



NOTICE OF SYSTEMIC ISSUE NO 1 OF 2024

1 Pursuant to section 193(i) of the *Administrative Review Tribunal Act 2024* ('ART Act'), I hereby inform the Minister for Social Services ('Minister'), the Secretary of the Department of Social Services ('Secretary'), the Attorney-General and the Administrative Review Council ('ARC') of the following systemic issue related to the making of reviewable decisions that has been identified in the caseload of the Administrative Review Tribunal ('ART'):

Whether a respondent agency should apply the Tribunal's interpretation of a provision of a statute in a case (primary case) in subsequent cases involving the same provision, rather than continuing to apply its own preferred interpretation of the provision, unless and until the Tribunal's decision in the primary case is set aside or varied? ('Systemic Issue')

2 The Systemic Issue involves 6 subsidiary issues. They are whether the answer to the Systemic Issue is affected by:

(1) How the ART or its predecessor the Administrative Appeals Tribunal ('AAT') (collectively, 'the Tribunal') was constituted for the primary case?

Note: The ART may be constituted by:

- a general member,
- a senior member,
- a non-judicial deputy president,
- a judicial deputy president (who is a judge of the Federal Court or the Federal Circuit and Family Court (Division 1)),
- the President (who is a judge of the Federal Court),
- any combination of the preceding,
- the Guidance and Appeals Panel (GAP) undertaking a review under section 122(1) or 128(2)(a) of the ART Act (constituted by a panel of 2 or 3 members one of whom must be the President or a deputy president), or
- the GAP undertaking a review under section 128(2)(b) of the ART Act (constituted by 1, 2 or 3 members);

(2) whether the Tribunal, the agency and any other party to the primary case agreed to treat the primary case as a test case?

- (3) whether the Tribunal expressly found in the primary case that the relevant statute did not permit the agency to apply its preferred interpretation?
 - (4) whether no party to the primary case has appealed against the Tribunal's decision in the primary case?
 - (5) whether the agency has not appealed the Tribunal's decision in the primary case but has filed a notice of contention seeking to uphold the Tribunal's decision on the basis of the agency's preferred interpretation of the statutory provision?
 - (6) whether the Tribunal's decision in the primary case is the subject of a stay order?
- 3 I propose that the ARC inquire into and report on the Systemic Issue, including the subsidiary issues.

The circumstances in which the Systemic Issue has arisen

- 4 The Systemic Issue has been identified in a transparent and cooperative manner between the Tribunal and the Secretary. The Secretary and his staff have acted in good faith to try to find practical solutions to a large and complex issue. They have kept the Tribunal informed of the steps they have been taking and have engaged constructively with the Tribunal in the process.
- 5 As explained below, the Systemic Issue involves income apportionment. It does not involve income averaging of the type that was the subject of the Robodebt Royal Commission Report.
- 6 The Systemic Issue has arisen in the following circumstances.
 - (1) Many benefits paid under the *Social Security Act 1991* ('SS Act') are means-tested by reference to a social security recipient's assets and income. Accordingly, other income received by a social security recipient during a fortnight for which they are paid a social security benefit could affect the amount of the benefit to which they are entitled for that fortnight. If a social security recipient under-declares their income to the Secretary for a particular fortnight, an over-payment may result which may give rise to a debt payable by the social security recipient to the Commonwealth.
 - (2) The SS Act contains various income tests. For present purposes, until the SS Act was amended on 7 December 2020, the income test in point 1067G-H23 in section 1067G of the SS Act ('point H23') relevantly provided as follows:

... ordinary income is to be taken into account in the fortnight in which it is first earned, derived or received.
 - (3) It is not unusual for a social security recipient's pay periods for salary and other income (which are typically weekly or fortnightly) to not align with the instalment periods for their social security benefit (which are typically fortnightly). This lack of alignment causes difficulties in determining when a social security recipient's income is 'first earned, derived or received'. The apportionment of income by the Secretary in one instalment period rather than another instalment period may affect the amount of

the benefit to which a social security recipient is entitled. Depending on how the social security recipient declared their income, the lack of alignment could result in the Secretary forming the view that there was an overpayment and consequently a debt.

- (4) In many cases involving the raising by the Secretary of debts for historical periods, information may be available about when income was received by a social security recipient, but not when it was earned or derived. From about mid-2022, the Secretary has interpreted point H23 and similar provisions to have the following meaning:

a person's ordinary income must be taken into account in the fortnight in which it can be established on the evidence that the income was first earned, derived or received. Accordingly, if there is evidence that a person has earned, derived and received income but the evidence permits only a finding as to the fortnight in which it was received, the income must be taken into account in the fortnight of receipt. That is so even if it is known that the income was not earned in the fortnight of receipt.¹

- (5) Many social security recipients have been affected by the apportionment of income resulting from the application of the Secretary's preferred interpretation of point H23 in respect of social security benefits preceding 7 December 2020. The impact of income apportionment has been of such a scale that the Commonwealth Ombudsman has published two reports on it ([Document 1](#) and [Document 2](#)).²
- (6) Many of the affected social security recipients have sought review by the Tribunal of the raising of a debt against them by the Secretary based on the Secretary's preferred interpretation of point H23. The Tribunal on first review has made a number of decisions regarding the application of point H23. Some of the decisions have supported the Secretary's preferred interpretation, while others have not. Some social security recipients who have disagreed with the Tribunal's first review decision have sought a second review by the Tribunal. The Secretary has also sought a second review of some of the Tribunal's first review decisions.
- (7) One of the cases in which the Secretary sought a second review involved Matthew Chaplin, who had received youth allowance. That case involved the following decisions:
- (a) a decision by an authorised review officer dated 28 April 2020 that Mr Chaplin owed a debt of \$911.98 ('ARO decision'); and

¹ This statement of the Secretary's interpretation is taken from paragraph 93(b) of the AAT's decision in [Secretary, Department of Social Services and FTXB \[2024\] AATA 3021](#) ('FTXB decision').

² Commonwealth Ombudsman, '[Lessons in lawfulness](#)' (Report, August 2023); '[Accountability In Action: identifying, owning and fixing errors](#)' (Report, December 2023). In a postscript to a further report '[Learning from merits review: best practice principles for agency engagement with merits review](#)' (December 2024), the Commonwealth Ombudsman stated that his office will revisit this issue in a separate publication.

- (b) a decision by the AAT at first review dated 8 January 2024 setting aside the ARO decision and remitting the matter to Centrelink for reconsideration ('AAT first review decision').
- (8) The Secretary disagreed with the AAT first review decision and, as I have mentioned, he sought a second review. As the legal issues in the second review proceeding involving Mr Chaplin were common to a large number of other cases, it was agreed by Mr Chaplin (who was assisted by pro bono lawyers), the Secretary and the AAT to treat that case as a test case.
- (9) On 20 March 2024, a deputy president of the AAT made an order in the Secretary's second review proceeding.³ Paragraph 5 of that order, which was made under section 35 of the *Administrative Appeals Tribunal Act 1975* ('AAT Act') assigned the pseudonym 'FTXB' to Mr Chaplin. Paragraph 6 of that order stated: 'Pursuant to s 41(2) of the [AAT] Act, the operation of the first review decision dated 8 January 2024 ... is stayed until the final determination of the Tribunal on the application under review, or until further order of the Tribunal.' On 16 December 2024, with the consent of Mr Chaplin and the Secretary, I made an order vacating paragraph 5 of the order dated 20 March 2024.
- (10) Because the Chaplin/FTXB case was designated as a test case, the AAT was constituted by a panel of three, comprising the President and two senior members.
- (11) At the hearing of the Chaplin/FTXB case, Mr Chaplin submitted that the AAT should adopt the following interpretation of point H23:
- a person's ordinary income can only be taken into account in the fortnight in which it was first earned or first derived or first received. Accordingly, if income is first earned and later derived and received but the evidence does not permit a finding as to the fortnight in which it was earned, the income cannot be taken into account even if the evidence permits a finding as to the fortnight in which it was derived or received.⁴
- (12) At the hearing of the Chaplin/FTXB case, in his further written submissions dated 4 July 2024, the Secretary stated the following: '[R]egardless of the conclusion reached as to the proper construction of the word "earned", [the AAT] ought to resolve the issue of whether the Secretary is able to assess ordinary income in the fortnight in which it is first received if there is insufficient evidence to establish when ordinary income was first "earned".'
- (13) Prior to the conclusion of the hearing of the Chaplin/FTXB case, the Secretary recalculated the debt said to be owed by Mr Chaplin in accordance with the Secretary's preferred interpretation, in the amount of \$806.16.

³ The deputy president had made an earlier order which erroneously assigned the pseudonym 'FTXB' to the Secretary (the applicant). This order was superseded by the order made on 20 March 2024. The reference to '18 March 2024' in footnotes 6 and 7 of the *FTXB decision* should have been to '20 March 2024', which is the date of the operative order.

⁴ This statement of Mr Chaplin's interpretation is taken from paragraph 93(a) of the *FTXB decision* [2024] AATA 3021.

- (14) The AAT published its decision in the Chaplin/FTXB case on 28 August 2024 ([Document 3](#)). It rejected both the Secretary's and Mr Chaplin's preferred interpretations of point H23 and adopted the following interpretation:

[T]he analysis required by point H23 in respect of each income amount of a person may be framed as follows:

In which of the person's instalment periods did they first:

- (a) become legally entitled to the income amount, where the income amount is of a kind that can be described as being earned; or
 - (b) become legally entitled to the income amount, where the income amount is not of a kind that can be described as being earned but can be described as being derived; or
 - (c) receive the income amount?⁵
- (15) At paragraph 160 of the *FTXB decision*, the AAT stated that the SS Act 'does not permit the Secretary to apply his preferred construction of point H23.'
- (16) Applying its interpretation of point H23, the AAT concluded that Mr Chaplin owed a debt to the Commonwealth of \$806.16. That is, the Secretary's preferred interpretation and the AAT's interpretation resulted in the same debt amount.
- (17) On 24 September 2024, Mr Chaplin appealed against the AAT's decision to the Full Court of the Federal Court of Australia ([Document 4](#)). On 15 October 2024, the Secretary filed a notice of contention contending that the AAT's decision should be affirmed on the basis of the Secretary's preferred interpretation of point H23 ([Document 5](#)).
- (18) On 23 October 2024, the Secretary issued a public statement ([Document 6](#)) in which he explained how he was managing outstanding cases involving income apportionment pending the hearing and determination of the appeal to the Full Court against the *FTXB decision*. He stated that he was pausing further decision-making on outstanding cases except where individuals request that a decision be made. He explained his approach as follows:

... I am aware that there are individuals, who for personal and related compelling reasons, require resolution of a debt potentially affected by income apportionment. Not having access to an internal review is preventing these people from seeking further external review and/or addressing their concerns. Accordingly, if an individual in this situation contacts Services Australia and asks that their review proceed, their internal review or explanation of decision will be progressed in accordance with the Department's interpretation of the law. Individuals will be given information about the Full Federal Court appeal and their review and

⁵ This statement of the AAT's interpretation is taken from paragraph 150 of the *FTXB decision* [2024] AATA 3021.

appeal rights will be explained. They will also be made aware that their debt may change in the future, should a Court determine a different interpretation of the law. Services Australia will also progress any reviews or explanation of decisions it is aware of where an individual has already requested it be progressed as part of the recommencement activities in April this year.

- (19) On 6 November 2024, I wrote to the Secretary informing him that I was considering whether his public statement – particularly his stated intention to progress cases ‘in accordance with the Department’s interpretation of the law’ – raised a systemic issue. I asked the Secretary to provide certain information to assist me with my consideration. **(Document 7)**
- (20) The Secretary provided the information I requested by letter dated 27 November 2024. In that letter, the Secretary agreed that the impact on the Tribunal’s caseload of cases involving the issue of income apportionment is a matter of systemic importance. **(Document 8)**
- (21) Having considered the Secretary’s letter dated 27 November 2024, I have formed the view that I should perform the function set out in section 193(i) of the ART Act in relation to the Systemic Issue.

Observations

7 I make the following observations that may be of assistance to the ARC:

- (1) An order under section 41(2) of the AAT Act has the effect of staying or otherwise affecting the operation or implementation of a decision. It prevents the decision from taking legal effect or being enforced. Ordinarily, a stay order is not described in terms of having any direct effect on the reasons for the decision, that is, that the reasons are stayed.
- (2) In the present case, the stay order dated 20 March 2024 was expressed to stay the operation of the AAT first review decision rather than the underlying decision made by the Secretary (the ARO decision). This may have a bearing on whether section 43(5C) of the AAT Act has the effect of staying the *FTXB decision* until the hearing and determination of the appeal to the Full Court.

Relevant documents

8 Listed below are documents that are relevant to a consideration of the Systemic Issue. They are either attached or hyperlinked.

- (1) Linked document – Commonwealth Ombudsman, ‘[Lessons in lawfulness](#)’ (Report, August 2023)
- (2) Linked document – Commonwealth Ombudsman, ‘[Accountability In Action: identifying, owning and fixing errors](#)’ (Report, December 2023)

- (3) Linked document – [Secretary, Department of Social Services and FTXB \[2024\] AATA 3021](#)
- (4) Attached document – Mr Chaplin’s Notice of Appeal to Federal Court of Australia (without the *FTXB decision*)
- (5) Attached document – Secretary’s Notice of Contention in Federal Court appeal
- (6) Linked document – Secretary’s [public statement](#) dated 23 October 2024
- (7) Attached document – President’s letter to Secretary dated 6 November 2024 (with some redactions)
- (8) Attached document – Secretary’s letter to President dated 27 November 2024 (with some redactions)

Dated: 16 December 2024

Justice Emilios Kyrou