Commonwealth
OMBUDSMAN

Executive schemes

August 2009

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

REPORT NO. 12|2009

Reports by the Ombudsman

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EXECUTIVE SUMMARY

Government agencies must have legal authority for any action they undertake. Legislation passed by the Parliament authorises much of what governments do, particularly where coercive powers are involved, but the source of authority for administering many of the ordinary activities of government is executive power.

Executive schemes are those that rely on executive rather than legislative power. The main advantages of executive schemes are the speed with which they can be set up and their flexibility when circumstances change. However, that very flexibility poses risks to the accountability of such schemes. Many of the checks and balances on government power apply only to powers conferred by legislation. Of particular concern are the restricted review and appeal rights that are available to people who are affected by decisions made under executive schemes.

Public awareness of the existence of executive schemes and the rules that apply from time to time can also be a problem, as illustrated in several of the case studies in this report. Agencies do not always publish all the criteria they take into account in assessing eligibility for a program or grant, and sometimes fail to make updated information available as promptly as they should. The standard of drafting of program rules, including eligibility criteria, may not be as high as in legislative schemes, which undergo several external scrutiny processes before they come into operation.

It is true that legislative schemes do not necessarily avoid all of the problems outlined in this report, particularly if legislation is developed and implemented as a matter of urgency. However, the risk that problems will occur is minimised by the level of scrutiny that occurs during the legislative process and through tribunal and court review of individual decisions made under a legislative scheme. In the absence of such external scrutiny, agencies need to be doubly careful that they consider the implications of the schemes they develop and administer. While some programs, particularly those implemented in response to an emergency, will need to be established quickly, agencies should ensure that the implications are thought through as fully as possible, and that lessons learnt from other programs, whether in their own or another agency, are applied to new programs.

This report draws on our examination of complaints about various executive schemes in the past six years. Several of the case studies included here have been the subject of comment in other Ombudsman reports, including annual reports. Based on our experience, this office has developed eight principles of best practice for agencies to consider when developing and administering executive schemes.

PART 1—INTRODUCTION

1.1 Governments rely increasingly on executive power to underpin distribution of benefits and delivery of their services. This report considers the problems that may arise in such schemes, particularly in relation to accessibility to the public, consistency of decision-making and accountability. The report draws on the experience of this office over the last six years in investigating complaints about various executive schemes. While the number of complaints about individual schemes has not always been large, there are common issues of concern.

1.2 This office has had an interest for many years in decisions made under executive schemes. The Ombudsman's report in 1999 on one such scheme, the Compensation for Detriment caused by Defective Administration scheme (CDDA scheme)[1] led to changes to the guidelines for Commonwealth agencies. The office has just completed a second own motion investigation into how the CDDA scheme is being administered.[2] Other executive schemes that we have investigated in recent years and that are referred to in case studies in this report include:

- the scheme administered by the Department of Education, Employment and Workplace Relations (DEEWR) for payment of employee redundancy benefits in cases of financial collapse
- the DEEWR programs that provide incentives for engagement of apprentices
- various grants administered by the Department of Agriculture, Fisheries and Forestry (DAFF)
- a program that provides a one-off payment to certain carers, administered by Centrelink on behalf of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
- the liquid petroleum gas vehicle scheme administered by the Department of Innovation, Industry, Science and Research (DIISR)
- the financial case management scheme that provides emergency assistance to certain Centrelink clients
- the F-111 deseal/reseal program administered by the Department of Veterans' Affairs (DVA).

1.3 Several of these schemes and the issues that they raise have been referred to in the Ombudsman's past annual reports or other published reports.

What is an executive scheme?

1.4 Executive schemes are those that rely on executive power rather than power conferred by legislation.

1.5 Government agencies must have legal authority for any action they undertake. Much of that authority, particularly where it involves the use of coercive powers, comes from legislation passed by the Parliament, but the source of authority for administering much of the ordinary affairs of government is executive power.

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1 Commonwealth Ombudsman, *To compensate or not to compensate?*, Report No. 02/1999.

2 Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, Report No. 11/2009.

Such ordinary activities can include entering contracts, conducting inquiries, developing policy, administering community programs and managing property and staff.

1.6 At the Commonwealth level, the source of executive power is section 61 of the Constitution.[3] Funding to support the exercise of executive power is authorised by the appropriations made by the Parliament, either as a specific item or as part of a general appropriation.

1.7 Many executive schemes are implemented without any legislative backing. Other schemes have a broad statutory basis but rely on executive power for their implementation. For example, the National Health and Medical Research Council (NHMRC) is set up under a legislative framework, but recommendations on research grants are made by advisory panels that are appointed under administrative guidelines and apply non-legislative criteria. While many of the issues raised in this report are relevant to both types of schemes, this report focuses on 'pure' executive schemes, that is, those without any legislative foundation.

Outline of this report

1.8 Part 1 of this report examines the benefits and drawbacks of executive schemes. The range of accountability measures applying to schemes that have a legislative basis is compared with those that do not. The main types of executive schemes are also outlined. Part 2 of the report examines common issues of concern arising in complaints made to this office about various executive schemes, using case studies by way of example. Part 3 recommends best practice principles to be considered when agencies are establishing and administering executive schemes.

The benefits of executive schemes

1.9 The main advantage of executive schemes is their flexibility. Because there is no need to wait until legislation is drafted, considered and passed by Parliament, such schemes can be quickly established when the need arises, adjusted easily as circumstances change and closed down when the need for them no longer exists. If legislation has unintended consequences that cause hardship, an executive scheme can ameliorate its effect on a particular group of people or in particular circumstances, before longer term statutory reforms are put in place.

1.10 Executive schemes are particularly useful in allowing government to respond promptly to emergencies with offers of financial aid and other assistance to those affected. One recent example was the inclusion of an ex gratia income recovery subsidy in the package of government payments to those affected by the Victorian bushfires in January/February 2009. Where an ongoing need is identified, an executive scheme may also be established as a temporary measure prior to legislation being developed.

The drawbacks of executive schemes

1.11 The very flexibility that is the key advantage of executive schemes can pose risks to people's rights in terms of program accountability and review of decisions. Government agencies are subject to a range of checks and balances, but the

[3] See *Pape v Commissioner of Taxation* [2009] HCA 23 (7 July 2009), per French CJ at para 126–127, stating that the collection of statutory and prerogative powers and non-prerogative 'capacities' that may be possessed by persons other than the Crown form part of the executive power and lie within the scope of s 61.

accountability framework assumes that they are exercising powers conferred by legislation. If they are not, many of the core safeguards do not apply.

1.12 Decisions made under executive schemes are not subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), which covers only decisions made under an enactment (s 3). Nor are the merits of such decisions reviewable by generalist or specialist administrative tribunals. There are only very restricted rights of judicial review by the High Court or Federal Court, arising under the Constitution s 75 and the *Judiciary Act 1903* s 39B. The Administrative Review Council has twice recommended that the ADJR Act be extended to include administrative decisions made under non-statutory schemes,[4] but this recommendation has not been implemented.

1.13 As a result, the Ombudsman is the only administrative law agency that can review decisions made under executive schemes. Decisions within the Ombudsman's jurisdiction include those made by private organisations that provide goods and services to the public under a contract with government (such as running immigration detention centres and the Welfare to Work program).[5] The Ombudsman cannot overturn decisions, but may make recommendations to the agency and the minister.

1.14 The restricted review and appeal rights under executive schemes are of concern, since decisions made under these schemes are often just as important and can affect people's rights and interests just as much as decisions made under legislative schemes.

1.15 It can also be more difficult for members of the public to get access to the rules that apply under executive schemes, especially if those rules change several times. While legislation and regulations are widely available online, the relevant documents that cover executive schemes are often not. The rules establishing an executive scheme are not legislative instruments subject to the publication and tabling requirements of the *Legislative Instruments Act 2003*. The *Freedom of Information Act 1982* (FOI Act) imposes some publication requirements on agencies, obliging them to make available all documents such as manuals, guidelines and precedents that are used in making decisions or recommendations, whether a decision is made under legislation or as part of an executive scheme (s 9).[6] Agencies must prepare and update lists of those documents at least annually, preferably quarterly. Lists are published on the National Archives of Australia website (www.naa.gov.au), but not all agency lists on that website are up to date.[7] A document that was not published or made available cannot be applied to disadvantage a person if he or she was not aware of it and could have taken action to avoid its effects (s 10).

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4 Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act,* Report No. 32, 1989, Recommendation 1; *The Contracting Out of Government Services,* Report No. 42, 1998, Recommendation 22.

5 *Ombudsman Act 1976*, ss 3(4B), 3BA.

6 The exposure draft FOI legislation released by the Australian Government for comment in March 2009 contains a similar provision. Agencies must publish, amongst other things, all agency operational information (that is, information to assist the agency to make decisions or recommendations affecting the public, such as rules, guidelines, practices and precedents) (see exposure draft of the Freedom of Information Amendment (Reform) Bill 2009, proposed ss 8(2), 8A).

7 As previously noted in Commonwealth Ombudsman, *Scrutinising government: administration of the Freedom of Information Act 1982 in Australian government agencies*, Report No. 2/2006, paras 4.9–4.12.

1.16 Public awareness of the very existence of executive schemes can be a problem. Agencies routinely publish on their websites and in their annual reports the legislation they administer. However, it is less common for them to list the executive schemes under which they make decisions. Some agencies such as DEEWR have included a list of their executive schemes in their annual reports as part of their FOI statements, but many do not.

1.17 Executive schemes have other potential risks that legislative schemes do not. The standard of drafting of rules, including eligibility criteria, may not be as high in executive schemes as in legislative schemes, for the reasons discussed below, and the schemes will not be subject to the same level of parliamentary scrutiny. The people who draft the rules may be the same people who interpret and apply them, leading to the risk of bias.

1.18 There is also the risk that governments may be perceived as using such schemes for political purposes. If criteria are highly flexible and the grounds for decisions about grants are not made public, concerns may arise about bias or other impropriety. The 2005 Senate committee inquiry into the Regional Partnerships and Sustainable Regions Programs arose from just such concerns. Its report recommended existing program procedures be strengthened and transparency increased, particularly in relation to special projects that did not fit the normal program criteria.[8] The subsequent report by the Australian National Audit Office (ANAO) made further recommendations for change.[9] The Australian Government decided to introduce guidelines for Commonwealth grant administration (discussed below at paragraph 1.39) partly in response to the ANAO report.[10]

Accountability measures for legislative and executive schemes

1.19 Government schemes that are established by legislation are subject to a range of accountability measures that do not apply to executive schemes.

1.20 If the eligibility criteria for a grant or program are in an Act, they must pass through several stages of scrutiny before Parliament agrees to them. First, all bills are drafted by the Office of Parliamentary Counsel, whose officers give expert assistance to agencies to ensure allowance is made for transitional arrangements, unforeseen circumstances and protection of rights and liberties in accordance with standard drafting principles. Second, agencies preparing legislation must consult with other government agencies and, where appropriate, with other interested parties. Third, once a bill is introduced to Parliament, it is subject to scrutiny by at least one parliamentary committee. The Senate Scrutiny of Bills Committee considers and reports publicly on each bill against criteria such as whether the bill trespasses unduly on personal rights and liberties, whether it makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers or non-reviewable decisions, or whether it provides insufficient parliamentary scrutiny of how a power is exercised. In addition, many of the more complex or controversial bills are referred to standing committees for more detailed public inquiry and report before Parliament debates them.

1.21 When the criteria for a program or grant are in regulations made under an Act, there are similar although more limited measures to review their content. The

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8 Senate Finance and Public Administration Committee, *Regional Partnerships and Sustainable Regions Programs*, 2005.

9 Australian National Audit Office, *Performance Audit of the Regional Partnerships Programme,* Report No 14, 2007.

10 Correspondence from the Department of Finance and Deregulation, 14 July 2009.

Office of Legislative Drafting and Publishing (OLDP) drafts all regulations. The Senate Regulations and Ordinances Committee considers all regulations and reports on whether they are in accordance with the parent statute, whether their provisions would be more appropriately contained in legislation and whether they trespass unduly on personal rights and liberties or make rights unduly dependent on administrative decisions whose merits cannot be independently reviewed. All bills, Acts and regulations are available to the public online.

1.22 Sometimes program criteria are not in legislation or regulations but are set out in a legislative instrument. Those too are subject to a range of safeguards: OLDP drafts some of those instruments on request by agencies; there are measures to promote high drafting standards; consultation is required where business may be affected; all instruments are published online on the Federal Register of Legislative Instruments; and all legislative instruments (with limited exceptions) are subject to disallowance by Parliament. These requirements are underpinned by the *Legislative Instruments Act 2003*.

1.23 By comparison, criteria for executive schemes:

- are less likely to be drafted by a person who has training and experience in legislative drafting
- require no public consultation in their development or amendment (except if they are regulatory schemes covered by the Best Practice Regulation Handbook)
- are not routinely examined by Parliament, although high profile or controversial schemes may be the subject of committee inquiries or parliamentary questions, particularly during the Senate estimates process
- are not agreed by or subject to disallowance by Parliament
- are not necessarily published as soon as they come into effect or when they are amended.

Increased government focus on disclosing information

1.24 The Australian Government has emphasised its commitment to improving openness and accountability of government and the Parliament, including by improving transparency of expenditure and decision-making.

1.25 As part of that goal, the Australian Government released an exposure draft of legislation to reform freedom of information laws in March 2009. The legislation aims to promote more open and accountable government by establishing an Information Commissioner and FOI Commissioner; requiring proactive publication of government information; requiring agencies to have publication plans and narrowing the range of exemptions from publication. Like the current FOI legislation, information that must be published will include documents such as guidelines that agencies use in their decision-making processes, whether under statutory or non-statutory schemes. The Government has also announced that it is developing guidelines for ministers and agencies on grants administration (discussed below).

1.26 The lack of formal accountability mechanisms for executive schemes underlines the importance of other measures that increase the transparency and accountability of the exercise of executive power. Executive schemes must not be forgotten in the process of developing new accountability measures and improving existing mechanisms.

The main types of executive schemes

1.27 While executive schemes come in many forms, a large proportion fall into one of two categories: schemes that allow the Australian Government to provide discretionary compensation payments, and schemes that provide government grants.

Discretionary compensation payments

1.28 A Department of Finance and Deregulation (Finance) circular[11] gives agencies guidance on four mechanisms for discretionary payments by government: the CDDA scheme, ex gratia payments, act of grace payments and waiver of debts. Act of grace payments and waiver of debts are authorised by the *Financial Management and Accountability Act 1997* (FMA Act), while CDDA and ex gratia payments are executive schemes that have no legislative backing. The discretionary payment schemes apply when there is a moral rather than legal obligation to the person or body concerned.

1.29 The Finance circular outlines the purpose of each mechanism, definitions of key terms and the circumstances in which payments would or would not be appropriate. Within those broad guidelines, it is up to ministers, and the agencies acting on their behalf, to determine who is eligible and the circumstances in which payments will be made. The two executive schemes that have attracted many complaints to this office, the CDDA scheme and ex gratia payments, are briefly outlined below.

1.30 This office investigated the administration of financial compensation mechanisms in 1999, leading to refinements to the Finance guidelines. As noted above, this office has just completed a report on the administration of the CDDA scheme.

CDDA

1.31 The CDDA scheme allows for compensation to members of the public who suffer detriment because of defective government administration. Defective administration can include an agency's unreasonable failure to follow procedures or give proper advice, or giving advice that was incorrect or ambiguous. Detriment includes personal injury, damage to property and other economic loss.

1.32 The Finance circular states that CDDA is a payment of last resort and will not apply in certain situations, including where legal action is available or an administrative review mechanism would provide a remedy, or where the effects of flawed legislation need to be overcome. A claimant's own actions are also relevant in deciding whether there is a moral obligation to pay. The basic principle is to restore the claimant to the position he or she would have been in if the problem had not occurred. Payments under the CDDA scheme can be approved by the responsible minister, who may authorise an officer of the relevant agency to make decisions on his or her behalf.

Ex gratia payments

1.33 Ex gratia payments are authorised by the Prime Minister and/or Cabinet, and are generally only considered after all other available schemes have been explored. The Finance circular requires amongst other things that the agency recommending payment must develop eligibility criteria, confirm the numbers and identities of people

[11] Department of Finance and Deregulation, *Discretionary compensation mechanisms*, Finance Circular No. 2006/05.

who may be eligible and implement arrangements for processing and delivering payments. The Prime Minister may impose additional criteria. Unlike act of grace payments which are made to individuals in special circumstances, ex gratia payments are generally directed at a group of individuals who have suffered a particular type of loss.

1.34 Ex gratia payment schemes which attracted significant numbers of complaints to this office include the F-111 deseal/reseal scheme for former maintenance personnel and the scheme set up to assist employees who have been made redundant in a corporate collapse.

Grant administration

1.35 A second group of executive schemes which have been a source of many complaints to this office concerns Commonwealth grants.

1.36 The ANAO has conducted audits of a range of grant programs and has issued a series of better practice guides on grant administration, its latest version in 2002.[12] While the ANAO guide applies to both statutory and non-statutory schemes, the points the guide makes about program risks and risk management are useful to consider when examining executive schemes. More recently, the Australian Government has issued guidelines for the administration of Commonwealth grants. Each of these is discussed below.

The ANAO's better practice guide on grant administration

1.37 The ANAO noted that risks to grant program administration include:

- pressure to implement programs urgently
- grant programs not contributing to the strategic objectives of the funding agency
- unequal treatment in appraising applications and awarding grants
- grants being awarded to ineligible individuals or organisations, or organisations which may not be able to complete a program effectively
- grants being awarded for activities which are inconsistent with program objectives
- incremental and undocumented changes in the interpretation of program objectives or guidelines over time
- unapproved variations to programs during the period of the grant.

1.38 The ANAO recommended a range of measures to counteract these risks:

- ensuring the program rules are clear and effectively communicated to stakeholders, contain assurance controls and provide for regular monitoring and evaluation
- obtaining independent advice from auditors or legal advisers if appropriate
- testing program information and guidelines with client groups before commencement
- ensuring eligibility criteria are robust and up to date (for example, by using recent census data)

[12] Australian National Audit Office, *Administration of Grants: Better Practice Guide*, 2002.

- ensuring administrative law and other legal requirements are met (such as procedural fairness, privacy and anti-discrimination law)
- addressing government access and equity objectives (ensuring that applicants are not disadvantaged by disability, cultural, language or other factors, and that programs are appropriately targeted)
- ensuring the criteria for and basis of recommendations and decisions at each stage of approving or refusing a grant are transparent and well documented
- providing for identifying, notifying and managing conflicts of interest of decision makers and other officers
- ensuring transparency and accountability in contracting out government services
- establishing relevant and meaningful performance indicators
- providing good internal and public reporting mechanisms on expenditure of funds and progress towards achieving program outcomes, especially where more than one agency is involved in the program.

Commonwealth grant guidelines

1.39 After we had commenced our examination of executive schemes leading to this report, the Australian Government announced that it would develop guidelines to provide a whole of government policy framework for grants administration.[13] The guidelines, which aim to provide clear rules and guidance to ministers and agencies, were issued on 1 July 2009 after our draft report had been circulated to relevant agencies for comment. Compliance with the new guidelines is a legal requirement under regulations made under the FMA Act.

1.40 Part I of the guidelines contains mandatory decision-making and reporting requirements for grants administration. Part II, which draws on the ANAO better practice guide, sets out sound practice guidance based on seven key principles. These guidelines should help to increase consistency between agencies and promote procedural fairness and accountability for expenditure.

Agency consultation

1.41 In accordance with our usual practice, the draft report was provided to those agencies referred to in the case studies for their comments: Centrelink, DAFF, DEEWR, DIISR, DVA and FaHCSIA. The draft report was also sent to Finance and the Department of Prime Minister and Cabinet because of their policy and administrative roles in relation to the Commonwealth grant guidelines, the CDDA and ex gratia schemes and to whole of government issues.

1.42 Six agencies (Centrelink, DAFF, DIISR, DVA, FaHCSIA and Finance) expressed support for the best practice principles set out in Part 3 of the report. DEEWR stated it would consider the best practice principles in developing and administering its executive schemes, noting the importance of ensuring fairness and transparency in their administration. The agencies did not agree with some of the criticisms of agency practice contained in the case studies in this report; in a couple of instances noted in the report the complaint issue is still under investigation.

[13] The Hon Lindsay Tanner MP, Minister for Finance and Deregulation, 'Improving government grants', *Media release*, 42/2008, 9 December 2008.

1.43 Finance stated that the Commonwealth grant guidelines issued on 1 July 2009 had addressed many of the issues raised in the report in relation to grants administration. Finance also considered that the mechanism for providing act of grace payments (discussed at paragraph 1.28), while not strictly a review option, is an alternative avenue for a person to seek an independent examination of their concerns. Under s 33 of the FMA Act, the Finance Minister can make a payment if he or she considers it appropriate to do so. The Minister or delegate will consider such factors as the information available to the claimant, the agency's actions and omissions, any unintended or inequitable outcome and any other special circumstances.

1.44 In relation to the fourth best practice principle concerning publication of lists of the executive schemes in agency annual reports, the Department of Prime Minister and Cabinet noted that as a matter of policy it does not support specifying guidance additional to the annual report requirements set by the Parliament through the Joint Committee of Public Accounts and Audit (JCPAA).[14] The department suggested instead that this office could propose that the Government consider mechanisms to ensure that agencies publish through appropriate channels lists of the administrative schemes under which they make decisions. Seeking JCPAA's support for an annual report requirement along these lines could be one of the options for the Government to consider in response. This office accepts that view, but notes also that agencies can take the initiative to list executive schemes in their annual reports when describing agency programs. There is support for that approach in the FOI Act ss 8–9.

[14] Under s 63(2) of the *Public Service Act 1999.*

PART 2—ISSUES ARISING IN COMPLAINTS

2.1 This part outlines the issues arising in executive schemes which have been the subject of complaints to this office.

2.2 Issues arising in complaints fall into five broad categories:

- inadequate advice to potential claimants
- criteria not properly thought through
- inadequate liaison with other organisations
- poor decision-making practices
- lack of effective review of decisions.

2.3 Each of these categories is considered below.

Inadequate advice to claimants

2.4 Within this group of complaints are the following issues:

- failure to publish guidelines or other relevant information
- ambiguous guidelines
- failure to update guidelines.

Failure to publish guidelines or other relevant information

2.5 Agencies vary widely in the amount of information that they make available to the public about their executive schemes. Some publish all relevant information, including ministerial guidelines, agency guidelines and simplified materials prepared specifically for public information. Some agencies decide not to publish their policy guidelines but prepare simplified materials such as fact sheets, application notes, frequently asked questions and customer guidelines. There is a risk that these materials will not address all the relevant criteria so that claimants are not made fully aware of matters relevant to their application.

2.6 This has obvious disadvantages for claimants. Agencies will also be hampered in administering the scheme: if a person is not made aware of unpublished material that affects them, the agency cannot apply that material in a way that prejudices the person (FOI Act s 10). Below are examples in three different schemes where the grievance expressed in a complaint to the Ombudsman arose when the complainant was refused a benefit under a rule that was not previously known by or available to them.

Case study: Closing date not clear

The Environmental Management Systems Incentive Program (EMSIP) program, developed by DAFF and administered by Centrelink, ran for five years until 30 June 2007. It provided grants to landholders to encourage the use of sustainable management practices.

A complainant's application was refused three months after the program finished on the basis that her application should have been lodged by 30 June 2007. The complainant argued that while she was aware that the program ended on that date, she was not advised that applications must be lodged by then. She had been advised to keep receipts for expenditure on her environmental management plan until 30 June 2007. Fact sheets sent to her in 2006 specified that the program ended on that date but did not refer to the closing date for applications. She had also been advised that she could lodge claims progressively.

An internal review by Centrelink found that the detailed information that had been on the DAFF and Centrelink websites at the time was no longer available to assist in resolving the complaint. The review officer concluded nonetheless that there was 'sufficient detail available' on the form that was part of the application and in the fact sheets sent to the complainant in 2006 for her to have 'concluded' that the program ceased in June 2007. Accordingly the review officer upheld the original decision.

We found administrative deficiency by Centrelink on the basis of inadequate advice to the complainant about the closing date for applications, a finding which Centrelink accepted. We also suggested to the complainant that she consider applying for compensation under the CDDA scheme.

Case study: Policy not published

The one-off Tobacco Package Restructuring Grant, administered by Centrelink on behalf of DAFF, was introduced to help tobacco farmers move into alternate business activities. Amongst other criteria, tobacco farmers needed to have a shareholder interest in a tobacco cooperative on a particular date (the eligibility date). The maximum payment was limited by a cap on the size of the shareholder interest.

Two complainants who held a shareholder interest were unaware of a rule that prevented them from receiving a full grant in respect of another shareholder interest they received from a deceased estate. Those beneficial interests were taken into account in calculating the maximum shareholding allowed. The relevant guidelines were not developed and published until after the commencement of the scheme and the death of the shareholders who had bequeathed their interest to the complainants.

Case study: Eligible claimants not advised

The General Employee Entitlements and Redundancy Scheme (GEERS) provides redundancy and other benefits to employees who have suffered loss in a corporate collapse. The scheme was introduced in 2001 and is administered by DEEWR (then known as DEWR). Applications must be made within 12 months of the termination of employment, although a senior agency officer has limited discretion to allow applications outside this period.

In 2003 and 2004 we received numerous complaints about the GEERS scheme. Our investigation of those complaints found amongst other things that there was inadequate notification to people who were eligible to apply for the scheme, resulting in some applicants failing to lodge an application within the required 12 months.

DEWR advised that when it became aware that a business failure may lead to GEERS claims, DEWR sent information about the scheme to the person administering the insolvency (the insolvency practitioner). DEWR relied on the insolvency practitioner and the former employer to ensure that redundant employees were advised about the scheme and how to make a claim.

We found DEWR's approach inadequate to ensure that employees were aware of the benefits potentially available to them. In one case, DEWR refused an appeal against rejection of a claim that was lodged outside the 12 month period on the basis of two reasons: most of the other employees of the same business had applied within time, and the insolvency practitioner had advised DEWR that

GEERS was discussed at two of five creditors' meetings. However, we were concerned that the meetings were held during work time, when former employees with new jobs would have found it difficult to attend. We were also concerned that they would have had to recognise they were creditors to know that they should be present. Our investigation subsequently revealed that GEERS was not listed on any meeting agenda or recorded in any minutes of the meetings.

We found administrative deficiency on the basis that DEWR, when considering the appeal, had failed to verify the insolvency practitioner's claim that GEERS had been discussed at meetings. DEWR accepted our recommendation that it reconsider the complainant's application as if it had been lodged within time.

2.7 In another GEERS case involving a late application, the complainant was functionally illiterate, had experienced serious illness after being made redundant and had no-one to help him with his affairs as his partner had died. The review officer had refused his appeal because it was not lodged within the 12 month period. After we drew the complainant's difficulties to DEWR's attention, a senior DEWR officer agreed that his circumstances warranted an exercise of discretion to accept the claim.

2.8 These cases were amongst a range of complaints that we raised with DEWR in a series of meetings about GEERS in 2004. DEWR made a number of improvements, including increasing its efforts to make potential claimants aware of GEERS through improved liaison with insolvency practitioners. Revised GEERS operational arrangements also spelt out in greater detail the responsibilities of insolvency practitioners for administering the scheme. The arrangements also allowed claims within 12 months of the termination of employment or the date of the insolvency event, whichever is the later. As a result of these improvements, the number of complaints to this office about GEERS declined markedly in 2005–06.

Ambiguous guidelines

2.9 Sometimes, whether through haste in developing a program or lack of thinking through the finer details, policy guidelines can be ambiguous. This can lead to confusion amongst both the public and the staff administering the scheme, as well as inconsistent decision-making. If different terminology is used in programs that address the same policy issues, an unintended consequence is that members of the public may fall between the cracks and be ineligible for any of the programs that are designed to address their circumstances.

Case study: Ineligible for both payments

A program administered by DEEWR aims to encourage employers to take on apprentices through payment of a Commencement Incentive, or to provide opportunities for out-of-trade Australian apprentices through the payment of a Recommencement Incentive.

In 2007 an automotive business that employed the complainant as an apprentice received the Commencement Incentive. The business later cancelled his employment because of financial difficulties. After obtaining a new apprenticeship, the complainant changed his training stream from a certificate in automotive mechanical (engine reconditioning) to a certificate in automotive mechanical technology (light vehicle). Both qualifications led to the occupation of motor mechanic. DEEWR determined that because the apprentice was undertaking the same training package, although in a different stream, his new employer was not eligible for the Commencement Incentive. The program guidelines stated that the Commencement Incentive could not be paid twice unless the apprentice changed to a different training package. The decision not to pay the Commencement Incentive was upheld on internal review.

Guidelines for the Recommencement Incentive stated that it only applied where the apprentice recommenced employment in the same 'qualification' rather than 'training package'. Accordingly the new employer was also not entitled to the Recommencement Incentive.

As a result of our investigation, DEEWR acknowledged that there was some ambiguity in the Recommencement Incentive guidelines, and stated that it would consider clarifying those guidelines to refer to the same 'training package' rather than 'qualification'. This would entitle apprentices to attract the Recommencement Incentive if they changed the qualification they were seeking as long as they were still working towards the same outcome. The amended guidelines came into effect on 1 July 2009. DEEWR also undertook to waive the existing guidelines in the complainant's case.

Failure to update guidelines

2.10 After the introduction of a program or grant, agencies sometimes identify that guidelines should be clarified or refined to reflect the true policy intention. Doing so without giving adequate explanation to the public or ensuring that formal guidelines, application forms and public information material are updated can cause confusion and trigger complaints. This is particularly the case if decision outcomes change and new applicants are aware that others in similar circumstances are found eligible.

Case study: Changing guidelines without formally updating them

The Murray Darling Basin Irrigation Management Grant program provides assistance to irrigators to implement water management strategies to address reduced water allocations. Payments are administered by Centrelink on behalf of DAFF. We received complaints about changes to the definition of 'irrigator', amongst other matters, and how those changes were implemented.

Initially the program guidelines required an applicant to hold an active licence for irrigation entitlement but did not require proof of a reduced water allocation. Because of some confusion about ground and surface irrigators, DAFF clarified its policy via email to Centrelink in February 2008. The email stated that applicants whose sole source of irrigation was a farm dam or bore should be rejected, even if they had an active licence, unless they could prove that their water allocation had been formally reduced by a regulating authority. The guidelines were not formally updated to reflect DAFF's email until June 2008. Applications lodged before the formal update were nonetheless assessed against the criteria set out in the email.

When we investigated complaints to this office, DAFF advised us that if Centrelink requested policy guidance on an issue, DAFF tried to provide a response as soon as possible. DAFF considered that an email was the quickest and most effective way to clarify a matter with Centrelink, pending formal

revision of the guidelines. DAFF described its action as a clarification rather than a policy change, and argued that its approach did not disadvantage people who had already lodged applications because Centrelink had contacted all affected applicants and invited them to provide additional evidence that a regulating authority had reduced their water allocation.

In an investigation that is continuing, we have put to DAFF that the change was not a clarification but a policy change and that it should not have been applied retrospectively to affect existing applicants. We also considered that the delay in adopting new policy guidelines and application forms was unacceptable.

Criteria not properly developed

2.11 A second group of complaints arises from the development of eligibility criteria or guidelines whose implications are not well thought out. The complaints fall into three types:

- unsuitable criteria
- failure to take account of reasonably foreseeable issues
- inconsistent guidelines and policy.

Unsuitable criteria

2.12 When a program is developed and implemented quickly in response to a particular event or to an individual's circumstances, particularly those that attract media attention, the eligibility criteria can appear arbitrary to those who believe they are equally deserving of government funding but who fall outside the criteria. This view can be particularly strong where eligibility for a program or benefit depends on a person's age or their length of service, or the timing of an event.

2.13 All programs are subject to some limits, whether by way of their commencement date or other eligibility criteria, and legislative programs may be similarly criticised for rigid cut-offs. However, when programs are embodied in legislation, there is more time to consider the implications during the drafting process, to seek expert financial or legal advice where relevant and to consult with stakeholders. Parliament is also able to debate the criteria and suggest amendments, and may seek further public input through a parliamentary committee inquiry.

Case study: A rigid cut-off date

In March 2007 the then Prime Minister announced a new ex gratia Carer Adjustment Payment (CAP). The one-off payment of up to $10,000 was to assist families with additional costs during the adjustment period immediately after a catastrophic event, such as a serious or severe illness or accident involving one of their children. Amongst other criteria, the child must be six years of age or less, have a major disability, severe illness or medical condition and significant care requirements, and the child's carer must be able to demonstrate a very strong need for financial support during the adjustment period. Part of the adjustment period must fall on, after or close to 1 January 2007. FaHCSIA has policy responsibility for the scheme and payments are administered by Centrelink. Applications for the CAP are assessed by an independent panel of experts who make recommendations to FaHCSIA.

Mr A complained to this office about the refusal to grant him the CAP for his son who had been diagnosed with cerebral palsy in May 2006 at the age of 12 months. The decision to refuse his application had been confirmed on internal review. Mr A applied for the CAP in June 2007 and his claim was rejected in November 2007 because the adjustment period did not fall on, after or close to 1 January 2007.

FaHCSIA stated that the main reason Mr A's application was rejected was that as at 1 January 2007, the family was not going through a significant adjustment period but was continuing to provide ongoing care needs that had been established for some time. After investigating Mr A's complaint, we concluded that FaHCSIA had adhered to the criteria in the CAP guidelines.

2.14 We queried in that case whether the cut-off date was unsuitable and arbitrarily chosen. Mr A and his wife still had to go through an adjustment period after their son's diagnosis and were still experiencing the financial effects of caring for their son. The age cut-off for the child was similarly arbitrary and, although that criterion did not affect Mr A, other parents who faced significant costs in caring for their older children in similar circumstances would be deemed ineligible.

2.15 The CAP case study also demonstrates the length of time that can be needed to establish an executive scheme and the inconvenience and frustration that claimants can experience in the meantime, particularly if it is not made clear to them that there will be initial delays. FaHCSIA acknowledged that processing Mr A's application had taken over four months and stated that a number of the original claims lodged between June and August 2007 had been delayed. The reason FaHCSIA gave for this delay was the time necessary to establish an independent expert panel, to design and construct a secure database and for the panel to develop a quality assurance process to ensure consistency in panel recommendations. Given that the purpose of the payment was to assist families with additional costs immediately after a catastrophic event, such a long delay limited its usefulness to those families. FaHCSIA advised that the average time to process a CAP claim was later reduced to between four and six weeks.

2.16 Another example of criteria which appear unsuitable and not fully reflecting the policy behind a program occurred in a grant program for drought-affected farmers.

Case study: Owning a property

The Exceptional Circumstances Exit Grant administered by DAFF is a one-off payment of up to $150,000 aimed at assisting drought-affected farmers to exit the industry. Claimants are required to have a continuing interest in a particular farm enterprise, rather than any farm enterprise, for at least five years immediately before leaving the industry. Two complainants to this office were deemed ineligible because during the five year period they had downsized to smaller farms.

When we asked about the rationale for this requirement, DAFF stated that the grant is targeted at drought-affected farmers who face particular barriers to leaving their land and farming as a way of life. DAFF argued that a farmer who has changed properties in the last five years was not part of the target group for exit grant.

Farmers in that position do not have the same long-term attachment to a farm that can inhibit adjustment and exit, or they have demonstrated that they can more readily deal with adjustment and change.

2.17 We queried whether a five year property ownership is the best rule for demonstrating a long-term attachment to a particular property or to farming as a way of life. A person who has been farming for many years and who has downsized their property in the past five years so as to reduce debt and maintain their way of life is excluded by this criterion. DAFF has responded that it will review whether the Exit Grant scheme is meeting its target outcomes.

Failure to take account of foreseeable issues

2.18 Sometimes implementation of a grant or program brings to light unpredictable issues that need to be addressed in revised guidelines. In other cases, guidelines have failed to take account of issues that should reasonably have been foreseen before the grant or program commenced. Agencies may need to seek legal, financial or other expert advice when proposals are being developed, particularly in relation to the terms and conditions of grants or funding agreements, the taxation implications of new proposals and their interaction with other programs and benefits.

Case study: Criteria too restrictive

DIISR is responsible for the liquid petroleum gas (LPG) vehicle scheme administered by Centrelink. The scheme provides grants to people who have their private vehicle converted to LPG.

We considered that some issues arising in complaints to this office could have been foreseen when the eligibility criteria were developed. One example was the requirement that a claimant have their vehicle registered in their state of residence. One claimant had no fixed address because he was an amusement park operator who travelled around Australia in the course of his work. After we investigated his complaint, the claimant received a grant. The ministerial guidelines were later changed to remove the requirement of registration in the claimant's state of residence.

Alignment with policy

2.19 Sometimes agency guidelines or practices are not aligned with the expressed policy of an executive scheme, including where the responsible minister has made a public announcement about the intended ambit or operation of the scheme. Because of the lack of external input or scrutiny in developing guidelines, it may not be until a complaint is investigated that the lack of alignment comes to light. Agencies need to take particular care to ensure consistency.

Case study: Agency practice not aligned with policy aim

The financial case management scheme provides emergency assistance to certain Centrelink clients whose benefit payments have been suspended for eight weeks because of serious or repeated failures of the activity test. Clients who are exceptionally vulnerable or have dependant children or other vulnerable dependants may be granted financial assistance through payment of their essential expenses up to the amount of their income support payment.

Our investigation of complaints about the Welfare to Work reforms in 2006 and 2007[15] found that it was Centrelink practice to withhold payment of benefits when an incident of non-compliance required investigation but before a decision had been made as to whether there had been a failure. In the gap between suspension of payments and making a decision, a person was not eligible for financial assistance. This practice meant that vulnerable clients could be left for weeks without any income support after benefits were suspended. Centrelink's service delivery delays exacerbated the impact of the suspension of payments.

We found that the scheme was not achieving its stated aim of protecting vulnerable people who are unduly affected by non-payment periods. Making assistance available under the scheme retrospectively did not provide an adequate outcome.

As a result of our investigation, a change was implemented from November 2007 so that benefits would be received until a decision was made to apply a non-payment period. At that time, a person would be advised of the availability of financial case management. A preliminary eligibility check would also be

[15] See Commonwealth Ombudsman, *Application of penalties under Welfare to Work*, Report No. 16/2007.

completed when an activity test failure was investigated to ensure a smooth transition if a non-payment period is subsequently applied.

The financial case management scheme is being phased out from 1 July 2009.

Case study: Application forms in conflict with policy

Under the LPG conversion scheme (described above), we received four complaints about the conflict between guidelines and policy on the vehicle's maximum weight. The ministerial guidelines and the customer guidelines produced by AusIndustry (the program delivery division of DIISR which administers the scheme) specified that a vehicle must be less than 3.5 tonnes. The program application forms, by contrast, stated for some time that a vehicle must not *exceed* 3.5 tonnes. This led to complaints where claims were rejected because the vehicle was 3.5 tonnes.

After the agency issued a new application form, the old forms were still available through some non-government websites. Our investigation found that DIISR honoured all claims that were made on forms containing the error, so that application outcomes were inconsistent depending on the form that was used.

DIISR subsequently advised that AusIndustry undertook a mail out in February 2009 to approximately 8,500 LPG installers, suppliers and motor vehicle dealers to inform them of changes to the program and application requirements and provide accurate and current information for customers. The mail out included a request that businesses that wished to make information about the LPG scheme available on their websites establish a link to the AusIndustry website. We consider that such measures help to avoid the problems that can arise when customers have access to different versions of forms.

Inadequate liaison

2.20 A third area of complaint arises from poor liaison between agencies and other organisations that are involved in delivering its programs.

2.21 Sometimes complaints arise when an agency oversees the provision of services by non-government organisations that are contracted to carry out government functions. At other times complaints are made when one agency administers the programs for which another agency has policy responsibility. This arrangement is a key function of Centrelink, which administers many payments for other departments, receiving, processing and deciding claims in accordance with policy guidelines. Complaints to this office show that misunderstandings can occur and inconsistent advice may be given by the administering agency and the policy agency. The policy agency may realise that the administering agency is applying its guidelines incorrectly but take no action.

2.22 One example is the complaints we received about decisions on claims for the third Equine Influenza Business Assistance Grant (EIBAG).[16]

[16] See Commonwealth Ombudsman, *Centrelink and Department of Agriculture, Fisheries and Forestry—Claim and review processes in administering the Equine Influenza Business Assistance Grant (Third Payment)*, Report No. 13/2008.

Case study: Criteria wrongly applied

In August 2007 the Australian Government declared an outbreak of equine influenza and imposed an initial total ban on all horse movements, followed by a zoning system that restricted horse movements in certain areas. A financial relief package for those affected included a series of three ex gratia lump sum payments (EIBAGs) to businesses that had lost income because of the outbreak and movement restrictions. The EIBAGs were granted under criteria set out in a series of policy guidelines that arose from ministerial directions and were published by DAFF.

The policy guidelines for the third EIBAG, announced in February 2008 when most movement restrictions had been lifted, required claimants to show either that their business was located in, or most of their business income was derived from, a restricted movement zone specified that month.

Five complainants contacted this office, dissatisfied with the refusal of their claims for the third EIBAG and the underlying policy. Centrelink, which administered the EIBAG on behalf of DAFF, had refused them payment on the basis that their businesses were not located or their activities conducted in a restricted movement zone. The five complainants had based their claims on the fact that most of their income before the outbreak came from customers in the restricted zones.

We found that the basis for Centrelink's decisions appeared to be inconsistent with the policy guidelines. DAFF had reviewed and upheld Centrelink's decisions on the basis that the complainants had not provided sufficient evidence to demonstrate that their businesses qualified for the payment. We considered that the complainants had been prevented from submitting proper applications because of Centrelink's incorrect decision-making and advice, and DAFF's failure to take steps to remedy those errors.

Both agencies acknowledged that Centrelink had applied the guidelines incorrectly. DAFF also acknowledged that the level of detail in the guidelines and consultation in preparing them and delivering the program were inadequate, while stating that this reflected to some extent the reactive nature and urgency of the program's implementation, at least in the early stages. DAFF advised that it had set up an internal management committee to develop a uniform approach to managing grants. Centrelink undertook to review the 799 rejected claims for the third EIBAG to identify any that may have been incorrectly processed and to invite the claimants to provide additional evidence. All assessments were to be subject to independent quality reviews.

Of the 799 rejected claims, 680 claimants (85%) accepted the opportunity to have their claims reassessed. In total, 463 of the 680 claims were reassessed as successful at a cost of $2,315,000.

Poor decision-making processes

2.23 Another group of complaints to this office raised the following issues relating to poor decision-making processes in the administration of executive schemes:

- lack of internal guidelines for investigators and decision makers
- poor recordkeeping by decision makers
- delay in finalising claims
- inadequate staffing resources
- inadequate information given to claimants when decisions are notified.

2.24 These types of complaints are not unique to executive schemes. However, poor decision-making practices have a particularly strong impact because of the absence of the accountability mechanisms that apply to legislative schemes, as discussed in Part 1 of this report.

2.25 Our investigations of 102 complaints about decisions made under the F-111 deseal/reseal scheme are used by way of example in several of the case studies in

this section, as they clearly illustrate the problems that can arise, particularly when evidence is scant and resources are limited. Problems with inadequate decision-making processes, however, are not limited to that scheme: they extend across many areas of government.

2.26 The basis of the scheme in the following F-111 deseal/reseal case studies is as follows. DVA administers a number of schemes in response to the health problems of Australian Defence Force personnel who participated in a series of deseal/reseal programs for F-111 aircraft fuel tanks between 1975 and 1999. As well as measures such as medical assistance and compensation payable for specific health problems, the Australian Government announced an ex gratia payment to personnel who had worked on the program, in recognition of their difficult working conditions.[17] The size of the payment depended on the number of days on the program: members who had worked more than 30 days received $40,000 and those who had worked between 10 and 29 days received $10,000.

Lack of internal guidelines for investigators and decision makers

2.27 Agencies need to ensure that staff have written guidelines about how to conduct their investigations and the decision-making process. It is particularly important to address how investigators should gather evidence to support claims and how they should assess claims, especially when primary sources of evidence are deficient because of the passage of time or because records were not properly kept or have been destroyed.

Case study: Gathering evidence

Complaints about the F-111 deseal/reseal scheme highlighted deficiencies in DVA's internal processes. In general, DVA was willing to accept a range of evidence, but had not issued guidance or policy on how information should be gathered to support or deny claims. In particular, the scope of an assessor's responsibility to gather evidence was not clear.

Deficiencies were apparent in the personnel records created and maintained by the RAAF. Many complaints arose from situations where the records held were not sufficient to support a claim, and/or the complainant considered that the records did not accurately reflect their service. The two main causes of insufficient documentation were informal placement of an individual onto a deseal/reseal process without adequate official recording of their movement, and the destruction of technical maintenance records.

Because the nature of the work done and the time spent were critical to decisions on claims, any dispute as to what an individual did was central. We found the lack of guidance to DVA staff resulted in inconsistent approaches to the assessment of claims. In some cases our investigation found insufficient documents to support a claim.

2.28 Once evidence has been gathered, staff need to be given clear guidance in how to assess claims, so that consistency in decision-making is promoted. This is particularly important where a large number of staff are involved in making decisions, but it can apply even to small teams.

[17] See Joint Standing Committee on Foreign Affairs, Defence and Trade, *Sealing a just outcome: Report from the Inquiry into RAAF F-111 Deseal/Reseal workers and their families*, 2009.

Case study: Assessing evidence

Once evidence had been gathered for the F-111 deseal/reseal claims, we found some inconsistencies in how that evidence was weighed by decision makers. DVA had no guidelines to assist the decision makers, and individual cases had no explicit records of how the evidence was considered.

Where the claim was straightforward, the treatment of evidence did not become an issue. Where the evidence was unusual and the matter was not straightforward, it was not always clear what weight the decision maker placed on different pieces of evidence, and how the evidence led to the conclusion. It was also not always clear that the decision maker knew what standard to apply in deciding whether the evidence was sufficient.

There also appeared to have been inconsistent treatment of similar evidence, such as statutory declarations by personnel who were employed at the same time as the claimant. In some cases this evidence appears to have been given considerable weight, while in others it was discounted. While either approach may be appropriate in an individual case, a review body should be able to look at the decision and see a clear statement of how the evidence was weighed and how that contributed to the final decision. This was not always possible.

DVA did not have a written policy for assessing and determining claims, apart from the participant definitions. The definitions were in some areas ambiguous and poorly worded, leading to differing interpretations. Where problems arose, it may have been useful to establish guidelines to guide future decisions. DVA advised that because the claims were handled by a small team with a very limited number of delegates who could make a decision, decision-making was consistent despite the lack of guidelines. However, this cannot be guaranteed.

Case study: Calculating an entitlement

A complainant's application for a payment under the GEERS scheme (outlined above) was approved for a period of 12 weeks' pay in lieu of notice. His employment contract provided for three months' pay in lieu of notice without specifying whether a month referred to a calendar month or a period of four weeks. He appealed the decision, arguing that he was paid monthly, that a month meant a calendar month and therefore he should receive 13 weeks' pay. The appeal was refused because his contract did not specify a calendar month.

When we contacted DEWR about his case in 2003, we asked if legal advice had been sought. Case law we examined indicated that a month refers to a calendar month when not otherwise specified, and Commonwealth and state interpretation legislation adopts the same position. DEWR advised that legal advice had not been sought before the appeal was finalised and that subsequent legal advice confirmed our view. DEWR recalculated the complainant's entitlement and undertook to issue instructions to staff to ensure that this interpretation became standard practice.

Poor recordkeeping by decision makers

2.29 It is important that decision makers keep accurate records of their decisions, including their reasons. If recordkeeping is poor, it is not clear how a decision was reached. This makes reviews of the decisions more difficult, whether internally or by an external body such as the Ombudsman. Poor recordkeeping also makes it difficult for an agency to assess the consistency of decision-making on similar cases.

2.30 Staffing constraints are often a pressing concern for agencies (as discussed in the case study *Missing records* and at paragraph 2.36), but a failure to keep good records will cause the agency more work in the longer term if a complaint or application for review is made. Agencies must ensure that their staff are properly trained in recordkeeping and that quality assurance processes are in place.

Case study: Missing records

In our investigations of complaints about the F-111 deseal/reseal scheme, we found that individual claim files contained limited information. In general, it was unclear on what basis decisions were made if no technical assessment had been prepared and placed on file. Technical assessments did not always note the source of the information relied upon and were undated. Where DVA had advised us a claim had been reconsidered, the files contained little or no evidence, such as a recorded assessment of the material forming the basis of a reconsideration request, the action taken and the outcome. Some records of telephone conversations with claimants, former supervisors and our office were missing, and it was not always clear who was the author of handwritten comments on file documents.

DVA advised us that in all cases both the recommendation and the delegate's decision were placed on file. The absence of a technical assessment meant that insufficient evidence was available to link a claim easily to the definition that determined the level of the person's payment. DVA agreed that records of all telephone conversations should have been made, but stated that given the available staffing resources this would have been a significant drain and would have led to delay in assessing and finalising claims.

The lack of written records also made it more difficult for our office to investigate claims. While staff were helpful in explaining matters, it is preferable for case information to be on the written record.

Delay in finalising claims

2.31 Delay in dealing with matters is one of the key causes of complaint across government agencies. The problem of delay in legislative schemes has been clearly acknowledged in the *Ombudsman Act 1976*: s 10 gives the Ombudsman the power to certify that there has been unreasonable delay by a person who has a statutory power to do an act or thing when no period for action is prescribed. The certificate has the effect of deeming the person to have decided not to act for the purposes of an application being made to the AAT to review the indecision. There is no statutory provision relating to delay in executive schemes.

2.32 Sometimes delays in decision-making are unavoidable, particularly if further information is required or if ministerial involvement is necessary because new or sensitive issues arise. Agencies cannot be criticised for adopting a cautious approach in such circumstances, even if that causes inconvenience to individual members of the public who are keen to have a prompt response.

2.33 When unexpected delays do occur, however, it is important to keep claimants fully informed of the status of their matter, the likely timeframe and the reasons for the delay. This will help the agency to manage the claimant's expectations and ensure a positive ongoing relationship. Because agencies are often under resource constraints, there can be a tendency amongst decision makers to deal with easier claims. This will optimise average processing speed but it can mean that more difficult claims are subject to lengthy delays.

2.34 One example concerns some complainants who had not had their F-111 deseal/reseal claims finalised within a reasonable time. Some claims were more time-consuming to investigate and assess because of difficulties in gathering evidence, especially given the length of time that had passed. We understand that DVA's practice was to conduct an initial assessment to see which claims could be quickly and easily dealt with. The more difficult claims were sometimes delayed as a result. From our examination of particular files, it seemed that DVA did not always regularly update claimants on the progress of their claims or advise them that finalisation of their claim may take some time.

2.35 Another example of delay and failure to keep the claimant informed about the status of their matter arose in the following complaint about a CDDA claim.

Case study: Keeping an eye on the time

Mr B contacted our office in May 2006 about Centrelink's refusal of his CDDA claim. At that time his appeal to the Administrative Appeals Tribunal (AAT) about a decision to reject his claim under the Pension Bonus Scheme had been adjourned pending the outcome of his CDDA claim. We declined to investigate the complaint at that time because a tribunal was considering Mr B's matter.

Mr B contacted our office again in July 2006 after his AAT appeal had been finalised. The AAT had recommended that Centrelink reconsider its decision to refuse his CDDA claim. Centrelink advised us that the matter had been referred for review to one of its officers who had not had any previous involvement in the case. We recommended that the Mr B await the outcome of the reconsideration process, and invited him to contact us again if Centrelink made an unfavourable decision.

In November 2006 Mr B contacted our office again as he had not heard anything about the progress of the matter. We contacted Centrelink, who undertook to contact Mr B to discuss progress.

Mr B made further contact with our office in February 2007 as he had not heard anything about the outcome of the matter. Centrelink told our office that the delay in processing Mr B's claim was partly due to the need to obtain external legal advice because of the amount of money involved. At our suggestion, Centrelink contacted him in April 2007 to provide an update. As Centrelink indicated then that the claim was close to resolution, we suggested to the complainant in May 2007 that it would be best to await the outcome, and invited him to contact us again if a significant time passed without an outcome.

In September 2007 Mr B advised us that the reconsideration of his CDDA claim had been finalised and that he had received compensation of $21,000. The reconsideration process took 14 months to complete.

Although the need to seek external legal advice contributed to the delay, Centrelink could have handled the matter better by keeping Mr B regularly informed of the progress of his matter.

Inadequate staffing resources

2.36 Agencies must ensure that sufficient staffing resources are allocated to administering executive schemes. Sometimes the problem may be a lack of sufficient staff to handle the workload, a problem which is commonly linked to complaints about delay. At other times, the issue may be a lack of appropriate skills and training.

Case study: Skilled administrative staff

Our investigations into the F-111 deseal/reseal scheme showed that the team dealing with the claims appeared to have technical rather than administrative skills. While it was important to have technical expertise to assist in assessing claims, we considered that a mix of technical and administrative staff might have produced a more efficient result. Our concerns about the treatment of evidence, the recording of decisions, the lack of sufficient guidelines and inadequate documentation in individual case files may have been avoided if experienced administrative personnel were involved in establishing and managing the relevant administrative processes.

We also found that, at least initially, there was an inadequate understanding of the role of this office. This may not have occurred if staff that were more familiar with public accountability mechanisms had been involved.

Inadequate information when notifying decisions

2.37 Claimants must be given a clear explanation of the reasons for the agency's decision on their applications. This will help them to decide if they should seek a

review of an unfavourable decision and inform them what issues they should address or what further evidence may be required.

Case study: Giving details to claimants

A large proportion of complaints to this office in 2003–04 about DEWR were made by redundant employees who had had a payment approved under the GEERS scheme (described above) but queried the amount.

We found that the GEERS notification letters followed a standard form that detailed the gross amounts payable under various headings. The dates, award coverage and hourly rates were not included, nor were the reasons for the decision. Where there was conflicting information, the letters also failed to indicate what weight was given to each piece of evidence or why one was preferred over another.

Applicants who were dissatisfied could dispute either the amount of one or more of the components making up the payment, or the decision to refuse payment of annual leave, payment in lieu of notice, redundancy pay or unpaid leave. We found that applicants were at a distinct disadvantage in seeking a review because of the lack of information. They might address irrelevant considerations or not address relevant matters. We also considered that the number of applications for review was likely to be reduced if reasons were provided in notifications of decisions.

DEWR undertook to review its processes and documentation in response to the matters we raised. After the introduction of more detailed notification letters and other improvements, the number of complaints to this office about GEERS declined markedly in 2005–06, and has continued to decline since.

Lack of effective review of decisions

2.38 A fundamental drawback of executive schemes is that a person who is adversely affected by an agency's decision has no right of review under the ADJR Act. Many legislative schemes also have other external review mechanisms, such as appeal to a specific complaints body or specialist tribunal. For example, the NHRMC administers an extensive funding program of research grants, and its governing legislation provides that complaints may be made to the Commissioner for Complaints. Such independent statutory review mechanisms can quickly identify and report on agency errors in applying law or policy, for example, by establishing where a claimant has not been given the opportunity to respond to others' adverse comments or where a decision maker has failed to take relevant considerations into account.

2.39 The absence of an external review mechanism for executive schemes makes it even more important that internal review processes add value to the decision-making process and act as an effective check. An internal review officer needs to do more than consider the papers already examined by the original decision maker. He or she needs to take steps to obtain additional information where necessary and to assist people to strengthen their applications for review, for example, by pointing out gaps in the information they have provided or suggesting what would be required for a claim to succeed. The internal review officer should be encouraged to contact every applicant for review as a matter of course,[18] and may need to explain the review process to applicants. Given the lack of external review options, it is particularly important that the internal review officer is seen to be, and is, independent of the original decision maker.

[18] See Administrative Review Council, *Internal review of agency decision making: a best practice guide* (2000), Principle 21: 'Agencies should encourage internal review officers to attempt to contact all applicants as a matter of course. Internal review officers should be allocated enough time per review for this to be possible.'

2.40 These considerations apply both to internal reviews undertaken within the agency that made the original decision, and to reviews conducted by the responsible policy agency when a second agency administers the scheme. The first case study below concerns internal review processes within a single agency. The second case study shows that even when reviews by two agencies are available, the original decision maker's errors may still not be corrected.

Case study: Internal review inadequate

In 2004 if a GEERS claim (discussed above) was refused, the only right of review was by a more senior DEWR officer. One of our concerns when we were investigating complaints about GEERS was that DEWR's investigation when an unsuccessful applicant sought review of a decision was inadequate.

One example was a complaint lodged by a former employee who had resigned three months before an insolvency practitioner was appointed, following the company's financial difficulties over a lengthy period. Resignation disentitled former employees from GEERS unless they could prove that a finding of constructive dismissal was likely, due to non-payment or underpayment of wages. When Mr C's application was refused, he requested a review. DEWR's notification of the review decision stated simply that the applicant had acknowledged he had resigned and that he had provided 'no evidence' of circumstances likely to lead to a finding of constructive dismissal. DEWR's notification did not canvass the matters that were considered in reaching the decision, nor the adequacy or otherwise of the information the applicant had provided to support his claim.

Mr C was confused about both the original and review decisions and the criteria that he needed to meet to establish constructive dismissal. In his letter of application for review, Mr C stated he had resigned because he 'was left with no choice', and he referred to payment of wages not being guaranteed and often delayed for weeks. The company owed him a substantial amount in salary sacrifice contributions and Mr C believed he took the most sensible course of action in seeking employment elsewhere. Our investigation noted that there was no information on the DEWR website to assist applicants in establishing constructive dismissal.

DEWR undertook to review its processes and documentation in response to the matters we raised in a range of complaints about GEERS. Amongst other measures, more detailed notification letters gave claimants additional information that would help them in seeking a review. GEERS operational arrangements were also revised, and claimants now have two opportunities to dispute DEWR's decision rather than one: they may apply for a review of the original decision, and subsequently may lodge an appeal against the review decision. Both the review and appeal mechanisms are internal processes and the appeal decision is final.

Case study: Two review processes inadequate

In the handling of the third EIBAG payment for the equine influenza outbreak (discussed above), Centrelink, which administered the scheme on behalf of DAFF, applied the policy guidelines incorrectly to refuse payment to certain businesses located outside the restricted movement zones. Applicants for the payment were able to seek review of the decisions, initially via review by Centrelink and subsequently through a special case review process in DAFF. However, opportunities to correct the decision maker's errors during both those review processes were not taken.

DAFF was aware that Centrelink may have made incorrect decisions and given incorrect explanations for refusing applications. Despite this, DAFF did not take any steps either to require Centrelink to review its decisions and explanations, or to ensure all affected applicants were contacted and given the opportunity to provide evidence of their claims under DAFF's special case review process.

DAFF considered that Centrelink's error did not disadvantage the claimants or prevent them from submitting a proper claim. DAFF based its decisions to uphold rejection of the claims on the fact that the claimants had not provided sufficient evidence to support their claims. However, DAFF's view did not take account of all the circumstances. Claimants were misled as to their eligibility and the information they should provide. They were not advised that they could submit further evidence to support their request for special case review. DAFF also had a special responsibility during the review process to consider applications more carefully.

PART 3—CONCLUSION

3.1 Executive schemes are a common feature of modern government. Their main advantages are the speed with which they can be set up and their flexibility when circumstances change. However, that very flexibility poses risks to the accountability of such schemes. As explained in Part 1, many of the checks and balances on government power apply only to powers conferred by legislation. Of particular concern are the restricted review and appeal rights that are available.

3.2 Our examination of complaints to this office about a range of executive schemes has found the following issues have consistently emerged:

- Agencies do not always publish all the criteria they take into account in assessing eligibility for a program or grant, and sometimes fail to make updated information available to the public as promptly as they should.
- Ambiguous guidelines can lead to confusion amongst the public as well as inconsistent decision-making.
- The standard of drafting of program rules, including eligibility criteria, is sometimes not as high as in legislative schemes, which are subject to a range of external scrutiny processes before they come into operation. Foreseeable issues may not be addressed, and guidelines sometimes have not aligned with the program's policy aims, as stated by the government or minister.
- Because of inadequate liaison, there can be inconsistency in advice given by the responsible policy agency and a second agency administering the scheme on its behalf.
- Decision-making processes and practices may be inadequate. Internal guidelines for investigators and decision makers may be missing or incomplete, recordkeeping practices may be poor, staffing resources may be inadequate and there can be unacceptable delays in finalising claims.
- Agencies do not always have adequate processes for internal review of their decisions. This presents particular disadvantages to claimants given the absence of external review options that apply to statutory schemes.

Best practice principles

3.3 Below are eight principles of best practice for agencies to consider when developing and administering executive schemes.

Principle 1—developing full eligibility criteria that reflect the policy intent

Agencies should ensure that eligibility criteria for executive scheme programs and grants are fully developed and impose only those requirements that either reflect the aim of the policy (including as outlined in any public announcement by the government or minister) or are necessary for administrative purposes, such as identification of the applicant.

Principle 2—ensuring guidelines are legally and technically sound

When developing program guidelines, agencies should seek legal and/or financial advice as required on the implications of their proposals, such as the terms and conditions of grants or funding agreements, the interaction of the proposed program with existing programs or benefits, and taxation implications.

Principle 3—ensuring comprehensive, accurate and up to date information is available

Agencies should make information about executive schemes as widely available as possible to the public:

- Agencies should publish ministerial guidelines and policy guidelines on their websites. They should also make simple accurate material available to the public in easily accessible formats, such as fact sheets, customer guides and frequently asked questions. Agencies must ensure that the information in those materials is consistent.
- Where industry partners are involved in distributing information about a scheme to the public, agencies should ensure that they are provided with updated information and are encouraged to provide links to the agency's website. These measures will help to ensure that program information is current.
- Both application closing dates and program end dates should be highlighted clearly in information for the public.
- When program guidelines are updated as requirements change or ambiguities are discovered, agencies should ensure that prompt action is taken to update websites and other sources of public information and that changes are highlighted. Application forms and other associated material should be checked for consistency with new guidelines and re-issued at the same time if necessary.
- Agencies should ensure that their lists of policies, guidelines, and precedents used in making decisions and other relevant documents required by the *Freedom of Information Act 1982* and published on the National Archives of Australia website are updated at least annually and preferably quarterly.
- The process for review of decisions should be clearly set out.

Principle 4—accountability through annual reports

Agencies should publish in their annual reports a list of the administrative schemes under which they make decisions.

Principle 5—ensuring no detriment through retrospective application

When a policy is changed, potential claimants who have already lodged their applications should not be disadvantaged by the application of that change, that is, the change should not be applied retrospectively.

Principle 6—liaising effectively with other organisations

Where policy responsibility and program administration are shared between agencies or where non-government organisations provide government services on an agency's behalf, the agency with policy responsibility must ensure that advice given to members of the public is consistent and that guidelines are correctly applied by all organisations involved. The policy agency should monitor the delivery of the program and review the program's implementation to ensure that the policy aims are being met.

Principle 7—good decision-making processes

In administering executive schemes, agencies should ensure that the principles of good administration are followed, particularly in relation to:

- adequate decision-making processes
- internal guidelines for investigators and decision makers
- good recordkeeping by decision makers
- timeliness in finalising claims and deciding reviews
- ensuring that staffing resources are adequate, including by ensuring that investigators and decision makers have proper skills and training
- giving claimants adequate information when they are notified of decisions.

Principle 8—complaint handling and review of decisions

In recognition of the absence of external review of decisions that are made under executive schemes, agencies must ensure that:

- a complaint handling mechanism is established when the scheme is set up
- there is a process for proper internal review by an independent officer, preferably with more than one opportunity for review, particularly where more than one agency is involved in developing and administering the scheme
- review officers routinely contact applicants, explain the review process to them if necessary and seek additional information from them as required
- applicants are informed of the reasons for the review decision and their right to contact the Ombudsman if they are dissatisfied.

ACRONYMS AND ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABN	Australian business number
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977*
ANAO	Australian National Audit Office
CAP	Carer Adjustment Payment
CDDA	Compensation for Detriment caused by Defective Administration
DAFF	Department of Agriculture, Fisheries and Forestry
DEEWR	Department of Education, Employment and Workplace Relations
DEWR	former Department of Employment and Workplace Relations
DIISR	Department of Innovation, Industry, Science and Research
DVA	Department of Veterans' Affairs
ECRP	Exceptional Circumstances Relief Payment
EIBAG	Equine Influenza Business Assistance Grant
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
Finance	Department of Finance and Deregulation
Finance Circular	Department of Finance and Deregulation, *Discretionary compensation mechanisms*, Finance Circular No. 2006/05.
FMA Act	*Financial Management and Accountability Act 1997*
FOI	freedom of information
FOI Act	*Freedom of Information Act 1982*
GEERS	General Employee Entitlements and Redundancy Scheme
JCPAA	Joint Committee of Public Accounts and Audit
LPG	liquid petroleum gas
NHMRC	National Health and Research Medical Council
OLDP	Office of Legislative Drafting and Publishing
RAAF	Royal Australian Air Force
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