable income in subsequent fortnights when income exceeds the free area.

⁴² *Chaplin (FCAFC)* (n 6) 96 [251] (Kennett J).

⁴³ *Ibid* 92 [232] (Kennett J). See also ‘Chaplin HCA Submissions’ (n 7) [51].

⁴⁴ *Chaplin (FCAFC)* (n 6) 95 [246] (Kennett J): ‘To the extent that recovery is precluded by the passage of time and consequent loss of relevant documents, this is a consequence of the legislature having chosen to enact a regime in which overpayments arise by operation of the Act and consequently may require proof’.

⁴⁵ ‘Chaplin HCA Submissions’ (n 7) [57]–[59].

⁴⁶ *SS Act* (n 7) s 1223(1)(a)–(b). Section 1223(9) provides that ‘unless the contrary intention appears, a reference to a social security payment includes a reference to a part of a social security payment’.

⁴⁷ ‘Chaplin HCA Submissions’ (n 7) [57]–[58], citing *Chaplin (FCAFC)* (n 6) 48 [14(c)], [154], [157], [159] (Thawley and Hespe JJ).

⁴⁸ ‘Chaplin HCA Submissions’ (n 7) [59].

⁴⁹ ‘DSS HCA Submissions’ (n 38) [47], [53].

⁵⁰ ‘Chaplin HCA Submissions’ (n 7) [57]–[59].

C *The Construction of Point 1067G-H23*

Chaplin's third ground concerns the construction of point 1067G-H23,⁵¹ which the Federal Court majority held permits the Secretary to take income into account when received, where evidence of the earning fortnight is unavailable.⁵²

Thawley and Hesse JJ's reasoning turned on the phrase 'where appropriate' in Step 1 of point 1067G-H1, which requires income to be 'work[ed] out ... on a fortnightly basis (*where appropriate*, taking into account the matters provided for in points 1067G-H2 to 1067G-H25)'.⁵³ Drawing on *Vella v Commissioner of Police (NSW)*, the majority reasoned that 'appropriate' connotes 'effective' or 'fitting',⁵⁴ and that where evidence is insufficient to apply point 1067G-H23, 'one must revert to Point H1' — that is, work out income on a fortnightly basis using the date of receipt.⁵⁵

Chaplin contends that 'where appropriate' means 'where applicable': that is, the parenthetical identifies which points in Module H are relevant to a particular case, conferring no discretion to disapply a point that is otherwise applicable.⁵⁶ Point 1067G-H23 is not rendered 'impossible to apply' merely because evidence of the earning fortnight is unavailable: impossibility in the statutory sense requires physical or legal impossibility, not evidentiary insufficiency.⁵⁷ Chaplin contends that the consequence of insufficient evidence is that the Secretary cannot form the requisite opinion that a debt arose — not that 1067G-H23 becomes 'inappropriate'. Chaplin further relies on a 1994 Explanatory Memorandum that stated income is tested 'when the person becomes entitled to it, regardless of when he or she receives it',⁵⁸ and on the 2020 amendments, which expressly introduced the receipt method, implying it was not available under the prior law.⁵⁹

Kennett J in the Federal Court identified three difficulties with the majority's construction. First, his Honour found that it requires income to be taken into account when received 'even if it is known that the income was "earned" earlier'.⁶⁰ This contradicts the emphasis point 1067G-H23 places on the event that occurs 'first'.⁶¹ Second, the justification breaks down where the fortnight of receipt also cannot be identified.⁶² Third, his Honour warned that 'the consequence of the Secretary's construction is that the availability of evidence affects not only the outcome of a controversy concerning the application of the test but the content of the test itself'.⁶³ What the statute requires thus varies according to whatever evidence remains.

⁵¹ Ibid [60]–[82].

⁵² *Chaplin (FCAFC)* (n 6) 84–5 [196]–[198] (Thawley and Hesse JJ).

⁵³ *SS Act* (n 7) s 1067G, point 1067G-H1 step 1 (emphasis added).

⁵⁴ *Chaplin (FCAFC)* (n 6) 84 [196] (Thawley and Hesse JJ), citing *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219.

⁵⁵ *Chaplin (FCAFC)* (n 6) 85 [198] (Thawley and Hesse JJ).

⁵⁶ 'Chaplin HCA Submissions' (n 7) [70]–[74].

⁵⁷ Ibid [79]–[80].

⁵⁸ Explanatory Memorandum, Student Assistance (Youth Training Allowance) Amendment Bill 1994 (Cth) 142.

⁵⁹ 'Chaplin HCA Submissions' (n 7) [76]–[78].

⁶⁰ *Chaplin (FCAFC)* (n 6) 93 [236] (Kennett J).

⁶¹ Ibid.

⁶² Ibid 93 [237].

⁶³ Ibid 93–4 [238].

Chaplin's own debt calculation illustrates the point. The Department used his statements indicating that he had been paid penalty rates on certain days to infer his working days,⁶⁴ while the receipt date was adopted where such inferences could not be drawn, thus applying different bases of allocation to different payments within the same debt period.⁶⁵

Before the High Court, the DSS advances an alternative textual construction by way of a notice of contention. If the fortnight in which income was 'first earned' cannot be determined, it may be taken into account when 'first received' in order to ensure the point 'still has work to do'.⁶⁶ But it is common ground that Chaplin's income was earned before it was received; the difficulty is identifying in *which* fortnight. The alternative construction thus faces the same objection Kennett J levelled at the majority: it requires income to be taken into account when received despite being known to have been earned earlier.⁶⁷

Both the majority and the dissent in the Full Federal Court invoked the canon against absurd or anomalous construction but reached opposite conclusions.⁶⁸ Thawley and Hespé JJ reasoned the legislature could not have intended a recipient who underreported their income to benefit from an absence of earning records⁶⁹ (presupposing that underreporting will necessarily produce an overpayment and that, in that case, the evidentiary burden would shift against the recipient⁷⁰). Kennett J reasoned with equal force that the legislature could not have intended for entitlements to 'wax and wane' according to what evidence survives.⁷¹ On his Honour's approach, any debt raised could, if not repaid, be recovered in civil proceedings in which the Secretary bears the onus of proof; yet a debt that could not be established there should not be raised administratively.⁷²

IV Evidentiary Burdens and the Facilitation Principle

It is long-established that, outside specific statutory prescription, there is no formal onus of proof in administrative decision-making.⁷³ A decision must, however, be underpinned by adequate supporting material;⁷⁴ generally, the party seeking to change the existing legal position must persuade the decision-maker that the change

⁶⁴ *AAT2* (n 4) 25 [56].

⁶⁵ *Ibid* 24–26 [52]–[56]; 'DSS HCA Submissions' (n 38) [47].

⁶⁶ 'DSS HCA Submissions' (n 38) [71], see also [67]–[70].

⁶⁷ *Chaplin (FCAFC)* (n 6) 93 [236] (Kennett J).

⁶⁸ *Ibid* 79 [166] (Thawley and Hespé JJ); 93–4 [238]–[239] (Kennett J); *AAT2* (n 4) 31 [74]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

⁶⁹ *Chaplin (FCAFC)* (n 6) 84 [194] (Thawley and Hespé JJ).

⁷⁰ See further Part IV below.

⁷¹ *Chaplin (FCAFC)* (n 6) 94 [239] (Kennett J), see also 93 [238].

⁷² *Ibid* 89 [215]–[216], 95 [248] (Kennett J).

⁷³ *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 357 (Woodward J) ('*McDonald*'). See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) [5.220]–[5.230].

⁷⁴ *McDonald* (n 73) 358.

is warranted.⁷⁵ Where a party fails to adduce evidence within its power to produce, or where such evidence is peculiarly within that party's power, the principle in *Jones v Dunkel* may permit an inference against that party.⁷⁶ These considerations frame the central question in *Chaplin v DSS*: who bears the consequences of an evidentiary gap in social security debt recovery?

The Federal Court majority's reasoning, across all three grounds, treats the recipient's inability to substantiate their original entitlement as sufficient to establish the debt, including where there is no independent evidence of overpayment. To that end, the majority invokes the facilitation principle in *Cessnock City Council v 123 259 932 Pty Ltd* ('*Cessnock*')⁷⁷ and *Berry v CCL Secure Pty Ltd*⁷⁸ — authorities concerning proof of loss in private law — to justify shifting the evidentiary consequences of the gap onto recipients in Chaplin's position on the basis that they bear responsibility for maintaining their own records.

The facilitation principle derives from the 1722 case *Armory v Delamirie* ('*Armory*') in which a chimney sweep's boy who found a jewel was held entitled to favourable inferences against a goldsmith who, by wrongfully refusing to return the stones, had created the very evidentiary gap he sought to exploit.⁷⁹ In *Cessnock*, the High Court restated the principle: where a defendant's breach has made it more difficult for a plaintiff to prove their loss, the plaintiff's burden of proof is 'facilitated'⁸⁰ (a 'fair wind' but not a 'free ride'⁸¹). Importantly, the principle is 'tied to its rationale, namely the uncertainty in proof of loss occasioned to the plaintiff by the defendant's breach'.⁸²

Although not raised in Chaplin's submissions, we argue that the majority's application of this principle inverts its rationale. The evidentiary gap in *Chaplin v DSS* exists not because of wrongdoing by the recipient (his conceded underreporting did not give rise to the gap) but because:

- (1) the Commonwealth failed to maintain adequate systems for recording earning dates;
- (2) employment law did not require employers to retain such records; and

⁷⁵ See *Commonwealth v Borg* (1991) 20 AAR 299 (Jenkinson and Sweeney JJ); *Comcare v Power* (2015) 238 FCR 187, 199 [67] (Katzmann J); *Beezley v Repatriation Commission* (2015) 150 ALD 11, 26 [68] (North, Tracey and Mortimer JJ); *Ward v Western Australia* (1996) 69 FCR 208, 215–18 (Carr J); *Re Russell and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (Cth)* [2011] AATA 52, [35] (Senior Member Creyke); Terry Carney, 'The New Digital Future for Welfare: Debts without Legal Proofs or Moral Authority?' [2018] (March) *UNSW Law Journal Forum* 1, 3.

⁷⁶ *Jones v Dunkel* (1959) 101 CLR 298.

⁷⁷ *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 281 CLR 39 ('*Cessnock*').

⁷⁸ *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, cited in *Chaplin (FCAFC)* (n 6) 78 [164] (Thawley and Hesse JJ).

⁷⁹ *Armory v Delamirie* (1722) 1 Strange 505; 93 ER 664 ('*Armory*').

⁸⁰ *Cessnock* (n 77) 76 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ), see also 96 [129].

⁸¹ *Ibid* 100 [139].

⁸² *Ibid* 76 [61].

- (3) the debt was raised years after the relevant period (triggered by ATO data-matching that was not available contemporaneously), by which time records no longer existed.⁸³

Throughout this period, the Secretary possessed statutory powers (which were not exercised contemporaneously) to compel the production of information and documents.⁸⁴ Thus, the majority's construction facilitates the goldsmith against the chimney sweep. The principle travels; its rationale does not.

The premise that recipients bear some responsibility for maintaining their own earning records should be tested.⁸⁵ Chaplin's payslips — the only contemporaneous records — did not record the days on which he worked, and his former employer confirmed that it held no such records.⁸⁶ Chaplin provided all payslips for the relevant period.⁸⁷ However, no statutory obligation required him, as a casual employee, to maintain independent records of his working days; such obligations, imposed by taxation and *Fair Work* legislation, fall upon employers, not employees, and even those obligations expire after five and seven years respectively.⁸⁸ The Robodebt Royal Commission documented the significant practical difficulties recipients face in sourcing such evidence years after the fact — including where employers have ceased trading, changed ownership, or maintained non-compliant payroll records.⁸⁹ Yet since Parliament's 2016 removal of the six-year limitation period for social security debts,⁹⁰ recipients face indefinite exposure to historical review, extending well beyond any statutory record-retention obligation. The Robodebt Royal Commission recommended reversing the removal of the limitation period, but that recommendation has not been implemented.⁹¹

The transposition of private law principles to public law debt recovery raises a further difficulty. In *Armory*, the Court intervened to protect a vulnerable private party against the more powerful one.⁹² When the Commonwealth asserts a social security debt, the asymmetry is starker still. The State wields statutory authority underpinned by strong garnishee powers and the prospect of referral for criminal prosecution.⁹³ If the facilitation principle is to inform the construction of these provisions at all, it cannot operate to the advantage of the party whose failure to exercise its statutory powers of compulsion contributed to the very gap it now seeks to exploit. As Kennett J observed, the risk that evidence will become unavailable

⁸³ *Chaplin (FCAFC)* (n 6) 66 [95]; *AAT2* (n 4) 22–3 [47].

⁸⁴ *Social Security (Administration) Act 1999* (Cth) (n 16) ss 68 (Person receiving social security payment), 192 (General power to obtain information).

⁸⁵ *Chaplin (FCAFC)* (n 6) 78–9 [164] (Thawley and Hespé JJ).

⁸⁶ *Ibid* 59 [70], 66 [95].

⁸⁷ *Ibid* 61 [77]–[78].

⁸⁸ *Taxation Administration Act 1953* (Cth) ss 382–5 (five-year retention); *Fair Work Act 2009* (Cth) s 535 (seven-year retention for employers).

⁸⁹ Royal Commission into the Robodebt Scheme, *Report* (Final Report, 2023) vol 2, 328–9; vol 1, xvii (Recommendation 18.2) <<https://robodebt.royalcommission.gov.au/publications/report>> ('*Robodebt Royal Commission Report*').

⁹⁰ *Budget Savings (Omnibus) Act 2016* (Cth) s 2, sch 13 pt 2 (removing the six-year limitation period in s 1229A of the *SS Act* (n 7) and inserting s 1234B, which provides that recovery proceedings may be taken 'at any time').

⁹¹ *Robodebt Royal Commission Report* (n 89) vol 1, xvii (Recommendation 18.2).

⁹² *Armory* (n 79).

⁹³ *SS Act* (n 7) s 1222(2); *Criminal Code* (n 10) s 135.2(1).

over time is ‘a consequence of the legislature having chosen to enact a regime in which overpayments arise by operation of the Act and consequently may require proof’.⁹⁴ Under the majority’s approach, recipients may be required to re-evidence their original entitlements years after they were claimed — a burden that may be impossible to discharge, and that falls hardest on those least able to meet it.

V Broader Implications

After special leave had been granted but while the appeal was still pending, Parliament passed the *2025 Act*.⁹⁵ It amended the *SS Act* and other legislation to retrospectively validate both the apportionment and receipt methods; but it also established an Income Apportionment Resolution Scheme, offering payments of \$200–\$600 to those affected by the unlawful practice.⁹⁶ These figures represent a nominal payment derived from sampling data on the average difference between debts computed by income apportionment and those computed by the receipt method.⁹⁷ For most debts, these payments are inadequate: capped at \$600 regardless of debt size, and based on cohort averages rather than individual losses. Yet if the High Court holds that neither method was lawfully available, the scheme would stand exposed as compensation for one unlawful practice calculated by reference to a second.

Although Parliament may amend the substantive law affecting pending proceedings even where the Commonwealth is a party (in accordance with what Gerangelos, drawing upon United States jurisprudence, refers to as the ‘Changed Law Rule’),⁹⁸ retrospective validation cannot alter what point 1067G-H23 meant while in force.⁹⁹ Yet the DSS contends that even if Chaplin succeeds and obtains a remitter, the matter would fall to be determined under the *SS Act*’s new s 1117D methodology rather than the provisions at issue in this appeal, limiting the utility of any order the Court might make.¹⁰⁰ However, that contention presupposes the High Court will find a debt exists but remit only its quantum — and even then, the s 1117D regime defines the key ‘entitlement period’ variable as a period the Secretary retrospectively

⁹⁴ *Chaplin (FCAFC)* (n 6) 95 [246] (Kennett J).

⁹⁵ See above n 34 and accompanying text; ‘Bills of Previous Parliaments: Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025’, *Parliament of Australia* (Web Page) <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F7370%22>>.

⁹⁶ *2025 Act* (n 8) schs 1–3.

⁹⁷ Explanatory Memorandum, Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025 (Cth) 14–15; *Sampling Activity #2* (n 12) 3.

⁹⁸ *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 250 (Mason J). See also Peter Gerangelos, ‘The Separation of Powers and Legislative Interference in Pending Cases’ (2008) 30(1) *Sydney Law Review* 61, 63–4. While the Changed Law Rule applies here, Gerangelos has identified the government-as-pecuniary-litigant scenario — where the Commonwealth pursues a specific financial claim and simultaneously legislates to improve its position in the pending proceedings — as the combination of factors most warranting constitutional scrutiny (even where the Changed Law Rule is not formally displaced): see Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, 2009) 185–6.

⁹⁹ Explanatory Memorandum, Social Security and Other Legislation Amendment (Technical Changes No 2) Bill 2025 (Cth) (n 97) 14–15.

¹⁰⁰ ‘DSS HCA Submissions’ (n 38) [24], citing *SS Act* (n 7) s 1117D(2)–(3), (14), as amended by the *2025 Act* (n 8) sch 1.

determines.¹⁰¹ But if the Court accepts Chaplin’s case in full — that no debt could be established under the prior law — any remitter would require the ART to reduce the debt to zero in accordance with the Court’s construction;¹⁰² and although the DSS could raise a fresh debt under s 1117D after the ‘validation time’,¹⁰³ the same evidentiary gap that defeated the original debt might defeat it again.

The litigation also has implications for an unknown number of criminal convictions premised on debts calculated using income apportionment, typically under s 135.2(1) of the *Criminal Code* (Cth). The Commonwealth Director of Public Prosecutions has confirmed that 159 individuals prosecuted between May 2018 and May 2023 had debts affected by income apportionment,¹⁰⁴ but this figure captures only those with active court orders and excludes the preceding 15 years of prosecutions.¹⁰⁵ While those convicted were not prosecuted for income apportionment as such, the unlawful methodology determined the debt upon which the charge was founded. Had the debt been calculated lawfully, charges might never have been laid, or sentences might have been reduced.¹⁰⁶

Retrospective civil validation cannot cure these defects: a conviction obtained when the debt was incorrectly calculated does not become sound because Parliament subsequently validates the unlawful calculation.¹⁰⁷ Yet the validation legislation contains no mechanism to address these convictions, and the Resolution Scheme requires that a resolution payment recipient ‘releases and forever discharges’ the Commonwealth from all liability¹⁰⁸ — potentially foreclosing criminal appeals.

Although the criminal implications are unlikely to be resolved by the High Court, the grant of special leave on 6 November 2025 — before the 2025 Act passed both Houses on 26 November — means that the interaction between retrospective validation and judicial construction is directly before the Court, notwithstanding the DSS’s mootness arguments.¹⁰⁹

VI Conclusion

Chaplin v DSS presents the High Court with an opportunity to determine the evidentiary foundations of debt-raising across the social security system. If the

¹⁰¹ 2025 Act (n 8) sch 1 item 2 (inserting s 1113, definition of ‘entitlement period’).

¹⁰² Matthew Chaplin, ‘Appellant’s Reply’, Submission in *Chaplin v Secretary, Department of Social Services* (Cth), HCA Case No M92/2025, 24 February 2026, [18].

¹⁰³ Defined in s 1113 as the commencement of the 2025 Act (n 8): 5 December 2025.

¹⁰⁴ Director of Public Prosecutions (Cth), ‘Answer to Question on Notice No SBE24-054’, *Senate Legal and Constitutional Affairs Legislation Committee, 2024–25 Supplementary Budget Estimates* (8 November 2024) 2 [3] <<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId25-PortfolioId5-QuestionNumber79>>.

¹⁰⁵ The Commonwealth Director of Public Prosecutions’ review commenced only from May 2018: *ibid*; see also Rudge (n 15) 12. Income apportionment through the Department’s software tools dates from 2003, when s 1073B was inserted into the *SS Act* (n 7) by the *Family and Community Services Legislation Amendment (Australians Working Together and other 2001 Budget Measures) Act 2003* (Cth), sch 6 item 26 (commencing 20 September 2003).

¹⁰⁶ See *DPP (Cth) v Keating* (n 10).

¹⁰⁷ *Ibid* 478 [46]–[47].

¹⁰⁸ 2025 Act (n 8) sch 3 item 2(5).

¹⁰⁹ ‘DSS HCA Submissions’ (n 38) [24], [60].

Federal Court majority's approach is upheld, the consequences of evidentiary gaps created by administrative omissions and the passage of time will be borne by recipients. If Chaplin succeeds, the implication is that the Commonwealth will be compelled to do what Kennett J found the statute already prescribes: establish its case before demanding repayment.¹¹⁰ The ruling will resonate as an important legal coda to recent evidentiary controversies in social security law — not least the 'omissions affair'¹¹¹ and, above all, *robodebt*.

¹¹⁰ *Chaplin (FCAFC)* (n 6) 95–6 [246]–[251] (Kennett J).

¹¹¹ See, eg, Christopher Rudge, 'Convict and Forget? The Failure to Remediate 15,000 Wrongful Criminal Convictions in Social Security' (2025) 48(2) *UNSW Law Journal* 502.