



NOTICE OF SYSTEMIC ISSUE NO 1 OF 2025

1. Pursuant to section 193(i) of the *Administrative Review Tribunal Act 2024* (ART Act), I hereby inform the Treasurer, the Commissioner of Taxation (Commissioner) 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) (Systemic Issue):

Financial hardship (which may sometimes be severe) is caused to recipients of family assistance benefits under the A New Tax System (Family Assistance) (Administration) Act 1999 by the Commissioner of Taxation (Commissioner) offsetting under section 87 of that Act income tax refunds due to those recipients against debts claimed from the recipients in respect of alleged overpayments of such benefits, in circumstances where:

- (a) many of the recipients are vulnerable individuals, some of whom rely upon the expected income tax refund to meet basic life necessities;*
 - (b) the offsetting process is automated, without any consideration being given to the circumstances of the recipient, including whether an approved repayment arrangement or repayment pause is in place between the recipient and Services Australia acting on behalf of the Secretary of the Department of Social Services (Secretary);*
 - (c) the failure to take the recipient's circumstances into account may constitute a jurisdictional error which enlivens the power of the Commissioner to reverse the offset;*
 - (d) the Commissioner's notice of assessment and statement of account which refer to the offset do not advise the recipient of any avenues of review if the recipient is aggrieved by the offset, including the Commissioner's power to reverse the offset referred to in (c); and*
 - (e) both the Secretary and the Commissioner contend that the offsetting of an income tax refund does not give rise to a decision either of the Secretary or the Commissioner, which is reviewable by the Administrative Review Tribunal.*
2. I propose that the ARC inquire into and report on the Systemic Issue.
 3. At paragraphs 20 to 24 below, I explain why I have concluded that the Systemic Issue falls within paragraph (i) of section 193 of the ART Act or, alternatively, under paragraphs (e) and (l) of that section.

Background to the Systemic Issue

4. Section 82(1)(g) of the *A New Tax System (Family Assistance) (Administration) Act 1999* (FAA Act) provides that one of the means by which a debt owed by a person is recoverable by the Commonwealth is 'the application of an income tax refund owed to the person'. A family assistance debt falls within section 82.
5. Section 87 of the FAA Act provides that, where section 82 applies to a debt, the Commissioner may apply the whole or a part of a refund to the debt.

6. Where the Secretary of the Department of Social Services (Secretary) is satisfied that recovery of a debt claimed against a recipient of a family assistance benefit will cause severe financial hardship, the Secretary may enter into an agreement with the recipient under certain provisions of the FAA Act (including section 91(1)) for the repayment of the debt by instalments or for repayment to be paused for a certain period.
7. Services Australia and the Australian Taxation Office (ATO) exchange data concerning family assistance benefit recipients, including the existence of family assistance debts.
8. An automated process is in place by which the ATO offsets the whole or a part of an income tax refund to which a recipient is entitled in order to reduce or discharge a family assistance debt. The automated process does not include consideration of any personal circumstances of a recipient, including whether a repayment plan or a repayment pause is in place.
9. The failure by the Commissioner to take into account the personal circumstances of a family assistance benefit recipient when exercising the power under section 87 of the FAA Act may constitute a jurisdictional error which may enable the Commissioner to re-exercise the discretion in that section pursuant to the principles in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 (*Bhardwaj*).
10. Where the Commissioner has offset an income tax refund to which a family assistance benefit recipient is entitled against a family assistance debt, the notice of assessment and statement of account that the ATO sends to the recipient do not contain any information about review rights in respect of the offset. The notice does not refer to the power of the Commissioner to re-exercise the discretion in section 87 of the FAA Act in accordance with the principles in *Bhardwaj*. However, on 25 July 2025, information was published on the ATO's website about how a person can apply for a fresh refund offset decision and the judicial review avenues available to challenge a refund offset decision in relation to family assistance debts.
11. The Commissioner and the Secretary have initiated discussions about potential changes to the process by which income tax refunds due to family assistance benefit recipients are offset, to enable the Commissioner to take into account some personal circumstances of recipients.
12. Multiple individuals whose income tax refund has been offset by the Commissioner have applied to the ART and its predecessor (the Administrative Appeals Tribunal) for review of the offset. The respondent is usually the Secretary. In their applications for review, many applicants have stated that they are struggling to meet basic family needs, including school and medical expenses, and were relying on receiving the income tax refund to meet some of those needs. They state that the non-receipt of the income tax refund has caused them financial hardship. The financial hardship described by some applicants appears to be severe.
13. In cases before the ART, the Secretary has contended that the ART does not have jurisdiction because the offset decision was made by the Commissioner rather than the Secretary and therefore the Secretary did not make any reviewable decision.
14. In some cases where the Secretary has made the abovementioned contention, the ART has transferred the application for review from the social security jurisdictional area to the taxation and business jurisdictional area. In such cases, the Commissioner has contended that the offset decision is not a reviewable decision because no Act or instrument made under an Act has designated it as such.

15. In some cases before the ART, the Commissioner has reversed the offsetting of an income tax refund and has paid it to the applicant, resulting in the applicant withdrawing their application for review.
16. The circumstances described above have occurred in multiple cases that have been the subject of an application for review to the ART. Accordingly, the situation is systemic in the sense that it is not isolated to a small number of cases. The magnitude of the systemic issue is considerable when one has regard to the reality that not all individuals who are affected by an offset decision seek review by the ART.
17. If the contentions of the Commissioner and the Secretary are correct, a large number of vulnerable members of the community who experience hardship from an offset decision will be deprived of the opportunity to seek ART merits review which is quicker and cheaper than the judicial review procedures that may be available. That would constitute a significant gap in Australia's system of merits review in an area of administrative decision-making where needy members of the community require protection against potential injustice.

Correspondence between the President and the Commissioner

18. On 22 August 2025, I wrote to the Commissioner to inform him that I was considering raising the Systemic Issue, and to invite his comments. My letter is attached.
19. A Second Commissioner of Taxation wrote to me on 12 September 2025 in response to my letter to the Commissioner. In her letter, which is attached, the Second Commissioner:
 - (a) explained the processes associated with the offsetting of income tax refunds against family assistance debts;
 - (b) advised that there were approximately 156,000 and 185,000 offsetting transactions in the 2024-25 and 2023-24 financial years, respectively;
 - (c) explained the legislative history associated with merits review of offsetting decisions;
 - (d) acknowledged that there are limitations inherent in the current data exchange between Services Australia and the ATO, and that the shortcomings associated with the current offsetting arrangements are significant in terms of law conformance, access to justice and for maintaining community confidence in the system, and require urgent attention; and
 - (e) advised that, since May 2024, the ATO has worked with its partner agencies and has been taking active steps to address the relevant issues, and that the ATO is committed to continuing to address the issues.

Is section 193(i) of the ART Act engaged?

20. Section 193(i) of the ART Act provides that the President has the function of informing relevant Ministers, relevant Commonwealth entities and the ARC 'of any systemic issues related to the making of reviewable decisions that have been identified in the caseload of the [ART]'. As stated in subparagraph (e) of the Systemic Issue in paragraph 1 above, the Commissioner and the Secretary contend that the offsetting of an income tax refund does not give rise to a reviewable decision. This raises the question of whether the Systemic Issue is 'related to the making of reviewable decisions that have been identified in the caseload of the [ART]'.

21. In my opinion, it is arguable that the Systemic Issue is related to the making of reviewable decisions identified in the caseload of the ART because (as explained above) the issue has been identified in the course of consideration of applications for review before the ART, including applications for review of debts claimed by the Secretary against recipients of family assistance benefits.
22. The phrase 'related to' is of wide import. Given the important public interest that the inclusion of the President's function in section 193(i) of the ART Act is intended to serve - which has been informed by the failures in administrative decision-making identified in the Robodebt Royal Commission Report - I am of the view that section 193(i) should be given a broad construction. My view is reinforced by the fact that section 236(4)(e) of the ART Act refers to 'systemic issues arising in ... the jurisdictional areas' without requiring any relationship to the making of reviewable decisions. See also paragraph 36 of the Revised Explanatory Memorandum to the *Administrative Review Tribunal Bill 2024*.
23. However, even if section 193(i) of the ART Act does not authorise the raising of the Systemic Issue, paragraphs (e) and (l) of that section do so. Those paragraphs set out as functions of the President 'to ensure that the [ART] operates efficiently and effectively and continually pursues the objective in section 9' and 'to do anything incidental or conducive to the performance of any of the above functions', respectively.
24. The ART's objective in section 9 of the ART Act includes the improvement of the transparency and quality of government decision-making (section 9(d)) and the promotion of public trust and confidence in the ART (section 9(e)). In my opinion, having identified the important gap described in paragraph 17 above, if I as the President of the ART were unable to raise the Systemic Issue with the relevant Minister, the relevant Commonwealth entity and the ARC:
 - (a) the transparency and quality of government decision-making would not be improved (see section 9(d)); and
 - (b) public trust and confidence in the ART would not be promoted (see section 9(e)).
25. I note that the Second Commissioner's letter dated 12 September 2025 did not contend that the Systemic Issue did not fall within section 193(i) of the Act.

Dated: 16 September 2025

Justice Emilios Kyrrou