THE DATE OF EFFECT OF MERITS REVIEW DECISIONS IN SOCIAL SECURITY AND OTHER CONTEXTS

*David Hertzberg**

Introduction

Among the many contexts of merits review, delivering administrative justice is arguably no more important than in the social security context.[1] Social security recipients, in spite of their financial disadvantage and limited means to buy legal services, are persons whose ability to review decisions about their social security entitlements is regulated by extremely complex legislation.

A particular feature that distinguishes and complicates the social security review and appeal system is that decisions on review can take effect retrospectively in certain circumstances and not others. The rationale of social security review is, after all, to establish a person's entitlement to a payment which is paid in respect of the time that a person is eligible[2] for one. The fact that time passes between an original decision and its review poses an issue of specific interest for social security. On review, the social security law must answer two quite separate questions: firstly, whether the decision under review is correct (or, in some cases, preferable); and, secondly, whether the effect of the new decision, if there is one, can be backdated to the time of the decision under review or another time. The answer to this second question can result in arrears being payable or can establish the quantum of an overpayment. This is the case even though the immediate effect of a decision on appeal from the Social Security Appeals Tribunal ('SSAT') to the Administrative Appeals Tribunal ('AAT') can be stayed[3] or in some cases payment made "pending review".[4]

In spite of the central importance of the time rules or "date of effect rules", which regulate whether a decision made on review can take effect in the past, there has been almost nothing publicly written about them and possibly less understood of how they work or if they do. In three of the most comprehensive Commonwealth reviews of social security review and appeal arrangements in the last 15 years—one instigated by the Department of Education, Employment and Workplace Relations in 2007,[5] one by the Australian National Audit Office, looking at Centrelink processes, published in 2005[6] and the other by, the then, Department of Social Security in 1997[7]—the topic of the date of effect rules was not specifically mentioned.[8]

In non-government instigated commentary on and criticism of the review and appeal system, the date of effect rules also tend to avoid specific mention, with the focus on delays in decision making,[9] costs[10] and the general complexity of the social security review and appeal structure.[11]

---

* *David Hertzberg is a Senior Legal Officer, Department of Families, Housing, Community Services and Indigenous Affairs.* *This paper was presented at the 2010 Australian Institute of Administrative Law Forum, Sydney, 22 July 2010. The views expressed are those of the author alone and do not in any way represent the views of the Department, its Minister or the Commonwealth Government.*

A lack of specific focus on date of effect rules is probably due to:

(a) their complexity and opacity;

(b) an assumption that they are somehow mechanical and therefore predictable in their operation; and

(c) the fact that they appear to, more or less, *work*.

This paper will discuss the date of effect rules not only because they justify some overdue attention, but also because they displace some administrative law presumptions about how merits review works and what it is. In so doing, I wish to outline some of the key areas of the law dictating when social security decisions on review take effect, to begin a discussion:

(a) on whether the rules could be simplified and made more accessible;

(b) to highlight some different approaches tribunals and courts have taken in relation to them; and

(c) on ways in which they could work more rather than less.

What merits review is and does

What is merits review? The answer usually given is deceptively simple; deceptive because it is not exactly true. The answer given is, of course, that a tribunal (or a person conducting internal review) stands in the shoes of the original decision maker. After all, provisions relating to the powers of merits review tribunals, whether they be (in relation to the AAT) in the *Administrative Appeals Tribunal Act 1975* ('AAT Act') or other legislation establishing merits review tribunals, such as the *Migration Act 1958* (which establishes and provides rules about the operation of the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT')) or the *Social Security (Administration) Act 1999* (which establishes and provides rules about the SSAT), certainly suggest that a tribunal stands in pre-loved shoes.

Section 43 of the AAT Act states that "the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision [....]". Similar provision is made in relation to the SSAT at section 151 of the *Social Security (Administration) Act 1999* and, in relation to the MRT, section 349 of the *Migration Act 1958* provides that it may "exercise all the powers and discretions that are conferred by this Act on the person who made the decision". Equivalent provision is found at section 415 in relation to the RRT.

These provisions are about powers. However, having the same powers as the original decision maker does not mean that a tribunal, on review, stands in *exactly* their shoes.

A tribunal can have regard to evidence not considered by the original decision maker.[12] It can stand in shoes that *should have* been stood in or *would have* if material not available had been. In some cases, as was established recently in the High Court decision in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 248 ALR 390 (discussed further towards the end of this paper), a tribunal may be able to have regard to facts that postdate the decision on review.

Outside the social security context

Outside the social security context, there is rare uncertainty about when a decision on review, even if new evidence is considered, is to have effect. For example, in the freedom of information jurisdiction, a decision by the AAT to release documents exempted by the

original decision maker is unlikely to raise questions about what point in time the new decision is to have effect.

Subsection 43(6) of the AAT Act, the only specific rule in it that relates to "date of effect", provides:

> A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.

Subsection 43(6) of the AAT Act appears as a very simple time rule. If a new decision is made (whether varying or setting aside the original decision) the tribunal's decision has effect from the time of the decision under review, even if years have passed since that earlier decision was made.

Under this provision, where the AAT affirms a decision on review, there is no new decision; the decision reviewed remains intact.[13] The original decision maker's shoes, having been temporarily borrowed by the AAT, are returned to their former feet (see in particular *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at 175). However, when a decision is varied or set aside, the decision of the tribunal is said to replace the decision under review (or in the case where the tribunal directs the decision maker to remake a decision in accordance with law, the decision as thus remade effectively replaces the decision).

In a migration case on appeal from the AAT to the Federal Court, *Al Tekriti v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 772 (at [19]), Mansfield J said, in discussing the general effect of subsection 43(6) of the AAT Act, that:

> Upon the AAT's decision coming into operation, it has effect or is deemed to have effect on and from the day of the decision under review. In the present matter, the effect of s 43(6) appears to be that the AAT decision of 29 June 2001 (setting aside the decision of the delegate of the respondent and determining that there are no grounds under Art 1F of the Convention to refuse to grant a protection visa to the applicant) has and is deemed to take effect on and from 22 September 2000. In effect, as a result of the AAT decision there is no decision on 22 September 2000 refusing the applicant a protection visa.

That a new decision, as made by a tribunal on review, effectively results in the original decision being nullified (in the sense of it being rendered no decision at all upon a tribunal setting it aside) is, in a sense, one way of paraphrasing the familiar statement in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 that a tribunal makes the correct or preferable decision or of restating the principle that a tribunal offers "*de novo*" review (for example, Merkel J in *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99 at 106.

A potential "problem"[14] with the rule in subsection 43(6) has been confronted where a decision, which has been "put into effect" is subsequently set aside by the AAT. The "problem" can arise if the decision originally made was relied on and another decision made, by operation of law in reliance upon it.

In *Lesi v Minister for Immigration and Multicultural and Indigenous Affairs* (S672 of 2003) and (S424 of 2002) (2003) 203 ALR 420 *('Lesi')* (another migration matter), the Full Federal Court considered circumstances which, according to the court, "appear[ed] a little curious". In that case the appellant held a permanent residence visa at the time a deportation order was made deporting him from Australia. The decision to deport was the decision on review

at the AAT. The appellant's visa, as a result of the deportation order, was cancelled by operation of the *Migration Act 1958*, which stated that a visa ceased to have effect upon its holder's deportation.

The deportation order, on review, was set aside. A question arose as to whether the permanent residence visa could be reinstated or was deemed to have remained in force: could the date of effect rule in the AAT Act convince the Full Federal Court of a "statutory fiction"[15] that the visa decision, having been made on a basis that no longer existed as a result of the backdating of the effect of the AAT decision, was effectively undone?

In finding a way to reinstate the visa, the Full Federal Court chose between two possible interpretations of subsection 43(6) in order to avoid an "obvious injustice":

> On the one hand, there are obviously strong reasons of principle why the legislature would not intend to visit upon the appellant the consequence of losing his entitlement to remain permanently in Australia based upon the implementation of a deportation order which, now, has been set aside. Nor could it readily be taken to intend that, by reason of the implementation of a deportation order which has been set aside, the appellant is now ineligible to be granted a visa by reason of his deportation. On the other hand it cannot have been intended to render invalid or unlawful a deportation order that was validly and lawfully made and implemented prior to it being set aside primarily for reasons that arose post-implementation.[16]

In choosing the earlier option, the Court effectively "revived" the status of the visa. The applicant was returned to circumstances as they existed prior to the deportation order. The Court said of the provision in the *Migration Act 1958* that had operated to cancel the visa:

> […] its operation is spent and the permanent residence visa reserves its effectiveness. The entitlements of the appellant under the permanent residence visa revived upon the making of the tribunal's decision.[17]

The Social security context

The social security law works differently. Court or tribunal decisions which have attempted to apply the "revival" approach taken in *Lesi* have been essentially overruled or specifically addressed by amending legislation. For example, in the now relatively old Full Federal Court decision in *Secretary, Department of Social Security v O'Connell* (1992) 38 FCR 540; 110 ALR 627 *('O'Connell')*, the respondent's payment was cancelled and she had failed to appeal to the Secretary against the cancellation decision within three months.

The Full Federal Court held that the cancellation was void "*ab initio*" and that the original decision to grant the entitlement was revived so as to put the respondent in the same position as if the cancellation decision had not been made. As a result, full arrears were payable and such arrears were held not to be limited by date of effect rules.

The Full Court approved of the following passage of the single Judge below:

> What is in my opinion important is to recognise that a decision to set aside a decision to cancel a family allowance has its effect when it comes into operation. It makes legally inoperative the decision which it sets aside when it is made, and once the January decision to cancel the allowance ceased to have legal effect there was revived Mrs O'Connell's legal entitlement to receive payment of family allowance payable on each family allowance pay day falling after the cancellation, until some disentitling event or act in the law should supervene.[18]

In response to this decision, the Government introduced legislation, the *Social Security Amendment Act (No. 2) 1993* which specifically addressed and overturned the decision in *O'Connell*. The new provision[19] provided that if:

- the Secretary makes a decision ("the first decision") to grant a social security payment or pay it at a particular rate and the Secretary subsequently cancels the payment or reduces the rate ("the second decision); and

- notice of the second decision is given to the person; and

- the person applies for review of the second decision more than 13 weeks after the notice is given; and

- a further decision (the "review decision") is made by the Secretary, an authorised review officer, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal; and

- the review decision sets aside the second decision; then

- *the second decision does not become void from the time when it was made and the mere setting aside of the second decision does not of itself revive the first decision*.

The Explanatory Memorandum ('EM') to the Bill[20] stated that "[n]ew section 1243A is an express provision contrary to the general administrative law proposition that, if a statutory decision is set aside *ab initio*, the parties are placed in the position that they would have occupied if the adverse decision had never been made".

In fact, the new provision did not establish a shift in social security from the "general law proposition" that a decision, once set aside, revives the circumstances that existed prior to the decision that was set aside. The new legislation merely, as clarified in the EM, "maintained" "Government policy" on "arrears payments".[21] The social security law, since the advent of the date of effect rules, had always intended to treat decisions made on review as not necessarily reviving earlier circumstances.

In short, in the social security context, a decision to set aside (or vary) does not, of itself, nullify the original decision. In particular, if the applicable date of effect rule does not allow a decision to be backdated, or not backdated all the way to the date of the decision on review, the decision on review continues to have "effect" until the new decision has "effect".[22] This means that a wrong decision can remain effective until the new decision comes into effect.

For decisions in other administrative contexts, such as the decision in *Lesi*, when a decision is set aside, doing so does not entail a new decision so much as it entails undoing the earlier decision. The social security law effectively requires a reviewer, including a tribunal, to make a new decision, settle its timing and, therefore, the period during which the faulty decision can continue to have effect.

The Social security date of effect rules

Very simply, there are two basic situations in which a date of effect rule can affect the amount of money a social security recipient is retrospectively entitled to:

(1) When the decision made on review is more "favourable" than the original decision. In this case arrears may be payable.[23]

(2) When the decision on review is "adverse". In this case, there may be a debt.

While the general principle is clear, the date of effect rules in the social security law are lengthy, complex and have been approached in some cases inconsistently by tribunals, undoubtedly because of this complexity.

This complexity is partly due to the numerous stages of review available to social security recipients. Once an original decision is made, a person affected by that decision (or Centrelink on its own motion) may ask for the original decision maker to review that decision. If a person is still unhappy with the decision as reconsidered by the original decision maker, a person can ask an Authorised Review Officer within Centrelink to conduct a full merits review of the decision.[24]

Following this (and only once these stages have been exhausted), further merits review is possible at the SSAT[25] and, thereafter, at the AAT.[26] After this stage, as is the case for any decision that has been to the AAT, merits review is exhausted and the only further avenue of appeal lies in review on a question of law at the Federal Court.[27]

There has been some criticism of this system and, in particular, of the lack of awareness of the difference between review at the original decision maker level and at the Authorised Review Officer level.[28] There has also been suggestion of limiting appeals to the AAT by leave of the tribunal.[29] Partly, the complicated and multi-layered nature of the social security review and appeal structure reflects the very nature of the pressures placed upon it as a result of the vast number of social security recipients in Australia and the fact that decisions are made in respect of each of them relatively frequently.

Given the elaborate review structure, there are a relatively large number of possible merits review avenues a particular decision could take. For instance, an original decision maker could affirm his/her own decision, only to see it set aside by an Authorised Review Officer, subsequently varied by the SSAT and then, the decision as varied, completely set aside at the AAT.

In this context, the social security law provides for date of effect rules which dictate the date of effect of new decisions made at the Authorised Review Officer stage and separate rules for new decisions made at the SSAT stage. There are no specific rules for when a new decision of an original decision maker takes effect (if he/she changes his/her own decision). There is also no provision in the social security law dealing with the date of effect of AAT decisions. However, the AAT has held relatively consistently that the provisions applicable to the SSAT and Authorised Review Officer stages, themselves provide the basis for reviewable decisions and, therefore, are effectively able to dictate the merits review function of the AAT, which, after all, is said to stand in their shoes.[30] In support of this approach, the AAT has also held that, as a matter of statutory construction, the more specific date of effect rules in the social security law effectively override the more general date of effect provision at section 43 of the AAT Act. In other words, subsection 43(6) of the AAT Act (as, for example, applied in *Lesi*) appears not to operate when the AAT is exercising its social security jurisdiction.[31] Further, there has been suggestion that the power to "otherwise order" provided by subsection 43(6) of the *Administrative Appeals Tribunal Act 1975*, effectively provides enough flexibility for this approach.[32]

Given this, it is possible to provide an overview of all of the operative social security date of effect rules by looking at those expressed to be applicable at the SSAT and Authorised Review Officer level.

In sum, the date of effect rules that apply to "favourable determinations" (decisions favourable to the person affected involving a rate increase or a resumption of payment after a suspension) are based on a number of variables, the most central of which are set out below:[33]

- whether a person has received notice of the decision sought to be varied or set aside (if a person does receive notice, arrears can only be paid if he/she requests review in time);

- whether the person has in fact requested review and, if so, whether this has been done within thirteen weeks;

- whether the Secretary (Centrelink) instigates the review on her or his own motion (in this case, arrears can only be paid back to the date the review began);

- whether the decision to increase a rate is as a result of the operation of the provisions requiring indexation of rates of payment;[34]

- whether the decision to which the date of effect rule applies is made as a result of the person informing Centrelink of an "event or change of circumstances";

- whether the decision to which the date of effect rule applies is made as a result of a person providing a "statement" (a term which is not defined and is difficult to distinguish from the provision of information about an "event" or change of circumstances).

In most cases before the AAT involving a question of how a date of effect rule is to be applied, the person whose payment, or its rate, is at issue generally argues that he/she was not given notice of the decision, or that in fact review had been requested in time. This is because if a person does not request review of a decision of which he/she was notified in time, arrears are generally not payable back to the date of the faulty decision. There is a relative paucity of consideration at the AAT level, or at the Federal Court, of the meaning and content of some of the other variables described above.

For the date of effect rules that apply to "adverse determinations" (rate reductions or cancellations or suspensions), variables include:[35]

- whether the new decision was made after a person informed of an event or change of circumstances or whether the person provided a "statement";

- whether or not an instalment of the relevant payment is made after the occurrence of the event or change and before the determination is made;

- whether or not the decision was made because the person earned "employment income" or "ordinary income";

- whether the decision to reduce a rate was made because of arrears of compensation;

- whether or not the person is of pension age;

- whether or not the person contravened the social security law leading to a delay; and

- whether or not the person provided a false or misleading statement.

As discussed further below, these "adverse determination" rules have been the subject of relative disinterest by tribunals.

Notice and requesting review

The general policy behind the most disputed date of effect rules is, more or less, clear: generally, if a person requests review of a decision he/she does not agree with and, as a result of that request, the rate is increased (a new decision is made on review), the person can receive arrears back to the date of the decision reviewed if notice of that decision had been received and review requested in time. If a person does not request review in time, arrears can only generally be obtained to the date of the decision on review if the person can successfully argue that he/she was not *notified* of that decision.

What notice is and what a review is have been the most tested questions in this context. What constitutes good notice for this purpose is not defined in the social security law. It has therefore been left to courts and tribunals to establish jurisprudence on this point.

In a recent decision of the AAT, Justice Downes noted that adequate notice is not always given, or held to be: "for the record, there have been at least 19 Tribunal decisions on adequacy of notice since 2000. Of those, 12 have decided that Centrelink letters are adequate notices".[36]

Relevant decisions indicate that adequate notice for this purpose does not need to provide reasons for the decision (as is required, for example, in relation to decisions under an enactment reviewable to a question of law under the *Administrative Decisions (Judicial Review) Act 1977*).[37] Notice, however, must contain enough information for it to be clear that a decision has been made; enough information for just an inference to be formed is not good enough.[38]

Notice for this purpose, it has also been held, does not need to provide sufficient information that would satisfy a decision maker's obligation to provide procedural fairness.[39] Further, it is generally accepted that the test of whether a person has been notified that a decision has been made is objective, rather than subjective. In other words, a person's actual knowledge that a decision has been made is not at issue in such cases.[40]

In *Secretary, Department of Families, Community Services and Indigenous Affairs and Walshe* [2007] AATA 1861 (16 October 2007) Justice Downes suggested that in order for notices to adequately discharge their function, at least they should set out:

- that a decision has been made changing the recipient's pension entitlement;
- the nature of the change, be it increase, decrease, suspension or cancellation;
- the date the change takes effect;
- the amount of the old entitlement; and
- the amount of the new entitlement.[41]

Another variable which has received the attention of courts and tribunals concerns what constitutes a request for review (generally because only if a request for review has been made within 13 weeks of notice can full arrears be paid).

Again, what constitutes a "request for review" is not defined in legislation. Tribunals and courts have, in the main, accepted that the concept is to be construed quite broadly: to include "repeated enquiries and expression of concern"[42]; such that "the magic word 'review'" need not be used;[43] and to encompass a "query" about a rate.[44]

Curiously, while decisions by original decision makers to limit arrears (that is, to refuse to backdate the effect of a decision favourable to a person's rate of payment) are frequently challenged, there has been almost complete disinterest about the circumstances under which an "adverse" decision (a decision to reduce a rate of payment or a decision to cancel a rate) can be backdated.[45] This would appear (that is, it is only apparent because such reasoning is not to be found on the face of tribunal decisions involved) to be because tribunals effectively read the provisions which dictate the circumstances under which debts can arise as not being limited by rules relating to when adverse decisions can be backdated.

The Social security date of effect rules and recent developments in the law of merits review

The decision of the High Court in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 248 ALR 390 *('Shi')* is a significant recent development in the law of merits review. In that case, the High Court held that evidence of facts that occurred between the decision on review and the date of review of the decision by the AAT could be considered in certain circumstances. The implications of the decision, however, go further than just addressing what constitutes acceptable evidence at the AAT. The decision has been said to indicate "the scope and extent of the Administrative Appeals Tribunal's review functions".[46] Dale Watson, of the Australian Government Solicitor, has described that case as one in which:

> The High Court was asked to determine what is really meant when the task of the AAT is referred to as coming to the 'correct and preferable decision' and unanimously held that generally the AAT was not restricted in any temporal way to its consideration of evidence in determining what is the correct and preferable decision.[47]

The case is worth considering in the context of social security date of effect rules because the issue of when decisions have effect is likely to influence the extent to which *Shi* is accepted as applicable in the social security context.

In short, *Shi* was an immigration case in which the decision on review was a decision to cancel a migration agent's registration based on the conduct of the agent. Part of the evidence provided to the AAT related to the agent's improved conduct since the time of the decision under review.

In the High Court's decision, particular consideration was given to a decision of the Federal Court in a social security matter, *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342 *('Freeman')*. In that case, the Federal Court had essentially held that the AAT could not have regard to facts which post-dated the decision on review, given the nature of social security entitlement. The decision at issue in *Freeman* was a decision to cancel a payment and the court's reasoning was effectively that, if facts postdating the cancellation decision could be taken into account (in circumstances where such facts, if they had been contemporaneous to the decision being made would have led to the decision not being made) the Tribunal would be assessing a new entitlement to payment rather than reviewing the decision to cancel.[48]

In *Shi* (in particular in the judgment of Kirby J), the High Court held that the nature of the decision on review was such as to allow new evidence (that is evidence of facts post-dating the decision, not necessarily evidence not put before the decision maker) to be taken into account. However, the High Court cautioned that the particular "nature" of the decision under review may not suit new evidence:

> If, for example, under federal legislation, a pension is payable at fortnightly rests, by reference to particular qualifications that may themselves alter over time, a "review" of an administrative "decision" to grant or refuse such a pension, by reference to statutory qualifications, may necessarily be limited to the facts at the particular time of the decision.[49]

Of course if a decision is replaced by a favourable determination that can take effect retrospectively, it would be strange for a person to be able to benefit from evidence of new circumstances post-dating the decision under review. However, this would not appear necessarily to be the case when the applicable date of effect rule does not allow for a decision to be backdated. That is, if the operative date of effect rule allows for a new decision on review to take effect only prospectively, it is difficult to see why the approach taken in *Shi* could not be adopted. How tribunals and courts approach this issue in the social security jurisdiction remains to be seen.

Two social security cases postdating the decision in *Shi* are already sending some mixed messages. In *Baum and Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 1066 (28 November 2008), the AAT said, in reliance on Kirby J's comment given above in *Shi*, that it could not take into account evidence of the applicant's entitlement to disability support pension that related to a period post-dating the decision on review:

> […] it seems to me that the inherent nature of the decision and the statutory context in which it is made confine me to evidence that relates to Mr Baum's condition, impairment and work capacity during that 13 week period. That does not mean that all of the evidence in the form of reports, assessments or records had to be generated in that period. What it means is that they must relate to that period.[50]

However, in *Hood v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 555, in which the applicant had appealed to the Federal Court on a question of law from a decision of the AAT which appeared to take into account facts contemporaneous with the AAT's decision, the Federal Court indicated that this approach was supported by *Shi*, notwithstanding that the decision was made in the context of entitlement to a social security payment. After considering *Shi*, Ryan J stated:

> It is therefore beyond question, in my view, that the Tribunal acted correctly in approaching the matter afresh, in the circumstances which obtained when it came to make the decision. Nothing in s 94 of the *Social Security Act 1991* (Cth) ("the SSA") [that is, the provision setting out the qualification criteria for disability support pension] requires a different outcome.[51]

Conclusion

Among complex rules for social security entitlement and review, the date of effect rules offer further complexity and are almost certainly little understood by persons affected by them. In particular, it is not yet clear whether the High Court decision in *Shi* will be applied only in cases where the decision on review cannot be backdated to an original decision, that is, where it takes effect only prospectively.

However, notwithstanding the issues raised by *Shi*, without specific legislative simplification and clarification, it is likely that the date of effect rules will continue to develop in their application through jurisprudence effectively reading between the lines on issues such as notice, what constitutes a request for review and whether debt decisions are limited by such rules.

More generally, because the date of effect rules distinguish the nature of merits review in the social security context from other jurisdictions, there may be a continued divergence in the approach the AAT takes to social security matters as opposed to review in other contexts.

Endnotes

1 Similar issues arise, in some cases, to payments made under the family assistance law (under the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999*). However discussion of family assistance is beyond the scope of this paper.

2 While this statement is true of periodic payments, there are some limited "one-off" payments provided for by the social security law that this statement does not apply to. I am using the term "eligible" here to describe the circumstance in which a person is *qualified* for a payment and it is *payable* to them—both emphasised terms being the terms used in social security legislation.
3 Under section 41 of the *Administrative Appeals Tribunal Act 1975*.
4 See section 131 of the *Social Security (Administration) Act 1999* which allows for a payment to made to a person after an "adverse decision" (that is, cancellation, suspension or rate reduction) up until the time of a decision of an Authorised Review Officer if the decision depends on the exercise of a discretion or the holding of an opinion by the decision maker. Similar provision exists in relation to decisions appealed from the SSAT to the AAT at section 145.
5 Instigated by the then Minister for Employment Participation, the Hon Brendan O'Connor MP, *Report of Review of Department of Education, Employment and Workplace Relations Social Security Appeals and Litigation Arrangements*, March 2008, available at http://www.workplace.gov.au/NR/rdonlyres/768E8827-63E3-46BF-846F-7A97C542223E/0/Report_of_Review.pdf.
6 Australian National Audit Office, *Centrelink's review and appeals system*, Canberra, Audit Report No. 35, 2004-05.
7 Margaret Guilfoyle, *Review of the Social Security Review and Appeals System: A Report to the Minister for Social Security*, August 1997.
8 The March 2008 *Report* (note 5) does, however, discuss the importance of implementing a decision immediately unless a stay is obtained (at 5).
9 Welfare Rights Unit, "Social Security Appeals: Practice and the Law", *Red Tape*, May 2006.
10 Debra Jopson and Adele Horin, "Millions lost in fierce legal war on the poor" in the *Sydney Morning Herald*, December 10 2007 available at http://www.smh.com.au/news/national/millions-lost-in-war-on-the-poor/2007/12/09/1197135289361.html?page=fullpage#contentSwap2.
11 See, for example, Lucy Mayes and Phillip A Swain, "Continuing debates as to social security appeals in Australia and Britain: Dancing to the same tune?", *Australian Journal of Administrative Law*, vol. 12, 2005 at 185.
12 Merkel J in *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99 at 106: "The AAT hears the matter de novo in light of the evidence placed before it".
13 See, for example, discussion in *Mulhallen and Department of Family and Community Services* [2001] AATA 80 (7 February 2001) at [29]: "The SSAT 'affirmed' the ARO [that is, the Authorised Review Officer in Centrelink] decision not to 'pay arrears' of JSA to the applicant, it did not vary or set aside the decision (paragraph 1255(4)(c)) (paragraph 6 above). The decision before the Tribunal [that is, the AAT] is therefore the decision of the ARO as affirmed."
14 See discussion of this provision by Dennis Pearce, *Administrative Appeals Tribunal*, 2nd ed., LexisNexis Butterworths, 2007 at 203.
15 See North J's discussion of *Lesi* in *Secretary, Department of Health and Ageing v Marnotta Pty Ltd* [2005] FCA 1395 at [31].
16 At [47].
17 At [55].
18 At 638.
19 Then section 1243A of the *Social Security Act 1991*, and later numbered as section 137 of the *Social Security (Administration) Act 1999*.
20 Social Security Amendment Bill (No. 2) 1993.
21 See the "Summary of proposed changes" to Part 5 of the Bill in the EM to the Bill.
22 This principle is enshrined in the social security law at section 123 of the *Social Security (Administration) Act 1999*.
23 See Subdivision B, Division 9 of Part 3 to the *Social Security (Administration) Act 1999*.
24 Section 129 of the *Social Security (Administration) Act 1999*. The Secretary can also conduct an own motion review without a request under section 126. See Australian National Audit Office, *Centrelink's review and appeals system*, Canberra, Audit Report No. 35, 2004-05 for a very useful discussion of perceived public uncertainty around the difference between review at the Authorised Review Officer level and the original decision maker level.
25 An application can be made under section 142 of the *Social Security (Administration) Act 1999*.
26 Section 179 of the *Social Security (Administration) Act 1999*.
27 Section 44 of the *Administrative Appeals Tribunal Act 1975*.
28 See, most particularly, Welfare Rights Unit, "Social Security Appeals: Practice and the Law", *Red Tape*, May 2006 at 3. See also Australian National Audit Office, *Centrelink's review and appeals system* (2005) Canberra, Audit Report No. 35 2004-05, which discusses confusion around these two review levels.
29 See Margaret Guilfoyle, *Review of the Social Security Review and Appeals System: A Report to the Minister for Social Security*, August 1997.
30 See *Yachmenikova and Secretary, Department of Employment and Workplace Relations* [2006] AATA 596 (5 July 2006) in which the AAT said at [19]: "Under s179 of the [*Social Security (Administration) Act 1999*] application may be made to the Tribunal for review of the Social Security Appeals Tribunal decision. In the case of such a review, the decision that is before the tribunal is (in the present case) the decision of the ARO as affirmed by the Social Security Appeals Tribunal. For the purposes of review, the Tribunal exercises all of the powers and discretions conferred on the person who made the decision (s43, AAT Act)

and does not exercise judicial powers or power at large. That being so the Tribunal does not have power or discretion to waive the effect of s152 concerning the date of effect of the Social Security Appeals Tribunal decision. The Tribunal may either affirm, vary or set aside that decision. Even if the Tribunal decided to set aside the Social Security Appeals Tribunal decision in a manner favourable to Ms Yachmenikova, subs152(4) would still apply and no amount of Newstart Allowance would be payable to her prior to 23 December 2005. That means the present application, even if successful, could have no practical effect."

31 See *Secretary, Department of Employment and Workplace Relations and Mitchell* [2006] AATA 804 at [58] and *Vine v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] AATA 135 (24 February 2010) at [17].

32 See *Re Thiagarajan and Secretary, Department of Employment and Workplace Relations* (2007) ALD 351 at [62] and *Giorgi and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] AATA 65 (1 February 2010)

33 See section 109 of the *Social Security (Administration) Act 1999*, which applies to favourable determinations made as a result of a request for review and section 110 which applies to other "favourable determinations". There are also more specific date of effect rules applicable to specific circumstances, such as the resumption of certain payments after "non-compliance" (section 110A).

34 See section 111 of the *Social Security(Administration) Act 1999* and subsection 109(7).

35 See section 118 of the *Social Security (Administration) Act 1999*. Specific rules also apply in relation to carer payment under section 120 and in relation to concession cards (section 122).

36 *Secretary , Department of Families, Community Services and Indigenous Affairs and Walshe* [2007] AATA 1861 (16 October 2007) at [48].

37 As able to be requested by a person under section 13 of the *Administrative Decisions (Judicial Review) Act 1977*. Note that a decision sought to be reviewed under social security law would still remain a "decision under an enactment for this purpose"; however, the jurisdiction of the Federal Court is rarely sought in social security cases because of the availability of merits review through tribunals and as a result of section 10 of the *Administrative Decisions (Judicial Review) Act 1977*.

38 *Austin v Secretary Department of Family and Community Services* (1999) 92 FCR 138; 57 ALD 330; 29 AAR 528; 3(10) SSR 159. See also *Secretary Department of Family and Community Services v Rogers* (2000) 65 ALD 185; 32 AAR 52, in which Cooper J referred to the importance of "the fact that a decision has been made and the content of the decision" (at [33]).

39 In *Rogers* (*supra*), Cooper J stated (at [33] and [34]): "The subsections make no reference to any requirement that the notice contain reasons or sufficient information for the recipient of the notice to understand the main reason for the decision and so be in a position to know whether or not to exercise the person's right to seek a review. Nor, in my view, do any principles of procedural fairness require that such a requirement be read into the provisions of s 299. There is no general rule of the common law or principle of natural justice which requires reasons to be given for administrative decisions even though the decision may adversely affect the interests or defeat the legitimate or reasonable expectations of other persons: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662. The right to reasons for a decision or information explaining the basis for an administrative decision, must be found, if at all, in the Act or some other statute."

40 See *Peura and Secretary, Department of Family and Community Services* [2003] AATA 1123 in which the Tribunal outlined its understanding of the law of notice (at [37]): the Tribunal should identify the decision of which notice is to be given; the letters should be construed objectively; the letters should be intelligible, that is they should inform the recipient of the making of the decision and the content of it; where the rate of pension is changed as a result of changed circumstances or the manner in which those circumstances are assessed, merely advising the recipient of the rate of his or her pension only constitutes advice of the effect of the decision; and the letters need not advise the reasons for the decision.

41 At [41].

42 *Secretary Department of Social Security and Trevisan* (1990) AATA 6581 at [18] see also *Secretary Department of Social Security and Marsh* (1996) AATA 10993 at [14] in which a person's worried phone call was accepted as a request for review.

43 *Frost and Secretary Department of Social Security* (1995) AATA 10360 at 10.

44 *Austin v Secretary Department of Family and Community Services* (1999) 92 FCR 138; 57 ALD 330; 29 AAR 528; 3(10) SSR 159 at [15].

45 See *Natale; Secretary, Department of Family and Community Services* [2003] AATA 717 (30 July 2003), for a rare exception.

46 Dale Watson, "The nature of review in the Administrative Appeals Tribunal: *Shi v MARA*", paper presented to the AGS Administrative Law Forum, 22 October 2008, available online at: http://www.ags.gov.au/publications/agspubs/papers/WATSON_Admin_law_2008.pdf.

47 At 1.

48 See 19 FCR 342 at 344-45.

49 Kirby J at [44].

50 At [48].

51 At [13].