Department of Families, Housing, Community Services and Indigenous Affairs and Centrelink

REVIEW RIGHTS FOR INCOME MANAGED PEOPLE IN THE NORTHERN TERRITORY

August 2010

Report by the Acting Commonwealth Ombudsman,
Ron Brent, under the *Ombudsman Act 1976*

REPORT NO. 10|2010

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PART 1—BACKGROUND

The complaint

1.1 Mr and Mrs A have lived in a remote Indigenous community in the Northern Territory (NT) for many years. In 2007, the Australian Government introduced Income Management (IM) into some NT communities. Later that year, the community in which Mr and Mrs A lived was declared to be a prescribed community[1] as part of the Australian Government's Northern Territory Emergency Response (NTER),[2] and Mr and Mrs A became subject to IM measures. This means that Mr and Mrs A are able to access only half of their income support payments as cash, while the remaining 50% is managed by Centrelink.

1.2 Mr and Mrs A repeatedly approached the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and Centrelink to seek exemptions from IM. In August 2009, after obtaining assistance from a community legal service, Mr and Mrs A were notified by a Centrelink Authorised Review Officer (ARO) that they had both been refused exemptions.

1.3 In keeping with internal instructions, the ARO advised Mr and Mrs A that they each had a right to have the decision reviewed by the Social Security Appeals Tribunal (SSAT). Mr and Mrs A subsequently applied to the SSAT for review and attended a SSAT hearing on 17 December 2009. On 11 January 2010, contrary to the advice provided by Centrelink, the SSAT decided that it did not have jurisdiction to review Mr and Mrs A's cases.

1.4 The question of whether Mr and Mrs A should be exempted from IM is not the subject of this report. Rather, this report concerns the status of Mr and Mrs A's review rights at the time they applied for review in December 2009, and by extension, the review rights of all people who were subject to IM in the NT under the rules in place until 1 July 2010 when the legislation was amended.[3]

Income management

1.5 IM was introduced following amendments to the *Social Security (Administration) Act 1999* (Administration Act) and related legislation. It is part of a range of measures forming the NTER. FaHCSIA is responsible for IM policy, while Centrelink is responsible for IM service delivery.

1.6 The NT IM measures apply in a variety of circumstances. Originally they most broadly applied to any person who was in receipt of one of a number of income support payments and had been physically present overnight in a prescribed area any time from 21 June 2007.[4] In those circumstances, 50% of a person's income support and family assistance payments were quarantined by Centrelink and allocated to particular expenses, such as rent, utilities and food. IM could not then, and still cannot, be used to purchase prohibited goods such as alcohol, tobacco or

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[1] 'Prescribed communities' are the 73 Indigenous communities specifically covered by the measures set out in the *Northern Territory National Emergency Response Act 2007*.

[2] The NTER was announced by the Australian Government on 21 June 2007 and legislation in support of it was passed in August 2007.

[3] *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010*.

[4] Section 123UB of the Administration Act as in force prior to 1 July 2010.

pornography. The intention is to ensure that the priority needs of people, particularly children, are met by the proper expenditure of income support money.

1.7 The legislation that applied to Mr and Mrs A was amended with effect from 1 July 2010. By that time, approximately 17,000 people were subject to IM in the NT.[5] Following the amendments, IM is now being rolled out across the NT. It is no longer applied to a person solely on the basis of their geographical location. The original provisions have been preserved for a period of 12 months while the new IM rules are implemented.[6]

1.8 For the purposes of this report, the IM rules that operated from 2007 until the amendments commenced on 1 July 2010 will be referred to as the 'original provisions'. The amended IM rules that commenced on 1 July 2010 will be referred to as the 'new provisions'.

1.9 The original provisions included several limited grounds upon which individuals and classes of people could be exempted from IM by the Commonwealth Indigenous Affairs Minister or by a Centrelink delegate.[7] If a person wished to be exempted from IM, they could either write directly to the Minister or ask Centrelink to make an exemption decision. If a Centrelink officer decided not to exempt a person from IM, the person affected could ask to have the decision reviewed by a Centrelink ARO. If the ARO decided not to exempt the person from IM, the person was informed that they could seek an external review of the decision by the SSAT. Technically, if a person's SSAT review was unsuccessful, that person then had a right to have the SSAT's decision reviewed by the Administrative Appeals Tribunal (AAT). So long as the SSAT is of the view that it does not have jurisdiction to review most IM exemption decisions made between June 2009 and July 2010, it appears that applicants are also unable to seek review by the AAT.[8]

1.10 The new IM provisions that operate from 1 July 2010 also include internal and external review rights for people affected by IM. The new provisions have clarified the availability of review rights for IM decisions made after 1 July 2010 and do not appear to be affected by the same problem at the SSAT level. Accordingly, this report only considers the review rights of those people who were subject to the original IM provisions prior to 1 July 2010.

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5 See www.fahcsia.gov.au/sa/families/progserv/welfarereform/Pages/nim_qanda.aspx

6 Transitional provisions—see ss 22, 23 and 24 of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010*.

7 Section 123UG of the Administration Act as in force prior to 1 July 2010.

8 Section 181 of the Administration Act provides that the AAT may only review a decision that has been reviewed by the SSAT.

PART 2—INCOME MANAGEMENT REVIEW RIGHTS

Amendments to the legislation

2.1 It is usual for social security decisions made by a delegate to be subject to external review by the SSAT. However, the legislative amendments that introduced IM also included s 144(ka) of the Administration Act, which provides that the SSAT cannot review a decision made under Part 3B to apply IM to a person in the NT or exempt them from IM.

2.2 In June 2008, the NTER Review Board was commissioned to review the NTER measures. It reported in October 2008 and made numerous recommendations, including that 'all welfare recipients [are] to have access to external merits review'.[9]

2.3 In response, the Australian Government initiated amending legislation in March 2009 designed to:

> ensure people subject to income management have access to the full range of appeal rights, including through the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.[10]

2.4 This development received wide recognition and was the subject of submissions to, and a report by, the Senate Standing Committee on Community Affairs.[11] The report reveals that there was a general impression that review rights would be available to all people who are subject to IM. This view was reflected in an evaluation of IM in the NT, published in August 2009 (after the 2009 amendments took effect). The evaluation report stated that:

> New legislation … reinstated the rights of review for individuals under income management. Customers can now appeal through the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.[12]

2.5 The 2009 amending legislation included a saving provision[13] which provides that the right to seek review by the SSAT, and then the AAT, applies only to a decision of an officer that has been made on or after 24 June 2009.[14]

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[9] Report of the NTER Review Board, October 2008, page 12.

[10] Australian Government and Northern Territory Government Response to the Report of the NTER Review Board, page 3. Similar statements are contained in other public material. See for example FaHCSIA's *Closing the Gap in the Northern Territory: January 2009 to June 2009 Whole of Government Monitoring Report,* Part One, Overview of Measures, pages 15 and 34; FaHCSIA's *Income management in the Northern Territory* fact sheet at www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/welfare_reform_employment/Pages/income_management_fs.aspx.

[11] The Senate Standing Committee on Community Affairs, Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2009, May 2009.

[12] Australian Institute of Health and Welfare, *The Evaluation of income management in the Northern* Territory, August 2009, page 5, www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/income_management_evaluation.aspx.gov.au/sa/indigenous/pubs/nter_reports/Pages/income_management_evaluation.aspx.

[13] A saving provision 'saves' from the application of legislation certain conduct or legal relationships that existed on or before the date of effect of that legislation.

2.6 Mr and Mrs A each received an August 2009 decision from an ARO refusing their application for exemption from IM. However, when the SSAT considered their applications for review, it decided that the saving provision limited its jurisdiction to an 'original decision taken on or after 24 June 2009 to apply the income management regime to a person's affected payment'. That is, the SSAT decided that it could not review the ARO's decision not to exempt Mr and Mrs A from IM because the decision to apply IM to Mr and Mrs A was made before 24 June 2009.

2.7 In reaching this view, the SSAT had regard to the legislation, Parliament's intention as evidenced by the explanatory memorandum, the Minister's second reading speech and debate recorded in Hansard. The second reading speech explained that:

> This measure will ensure people subject to the Northern Territory income management regime have access to the Social Security Appeals Tribunal and Administrative Appeals Tribunal mechanisms afforded to other Australians in relation to their income support and family payments.[15]

2.8 However, the debate raised concerns that the amendments would have limited application. For example, Senator the Hon. Nigel Scullion, Senator for the NT, explained that:

> the measures … affect a few new applicants. I am unaware how many that will be, as it will not affect the 17,000 odd individuals currently on income management.[16]

2.9 Only a court of competent jurisdiction can conclusively determine how legislation should be interpreted—it is not a matter for this office. However, the evident discrepancy between the information that has been publicly disseminated about the availability of external review rights after June 2009 and the SSAT's view on its jurisdiction is a matter of administration and a legitimate area of concern for the Ombudsman.

The current situation

2.10 We learned of the SSAT's decision regarding Mr and Mrs A in January 2010 and obtained a copy of the decision shortly afterwards. When we met with senior FaHCSIA and Centrelink officers in Darwin in February 2010, we were surprised to find that they were unaware of the SSAT's decision.

2.11 On 4 February 2010, FaHCSIA provided answers to questions on notice to the Senate Community Affairs Legislation Committee. In response to a question about the current IM appeal and review rights, FaHCSIA explained that the 2009 amendments meant that a decision by an officer that is:

> made under Part 3B of the Administration Act, on or after 24 June 2009, in relation to a person who is subject to the income management regime under the current Northern Territory income

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14 Schedule 2 of the *Family Assistance and Other Legislation Amendment (2008 Budget and Other* Measures*) Act 2009.* For a 'decision of an officer' see s 140(1)(a) of the Administration Act.

15 Hansard, House of Representatives, 18 March 2009, page 3026.

16 Hansard, Senate, 18 June 2009, page 3,665.

> management measure is able to be reviewed by the SSAT, and by the AAT (provided the SSAT has reviewed it first).[17]

The response did not advise that the SSAT has a different view.

2.12 As part of our investigation, we prepared a draft report and made preliminary recommendations to FaHCSIA, Centrelink and the SSAT. Primarily, we were concerned that if FaHCSIA and Centrelink disagreed with the SSAT then they should have taken action to address the problem. Conversely, if they accepted the SSAT's decision then they should have taken steps to amend publicly available information and update instructions for staff shortly after the decision was delivered.

2.13 We recommended that FAHCSIA provide a revised response to the Senate Committee. We also suggested that it would be prudent, in future, for FaHCSIA, Centrelink and the SSAT to consider any significant legislative changes before they came into effect. The agencies and the tribunal provided comments in response.

FaHCSIA's response

2.14 FaHCSIA's initial response stated that it had undertaken some consultation in relation to the 2009 amendments, including the provision of written advice to the SSAT in late 2009. FaHCSIA believes that the ARO's August 2009 decision was capable of triggering the SSAT's jurisdiction and recently confirmed this view in letters to Centrelink and the SSAT.

2.15 FaHCSIA identified two possible solutions to this issue: appeal the SSAT's decision to the Federal Court or amend the review provisions to make them clearer.

2.16 Despite the differences between FaHCSIA's and the SSAT's interpretations of the availability of review rights, FaHCSIA advised that it did not intend to pursue the matter in the courts because of Mr and Mrs A's particular circumstances. FaHCSIA also holds the view that there is no need to amend the legislation to clarify the situation as the SSAT is in error.

2.17 In the event that there is a further SSAT decision that applies the same or similar reasoning, and affects a person who remains subject to IM, FaHCSIA stated it would consider whether it should appeal the decision in that case. It would also consider how to fund the reasonable costs of the other party to the litigation. FaHCSIA recognises that this is not an ideal response and delays clarification of the law.

2.18 Finally, in response to our concern that FaHCSIA may not have provided accurate information to the Senate Committee, FaHCSIA explained that at the time of the Committee hearing on 4 February 2010, almost three weeks after the SSAT had delivered its decision in Mr and Mrs A's cases, FaHCSIA had not yet recognised the importance of the SSAT's decision. It was later clarified by Centrelink that the SSAT's decision of 11 January 2010 was not referred to FaHCSIA until 29 January.

Centrelink's response

2.19 Centrelink responded that it had been instructed by FaHCSIA to continue to advise people who were unhappy with an ARO IM exemption decision made after

[17] *Inquiry into Welfare Reform and Reinstatement of the Racial Discrimination Act,* Answers to Questions on Notice, www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/QoN3F.pdf.

24 June 2009 that they could apply to the SSAT for a review of that decision. So far, Centrelink has identified 8 customers who may have been directly impacted by this issue.

2.20 While FaHCSIA identified two possible solutions, Centrelink informed us of a third option. It advised that it has developed a proposal for an additional administrative process for its AROs to ensure that the jurisdiction of the SSAT is triggered before a person is referred to the tribunal. In addition, each of the cases since June 2009 in which an ARO has decided not to exempt a person from IM will be reviewed to determine if an approach should be made to that person to clarify the appeals process. Centrelink did not provide specific details about this third option, however it is evident that it will need to be canvassed with the SSAT. Centrelink advised that it has approached the SSAT seeking a meeting to resolve the situation.

SSAT's response

2.21 The SSAT explained that it was not consulted about the 2009 amendments before they commenced. Rather, in late 2009 the SSAT raised its concerns with FaHCSIA that the external review rights may be more restrictive than first envisaged. Subsequently, FaHCSIA wrote to the SSAT asserting its broader view of the availability of external review rights. There was no further engagement on the matter.

2.22 The SSAT pointed to recent legislative changes that now enable the Secretary of FaHCSIA, in certain circumstances, to make oral submissions at an SSAT hearing and suggested that this may be an appropriate mechanism in future 'precedent' type cases.

Areas of concern

2.23 After considering the information provided during the course of our investigation, we remain concerned about the following administrative matters:

- The impact of this issue should not be measured by the number of people who have actually sought review by the SSAT or even the number who had been refused IM exemption by an ARO since 24 June 2009. Rather, the gravity of this issue is to be gauged by the difference between the public statements advertising the introduction of the full range of external review rights for IM customers and the reality that the SSAT had warned, and then formally concluded, that it does not have jurisdiction to conduct such reviews
- The broad message delivered by the Government and agencies after the mid-2009 amendments, was that people in the NT subject to IM would have the right to reviews by the SSAT and the AAT. However, the SSAT's decision regarding Mr and Mrs A indicates that the vast majority of people subject to IM who thought they may have benefitted from the 2009 amendments did not acquire review rights at that time
- The SSAT made its decision in January 2010. It is a serious concern that more than half-a-year has passed and the issue has still not been resolved. In fact, even though the SSAT provided a copy of its decision to Centrelink when it was handed down and this office raised the matter with Centrelink and FaHCSIA in February, there was little evidence that the issue was being considered comprehensively until a draft of this report was provided to the agencies
- As Mr and Mrs A were assisted by a community legal service, it is possible that the community legal sector's knowledge of the SSAT's decision may have had a 'dampening' effect on requests for review. Consequently, lawyers

and their clients may have decided not to commence or proceed with IM exemption requests following the SSAT's decision. FaHCSIA's wish for other people to bring their IM exemption requests to the SSAT (so a challenge could be mounted) failed to recognise the likelihood that the SSAT's decision could discourage people from doing so

- Although FaHCSIA did not consult the SSAT prior to the 2009 amendments being passed, it was on notice about the SSAT's jurisdictional concerns. In those circumstances it would have been prudent for FaHCSIA to have monitored the progress of this issue more closely and to have given thought, in advance, to possible remedial strategies
- Following the SSAT decision there should have been an effective strategy to identify affected people followed by clear and accurate messages for customers, the public and Centrelink staff. If they disagreed with the SSAT's decision, FaHCSIA should have challenged it or pursued options such as the additional administrative process mentioned at paragraph 2.20 above shortly after that decision was handed down
- FaHCSIA's response to the Senate Committee's questions on notice may have been misleading as it failed to inform the Committee that the SSAT had taken a different view of its jurisdiction.

PART 3—RECOMMENDATIONS AND AGENCY RESPONSES

3.1 The opportunity to seek external review of Centrelink's decisions is an important feature of Australia's social security system. It provides transparency and is an accessible means of challenging decisions that have far reaching consequences for individuals and families. It is important that people have clear and unambiguous information about their right to seek review by the SSAT and the AAT.

3.2 It is important that the agencies involved share a common understanding of the operative review provisions to enable Centrelink to provide accurate information to its customers and for people affected by the amendments to make informed decisions about their options.

3.3 IM has an impact on people's personal financial decision making in an unprecedented way. Additionally, until the most recent amendments, the IM regime and other NTER measures have not been subject to the *Racial Discrimination Act 1975*. This context reinforces the importance of giving people an opportunity to challenge IM-related decisions.

3.4 The Ombudsman considers that the handling of this issue has been administratively deficient. It is not appropriate that FaHCSIA and Centrelink have left the question of the existence of external rights of review unanswered since January this year.

3.5 It is also evident that consideration could have been given to the third option now being canvassed by Centrelink which may ensure that IM customers are not disadvantaged by the SSAT decision in Mr and Mrs A's cases. This option could have been developed by FaHCSIA and Centrelink shortly after the SSAT delivered its decision in January. It remains to be seen if the SSAT will find Centrelink's additional process sufficient to trigger its jurisdiction.

3.6 In short, FaHCSIA and Centrelink did not recognise the significance of the SSAT's decision in Mr and Mrs A's cases. The two agencies did not respond in a timely way, neither by initiating an appeal to the Federal Court, nor moving to amend the legislation to address the anomaly or developing an additional administrative process to answer the SSAT's concerns about its jurisdiction.

Subsequent information

3.7 We met with FaHCSIA and Centrelink in mid July. FaHCSIA subsequently wrote to this office and explained:

- The decision not to appeal the SSAT's decision was informed by a number of factors including the personal circumstances of Mr and Mrs A and FaHCSIA's ability to make submissions to the SSAT in any subsequent cases. However, FaHCSIA accepts that the decision should have been made more promptly and in a more considered and strategic fashion
- Consequently FaHCSIA is reviewing and consolidating the Standing Operation Statements (SOSs), which provide guidance to Centrelink as to which SSAT decisions should be referred to FaHCSIA for its attention. The SOSs will now advise that Centrelink should refer all SSAT decisions to FaHCSIA that substantially affect program administration, raise substantial jurisdictional matters, reflect significantly on current policy or raise issues

considered to be important, systemic, unusual or sensitive. This will include those cases where the SSAT decision upholds the ARO decision[18]

- FaHCSIA's legal area, which receives decisions referred by Centrelink, will put in place procedures to ensure prompt consideration of the implication of all such decisions and that a strategic approach is taken when dealing with them
- FaHCSIA supports Centrelink's efforts to identify customers who sought IM exemption between 24 June 2009 and 30 June 2010 as part of its administrative solution to the problem
- Centrelink has established a new process for managing exemption requests under the new IM provisions, which will allow closer monitoring and identification of any trends in this area and will allow Centrelink to respond to any service delivery issues. FaHCSIA and Centrelink also propose to put in place interim guidelines to assist staff in this regard
- On 19 July 2010, FaHCSIA contacted the Acting Secretary of the Senate Standing Committee on Community Affairs and advised that FaHCSIA wished to supplement its response to the Committee to note that the SSAT had reached a different view on the scope for review of exemption decisions. FaHCSIA is writing to the Committee to confirm this advice.

3.8 After reviewing a draft version of this report and meeting with this office, FaHCSIA and Centrelink have engaged with the issues raised by the SSAT decision. The developments most recently advised by FaHCSIA are welcome and indicate there is an increased awareness of the importance of engaging with, and managing, such matters promptly and strategically.

Recommendations to FaHCSIA

3.9 The Ombudsman makes the following recommendations to FaHCSIA.

Recommendation 1

FaHCSIA should work with Centrelink to ensure that the additional administrative process now canvassed by Centrelink will trigger the SSAT's jurisdiction and affected customers are given accurate information about their options.

Recommendation 2

If the SSAT indicates that the additional process will be unlikely to trigger its jurisdiction, or formally decides that it still does not have jurisdiction, consideration should be given to other alternatives including an appeal to the Federal Court.

Recommendation 3

FaHCSIA should implement the proposed amendments to the Standard Operational Statements and procedures followed by its legal area. It should continue to take all necessary steps to ensure that the implications of court and tribunal decisions are identified quickly and that any response is prompt, strategic and coordinated.

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[18] The emphasis was previously upon referring those cases where the SSAT has changed the ARO's decision. As Mr and Mrs A's SSAT decision did not amend the ARO's decision, Centrelink did not immediately consider it for referral to FaHCSIA and there was no mechanism for Centrelink to flag its significance.

Recommendations to Centrelink

3.10 The Ombudsman makes the following recommendations to Centrelink.

Recommendation 4

Centrelink should work with FaHCSIA to ensure that the additional administrative process now canvassed by Centrelink will trigger the SSAT's jurisdiction and affected customers are given accurate information about their options.

Recommendation 5

If the SSAT indicates that the additional process will be unlikely to trigger its jurisdiction, or formally decides that it still does not have jurisdiction, consideration should be given to other alternatives, including an appeal to the Federal Court.

ABBREVIATIONS AND ACRONYMS

AAT	Administrative Appeals Tribunal
ARO	Authorised Review Officer
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
IM	Income Management
NT	Northern Territory
NTER	Northern Territory Emergency Response
SOSs	Standing Operational Statements
SSAT	Social Security Appeals Tribunal