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Australian Government
Department of Social Services

Professor Margaret Allars SC
Chair
Administrative Review Council

By email: s 22

Dear Professor Allars

**Notice of Systemic Issue No 1 of 2024 – Response under section 294B of
Administrative Review Tribunal Act 2024 (Cth)**

I write to you in your capacity as Chair of the Administrative Review Council (**Council**) and in relation to the Notice of Systemic Issue No 1 of 2024 (**Notice**) issued by the Honourable Justice Kyrou AO, President of the Administrative Review Tribunal (**Tribunal**), on 16 December 2024 in accordance with his Honour's functions under section 193(i) of the *Administrative Review Tribunal Act 2024 (Cth)* (**ART Act**). The President has notified the Council of the following systemic issue that has been identified in the caseload of the Tribunal (**Systemic Issue**):

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?

As the President outlined in the Notice, the Systemic Issue has arisen in relation to the decision of the Tribunal in *Secretary, Department of Social Services and FTXB [2024] AATA 3021 (FTXB)* as well as issues relating to 'income apportionment', which is a phrase used to refer to a historical method of assessing a person's employment income in ascertaining their entitlement to social security payments. My understanding of the expression 'income apportionment' continues to be as submitted on my behalf to the Tribunal in *FTXB*, and to the Full Court of the Federal Court in the appeal from *FTXB*.

In accordance with my obligation under section 294B of the ART Act, I write to inform the Council of the actions that I and my department have taken and propose to take in relation to the Systemic Issue. In doing so, I also offer some observations on the Systemic Issue as well as the six subsidiary issues the President has identified in the Notice.

I otherwise note that on 27 November 2024, the former Secretary (Mr Ray Griggs AO CSC) wrote to the President in response to his Honour's letter dated 6 November 2024 requesting information that would assist him in considering whether a systemic issue had arisen (**November response**). The position outlined in the November response reflects the position my department and I have continued to take. I do not propose to repeat the content of the November response in this letter but respectfully invite consideration of it by the Council.

OFFICIAL: Sensitive, Legal privilegeAction that has been taken

The November response provides details of the actions that the department has taken to address the *FTXB* decision.

First, following the publication of the *FTXB* decision, the former Secretary and the department gave the decision careful and extensive consideration. A view was formed, which I maintain, that the Tribunal's reasoning in *FTXB* was incorrect. In circumstances where the Tribunal's decision in *FTXB* upheld the debt amount pressed for by the Secretary (albeit based on reasoning the department considers to be incorrect), it was appropriate for an appeal to be brought by the respondent in the review (Mr Chaplin) and not the Secretary. Instead, the former Secretary caused for a Notice of Contention to be filed in the appeal advocating for the construction of section 1067G-H23 advanced before the Tribunal, and I continue to press that Notice of Contention. Given the significance of the issue in this litigation, an agreement was reached with Mr Chaplin to fund his reasonable legal costs of the appeal, regardless of the result.

Secondly, the department and Services Australia (**Agency**) have taken steps to implement a fair and consistent approach to affected cases currently with the Agency, and the approach has been openly communicated to the public. The Agency has continued to pause debt raising activities and internal reviews relating to debts potentially affected by income apportionment pending the Full Court's determination of the appeal. It is only in circumstances where an individual has nonetheless requested that their matter be progressed, after being informed of the ongoing Full Federal Court proceeding and the potential for their debt amount to change as a result of any decision in that matter, that the Agency has proceeded on the basis of my current understanding of the law. By 9 March 2025, the Agency had received fifty such requests. Sixteen of those requests have been finalised by my delegates. This is out of 15,373 formal reviews and 6,843 explanation of decision requests currently paused due to the issue. As further addressed below, this approach has been informed by my predecessor's, my and my department's careful assessment of the appropriate steps available and required to be taken to minimise adverse impacts on individuals, the administration of the social security and family assistance schemes (hereafter, **Scheme**) and public resources while the Full Court of the Federal Court considers and rules on the legal issues.

Thirdly, I have maintained a consistent position on the correct law in all social security reviews currently before the Tribunal. As such, I have continued to advance the position that the reasoning in *FTXB* was incorrect. Where the legal issue had an impact on the debt amounts, I have sought to persuade the Tribunal to determine the reviews after judgment has been delivered in the Full Court appeal so that the Tribunal can make its decisions in accordance with what will be binding legal authority. Where this has not occurred, all Tribunal first review decisions that have applied the reasoning in *FTXB* are either being implemented, based on the individual circumstances of the decision (for example, a decision to waive a debt under special circumstances or the debt quantum is the same regardless of the calculation method relied on), or appealed to ART second review.

Fourthly, I have otherwise sought to manage the caseload of affected matters currently before the Tribunal in a transparent and fair way, and in a manner that minimises any adverse impact on affected individuals. This is set out in further detail in the November response.

Fifthly, the actions that my department and I have taken have proceeded on the basis that the *FTXB* decision is subject to a stay due to the operation of section 43(5C) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), as it applied prior to its repeal (**subsidiary issue 6**). I note the observations made by the President at paragraph 7 of the

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Notice. I respectfully agree with the President's observation that a stay under section 41(2) of the AAT Act operates to prevent the operation of the *decision* rather than the *reasons* for the decision. However, it is my understanding that the reasons themselves do not have operative, binding force.

In relation to the President's observation that the stay order in question was expressed to stay the AAT's first review decision rather than the underlying decision made by my delegate (an Authorised Review Officer from the Agency), to assist the Council I bring to its attention section 180 of the Administration Act (as it existed on 20 March 2024). Item 3 of the table contained in that section modified section 41 of the AAT Act such that references to "the decision to which the relevant proceeding relates" were references to both the decision made by the AAT on first review and the original decision. In my view, the stay order made on 20 March 2024 in the *FTXB* proceedings operated in respect of both the AAT first review decision and the decision of the Authorised Review Officer.

Proposed further action

As I have noted above, the *FTXB* appeal was heard by the Full Court on 6 March 2025. The Court has reserved its judgment.

Pending judicial resolution of the legal issues, my department and I intend to maintain the current pause on the majority of debt raising, recovery and internal review activity for matters that may be affected by income apportionment. My department and I intend to continue to be transparent with the Tribunal about the progression of the *FTXB* appeal and the steps that are being taken in affected matters. In affected matters currently before the Tribunal, consistently with my obligations as a model litigant, I will endeavour to assist the Tribunal and will instruct my legal representatives accordingly. This will include consideration, when appropriate based on the facts of each particular case, of attempting to resolve matters through alternative dispute resolution to minimise the impact on affected individuals. I will also continue to seek to limit appeals (including applications to the Tribunal for second merits review) when possible, for example in cases where the application of *FTXB* results in the same debt amount as my preferred construction.

Additional observations on the Systemic Issue

As noted above, the former Secretary's decision, which I have maintained, to direct the Agency to take the approach of progressing matters in line with the construction of section 1067G-H23 that was rejected in the *FTXB* decision was made after careful consideration of the *FTXB* decision, noting my obligation under s 8(f) of the *Social Security (Administration) Act 1999* (Cth) (**Administration Act**) to have due regard to relevant decisions of the Tribunal. My understanding is that while the *FTXB* decision (unless it is set aside on appeal) is legally binding on me in respect of that individual case, I am not legally bound to apply in other cases the interpretation of section 1067G-H23 (and other similar provisions in social security law) applied by the Tribunal in *FTXB*. While the Tribunal is independent from Government, which is essential for its important role in the monitoring and review of administrative decision-making, it nonetheless forms part of the Executive branch of Government.¹ It is the "*judicature that declares and enforces the law which determines the limits of the power conferred by statute upon administrative decision-makers.*"² As the Council said in a 1995 report:³

¹ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* (2022) 289 FCR 72 at [20]-[22] (Rares J, with whom Bromwich and Goodman JJ agreed); *Re Burchill and Department of Industrial Relations* (1991) 23 ALD 97 at 109 (Deputy President Forrest).

² *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 at [43].

³ Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) at [6.36].

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Where an agency's decision is varied or set aside by a review tribunal, the agency must either accept the tribunal's decision and implement it in the particular case, or if they wish the particular decision to be altered, seek further review of or appeal against the decision (as available). Review tribunal decisions do not create binding precedent. As a result, agencies need not follow them in other cases and there is scope for differences to emerge between an agency's interpretation of the legislation or policies according to which it operates and a review tribunal's interpretation of the same legislation and policy....

In its 1995 report, the Council also recommended that when Government agencies consider a review tribunal decision to be incorrect, they should:⁴

- *amend their policy and guidelines, or seek to amend the law, to clarify the policy intention;*
- *seek further review of the decision or appeal against it to a court; or*
- *make a public statement of their position in relation to the review tribunal decision.*

The approach taken by the former Secretary, which I have maintained, is consistent with the above recommendations. This includes making a public statement confirming the position in relation to the *FTXB* decision and taking steps to contest the legal reasoning I disagree with in the Federal Court.

I acknowledge that the *FTXB* proceedings were identified by the Tribunal as a test case and in light of the issues involving income apportionment and the construction of section 1067G-H23 affecting a number of matters before the Tribunal, and that the parties proceeded on that basis (**subsidiary issue 2**). I also acknowledge that the Tribunal in *FTXB* was constituted by the President (who is a judge of the Federal Court) and two Senior Members, reflecting the fact that it was a test case intended to provide broader guidance to administrative decision-makers (**subsidiary issue 1**). The actions taken by my department and the Agency – including the decision to pause debt raising, recovery and review activities – have been done in light of those factors.

I acknowledge that the Tribunal in *FTXB* expressly found that my interpretation of section 1067G-H23 was not open (**subsidiary issue 3**). However, as outlined above, the decision did not create a binding legal precedent that I am required to apply in cases other than Mr Chaplin's. In circumstances where the Full Federal Court will be imminently considering the correct construction of section 1067G-H23 and will provide binding judicial authority, I do not consider it would be a justifiable use of Commonwealth resources to require the Agency to change its processes to apply an interpretation of the law that may not be held to be correct.

Adopting the interpretation of the statute applied in *FTXB* would have a significant impact on the Scheme as a whole, including on the Agency's customers. According to the Agency's *Annual Report 2023-24*,⁵ 8.5 million customers received Centrelink benefits in the period of 1 July 2023 to 30 June 2024. The Tribunal's decision in *FTXB*, if applied, would impact a significant number of current and former Agency customers. Changing the Agency's processes to implement the construction of the legislation preferred in *FTXB*, and potentially reversing those changes in the event the Full Federal Court determines a different interpretation of the law, would be highly disruptive to individuals, the Scheme, and to the Agency's operations. It would also entail very significant, and potentially avoidable, cost to the taxpayer.

⁴ Ibid at [6.41].

⁵ Accessible at <https://www.servicesaustralia.gov.au/annual-report-2023-24?context=22>.

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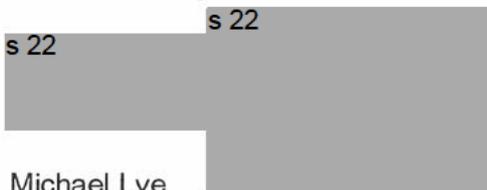
In this respect, I also note the Agency has performed provisional recalculations of a number of debts applying the decision in *FTXB* for the purposes of applications currently before the Tribunal. Those recalculations have demonstrated that applying *FTXB* can either reduce the size of a debt, make no difference to a debt, or increase the size of a debt. In cases where it increases the size of a debt, applying *FTXB* would result in the Commonwealth seeking to recover a debt that I consider to be higher than what the person in fact owes at law. In those circumstances, I have appealed those decisions. There are a small number of impacted cases where the debt under the *FTXB* method is higher than the General Guidance.

I wish to conclude by recording that throughout, my department, the Agency, the former Secretary and I have treated the Tribunal's decision in *FTXB* with utmost seriousness and attention. The steps taken in response to that decision reflect my and my department's understanding of the law, and a painstaking effort to manage the impact of the decision (in the face of legal uncertainty as to its correctness) in a manner that is fair, transparent, and minimises adverse impacts of the uncertainty on impacted individuals and public resources.

Please do not hesitate to contact me if I can be of any further assistance to the Council.

Yours sincerely

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Michael Lye
Secretary, Department of Social Services

13 March 2025