

# Department of Industry, Tourism and Resources

## FAILURE TO PROVIDE ADEQUATE REASONS FOR A DECISION REFUSING AN R&D START GRANT APPLICATION

October 2007

*This is an abridged version of report 13|2007.  
The full report has not been made publicly available  
due to the amount of personal detail it contains.*

Report by the Commonwealth Ombudsman,  
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **13|2007**

## Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal finding or report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version. Copies or summaries of the reports are usually made available on the Ombudsman website at [www.ombudsman.gov.au](http://www.ombudsman.gov.au). Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

## ISBN 978 0 9803878 9 6

Date of publication: October 2007

Publisher: Commonwealth Ombudsman, Canberra Australia

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The Commonwealth Ombudsman received a complaint from an unsuccessful applicant for a Research and Development Start (R&D Start) Grant.

R&D Start Grant applications were decided by the Industry Research and Development Board (the Board). AusIndustry, a division in the Department of Industry, Tourism and Resources (DITR), played a central role in the grant application process. It provided applicants with feedback on draft applications; assessed and numerically scored final applications before forwarding them to the Board with its recommendation; and provided applicants with written notice of the Board's decision, including the reasons why unsuccessful applications had been refused.

The complainant had applied twice. AusIndustry ranked the first application highly and recommended it be granted, but the Board refused it. The reason given was that 'The Board considered that the application rated very lowly against the National Benefits criteria. In particular, the Board considered that: The application would not yield an appropriate return in National Benefits to Australia'.

Neither the Board's minutes, nor the decision notice, identified what it was about the complainant's particular situation that led to this conclusion. The complainant's AusIndustry Customer Service Manager provided further feedback and assistance to the complainant, identifying three areas of weakness to be strengthened in any resubmitted application. However, he expressly qualified this feedback as being his 'opinion only', and not representing the Board's reasons for decision.

Based on AusIndustry's feedback, the complainant submitted a second application. AusIndustry again scored it highly and recommended to the Board that it be granted. The Board again refused the application. Its minutes and record of decision state:

The Committee reconsidered the application and was not satisfied that the applicant had provided sufficient and adequate evidence to overcome the previous Committee's decision not to approve the grant funding.

Note to the Customer Service Manager: The Committee advises the Customer Service Manager that as this application did not provide the answers to the questions previously raised by the Committee, it should not have been resubmitted, at this stage, for the Committee's consideration.

It appears, therefore, that the second application was rejected for substantially the same reasons as the first. It is clear that the Board considered that the national benefits criterion was not satisfied, but not why.

It is well established in the relevant case law, and supported by the Administrative Review Council's *Practical Guidelines for Preparing Reasons for Decisions*, that reasons for decisions ought to set out not only the criteria that an application has been assessed as failing, but why that assessment was made on the particular facts of the case. This did not happen in this instance.

In correspondence with the Ombudsman's office, AusIndustry described the reasons for decisions for both rejection decisions as 'brief' but 'appropriate for communication to the applicant'. AusIndustry also submitted that schemes for competitive grants are not funded to provide lengthy reasons for decisions.

In this scheme, the grants were for substantial sums of money and the preparation of the applications were time consuming and costly. There was also an opportunity for applicants to revise the application to address any shortcomings. Given the nature of these decisions, it is important that any reasons documented by the Board and conveyed to an applicant were given with sufficient detail to allow the applicant to make a decision as to whether to revise or discontinue their application.

The complainant's decision to resubmit its application was a commercially significant one, involving a significant commitment of time and money, including the cost of retaining external consultants and lawyers.

In the Ombudsman's view, AusIndustry's failure to ensure that the substance of the Board's reasons for decisions were recorded in the Board's minutes and communicated to the complainant, put the complainant at a significant disadvantage when the second decision was made. This justifies this office recording an outcome of administrative deficiency in this case, and amounts to 'defective administration', as that term is used in the 'Compensation for Detriment Caused By Defective Administration' (CDDA) scheme guidelines.

The complainant had previously applied to AusIndustry under the CDDA scheme, and AusIndustry had rejected its claim. The Ombudsman recommended that AusIndustry reconsider the applicant's CDDA claim, specifically for the additional expenses incurred in the preparation of their second application in the light of the Ombudsman's view that there was administrative deficiency in this case.

After receiving our final report, the Secretary of the Department of Industry, Tourism and Resources rejected the conclusion of defective administration. Nonetheless, in the interests of bringing the matter to a conclusion, he stated that he was prepared to review the CDDA matter in the light of any substantiated claim made by the applicant. The Ombudsman has made the point that any review, to be independent and objective, must be based on the Ombudsman's finding of administrative deficiency.

The Ombudsman also recommended that AusIndustry review its, and the Board's, recordkeeping and decision making processes in relation to the Commercial Ready program to ensure that the details of the Board's reasons for decisions are clearly recorded in a form suitable for communication to complainants; and that AusIndustry staff receive appropriate training in providing reasons for decisions, and its obligations under the *Administrative Decisions (Judicial Review) Act 1977*. In his response to the final report the Secretary of the Department of Industry, Tourism and Resources has agreed that AusIndustry will implement these recommendations.