

Putting things right: compensating for defective administration

**ADMINISTRATION OF DECISION-MAKING
UNDER THE SCHEME FOR COMPENSATION FOR
DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION**

August 2009

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

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EXECUTIVE SUMMARY

The *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA) is an administrative scheme that enables the payment of compensation to members of the public. The scheme provides Commonwealth agencies with discretionary authority to compensate individuals or bodies that have suffered loss or damage as a result of defective administration and who cannot be compensated through other avenues, such as the settlement of a legal claim. Decisions to compensate under the scheme are approved on the basis that there is a moral as distinct from a legal obligation to pay compensation to a claimant.

The CDDA Scheme was reviewed by the Ombudsman's office in 1999, by the Australian National Audit Office in 2003–04, and by the Department of Finance in 2004–05.

This report details the findings of an own motion investigation conducted by the Ombudsman's office. The report draws widely on the experience of this office in dealing with complaints about CDDA administration. A special feature of this investigation was a consideration of the policies and practices of three service delivery agencies, to illustrate emerging and recurring issues. Those agencies were Centrelink, the Child Support Agency (CSA) and the Australian Taxation Office (ATO). While the report refers specifically to those three agencies, it is intended to guide all agencies involved with the administration of the CDDA Scheme.

A number of areas requiring general improvement in CDDA administration have been identified in this and earlier reports. In summary, there is a need for:

- greater visibility of the scheme
- better assistance to claimants in accessing the scheme and making a claim
- improved monitoring and reporting of claims by agencies
- greater accuracy of agency records, particularly in recording oral advice that could give rise to a CDDA claim
- improved communication with CDDA claimants during the claim process
- readily accessible and consistent training materials for agency staff on CDDA administration
- less defensive and legalistic approaches to CDDA decision-making by agencies
- use of CDDA claims to identify systemic problems in agency administration
- coordination and consistency of CDDA administration across Australian Government agencies.

The recommendations arising from this investigation, in Part 3, are framed in general terms that are relevant to all Australian Government agencies. The three focus group agencies were provided with a draft of this report, and invited to comment. Their specific responses are set out in Part 4.

PART 1—INTRODUCTION

Features of the CDDA Scheme

1.1 The CDDA Scheme was established by the Australian Government in 1995. It was established by administrative action rather than legislation. The scheme is anchored in Finance circular 2006/05: *Discretionary Compensation Mechanisms* (Attachment A of the Finance circular is reproduced at Appendix 1).

1.2 The scheme provides a means of compensating individuals and bodies that have suffered because of defective government administration. Importantly, the scheme is intended to compensate those to whom there is no legal obligation to pay compensation. The Finance circular explains this distinction by saying that payments are approved ‘at the discretion of the decision maker ... on the basis that there is a moral, rather than purely legal, obligation to the person or body concerned’.¹

1.3 While founded on the need to address a moral obligation to compensate those who have experienced a detriment² resulting from defective administration, the scheme is a practical one. Its goal is to restore a claimant to the position they would have been in had unreasonable or defective administration not occurred. The scheme can compensate for non-financial as well as financial loss.

1.4 The scheme is not limited by the quantum of loss. Its principles apply equally to small claims and large.³ The Ombudsman recognises the challenge that this range presents for officials who must make decisions under the scheme which are robust and meet the concurrent requirement to use Government resources in a manner which is efficient, effective and ethical.⁴

1.5 In an environment of complex statutory and administrative systems, people rely on government agencies for timely, comprehensive, and accurate information and decisions. A failure on any of those dimensions can have a significant financial or other impact on a government client. Social support entitlements, child support and tax liabilities are among the dealings with government that can be affected detrimentally. Similarly, a decision that is unreasonably delayed, or is not soundly based on relevant information, can cause loss to a person. Broadly, it is these losses the CDDA Scheme is designed to address.

1.6 The significance of the CDDA Scheme for Australian Government administration is illustrated by the number of claimants that seek compensation under the scheme. During 2007–08 Centrelink made 781 payments totalling \$2,354,702 under the CDDA Scheme, the CSA made 15 payments totalling \$19,360, and the ATO made 232 payments totalling \$583,568 in the same period. Each agency received other claims that were not approved.

¹ http://www.finance.gov.au/publications/finance-circulars/2006/docs/FC_2006.05.pdf introductory information, para 6.

² According to the Finance circular, ‘detriment’ means a quantifiable financial loss that a claimant has suffered: see Attachment A to the circular, para 35, at Appendix 1 of this report.

³ The experience of one agency, the ATO, illustrates this point; the number and total of payments over a three year period were: in 2005–06, 66,872 payments totalling \$7,127,855; in 2006–07, 136,757 payments totalling \$19,483,27; and in 2007–08, 232 claims totalling \$583,568.

⁴ As required by s 44 of the *Financial Management and Accountability Act, 1997*.

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1.7 The scheme applies to detriment suffered as a direct result of defective administration by an Australian Government agency that is subject to the *Financial Management and Accountability Act 1997* (FMA Act). ‘Defective administration’ is defined in Attachment A to the Finance circular⁵ published by the Department of Finance and Deregulation⁶ (Finance) in the following terms:

- a specific and unreasonable lapse in complying with existing administrative procedures
- an unreasonable failure to institute appropriate administrative procedures
- an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or reasonably capable of being obtained by the official to give)
- giving advice to (or for) a claimant that was, in all the circumstances, incorrect or ambiguous.

1.8 Broadly, that definition can be summarised as a failure by an agency to institute appropriate administrative procedures, to comply with existing administrative procedures, or to provide proper advice.

1.9 The CDDA Scheme does not apply where there is a legal liability to the claimant. If ‘it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated’,⁷ the claim is to be settled in accordance with the Legal Services Directions issued by the Attorney-General under s 55ZF of the *Judiciary Act 1903*.⁸ If there is another legal mechanism available to a claimant (including court or tribunal action), that mechanism should generally be pursued.

1.10 The CDDA Scheme is one of a number of compensatory mechanisms that are available to provide either a special discretionary payment to a person or financial relief from a debt owed to the Commonwealth. Others include:

- the settlement of a legal claim under the Legal Services Directions
- an act of grace payment under s 33 of the FMA Act
- waiver, postponement or deferral of a debt under s 34 of the FMA Act
- write-off of a debt under s 47 of the FMA Act
- an ex gratia payment, authorised by the Prime Minister or Cabinet.

1.11 Each of those mechanisms is applied at the discretion of the decision maker and may be applied on the basis that there is a moral, rather than purely legal, obligation to the person or body concerned. All claims are considered on their merits on a case-by-case basis, and all other possible avenues of redress must be considered before any of the mechanisms can be applied. The mechanisms are generally confined to claims related to FMA Act agencies and the legislation they administer. Conditions may be attached where the mechanisms are applied.

⁵ Attachment A to Finance circular 2006/05, para 23, at Appendix 1 of this report. Finance is responsible for providing policy advice on the CDDA Scheme. An earlier Finance memorandum provided advice on the establishment of the CDDA Scheme: *Department of Finance Estimates Memorandum 1995/4*.

⁶ Formerly the Department of Finance and Administration, and now the Department of Finance and Deregulation, referred in this report as ‘Finance’.

⁷ Attachment A to Finance circular 2006/05, para 22, at Appendix 1 of this report.

⁸ See Appendix C, *Handling monetary claims* in *Legal Services Directions 2005*.

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1.12 Despite these commonalities, each of the discretionary compensation mechanisms has unique features, for instance:

- An Act of Grace payment may be approved where a claimant has sustained loss as a direct result of the involvement of an Australian Government agency or the application of Commonwealth legislation, and an unintended, inequitable or anomalous effect has arisen.
- The Finance Minister or his or her delegate may waive, postpone or defer recovery of an amount owing to the Commonwealth, but generally only where all other avenues of relief have been exhausted and there are no third parties adversely affected by the waiver decision.
- Recovery of a debt can be 'written-off' in limited circumstances where the Chief Executive Officer of an agency or their delegate has decided not to pursue a debt, for example where it would be uneconomic to do so.
- An ex gratia payment can be made by the Prime Minister and/or Cabinet to deliver financial relief to individuals or groups of people at short notice. The mechanism is flexible and does not have pre-set criteria, however it will usually only be considered after all other mechanisms have been fully considered.
- Some of the mechanisms outlined above can be considered in relation to the same matter, for example 'a claim relating to a loss that usually arises in the CDDA context may, in some circumstances, need act of grace consideration where a moral obligation relating to issues other than purely administrative ones, arises from the initial examination of the claim'.⁹

1.13 Other statutes also provide specific authority for similar mechanisms. For example, the *Social Security Act 1991* authorises write-off or waiver of a debt incurred under that Act (ss 1236, 1237, 1237A). Financial assistance or compensation packages are also established by government to deal with specific administrative incidents, an example being the *Reconnecting People Assistance Package* that is administered by the Department of Families, Housing, Community Services and Indigenous Affairs, to assist people who were subject to inappropriate immigration detention.

1.14 Together, those different mechanisms are an important and flexible means for providing financial assistance and compensation to people who have suffered a loss because of defective administration. The CDDA Scheme is especially important because, as noted earlier, it is intended to address claims that arise from a moral rather than legal imperative to pay compensation

1.15 The CDDA Scheme applies across government. The authority to make decisions and payments under the scheme is the responsibility of individual portfolio ministers, and in practice decisions are made by agency delegates authorised by those ministers.

1.16 The Ombudsman's role in relation to the CDDA Scheme arises in three ways. Firstly, the Ombudsman can receive complaints about CDDA decision-making and administration by individual agencies. This is especially important as CDDA decisions are not open to tribunal review; nor are they readily open to judicial review, because the CDDA Scheme is an administrative rather than a statutory scheme. The Ombudsman can generally provide a quick, informal and inexpensive means of

⁹ Attachment A to Finance circular 2006/05, para 42, at Appendix 1 to this report.

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addressing individual complaints against government agencies. In CDDA administration, the Ombudsman is effectively the only external administrative law review mechanism available to the public.

1.17 Secondly, the Ombudsman can recommend that a government agency should pay compensation to a person who, in the Ombudsman's view, has a legal or moral claim against the agency. This is recognised (and taken a step further) in the Finance circular, which provides that 'Where the circumstances of a case do not fall within the exact criteria for defective administration, but the agency concerned agrees with the Ombudsman that detriment has occurred as a result of defective administration and the agency is inclined to compensate a claimant, a proposal or recommendation by the Ombudsman supporting compensation is sufficient basis for payment'.¹⁰

1.18 Thirdly, and more generally, the Ombudsman's office has a special interest in the remedies available to members of the public who suffer detriment as a result of poor administration. An Ombudsman report in 1999, *To compensate or not to compensate?*, was influential in the development of the CDDA Scheme. Discussion of CDDA issues is a regular theme in the annual reports of the office.¹¹ We regard the scheme as a vital measure to ensure administrative justice for the public. Administrative compensation will become steadily more important as legislation and government programs grow more complex; government regulation and benefit distribution become more extensive; and people and businesses rely more on government for correct advice, decision-making and regulation.

1.19 The Ombudsman's office decided that it was timely to review the operation of the CDDA Scheme. This report is designed to provide general guidance for government agencies on important themes in CDDA administration and steps that should be taken to improve CDDA administration.

Previous reviews of the CDDA Scheme

1.20 The Ombudsman report in 1999, *To compensate or not to compensate?*, undertook a general review of financial redress arrangements. As to the CDDA Scheme, key findings of the report were:

- CDDA rules were not being consistently applied by agencies
- agencies were confused about the different rules which apply in legal liability and the varied compensatory mechanisms available under the FMA Act
- CDDA claims were being rejected by agencies on the basis that there was a lack of documentary evidence to support a claim or to verify the advice that a person claimed to have received
- appropriate compensation arrangements can provide a powerful incentive to improve service

1.21 The 1999 report made a number of recommendations, which in our experience continue to be relevant. They were that agencies should:

- interpret the rules of the scheme broadly and flexibly

¹⁰ Attachment A to Finance circular 2006/05, para 83, at Appendix 1 to this report.

¹¹ For example, see Commonwealth Ombudsman, *Annual Report 2003–04* at 79–81, 89–90; *Annual Report 2004–05* at 39–40, 79; *Annual Report 2007–08* at 122–123.

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- cooperate with Ombudsman investigations to ensure all relevant facts are known
- approach requests or recommendations for CDDA compensation with an open mind
- provide adequate reasons for rejecting a CDDA request or recommendation
- assess the training needs of staff involved in CDDA administration
- revise guidelines on compensation so that both staff and members of the public can understand the principles on which CDDA compensation system is based, and how a request should be assessed.

1.22 Two further reviews of the CDDA Scheme have since been undertaken—in a report of the Australian National Audit Office’s (ANAO), *Compensation Payments and Debt Relief in Special Circumstances*;¹² and by Finance, in an internal and unpublished government review in 2004–05.

1.23 The Finance circular *Discretionary Compensation Mechanisms* provides detailed policy and operational guidance on the CDDA Scheme. The circular states that it is not to be taken as an exhaustive guidance document,¹³ though in practice it is the principal reference source for CDDA decision-making. The circular deals with the following matters:

- what constitutes defective administration and unreasonable action by an agency
- how a claim should be treated where there is insufficient evidence
- the assessment and quantification of detriment and financial loss¹⁴
- when legal advice should be sought
- the procedure for settling claims
- review and reconsideration of claims
- the interaction of the CDDA Scheme with other mechanisms for financial relief and compensation
- the role of the Ombudsman’s office as a complaint and oversight mechanism.

Scope and methodology

1.24 Each year the Ombudsman’s office receives more than 200 complaints that give rise to CDDA issues. In some of those cases the CDDA issue is first raised by the Ombudsman’s office as a possible remedy that should be considered by an agency. In other cases a person has complained to the Ombudsman’s office about a CDDA decision of an agency. In all cases, the general approach of the Ombudsman’s office is that the responsibility for CDDA decision-making rests with agencies, and the primary role of the Ombudsman is to ensure that agency decisions are made properly and reasonably. It is expected that agencies will decide all claims

¹² Report 35, 2003–04

¹³ Attachment A to Finance circular 2006/05, para 3, at Appendix 1 to this report.

¹⁴ The Finance circular at Attachment A defines detriment as ‘quantifiable financial loss that a claimant has suffered’. Three types of detriment are identified: ‘detriment relating to a personal injury including mental injury (personal injury loss), economic detriment that is not related to a personal injury (pure economic loss), and detriment relating to damage to property’ (para 35–36).

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before the Ombudsman's office expresses a view on either the handling of a claim or the merits of an agency decision.

1.25 Over time, the Ombudsman's office has developed confidence in the way that agencies handle CDDA claims. That lies behind our standard approach of referring all CDDA issues to agencies in the first instance. Problems are nevertheless encountered from time to time, and it is especially important that CDDA administration is of a uniformly high standard across government.

1.26 That explains the decision to conduct this own motion investigation, and to do so by considering the experience of three focus agencies—Centrelink, the ATO and the CSA. The Ombudsman's office has no greater concern about CDDA administration in those than in other agencies. Rather, client service delivery is a core function in each agency; they each interact differently with the public under the programs they administer; and, as is to be expected, the three agencies together deal with a substantial number of CDDA claims each year. In short, they provide a good illustration of the range of CDDA claims and issues. Their experience can provide valuable insights and guidance for other Australian Government agencies.

1.27 The aim of this investigation was to:

- gauge the level of support for the CDDA Scheme within agencies
- highlight the important role that the CDDA Scheme plays in providing a remedy for those adversely affected by defective administration
- highlight the Ombudsman's role in supporting the CDDA Scheme and in dealing with complaints about agency decision-making in CDDA cases
- provide guidance on the elements of a good CDDA claims system for the use of all FMA Act agencies
- identify any systemic problems in the handling of individual claims and the structure and content of the Scheme itself
- make recommendations to address any problems identified.

1.28 The three focus agencies were asked to provide a list of all CDDA claims received during 2007, together with details of finalised claims. An illustrative sample of cases from each agency, reflecting a cross section of claim size, outcomes, and timeframes for resolution, was analysed. Each agency provided us with copies of their guidelines, and we discussed with them their CDDA Scheme handling policies and procedures. We analysed their documentation, guidelines and practices, and compared these with the outcomes of the cases selected for review. We compared those results with information collected from CDDA-related investigations we had undertaken in the past 12 months.

1.29 From the more general experience of the Ombudsman's office in dealing with CDDA issues and the information supplied by the three agencies, this report has been prepared and deals with the following general themes in CDDA administration:

- visibility and accessibility of the CDDA Scheme and the way it is administered
- the importance of timeliness in CDDA claim handling
- accuracy of agency records
- adequacy of procedures for communicating with claimants, including advising of claim outcomes and review opportunities

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- support for decision makers in training and reference materials
- effectiveness of investigation procedures and support, including identifying and addressing all relevant matters and ensuring that decisions are free from bias
- the capacity for and practice of reviewing decisions
- how information about claims may be used for broader purposes such as business systems improvement
- evidence of legalistic approaches
- governance of CDDA functions within agencies
- elements of agency culture which limit the effectiveness of the scheme.

1.30 Those general themes are illustrated at points with examples taken from the three focus agencies. The detailed findings relevant to those agencies, and their responses, are reported in Appendixes 1 and 2.

PART 2—AGENCY MANAGEMENT OF CLAIMS

Visibility and accessibility

2.1 It is important that members of the public are aware of their options and the remedies available to them when they believe they have been adversely affected by government administrative action. The CDDA Scheme is currently promoted through agency internet sites, decision letters and general instructional material. Agency staff also need to be aware of the scheme and draw it to the attention of potential claimants.

2.2 The practice of promoting the scheme varies among agencies. A survey of 25 agency websites undertaken by the Ombudsman's office in early 2009 identified that only the three focus agencies use their websites to provide easily accessible information on the CDDA Scheme.¹⁵ Both the ATO and CSA provided a detailed compensation guide on their website, including a link to the Finance circular. Both offered to provide a printed version of the information on request.

2.3 The CSA's online policy manual, *The Guide*,¹⁶ provides advice on how to make a claim, including in general terms the information that is required, how the claim will be processed, and the CSA's service standards on communicating with claimants and resolving their claims.

2.4 The ATO has developed an *Applying for Compensation* form to assist claimants to prepare an application.¹⁷ This document refers to the ATO's service standards and links this with the *ATO Taxpayer Charter* commitments. The ATO also has a dedicated toll-free compensation assistance line and email address for enquiries.

2.5 Centrelink has only recently used its website to provide access to printed and web-based material on CDDA claims. Centrelink explained that in its view there was adequate awareness of the CDDA Scheme through its general complaints phone line and by way of referral from members of Parliament. The Welfare Rights Network is also a valuable source of scheme information for Centrelink customers.

2.6 None of the three agencies provides a reference to compensation and CDDA decision-making processes in its Service Charter. The ATO's Draft Practice Statement on CDDA administration did not, for example, identify the Ombudsman's role. However, it is encouraging to note that standard decision letters adopted by the three agencies routinely advise unsuccessful CDDA claimants of the Ombudsman's role.

2.7 As a general principle, CDDA administration will be improved if agencies assist claimants by explaining the process that will be followed, the factors that will be considered, and the information required to decide a claim. A well-designed claim form with supporting instructions can play an important role in eliciting relevant information and minimising the submission of irrelevant information or claims. This

¹⁵ As required by the Finance Minister's Orders, tables within each agency's annual report include detail on payments made under the CDDA Scheme that year. While this information is useful, the purpose is not to provide advice to the public on the Scheme and how to access it.

¹⁶ See http://www.csa.gov.au/guidev2/TheGuideMaster.aspx?content=6_11_1.

¹⁷ See www.ato.gov.au/content/downloads/Compensationapplication.pdf.

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can improve both the efficiency and the quality of CDDA decision-making. The following case study provides an illustration of this point.

Case study: *Knowing what to do and how to do it*

Ms A sought compensation from the ATO and completed its online compensation claim form. Question 8 asks 'Why do you think you are entitled to compensation from the tax office?' An instruction note advised claimants to set out the circumstances of the alleged ATO wrongdoing that gave rise to the claim, including attaching this information on a separate sheet if more space was needed.

Ms A attached a separate sheet in response to this question stating that 'As a consequence of poor administrative conduct by the tax office in the year 2002 the taxpayer has been significantly disadvantaged and as such is seeking compensation. It is the contention of the taxpayer that the tax office has breached both express and implied warranties owed to the taxpayer in addition to failing to maintain its own service standards outlined in the tax charter'. Under a sub-heading titled 'The events which have led to this claim are as follows', Ms A gave details of the circumstances that she considered amounted to defective administration.

The ATO wrote to her to advise that the claim was 'unfortunately expressed in summary form'. She had not meaningfully particularised the ATO conduct that caused loss, adequately explained how it gave rise to compensation, or explained how the quantum of her loss had been calculated. The ATO encouraged Ms A to provide additional material and cautioned that a failure to do so would mean that a decision would be made based on the material she had provided.

While we were satisfied that the ATO had adequately investigated Ms A's claim and reached a reasonable decision, we were critical of the ATO letter for paying little regard to the efforts Ms A had made to expand on her claim in the manner requested by the ATO. The guidance provided for completing the form does not appear to adequately satisfy the requirements of the officers assessing the CDDA claims.

2.8 A general recommendation is made below that all FMA Act agencies should review the comprehensiveness and accessibility of information provided to the public on the CDDA Scheme. Agencies should also review claim forms to ensure that applicants are encouraged to provide relevant and adequate information.

Timeliness of CDDA claim handling

2.9 Delay is a recurring theme in CDDA complaints to the Ombudsman. A delay in processing a CDDA claim will typically compound the detriment suffered by a person who has already experienced defective administration. Their sense of grievance will be exacerbated if there is a failure to provide either a regular progress report or—where appropriate—an apology.

2.10 The internally published timeliness standard for processing claims ranged among the three focus agencies from 28 to 90 days, or as agreed with a claimant (more detail is given on this issue at Appendix 2). This variation may be appropriate given differences in the type and complexity of claims the three agencies deal with.

2.11 Complexity is an understandable cause of delay in resolving a claim. Other factors which, in our experience, are common but less excusable include:

- inefficient administrative practices, such as decentralised processing arrangements that result in files being moved slowly from one office to another
- administrative drift, that is, inattention to progressing matters

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- lack of relevant analytical or drafting skills and expertise among staff dealing with CDDA claims
- human error, such as agency staff misplacing or overlooking relevant documents.

2.12 The case study below illustrates the complex interplay of issues that are often seen in CDDA complaints. Internal monitoring of timeliness could have brought the matter to the attention of officers working in the area and prompted an earlier resolution.

Case study: *Keeping an eye on the time*

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

Mr B contacted our office again in July 2006 as his AAT appeal had been finalised. The AAT had recommended that Centrelink reconsider its decision to refuse Mr B's CDDA claim. Our office contacted Centrelink about the matter and we were advised that the refusal of the CDDA claim had been referred for review to an officer who had not had any previous involvement in the case. We recommended that Mr B await the outcome of the reconsideration process and invited him to contact our office if Centrelink made a decision that was unfavourable to him.

Mr B contacted our office again in November 2006 as he had not heard anything from Centrelink about the progress of the CDDA claim reconsideration. We contacted Centrelink, and it undertook to arrange for someone to contact Mr B to discuss the progress of his claim.

Mr B made further contact with our office in February 2007 as he had still not received news of a decision. Centrelink told our office that the delay arose partly from the requirement to obtain external legal advice because of the amount of money involved in the claim. Centrelink accepted our advice to contact Mr B and provide him with an update. We advised Mr B in May 2007 that the claim was close to resolution and he should await the outcome of the decision.

In September 2007 Mr B contacted our office to advise that the reconsideration of his CDDA claim had been finalised and that he had been paid compensation of \$21,000.

Although the need to seek external legal advice contributed to the delay in finalising this claim, the matter could have been better handled by Centrelink by keeping Mr B advised of the progress of the reconsideration on a regular basis. The reconsideration process took 14 months to complete.

2.13 Monitoring and reporting of timeliness do not appear to have improved markedly since the ANAO report recommended that 'agencies determine appropriate performance time indicators for processing discretionary compensation and debt relief claims, and monitor performance against those indicators'.¹⁸ None of the three focus agencies provided detailed information of that kind in their annual reports. The information was limited to the number of claims handled and the amount of CDDA compensation paid in the reporting year.

2.14 More detailed monitoring and reporting against agency performance measures are needed to enhance accountability and transparency of CDDA

¹⁸ ANAO, Audit Report No.35 2003–04, Business Support Process Audit, *Compensation Payments and Debt Relief in Special Circumstances*, recommendation 9, paragraph 5.51.

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administration and to improve processing times. A general recommendation to that effect is made below.

Agency recordkeeping

2.15 Good decision-making must be underpinned by good recordkeeping. In CDDA administration, it is especially important that an accurate record is kept of a claimant's contact details, that each stage in the assessment of a CDDA claim is properly documented, and that CDDA claim statistics are reliable. The general complaint experience of the Ombudsman's office is that CDDA claim processing becomes more complex and delayed where there is a failure in recordkeeping standards. (A related issue, concerning CDDA claims that are rejected because an agency has no record of oral advice a person claims they received, is discussed below under 'CDDA decision-making'.)

2.16 Some specific deficiencies in recordkeeping were noted in the survey of the three focus agencies. A general recommendation on records management is made below.

2.17 The requirement imposed by the Finance circular for a signed deed of release where a CDDA claim is approved¹⁹ was not met in a number of cases. Nor, in all rejection cases, was there a final sign-off document attesting that a matter was finalised. (The requirement for deeds of release is discussed in more detail below.)

2.18 We were not satisfied that the ATO's case files contained sufficient notes to explain and support the decision-making process applied in each case. Key documents were missing from some files. We were also concerned that the assessment processes against the criteria for the scheme were not being systematically recorded. As a result, it was difficult to judge whether a consistent assessment process was being applied or to verify the transparency and accountability of the decision-making process.

2.19 The CSA's tracking of its current compensation claims was readily accessible through a spreadsheet stored on a national compensation shared drive and through the CSA computer system. However, the function of the spreadsheet and computer systems assume that claims move in one direction through the assessment process, and does not account for claims which need to be returned to a region, rewritten or reconsidered before being finalised. Ultimately, the systems rely on individual officers to monitor the status of claims manually.

2.20 Centrelink's largely electronic-based records management system did not demonstrate an adequate level of accuracy. The case study below gives an example of this problem of inaccuracy in recording the progress and finalisation of a CDDA claim.

¹⁹ Both Centrelink and the ATO have adopted a general practice of using deeds of release only once certain thresholds of compensation have been reached (\$1000 for Centrelink, and \$2,000 for the ATO). Centrelink says it received advice from Finance that it was a matter for Centrelink whether deeds were required in all cases. However, the guidance Finance Circular 2005/05 provides at para 73 is clear that 'in order to protect the interests of the Commonwealth, compensation under the CDDA Scheme can only be paid where the claimant agrees in writing not to pursue further compensation in relation to the circumstances of the claim. This agreement should be in the form of a deed of release'.

Case study: *Production of records*

Mr C incurred expenses from an educational institution and claimed compensation from Centrelink on the basis that it had given him incorrect advice about his eligibility for a pensioner education supplement (PES). Centrelink rejected his claim, saying that it could not be established that it had given deficient advice.

Centrelink's case officer talked to Mr C by telephone during the preparation of his submission. The submission commented that during the phone call Mr C gave an account of events relating to Centrelink's advice that was inconsistent with his previous statements.

We asked Centrelink for the online document that recorded the telephone conversation referred to. Centrelink advised that it does not record such conversations on its online system, but that there may be a handwritten note on the file if the case officer had made one.

Ultimately, Centrelink was able to produce the case officer's handwritten notes. However, the Ombudsman's office is concerned about the lack of certainty that the notes would exist, and their availability to this investigation.

2.21 A further concern was the recurrent practice of the same officer both preparing the CDDA case submission and signing the decision letter to the claimant on the delegate's behalf. This practice undermines confidence in the independence of the two roles and officers, and should be avoided.

2.22 More accurate recording of the progress of CDDA claims, the identity of the decision maker and the dates and circumstances of finalisation would allow agencies to make meaningful analysis of their performance in relation to CDDA processing.

Communication with clients

2.23 A CDDA claimant will believe they have already experienced defective administration. The grievance will be compounded if the person feels their claim was badly handled or wrongly rejected. Good communication with the claimant throughout the process is necessary to minimise that risk.

2.24 The three focus agencies in this investigation generally maintained some form of regular contact with claimants throughout the process, although there were lapses.

2.25 It was not always clear if claimants were kept informed of standard completion time frames. In some cases where the timeframe had slipped, no attempt had been made to advise or renegotiate with the claimant. A likely consequence is that the claimant's expectations were not properly managed.

2.26 During the course of this investigation, Centrelink improved its claims processing by requiring internally that the submission to the decision maker include a section reporting on communication with the claimant.²⁰ The assessing officer is prompted to engage directly with the claimant. Our recommendation that agencies ensure claimants have a full opportunity to comment on the agency's assessment of a claim prior to a decision being made (recommendation 1(i) below) is relevant here.

²⁰ Initially many of the Centrelink files we sampled did not record that the CDDA claim had been acknowledged, that the claimant had information on time frames or the contact details for the officer handling the claim.

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2.27 The ATO places considerable emphasis on face-to-face meetings with claimants and mediation (paid for by the ATO) in an attempt to reach an agreed resolution. In principle this is a laudable initiative which assists both parties to understand which issues are in dispute and in agreement, and gives both the parties an opportunity to be heard directly by the other, promoting natural justice. However, it is important that a mediation is approached in the proper frame of mind, as illustrated in the case study below.

Case study: *Adversarial approach and mediation*

Ms D sought a private binding ruling on a business income tax matter. In accordance with ATO preferences, Ms D paid more than \$500,000 taxation liability in advance, anticipating general interest charges if the ruling was adverse. After four years, a private binding ruling had not been issued and the ATO advised Ms D that a ruling would not be made.

Ms D sought compensation for legal and accounting fees, her business costs of compliance with information requests, and interest foregone on the advance payment. The ATO made an initial compensation offer of less than 2% of the sum claimed, and a further offer of less than 20% of the claim on a 'take it or leave it' basis. Both offers were rejected and the ATO closed the case.

Ms D complained that she was not given adequate justification for the amounts offered to her. This complaint was verified upon inspection of the ATO file, which had little information to support the two sums offered to Ms D.

The ATO later arranged a mediation session with Ms D. Her anger and resentment were mollified by an apologetic approach on the part of the ATO, and she accepted a settlement of less than one third of her original claim.

Disappointingly, the formal report on the mediation session measured its success in terms of the cost saving to the ATO, rather than a good faith assessment of the strength of Ms D's claim and deficiencies in the ATO's handling of her case. The report noted that the outcome was 'outstanding' in part because 'settlement was achieved by the ATO moving only [\$X] on its starting position, in contrast to the claimant moving [more than five times that amount]'. It is speculative whether that attitude would have prejudiced the integrity of the mediation.

Supporting CDDA officers

2.28 Officers who handle CDDA claims should be skilled, adequately trained, and supported with accurate and accessible information. The investigation of the three focus agencies indicated that positive steps were taken in each agency to meet those requirements. Some of the better practices discussed below merit adoption by all agencies.

2.29 Both the ATO and Centrelink placed special emphasis on recruiting suitably qualified and skilled officers to deal with CDDA claims. The ATO, for example, recruited staff with investigation and forensic skills. In keeping with its commitment to mediation, the ATO puts its CDDA unit staff through accredited mediation and/or alternative dispute training, in addition to training in investigative skills.

2.30 The CSA reported that many of its CDDA officers have a background in telephone skills, which form the basis of much of the CSA's work. Upon recruitment, CSA staff training focused on investigation techniques and report writing (though we noted a comment by one CSA CDDA officer in an email exchange, 'I had difficulty understanding the need for some of the changes made to the sub (I am struggling)' in relation to a particular claim.

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2.31 As a general observation, it would benefit agencies if there was a formal training opportunity available to CDDA staff in all agencies, focused on decision-making skills and report writing. Much of the existing training in agencies is conducted on-the-job and through the feedback that is provided to officers as part of the agency's quality assurance processes. This tends to be narrower in focus and more agency-specific than a general training program would be.

2.32 A training program offered by a central agency could also provide a stronger focus on the underlying principles of the CDDA Scheme—importantly, its emphasis on moral rather than legal obligation, the concept of defective administration, and assessment of compensation.

2.33 Ongoing support in the focus agencies was provided to CDDA staff through decision-making manuals, procedural advice, practice statements, templates, pro formas and newsletters. There is scope within most agencies for consolidation of this valuable instructional material into a single, coherent manual or folder. Information contained in separate documents or locations may be inadvertently overlooked or applied inconsistently by officers.

2.34 Standardised document templates would also support consistency in analysis of claims and in providing reasons for decision. There was some resistance to this suggestion in our meetings with the focus agencies. The view was put that CDDA claims are all unique and that standardisation was therefore impractical.

2.35 We do not support that view. The CSA submission template is a good example of a useful decision-making support tool. It includes reminders for officers in terms of relevant information and evidence, the weight that can be attached to it and to corroborating or rebutting evidence (see Appendix 4). It is also the experience of the Ombudsman's office, in its general oversight role, that document templates improve the efficiency, consistency and quality of claim handling.

2.36 Other forms of decision-making support made available to staff in the three focus agencies included regular phone hook-ups and annual conferences. We consider that these practices are useful and should be maintained.

CDDA decision-making

2.37 The agency decisions that were reviewed as part of this investigation were generally reasonable, and the decision letters largely provided a satisfactory explanation for the decision reached. However, we also found decisions that were based on incorrect information, a superficial consideration of the claim, an inappropriately legalistic approach, or an inadequate explanation to the claimant. Agencies need to ensure that decisions on all CDDA claims are soundly based and that reasons are recorded and clearly explained.

2.38 In those cases in this investigation where there was a superficial analysis, we asked the agencies to reconsider the decision. Invariably on reconsideration the decisions were more robust, the consideration of available evidence was comprehensive, or account was taken of additional evidence of probative value. This suggests that there was room for improvement in the quality of primary decision-making in the first instance.

2.39 Letters of advice to claimants of the final decision were often detailed, though some did not adequately explain why a claim was rejected. In some decision letters the language was legalistic and unnecessarily complex for a CDDA decision. In the

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example below, *Advising decisions*, the advice letter makes little attempt to explain the decision in terms relevant and comprehensible to the claimant. That fault is illustrated also in the earlier case study, *Knowing what to do and how to do it*.

Case study: *Advising decisions*

Ms E made a CDDA claim in relation to an 18% activity test breach rate reduction that was applied to her Newstart Allowance (NSA) when she left employment voluntarily. Her claim was refused, and that decision appears sound. However, the letter informing Ms E of the delegate's decision was brief and did not fully or clearly explain why her request had been refused. It read:

The Newstart Allowance Activity Breach and the 18% rate reduction was applied pursuant to section 624 of the *Social Security Act 1991*. It was the result of you ceasing work with [name of company] on [date] voluntarily. There was no defective administration on the part of Centrelink. Any loss that you suffered was not the result of negligence or defective administration. There are no grounds for compensation.

Through the case submission the delegate would have been aware that Ms E suffered from schizophrenia and was heavily medicated at times. The case submission also explained that 'the first decision pertaining to the NSA Activity Breach and 18% rate reduction had no practical effect' as there had been a subsequent decision to back pay Disability Support Pension (DSP) from the date of NSA claim. In effect, Ms E was paid a full entitlement to DSP, and the 18% penalty did not apply.

The letter advising Ms E of the outcome of her claim did not explain the real effect of the decisions made in her case, nor did it reflect the need for careful communication with for a claimant in Ms E's condition.

2.40 In another example a statement of outcome was given rather than the reasons behind the decision:

After careful consideration, I regret to advise you that it has been determined that compensation is not payable in your case. The criteria for determining your case are attached. In making this decision, the Delegate ... has considered the information supplied in support of your claim and the relevant information on file. Your electronic record and all other relevant information held by [the agency] (sic).

2.41 That letter did not tell the claimant the decision maker's findings, how those findings were reached, or how the CDDA criteria were applied to the facts of the claim. It is unlikely that the claimant would be reassured that their claim was properly decided. The letter is as likely to generate further enquiries either to the agency or to the Ombudsman.

2.42 The following case study below illustrates an inadequate investigation of a CDDA claim.

Case study: *Decision based on incorrect information*

Mr C, whose case is noted above in the case study 'Production of records', lodged a CDDA claim arising from advice he was given about his eligibility for pensioner education supplement (PES).

Mr C said that he contacted Centrelink to enquire about PES and whether he could complete an IT course over a longer period of time than usual, because he suffered from an acquired brain injury. He said that Centrelink advised him he could not take 'forever' to complete it, but there was no specific time limit for completion. Mr C registered for the course, payed an enrolment fee, and submitted a PES claim.

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The PES claim was rejected on the basis that Mr C would exceed the maximum amount of time allowed to complete the course. He thereupon lodged a CDDA claim for his enrolment fee.

The Centrelink case submission stated that in its discussions with Mr C his account of events was inconsistent, particularly as to the times of his contacts with Centrelink. Centrelink used this information and the lack of a record of incorrect advice to conclude Mr C had not been given the wrong advice.

Centrelink did not take into account Mr C's habit of making a note of each contact with them, which was his strategy for coping with his brain injury. Nor was regard had to the fact that he did not have his notes on hand when Centrelink contacted him, or that the early morning call had woken him and he had been confused. The CDDA decision also incorrectly stated that Mr C continued with the course even though his PES claim had been rejected: in fact he had not.

On reconsideration Centrelink set aside the original decision and made a CDDA payment to Mr C of the enrolment fee. The new decision commented that the original decision did not give weight to the fact that Mr C had:

- an acquired brain injury
- not commenced the course after learning he would not receive PES
- a past record of double-checking advice given by Centrelink
- taken action consistent with the advice he claimed to have received.

2.43 The three focus agencies told us that dissatisfied CDDA claimants often do not understand that not all administrative problems are defective administration that is compensable under the CDDA Scheme. Another source of dissatisfaction is the difficulty of quantifying actual financial loss (including the differentiation between economic loss and lost opportunity). Often, too, there is an irreconcilable difference in the version of events given by the claimant and the agency, especially concerning oral advice.

2.44 Those difficulties will inevitably arise in applying an administrative scheme that provides financial redress to those adversely affected by defective administration. They underscore the importance of thorough investigation, effective communication with claimants, balanced decision-making, proper documentation of decisions, and clear explanations to claimants. A recommendation to that effect is made later in this report.

2.45 Another complicating issue in handling CDDA claims is the interaction between CDDA and the administrative review process. If a person's claim or detriment can be addressed through a court or tribunal, CDDA may not be the appropriate remedy. The interaction of those two options was correctly addressed in one Centrelink case we observed, which noted that a right to statutory review was relevant only if it could provide a remedy for the detriment suffered. The distinction was not properly understood in other cases, including the case below.

Case study: *Providing a remedy*

Ms F complained in 2007 about an incorrect CSA decision in 2001 that caused her loss. In giving effect to a court order, the CSA had incorrectly calculated the total number of nights that one of the children spent in the care of the paying parent. Ms F visited a CSA office in 2001 to query the care decision, but accepted the CSA's assurance that the calculations were correct. As a result, the paying parent paid less child support than he should have for a period of five and a half years.

When the CSA discovered the mistake the case officer corrected the level of care. Ms F then lodged a request for an extension of time to object to the original care decision. The request was refused by the CSA, and on appeal by the Social Security Appeals Tribunal (SSAT). The reason was that to re-open the earlier decision would not be fair to the payer, who like Ms F had relied on the accuracy of the CSA's assessment and the finality of the CSA's decision.

We advised Ms F that it was open for her to lodge a CDDA claim with the CSA, which she did in December 2007. She was contacted by the CSA and encouraged to withdraw her claim on the basis that it was unlikely to be successful as she had not appealed the recent SSAT decision to the Administrative Appeals Tribunal. The CSA confirmed this advice in writing.

In our view the CSA had confused two issues—whether the SSAT had made a correct decision on Ms F's extension of time application, and whether she had suffered a financial loss as the result of the CSA's defective administration in 2001. An appeal against the SSAT decision would look only at whether the SSAT had correctly applied the law in refusing to grant an extension of time.

We advised the CSA that the right to appeal against the SSAT decision was unlikely to provide a remedy for the CSA's defective administration. The CSA agreed to reinstate and consider Ms F's CDDA claim.

2.46 The application of procedural fairness principles to the CDDA process is also an important issue. A recommendation is made in Part 3 that agencies ensure that CDDA claimants are given a full opportunity to comment on the agency's assessment of a person's claim prior to a decision being made on the claim. One way of meeting that obligation is to provide the claimant with a copy of the agency brief or submission that is prepared for the decision maker. Three considerations support this recommendation.

2.47 Firstly, the doctrine of procedural fairness can require that a person be given an opportunity to comment on material adverse to their interests that is placed before a decision maker. This is illustrated by *G & M Nicholas Pty Ltd v Minister for Finance and Deregulation* [2009] FCA 121. The court set aside on natural justice grounds a decision of the Minister for Finance, in which the Minister had rejected a claim for an act of grace payment under s 33 of the FMA Act. The applicants had not been given an opportunity to comment on material adverse to their claim that was placed before the Minister, notwithstanding their earlier request to be provided with all relevant information. Different considerations can arise in relation to CDDA claims, which are not made under a statutory provision such as s 33 of the FMA Act. However, natural justice can apply to decisions made under executive schemes²¹ and, more generally, the principles of natural justice provide useful guidance on procedural fairness in decision-making. In *G & M Nicholas* and other cases dealing with statutory powers, the courts have stressed in general terms the importance of providing a claimant with an opportunity to comment on adverse material that is 'credible, relevant and

²¹ For example, *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44.

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significant'²² to a decision that can 'destroy, defeat or prejudice [the] person's rights, interests or legitimate expectations'.²³

2.48 Secondly, a claimant can seek access to a CDDA brief under the *Freedom of Information Act 1982*. It is possible under proposed legislative changes to the FOI Act (e.g., reduced FOI charges, and a stronger emphasis on disclosure) that there will be more frequent requests to agencies for FOI access to CDDA decision-making documents. If so, it is better that access be provided at the initiative of an agency before a decision is made so that a person can make a constructive contribution to the process.

2.49 Thirdly, the CDDA decision-making process can be improved by better communication and discussion between agencies and claimants. If a decision is made to deny a person's CDDA claim, it is essential that the agency's decision is based on a fair and accurate assessment of the claim and the CDDA criteria. Providing a claimant with an opportunity to comment on adverse material in a brief or submission before it is submitted to the decision maker will go a long way to ensuring that all issues are properly considered. This view received support from Finance in its response to the draft report. Finance commented that providing a claimant with the information upon which a decision is based and an opportunity to comment can be expected to reduce the number of revisited cases, and in turn, the associated work for agencies.

Review of decisions

2.50 A CDDA claimant who disagrees with an agency's decision has few available options. One option is to request internal review of the decision within the agency. Some agencies have an internal review mechanism created for this purpose (see Appendix 3). More generally, it is to be expected that any agency would review a decision if the claimant presented new evidence. The three focus agencies told us that it was their practice to do so. On the other hand, a decision might not be reviewed if no new evidence were presented, although this does sometimes happen.

2.51 Beyond internal review, there are limited options for external review of CDDA decisions. They are not reviewable by the AAT. Nor are they amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act), which applies only to decisions made 'under an enactment' (s 3).²⁴ A CDDA decision is possibly reviewable by the Federal Court under s 39B of the *Judiciary Act 1903*, which applies to decisions made 'by an officer of the Commonwealth'. This avenue of review would nevertheless be fraught with difficulty, because of the expense of a judicial review action, the fact that CDDA decisions are made under an administrative scheme that does not impose legal duties in the same manner as legislation, and there is doubt about the grounds of review that would apply in the s 39B jurisdiction.

2.52 The principal external review option available to CDDA claimants is to approach the Ombudsman. The main limitation on this method of review is that the Ombudsman does not have determinative powers and can only recommend that an agency changes its decision. As noted earlier, the customary approach of the Ombudsman is to focus primarily on the fairness and consistency of the process by which CDDA decisions are made and notified to claimants. On occasions, as

²² For example, *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at para 16.

²³ For example, *Annetts v McCann* (1990) 170 CLR 596 at 598.

²⁴ *Smith v Oakenfull* [2004] FCA 4.

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circumstances warrant, this office will comment on the merits of an individual agency decision, or recommend that compensation be paid to a person. Agencies, as a general rule, accept Ombudsman recommendations, particularly recommendations to reconsider existing decisions in the light of new evidence or evidence that was overlooked.

2.53 The Ombudsman's office accepts that government would be unlikely to alter that arrangement and to make CDDA decisions reviewable by the AAT or the Federal Court under the ADJR Act. The CDDA Scheme has worked well. Over time, the scheme has developed in importance as a remedy that is available to aggrieved members of the public. Decisions to pay compensation are frequent, and the criteria of the CDDA Scheme are generally applied in a careful and professional manner. Active steps are now taken by some agencies to draw public attention to the existence of the scheme. Resources are also devoted by agencies to CDDA training, case review and ensuring consistent and high quality decision-making.

2.54 There would be an understandable concern within government that the steady operation and incremental development of the CDDA Scheme could be warped if individual CDDA decisions were reviewable by a tribunal or court. The chief concern is that a court or tribunal might interpret the CDDA criteria more expansively and be more generous in awarding compensation. If so, the cost of the CDDA Scheme to government would be both unpredictable and inflationary. The cost of defending proceedings in a court or tribunal would be a related concern. Another risk is that review of CDDA decisions in a court or tribunal, where the spirit of legalism and legal doctrine would be far greater, would blur the current distinction between 'moral' and 'legal' obligation that is central to CDDA. An associated risk, as legal proceedings became more frequent, is that the CDDA Scheme could become mired in adversarial disputes and legal principle. Simply stated, the survival of the CDDA Scheme probably depends upon it remaining an administrative scheme under which decisions are not routinely subject to court or tribunal review.

2.55 Independent review of agency decisions is nevertheless an important administrative law principle and should not be forsaken entirely on the grounds of expediency. The right to review could be secured in other ways that would be consistent with the current design of the CDDA Scheme. A recommendation is made below that the Australian Government consider establishing an inter-agency review panel to conduct advisory review of individual CDDA decisions. We suggest the following model for further consideration:

- The panel would be chaired by a representative from the Department of Finance; other members would be nominated by government agencies that are regularly involved in dealing with CDDA claims. When reviewing an individual case the panel would comprise three members, drawn from the larger pool of nominated members.
- The role of the panel would be to review individual cases 'on the papers'— that is, to review the file forwarded by an agency, including any written submission from the CDDA claimant. The panel would not meet with claimants or provide an oral hearing.
- At the conclusion of a review the panel would provide a recommendation to the agency in question, with a brief accompanying explanation for the panel's recommendation. The final decision would rest with the agency: that is, it could accept, reject or modify a recommendation of the panel.
- Cases would be referred to the panel by an agency. Agencies could choose to make a referral either as a substitute for, or in addition to, an internal

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review of a disputed decision. A CDDA claimant would not have the right to approach the panel directly. It would be open to the Ombudsman to recommend to an agency that a particular case be referred to the panel.

- Meetings of all members nominated to the panel would be held periodically (for example, every three months). These meetings would review the recommendations made by the panel and any other issues raised for discussion by individual agencies.

2.56 This proposal would not mark a radical departure from the current design of the CDDA Scheme. It is not dissimilar from the contribution that the Ombudsman currently makes to the operation of the scheme across government. However, the creation of a panel would be a valuable supplement to that limited oversight. The panel would provide a forum for inter-agency discussion and collaboration. Greater learning and consistency in CDDA administration should result over time.

2.57 Another crucial reason to establish a panel is that it would introduce a stronger spirit of administrative justice to the CDDA Scheme. The right to request that a decision be reviewed by people who are independent of the initial decision is an important right that is widely respected throughout government. There is no reason why that right should not be secured, at least in a limited form, in the CDDA Scheme. The purpose of that scheme is, after all, to extend a benefit to those who are damaged by defective administration.

2.58 In summary, the Ombudsman's office is of the view that the proposed creation of an inter-agency review panel would provide a modest though important addition to the CDDA Scheme. It would inject an element of fairness across government that is presently lacking.

Oral advice

2.59 The Ombudsman frequently deals with complaints in which agencies deny having given oral advice in the terms alleged by the complainant. The agency has no record of the advice (or of the conversation) and refuses to accept the complainant's version of events. Many of these complaints end up as claims for compensation, with the complainant alleging they acted on the agency's advice to their detriment. The frequency of this problem was noted in a recent Commonwealth Ombudsman e-bulletin (Number 3).

2.60 CDDA claims based on oral advice often fall down because of the agency's view that there must be a contemporaneous agency record to corroborate the claimant's version of events. If the oral advice alleged is not consistent with the advice that an agency would ordinarily give, the agency is reluctant to accept a claimant's version of events even where the claimant has a contemporaneous record or a clear recollection of the advice.²⁵ This reluctance occurs in spite of guidance from the Finance circular that 'documentary or incontrovertible proof of defective administration should not be required',²⁶ as the case studies below indicate.

²⁵ See also our comments under the 'Agency Culture' heading.

²⁶ Attachment A to Finance circular 2006/05, para 33, at Appendix 1 of this report.

Case study: *Believing what you hear*

Mr G claimed compensation based on actions he took after obtaining advice on the ATO Superannuation Hotline. The CDDA decision contained the following reasons for dismissing the claim:

In your case investigations reveal that there are no Tax Office records of your conversation in June 2007. Accordingly, the Tax Office is not in a position to verify that the telephone conversation occurred nor, importantly, are we able to verify the substance of the conversation.

The decision also refers to case law from which the ATO drew the conclusion that it does not have a duty of care in relation to oral advice.

2.61 The ATO response in that example is standard for many agencies. The Ombudsman's office is critical of that approach, on three grounds.

2.62 Firstly, it is unfair to the client to dismiss a claim because the agency has no record of the call, when in fact such records are not systematically kept.

2.63 Secondly, from a claimant's perspective, it can appear that an agency which has made a mistake is able to avoid the consequence of the error by also having substandard records.

2.64 Thirdly, it is inappropriate to rely on the absence of a legal duty of care. Agencies are aware in administering complex legislation that members of the public rely on agencies for advice. That advice is often provided orally, through telephone hotlines (such as the 'Superannuation Hotline') that have been established by agencies for that purpose. A member of the public calling the agency is likely to expect they will receive reliable advice from a specialist service. This message is reinforced by agency service charters (such as the *Taxpayers' Charter*) that commonly commit agencies to providing accurate advice, including oral advice, to members of the public.

2.65 Agencies rightly point that callers can misunderstand advice given or provide insufficient information when seeking advice. The Financial circular specifically acknowledges the need to determine 'whether there has been confusion or misinterpretation of advice rather than defective administration per se, although some client misinterpretations will result from poorly constructed advice'. The Circular also notes that this point is one of a number of considerations to be taken into account in determining the plausibility of the claimant's account.²⁷

2.66 In another case in which an agency took a dismissive approach to oral advice, the agency also applied legal precedent to reject the claim. We consider that the legal precedent was inappropriately applied, an issue which is discussed below in the section 'A legalistic approach'.

²⁷ Attachment A to Finance circular 2006/05, para 32, of Appendix 1 of this report.

Case study: *Acting, or not acting, on oral advice*

Ms H sought compensation for a lost entitlement to maternity payment. She was temporarily absent from Australia at the time of her son's birth and asked a friend to lodge a claim for the payment on her behalf.

Her friend was advised by Centrelink that payment could not be paid for children born overseas, and did not lodge a claim. When Ms H returned to Australia, she found out that that advice was incorrect. She lodged a claim for the payment, but was refused because it was not lodged within 26 weeks of her child's birth.

Centrelink refused Ms H's claim for compensation. Centrelink accepted that it was likely that the friend had been given incorrect advice, but relied upon the Federal Court decision of *Scott v Secretary, Department of Social Security* [2000] FCA 1241 and maintained that the advice given to Ms H's friend was so 'informal' that it could not reasonably be relied upon.

We suggested to Centrelink that this case was not conclusive of Mrs H's CDDA claim, and asked that it reconsider its decision on the basis that the incorrect advice given to the friend had discouraged Ms H from lodging a valid claim.

On reconsideration, Centrelink paid Mrs H compensation for the full amount of the lost maternity payment.

2.67 An option that agencies should consider is to record telephone calls where advice is sought. The CSA introduced call recording in mid-2007 and its compensation officers report that it is very useful in assessing claims. Officers can access a contemporaneous record of a conversation and revisit discussions to ascertain unclear matters with more accuracy.

2.68 We recognise the potential resource and administrative burden in recording oral advice, at least in response to questions about benefits, entitlements and legal requirements. As a minimum, a brief written record of oral advice should not prove onerous. This would be an important step in ensuring good administration and would also assist the resolution of CDDA claims.

Addressing systemic issues

2.69 CDDA Scheme claims can alert agencies to potential problem areas and opportunities for improvement to agency administrative systems.

2.70 We have seen cases in which an Ombudsman recommendation on a CDDA claim resulted in a correction to agency procedures or reference material that would be of wider benefit.²⁸ We have seen this more in Centrelink practice than in the ATO or CSA.²⁹ Generally, however, this occurs on an ad hoc basis, and usually in response to the initiative taken by an individual officer.

2.71 We did not identify any formal procedure in any of the three focus agencies by which a CDDA processing area could draw issues to the attention of a relevant business line or service area within the agency to facilitate systemic remedial action.

²⁸ This also occurs in response to findings of administrative deficiency by the Ombudsman's office, that are usually made independently of a CDDA claim.

²⁹ The ATO indicated that business and service lines were involved with some CDDA processing and that debriefs did occur with the relevant SES where appropriate. Previously, the CSA had a central database, CSAOFI (Opportunities for Improvement) to record systemic improvement issues. However, CSAOFI is not supported by its current computer system.

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Nor was there any evidence that the agencies had implemented a formal process for reporting on CDDA claims to the agency executive. Centrelink advised that it has processes by which that reporting can occur, such as a quarterly newsletter alerting Senior Executive Service (SES) officers to important cases and trends.

2.72 It can be beneficial though challenging to incorporate information from compensation claims and complaints into the business practice of an organisation. The ATO reported some difficulty in this area, particularly if the determination of an individual CDDA claim is finely balanced. The officers whose decisions or conduct led to the CDDA payment might regard feedback as being critical rather than constructive. However, in a mature organisation, feedback should be part of a culture of continuous improvement that has a positive effect on staff morale.

2.73 One aspect of Centrelink practice that can be inimical to systemic improvement is to determine whether a claimant suffered financial detriment prior to considering whether there was defective administration. Although this is an understandable procedure for dealing efficiently with the bulk of claims, it can preclude the identification of defective administration. Some flexibility is therefore required in applying this practice.

A legalistic approach

2.74 As noted earlier in this report, the CDDA Scheme is premised on a distinction between legal and moral claims. A threshold issue for an agency upon receiving a claim for compensation is whether ‘there is a meaningful prospect of liability’ for breach of a legal obligation.³⁰ If so, the claim is to be settled ‘in accordance with legal principle and practice’ under the *Legal Service Directions* made by the Attorney-General. If not, the claim can be evaluated as a CDDA claim.

2.75 In approaching that issue, it is understandable that agencies will initially adopt a legal frame of reference. It may be necessary, for example, to obtain legal advice on whether the claim is to be decided under the *Legal Service Directions* or as a CDDA claim. However, when the decision is made at that early stage to evaluate the claim as a CDDA claim rather than as a legal claim, it is inappropriate to retain a legal frame of reference in the further processing of the claim.

2.76 That does not always occur. The experience of the Ombudsman’s office is that CDDA claim processing is too often dominated by legal concepts, thinking and approaches. We see this happen in a number of ways.

2.77 Firstly, if an agency receives legal advice that there is no legal liability to pay compensation, this can colour the subsequent processing of the matter as a CDDA claim. Opinions expressed in the legal advice can flow over into the CDDA process and create a barrier to the independent assessment of the CDDA claim. There is a risk of this occurring if the legal advice is to the effect that the agency was not negligent, did not owe a duty of care, or that there is a lack of adequate evidence to support a legal liability claim. Similar issues can arise in the CDDA process (notably, the information to support a claim), but the issues are to be approached in a different manner and in a different setting. For example, there is no onus on a CDDA claimant

³⁰ Finance circular, introduction, para 36: http://www.finance.gov.au/publications/finance-circulars/2006/docs/FC_2006.05.pdf.

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to prove their claim;³¹ and whether an agency should approve a CDDA claim does not necessarily turn on whether an agency's conduct was careless or blameworthy. It is therefore important to rule a line under legal liability issues considered prior to a claim being accepted for CDDA assessment.

2.78 Secondly, legal concepts continue to be applied during the CDDA process. Legal principles on negligent advice, duty of care, standard of care, burden of proof and calculation of loss are prominent at times in CDDA cases examined by the Ombudsman's office—some examples are given below. There is no denying that legal principles distil experience and wisdom that can be useful in highlighting issues and drawing distinctions in dealing with compensation issues. It is nevertheless important that legal principles do not dominate the CDDA process. It is, after all, 'an administrative scheme to enable Commonwealth agencies to compensate persons who have suffered detriment as a result of an agency's "defective" actions or inaction, and who have no other avenues of redress'.³²

2.79 Thirdly, legal approaches and attitudes sometimes dominate the CDDA process. It is characteristic of legal claims resolved in an adversarial setting that parties make competing claims and have to negotiate a settlement on favourable terms. The process of negotiation and settlement can overshadow a more detailed inquiry into the facts of a claim. That approach is not suited to the CDDA process. The Ombudsman's office encounters instances in which agencies adopt an inappropriate 'compensation minimisation' approach, or resolve claims without undertaking a proper consideration of the facts of the case or the nature of the claim. The above discussion under *Oral advice* illustrates this.

2.80 A related practice, which is criticised below, is that agencies are instructed to obtain a deed of release before making a CDDA payment. Requiring a person to surrender their legal rights in the CDDA process has a tendency to focus attention on legal perspectives and issue.

2.81 Fourthly, the placement of CDDA teams within agency legal areas (discussed under *Central coordination* below) can contribute to this tendency. Many CDDA administrative staff are legally qualified. While it is appropriate for agencies to draw on the analytical and decision-making skills of legal staff, it should be clear that this alone is not the perspective that is to be applied in the CDDA process.

2.82 A related issue is that agencies sometimes rely on outsourced legal advisers for advice and analysis on CDDA claims. It is important, when this occurs, that the handling of the CDDA claim does not become blurred by a focus on legal principles and approaches. The ATO's practice of having an outsourced legal adviser correspond directly with a claimant is not one that we condone. This can create confusion and concern for CDDA claimants, who think that their claim has been escalated into a legal dispute.

2.83 Finally, the agency CDDA manuals contribute to blurring the distinction between claims that stem from a moral rather than legal obligation. Centrelink's *Customer Compensation Handbook* was prepared by the Australian Government

³¹ See Administrative Review Council, *Decision Making: Evidence, Facts and Findings*, Best-Practice Guide 3 at 8: 'In administrative decision-making the decision maker is responsible for determining all material questions of fact and basing each finding of fact on logically probative evidence. The question to be decided is whether, on the basis of the logically probative evidence, the decision maker is reasonably satisfied that a particular fact is more likely than not to be true.'

³² Attachment A to Finance circular 2006/05, para 1, at Appendix 1 to this report.

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Solicitor, and has a tendency to blur that boundary by emphasising the legal rather than moral aspects of the CDDA Scheme. An example is the following statement:

In essence, the scheme requires that the compensation be determined in accordance with legal principle and practice. For example it refers to reducing the compensation payable to take into account whether the actions of the claimant contributed to the loss (equivalent to contributory negligence), and whether the claimant took steps to minimise the loss (equivalent to mitigation).³³

2.84 The handbook does not clarify that mitigation must be interpreted in relation to the particular claimant's circumstances. Another statement in the handbook, following a discussion of evidence in relation to defective administration, says 'this is essentially just a repetition of the factors to be taken into account when weighing up evidence for the purpose of considering legal liability'.³⁴ This is preceded by an acknowledgement that the evidence requirements are different in the CDDA Scheme and general litigation; nevertheless such statements are unhelpful and increase the likelihood that CDDA officers will wrongly apply legal principles in administering this discretionary scheme.

2.85 This investigation found an over-reliance on legal terms such as 'balance of probabilities'. In decision-making under an executive scheme, it is preferable and more accurate to speak of a decision maker being reasonably satisfied on the components of the claim. The CDDA submissions we reviewed referred to legal concepts, such as a claimant's 'contributory negligence', whereas Finance circular 2006/05 refers to 'contributory actions' or 'lack of mitigating actions'.

2.86 The CDDA submissions also referred to a 'burden of proof' on the claimant. In practical terms, while a claimant could normally be expected to substantiate their claim, administrative officers need to be careful not to elevate this into requiring the claimant to discharge a burden of proof. Agencies may have access to valuable information relating to a claim that is not known to a claimant, such as internal file notes. The agency could be expected to consider that information as part of the CDDA decision-making process and to inform the claimant of its existence. The agency should not focus only on the argument or information provided by the claimant. A claim should ordinarily be approved where the material before a decision maker, from whatever source, provides a reasonable and proper basis for compensation to be paid. One letter we reviewed advised a claimant, on a question of oral advice, that 'without collaborative evidence, I cannot be satisfied that there are definite conclusive grounds for me to consider defective administration'.³⁵ This reference to 'definite' and 'conclusive' goes beyond the standard of 'satisfaction' in the Finance circular.

2.87 Some agencies provide decision makers with additional guidance beyond Finance circular 2006/05, but this advice too tends to focus on the legal aspects of compensation decision-making. (Nor is the advice always accurate. An example is a comment in Centrelink's *Customer Compensation Handbook*, stating that CDDA decisions are not reviewable by a court because the CDDA Scheme is wholly

³³ Centrelink Compensation Handbook, at para 210.

³⁴ Centrelink Compensation Handbook, at para 209.

³⁵ Correspondence to Ms M dated 28 February 2007.

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discretionary.³⁶ As noted earlier in this report, a CDDA claim may be reviewable under the Judiciary Act s 39B.)

2.88 In summary, agencies need to ensure that their instructional material and approach in handling CDDA claims does not rely inappropriately on legal concepts, doctrines and precedents. A recommendation to that effect is made in Part 3 of this report. This problem is found in agency practice rather than in the guidance provided in Finance circular 2006/05. For that reason no recommendation is made in this report for a review of that aspect of the Finance circular.

2.89 There may, on the other hand, be pressure from other quarters for a review of the Finance circular to be undertaken. The issue is raised in a recent issues paper on alternative dispute resolution published by National Alternative Dispute Resolution Council (NADRAC).³⁷ The paper draws attention to possible barriers to the settlement of legal claims arising from the terms of the Legal Services Directions. In particular, the issues paper notes, it should be made clearer to agencies that the cost of continuing to defend or pursue a claim is a relevant consideration in deciding whether to settle; and the requirement in the Directions that a claim not be settled unless there is 'at least a meaningful prospect of liability being established' is not well understood by all agencies and could set the bar to settlement too high. NADRAC suggests that further consideration may need to be given 'to the relationship between settlement of legal claims under the Legal Services Directions and resolution of complaints and claims under the Compensation for Detriment caused by Defective Administration and Act of Grace schemes'. Implicit in that suggestion is that the CDDA Scheme can be viewed as a mechanism that supports alternative dispute resolution, that is, the settlement of a dispute without the need for a judicial decision.

2.90 Building on that concern, it may be appropriate that a wider review is undertaken into the terms of the CDDA Scheme, its role in settling disputes, and whether the distinction between claims based in legal and moral obligation is both appropriate and observed in CDDA administration. Finance has advised the Ombudsman that they have considered the need to review the CDDA Scheme, and will make an assessment of this in light of this report. The issues referred to could suitably be addressed in that review.

Deeds of release

2.91 As noted earlier, Finance circular paragraph [73] states that agencies should require claimants to sign a deed of release as a condition of a CDDA payment. This practice is followed in most agencies, at least beyond a pre-determined threshold settlement amount. Although the drafting of a deed can be negotiated between the agency and a claimant, it is common practice for agencies to provide a standardised deed.

2.92 An example is Centrelink's standard deed which asks a claimant to release the Commonwealth from 'all actions, suits, claims, costs and demands of any nature arising out of the incident, and any matter or thing connected with the incident'.³⁸ The comprehensive nature of such a release goes against the principle that a successful CDDA claimant is only compensated to the point of placing them in the same position they would have been in had the defective administration not occurred.

³⁶ Such as provided for by the common law, the *Judiciary Act 1903* or the High Court's original jurisdiction.

³⁷ NADRAC, *Alternative Dispute Resolution in the Civil Justice System*, Issues Paper, March 2009 at para 7.7.

³⁸ Centrelink's standard deed of release and indemnity.

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2.93 The Ombudsman's office believes that a person should be able to make a further claim if an uncompensated detriment arises or is identified subsequent to a CDDA claim being settled. In fact, the three focus agencies advised that, in spite of a deed of release being agreed, they would consider a further claim arising from the same circumstances if further detriment is identified at a later point. This is commendable, but calls into question the value of the deed, especially in a scheme that is based on a principle of moral obligation. The existence of the deed will be a barrier to a further claim being lodged, especially where (as is often the case) the claimant did not receive legal advice in pursuing the CDDA claim.

2.94 The practice of requiring a deed of settlement is also at odds with the character of the CDDA Scheme. When a deed of settlement is used to settle a legal claim, it constitutes a bargain struck between the parties in which they agree to forgo their legal rights in exchange for the terms of settlement. In a sense, each party is contributing something of value to the settlement. Approval of a CDDA claim, on the other hand, is not the settlement of a legal dispute. The CDDA claimant has less bargaining power, and the fear of litigation is unlikely to weigh on the government agency in pressuring it to approve a CDDA payment. A CDDA claimant will have little bargaining power when faced with a demand by a government agency to sign a deed of release as a condition of the claim being approved. It is a one-sided bargaining process. Not surprisingly the deeds of release used by government agencies are usually in a standard form.

2.95 The Finance circular also recommends that 'in some circumstances, it may be considered necessary to seek an indemnity from the claimant in relation to any legal action by any other person in relation to the claim'.³⁹ The circular goes on to recommend that legal advice be sought in drafting a deed of indemnity. This raises several issues:

- The circular does not suggest that the Commonwealth ensure that the CDDA claimant seeks or receives legal advice. This would be impractical in many CDDA claims because of the relatively small sums involved.
- It is difficult to see why a claimant, who does not have a legal liability claim but is being compensated only for an administrative failure by government, should be required to provide an indemnity for the government against legal action by a third party.
- The scheme can only compensate for existing losses, whereas the legal liability covered by an indemnity may extend to compensation for future loss.

2.96 The three focus agencies each saw value in executing a deed as a means of communicating 'closure' of a claim. The Ombudsman's office appreciates that need, particularly for claims that are protracted, but it is questionable whether a deed of settlement is the appropriate mechanism for that purpose. The deed is requiring the claimant to surrender legal rights that may not have been addressed in the CDDA decision, which is not a settlement of a legal liability claim. Finance has advised that it will assess its advice on deeds of release in its upcoming review of Finance circular 2006/05.

2.97 To require a claimant to surrender legal rights through a deed of release also exacerbates the tendency of CDDA claims to be approached from a legal, rather than a moral perspective. This tendency was criticised earlier in this report. The following

³⁹ Attachment A to Finance circular 2006/05, para 74, at Appendix 1 of this report.

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case study illustrates the legal complexity that can be introduced into the CDDA process when a deed of release is required.

Case study: *Something for nothing*

The CSA wrongly made a child support assessment in the case of Mrs J and Mr K, whose arrangements were subject to a court order that precluded further CSA assessment. Mrs J accrued a sizeable debt under the erroneous assessment. Further, Mr K initiated a second court hearing and Mrs J claimed that she accepted the arrangement on which the subsequent court order was based and which was otherwise unfavourable to her, in order to discharge the debt incurred under the CSA assessment.

The CSA acknowledged its error and agreed to pay Mrs J's legal costs relating to the court hearing and her disagreement with the CSA, but declined to pay compensation for the unfavourable court order on the basis that this was a future loss. Despite this, Mrs J was asked to sign a deed of release in respect of all claims for loss or damage sustained directly or indirectly by Mrs J, now or in the future, in order to access the compensation offered.

The CSA had not made any assessment or decision on whether it was responsible for future losses, only that the CDDA Scheme was not able to compensate Mrs J for such losses. To compel Mrs J to sign a deed of release that required her to give up a potential and unexplored claim, in order to access compensation for detriment that had been incurred, was inappropriate.

It should be noted that for reasons unrelated to the deed of release, the Ombudsman chose not to pursue the matter further and this issue was not subject to discussion with the CSA.

2.98 A recommendation is made below that Finance review this aspect of the Finance circular, and work with agencies to explore alternate means of bringing disputes to a close. Finance advised in response to the draft report that it will.

Agency culture

2.99 The ANAO report on the CDDA Scheme neatly captured the opposing pressures that agencies must balance in administering the scheme—to 'have prudent safeguards in place so that compensation is provided only when warranted', while discharging the Commonwealth's responsibility 'to provide compensation in a responsive and timely manner'.⁴⁰

2.100 There is scope for all agencies to display better understanding of and commitment to the CDDA Scheme. An illustrative point is that Centrelink's *Customer Compensation Handbook* quotes approvingly from a judgment⁴¹ that mis-describes the CDDA Scheme suggesting that 'the CDDA scheme is designed to avoid public relations problems involving public bodies and the political consequences of such problems'. The judgment is also quoted as saying that 'The CDDA Scheme is, in effect, a mechanism for dealing with complaints which do not raise any arguable assertion of legal wrongs'. That is not a fair summary either of the objectives or operation of the CDDA Scheme. The comments, if included in an agency handbook, should be supplemented by a commentary that draws attention to other concepts of justice, equity and discretion that underlie the CDDA scheme.

⁴⁰ Audit Report No.35 2003–04 at p16 para 7.

⁴¹ At paragraph 188, referring to *Smith v Oakenfull* [2004] FCA 4 at paragraph 20 'It is perhaps not unduly cynical to say that the CDDA Scheme is designed to avoid public-relations problems involving public bodies and the political consequences of such problems'.

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2.101 The experience of the Ombudsman's office is that the scales are frequently tipped toward safeguarding Commonwealth funds at the expense of responsive compensation where a moral obligation is owed. The legalistic approaches and treatment of oral advice discussed earlier in this report suggest an underlying culture that is skewed towards denying compensation claims.

2.102 In many cases that we have observed agencies appear reluctant to accept a claimant's version of events. Instead, agencies place considerable reliance on an assumption that staff knew their jobs and agency policies and legislation. The starting point, quite often, is that knowledgeable agency staff are unlikely to have provided deficient advice, and that a claimant's version of events ought not to be accepted. This theme is captured in the following case study.

Case study: *Benefit of the doubt*

Mr L, accompanied by his father, attended a Centrelink office to claim Newstart allowance (NSA). He claimed a customer service officer (CSO) who took his details then advised that she would 'get the ball rolling'. Mr L and his father understood this to mean that Centrelink would contact him later, and he left the office. Apparently, the CSO meant that Mr L would be interviewed later that morning.

After hearing nothing, Mr L contacted Centrelink in the following month and was advised that his claim for NSA had been refused because he had not attended the required interview. He was granted NSA a month later. Mr L made a CDDA claim for an amount equal to NSA payable during the 'missing' month.

The Centrelink submission on the CDDA claim noted several matters: that the CSO officer could not recall speaking to Mr L; it was inherently unlikely that Mr L would not have been advised to remain in the office to attend the mandatory interview; Centrelink staff are well versed in the relevant procedures and would not have misadvised Mr L; and he may have misheard or misunderstood any oral advice provided to him.

Mr L's father provided the Ombudsman's office with a statutory declaration setting out his recollection of events and that provided corroborative support for Mr L's version of events. These accounts seemed plausible and consistent, and we recommended that Centrelink reconsider its decision. Centrelink subsequently granted Mr L compensation, equivalent to the amount that he would have received if the claim had proceeded smoothly when he first contacted Centrelink.

2.103 Where there is no written evidence to corroborate a claimant's account, we found that agencies generally did not engage in detailed consideration of the account's plausibility, or whether the claimant's actions were consistent with the advice they claimed to have been given.

2.104 It is reasonable for an agency to rely on its staff's knowledge, experience and skills and to test a claimant's account against staff recollections. However, agencies must also accept that even the most experienced and capable staff can make mistakes. It is unreasonable to reject an otherwise plausible and consistent account solely on the basis that it was 'inherently unlikely' that an agency officer may have made a mistake.

2.105 That approach is not consistent with Finance circular 2006/05, which invites decision makers to consider the plausibility of the claimant's account and the allegations against the agency.⁴² We have seen cases in which complainants expressed great distress at the suggestion that their account of events was embellished or fabricated. This was especially pronounced because compensation

⁴² Attachment A to Finance circular 2006/05, para 32, at Appendix 1 of this report.

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under the CDDA Scheme is purely restorative, and offers no financial windfall to the claimant.

Central coordination

2.106 An important reform in the history of the CDDA Scheme was the devolution to agencies of the discretion to make decisions on compensation. This enables claims to be handled more efficiently and in closer proximity to the circumstances that gave rise to the claims. It is more likely too that agencies will take responsibility for correcting systemic problems that are highlighted by individual CDDA cases.

2.107 Devolution carries a risk. One is that central leadership and coordination will be lacking in CDDA administration. Another is that there will be inconsistent practice among agencies in how claims are decided. Measures need to be put in place to counter those risks.

2.108 The three focus agencies in this investigation have established central coordinating branches for handling CDDA claims. ATO and Centrelink claims are also investigated and determined by staff within this branch. CSA's National Complaints Resolution Unit keeps track of claims and provides quality assurance, but otherwise compensation claims are generally dealt with at the regional or state level. To support consistency, some agencies conduct regular conference calls to keep all case officers informed of key issues and provide a forum for discussing issues of interest and training opportunities. We commend this practice.

2.109 There is, on the other hand, some divergence in agency practice, as discussed in this report. In the Ombudsman's view there is scope for a more centralised leadership role and a more consistent whole-of-government approach to CDDA training, guidelines and skills. Regular reiteration of the purpose of the CDDA Scheme would reinforce the permissive nature of the scheme and increase commitment to its rigorous implementation. Other benefits would be greater levels of commitment to the CDDA Scheme across government, increased consistency of approach to CDDA claim resolution and more comprehensive reporting.

2.110 There may also be merit, as recommended earlier in this report, of establishing an inter-agency panel that could review individual cases on referral from agencies, and conduct regular seminars for agency decision makers. This would enable challenges, problem issues and best practice to be shared among agencies. Finance, the Commonwealth Ombudsman's office and the ANAO could also play a lead role in coordinating and participating in those forums.

PART 3—CONCLUSIONS AND RECOMMENDATIONS

3.1 The CDDA Scheme is an important and valuable mechanism for addressing the adverse financial consequences of defective administrative action for members of the public. The scheme is particularly important in agencies with a large client base and that administer government programs that have financial consequences for the public, such as taxation, social security and child support.

3.2 The agencies examined as part of this study have well developed systems in place to handle CDDA claims. However, there is room for improvement in each system. There are also lessons for other agencies.

3.3 A major theme in this report is that, while there is general acceptance by agencies of the CDDA Scheme, there is still a reluctance by agencies to admit error and to approve worthy claims. More can be done within agencies to facilitate greater acceptance of the scheme, its principles and purpose. The impression at times is that the balance between fiscal prudence and justifiable compensation has not been properly struck: the balance is tilted towards protecting government revenue to the detriment of proper assessment of claims. Adverse assumptions are too often made about the unreliability of claimants' accounts; and positive assumptions, unsupported by evidence, are too often made about the reliability of agency actions.

3.4 Administrative drift is a recurring problem that affects claim handling in many agencies. Timeframes for handling claims need to be reviewed. Better internal monitoring and outcome reporting to agency executives would improve accountability. The problem of delay was raised in both the ANAO and Finance reviews⁴³ and has not been fully addressed by agencies. Agencies should consider the potential that information technology offers in terms of improved case monitoring, better decision-making support, and enhanced feedback for improvements in administration.

3.5 Agency procedural information, policy guidance and practice statements can be improved. Closer attention needs to be paid to providing staff with current and up-to-date administrative support for CDDA claims handling. Priority should be given to developing coherent instructional material, including illustrative case studies, to assist staff in exercising judgement about the plausibility of claims and the treatment of evidence.

3.6 Agencies need to provide staff with clearer guidance, with a less legalistic approach, and to emphasise more strongly the administrative and discretionary nature of the CDDA Scheme and the moral obligation that underpins it. A recommendation is made below that Finance review its advice on the nature and effect of moral obligations within the circular to guide agencies in the identification and consideration of those obligations. In turn, agencies should regularly update their policy and procedural information to ensure it is consistent with the content of and guidance provided by Finance circulars; issues should be referred to Finance where clarification is needed.

⁴³ The ANAO noted there was insufficient internal monitoring of claims, as manifested by slow processing times and limited analysis of results. The in-house Finance review also commented on the lack of both recordkeeping and claims monitoring, which had caused delays in the resolution of claims.

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3.7 The quality of CDDA decision-making is not as high as it should be. Suggestions made by the Ombudsman's office to agencies about particular cases during the course of this investigation provided the impetus for a review of those cases and a revision of agency procedures and information. That responsiveness is welcome, but illustrates the scope for further improvement. Proper handling of a claim should not depend on an external stimulus.

3.8 The treatment of CDDA claims involving oral advice remains a key concern.⁴⁴ Agencies have either been slow or reluctant to implement systems to adequately support an oral advice environment. This is a pressing concern with the establishment of specialist call centres and hotlines that members of the public increasingly contact for expert advice. The distinction between advice that can be relied upon and advice that cannot is not well understood by members of the public. Call recording is an option that requires serious consideration by government agencies.

3.9 In a welcome initiative, the CSA has initiated inter-agency meetings to share ideas and best practice. At the time of writing, only one meeting has been held. There is scope for greater centralised coordination, training and review by either Finance or an inter-committee or panel. A more centralised and coordinated approach to the CDDA Scheme is likely to result in better CDDA administration and a greater consistency across agencies.

3.10 Agencies are not making full use of the opportunity the CDDA Scheme provides for improving agency administration. Insufficient attention has been given to addressing systemic problems highlighted by claims. Agency CDDA processes that require staff to first determine what financial detriment a claimant has suffered may unintentionally operate to exclude opportunities to identify and address problems at a systemic level. There is scope for more formal and structured reporting and feedback on the deficiencies identified in individual CDDA claims to relevant business areas for remedial action.

3.11 There have been some real improvements to CDDA administration since the in-house review by Finance in 2004–05. One improvement is that agencies are less likely to resort to legal advice. In particular, the three focus agencies have established procedural instructions and material to assist staff to work through issues in-house, without the need to resort to external legal advice.

3.12 References to the Ombudsman's role in the CDDA Scheme are more frequent in the information provided by agencies to clients. Claimants are usually advised that they can approach the Ombudsman's office. This practice should be continued, given that adverse CDDA decisions cannot be reviewed by merits tribunals and are not readily amenable to judicial review by the courts.

3.13 Greater assistance could be made available to claimants to facilitate the making of CDDA claims. Agencies could make more use of suitable templates to assist and guide claimants in making claims and in presenting information needed for a claim to be properly considered. This will in turn make the decision-making process easier and less time-consuming.

3.14 The issues thrown up by complex and difficult cases are not always well recognised. Complexity is often not identified until late in the process. Improved staff

⁴⁴ It has been so since 1997 when the Ombudsman published a report on oral advice: *Issues Relating to Oral Advice: Clients Beware*.

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supervision and increased monitoring could address these problems. More use of mediation and negotiated settlements and face-to-face discussions with claimants may be warranted in complex cases.

3.15 Training for staff is another area for development. This is important within agencies, but opportunities should also be explored for training that is made available across agencies. A lead could be taken by agencies sharing training programs with other agencies. Training can be important in downplaying the legal focus in CDDA administration.

Recommendation 1

The Ombudsman recommends that all agencies subject to the *Financial Management Accountability Act 1997* take note of this report, and in particular that agencies:

- a. review their publicly available information to ensure that information about the CDDA Scheme, including the Ombudsman's role in review of decisions, is accessible on agency internet sites, and referred to in service charters, correspondence relating to decisions, and on fact sheets and similar material relating to complaints, review of decisions and appeals
- b. review their claim forms to ensure that claimants are assisted to provide all required information
- c. review their timeliness standards, increase monitoring of compliance with those standards, and consider whether the resources currently available to CDDA processing are adequate to meet appropriate timeliness standards; reporting against CDDA timeliness standards should be incorporated in agency annual reports
- d. adopt a rigorous approach to records management, including by encouraging staff to maintain accurate records, providing staff with guidance on records-management processes, supporting an agency culture of compliance and applying effective quality assurance mechanisms
- e. implement and ensure compliance with procedures acknowledging the receipt of a CDDA claim within a set timeframe and that claimants are regularly advised of the progress of their claim, particularly if a matter is likely to exceed timeliness standards
- f. consolidate all documentary instructional material on handling CDDA claims into a single coherent document, and consider formal training with a focus on administrative decision-making and report writing
- g. use decision-making templates to encourage consistent consideration of claims
- h. ensure that reasons for decisions are properly recorded and the reasons for rejected claims are clearly explained to claimants
- i. agencies ensure that claimants have a full opportunity to comment on the agency's assessment of a claim prior to a decision being made
- j. implement formal processes by which CDDA claim processing areas are able to draw problems to the attention of relevant business lines or service areas within the agencies for systemic remedial action
- k. review instructional and other decision-making support material and ensure that they place more emphasis on the merits of administrative decision-

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making consistent with the CDDA Scheme, and less reliance on legal precedent, doctrine and concepts

- I. provide clear training and ongoing guidance to staff on:
 - the purpose of the CDDA Scheme
 - deciding claims on their merits
 - the standard of evidence required to make a decision
 - who should provide the evidence.

Recommendation 2

The Ombudsman recommends that:

- a. the Australian government consider the merits of establishing an inter-departmental advisory or review panel to deal with disputed or exceptional CDDA claims.
- b. Finance and relevant agencies consider strategies for greater sharing of information on best practice and whether there is merit in the creation of an inter-agency body to encourage a consistent, whole-of-government approach to CDDA claims.
- c. Finance review the requirements in relation to deeds of release contained in the Finance circular in order to address the issues raised in this report.

PART 4—AGENCY RESPONSES

4.1 The ATO, Centrelink, CSA and Finance were given the opportunity to review and comment on a draft of this report. All agencies were generally supportive of the report, and welcomed the opportunity to bring consistency to the operation of the CDDA Scheme. Much of the agency commentary on the draft report explained the steps the agencies take already to comply with the recommendations, and the further work undertaken by agencies during the course of this investigation.

4.2 There was some disagreement by agencies with the general criticism in this report of agencies for relying on legal concepts and approaches, particularly in requiring a claimant to substantiate a claim for CDDA compensation. As to their own administration, the agencies felt that they approached claims in the correct manner and were properly guided by CDDA principles and administrative law norms. Moreover, agencies had to be mindful of their responsibility to manage public money appropriately and to rely on satisfactory evidence in approving a compensation claim. The ATO disagreed that this could be described as a 'legalistic' approach.

4.3 There were also agency comments that are relevant to the specific recommendations, as set out below.

Recommendation 1(b) comments

4.4 The CSA notes that it does not require the use of a specific claim 'form', believing this may work against their efforts to easily resolve a claimant's matter. Finance notes that the format of claim forms must reflect the particular requirements of departments and agencies.

Recommendation 1(i) comments

4.5 This recommendation was revised to take account of comments made by Finance, CSA and Centrelink on an earlier formulation of this recommendation. The draft report recommended that agencies provide the case submission to claimants for comment prior to a decision being made. The agencies noted that this occurs in some instances, but that in other instances less formal and resource intensive steps could be taken to ensure that a claimant has a proper opportunity to put their case and to comment on adverse material. Generally, agencies accepted the importance of ensuring that procedural fairness is observed in the CDDA decision-making process.

Recommendation 2 (a) comments

4.6 Centrelink expressed strong support for Recommendation 2(a), adding that unless it is 'adopted in some form, the risk of inconsistent approaches to CDDA will remain'.

4.7 In supporting this recommendation, Finance noted that it will 'assess the merits of establishing an inter-departmental advisory or review panel to deal with disputed or exceptional CDDA claims. Establishing such an advisory or review panel may have significant resource implications, and would necessarily require an evaluation of the associated costs and benefits and ultimately policy approval from the Australian Government.' Finance also notes that while it 'respects an individual's right to seek review of a decision ... the CDDA Scheme is intended to be an avenue of last resort. It would seem inconsistent with the purposes of the scheme to introduce another review mechanism, other than those which already exist, noting

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that the scheme was designed so that an agency could assess its own administration’.

4.8 The ATO sees ‘some merit in the proposal for exceptional matters’, and lends its support to the establishment of an advisory, rather than review panel, so that the executive power of the Minister on which compensation decisions are based is not inappropriately fettered.

Recommendation 2 (b) comments

4.9 Finance notes that in consultation with relevant stakeholders, it will host the first inter-agency forum, with ongoing information sharing strategies (both formal and informal) to be evaluated against efficiency and effectiveness criteria.

APPENDIX 1—FINANCE CIRCULAR 2006/05, ATTACHMENT A

ATTACHMENT A

The Compensation for Detriment caused by Defective Administration Scheme (the CDDA Scheme)

Introduction

1. The CDDA Scheme is an administrative scheme to enable Commonwealth agencies to compensate persons who have suffered detriment as a result of an agency's 'defective' actions or inaction, and who have no other avenues of redress. The Department of Finance and Deregulation (Finance) is responsible for providing policy advice on the CDDA Scheme. However, portfolio Ministers continue to have responsibility for decisions made under the CDDA provisions.
2. This is a guidance document. It sets out the criteria to be taken into consideration when addressing a claim for defective administration, as well as the limitations placed on the Scheme.
3. While this document is not intended to be exhaustive, it does identify criteria to be applied and factors that might be taken into account in making a decision about whether or not compensation should be paid under the CDDA Scheme.
4. There are two key features which are common to the mechanisms described by the covering circular, including the CDDA Scheme. They are:
 - decisions are made at the discretion of the decision maker; and
 - payments are approved on the basis that there is a moral, rather than legal obligation to the person or body concerned.
5. The claimant's own actions are also a relevant factor in deciding whether there is a moral obligation to pay compensation under the CDDA Scheme.
6. Each case must be determined on its own merits. It is important that the principles of natural justice are applied to CDDA matters and that claimants are treated equitably. This means that decisions should be taken impartially and that claimants should always be given the opportunity to state their cases in writing.
7. In accordance with the principles of the *Privacy Act 1988*, all aspects of an investigation should be treated as confidential to ensure adequate protection of the claimant's privacy.

Decision makers

8. Where an authority is given by a Minister to an agency official to approve payments under the CDDA Scheme, that authority is to be conferred

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expressly, that is, authorisations must be given separately from the Minister's general authorisations to incur expenditure. This requirement is in recognition of the special and potentially sensitive nature of decisions made under the CDDA Scheme for which the agency and its Minister may be held accountable.

9. Where a decision maker is a person other than a Minister, the decision maker acts for and on behalf of the relevant Minister. The decision maker is an agent of the Minister and not a delegate. Only an officer who has been authorised by the Minister can decide claims under the CDDA Scheme.

Who can apply?

10. Any individual, company or other organisation can submit a claim for CDDA. The claim can be submitted either directly to the relevant agency or through a third party.
11. While the majority of CDDA requests are from agencies' external clients, internal clients (agency employees) are not precluded from making claims. However section 73 of the *Public Service Act 1999* provides that the Public Service Minister, or his or her delegates, may authorise payments up to \$100,000 due to special circumstances which relate to, or that arise out of, the person's employment, or another person's employment, with the Commonwealth. The CDDA mechanism should not be used as an alternative or a 'top up' to this avenue of compensation or to any other avenue of compensation.

Time in which to apply

12. There is no time limit in which a claim must be submitted. However, significant lapses in time between the alleged defective administration and the submission of a claim may exacerbate any difficulties that arise in gathering evidence and verifying the facts of a case.
13. It would be unrealistic for claimants to expect that claims will be investigated and compensation paid where no reasonable excuse is provided for a protracted delay.

Details to be provided

14. There is no particular form in which a claim is to be made. However, claims will be reviewed more readily by the decision maker if the claimant addresses the criteria for determining defective administration, explains how the actions or inactions were defective, provides details of the detriment being claimed and explains how the defective administration directly caused the loss. Claimants should provide evidence to support their claims.
15. At [Appendix A](#) to this guidance is a template claim form which might be provided to prospective claimants. However this may need to be tailored to reflect the type of claims individual agencies receive.

Determining a claim for CDDA

16. There are a number of steps in determining a CDDA claim, including but not limited to:
 - a. consider the general limitations on the operation of the Scheme in relation to the particular claim;
 - b. consider whether the agency's actions or omissions to which the complaint relates, fall within the criteria of defective administration;
 - c. in the event that it appears that defective administration can be verified, determine whether the claimant suffered any actual 'detriment' and whether there is a direct causal link between the defective administration and the detriment;
 - d. quantify the extent of the detriment suffered⁴; and
 - e. provide a recommendation to the decision maker.
17. In complex cases where some of the issues involved can be verified more easily than others, it may be practical, if a claimant agrees, to split a claim into components which can then be determined separately.

When should legal advice be sought?

18. In general, an agency should seek legal advice either from its internal advisors, or if necessary, from external providers, in determining a CDDA claim if a payment is contemplated⁵ and if:
 - the decision maker requires assistance in the application of these principles particularly when consideration of legal principle and practice is required; or
 - the decision maker considers there may be a question whether the relevant legislation provides the claimant with an alternative administrative review mechanism, bearing in mind that not every person affected by a reviewable decision would have a meaningful right of review; or
 - the claimant alleges that they have a legal claim and the decision maker is uncertain whether legal liability exists, eg. breach of contract, negligence and the allegations, prima facie, appear to have some substance.

⁴ The usual process for examining a claim is that an agency official who is in a position to undertake steps (a) to (e) above submits a written report and recommendation for the consideration of the appropriate decision maker. A decision maker is permitted to make a payment if he or she considers that defective administration has taken place. However, there is no obligation to make a payment.

⁵ Legal advice need not be sought if the agency is confident that a claim is completely unfounded. In addition, both the Ombudsman and the Australian National Audit Office have at times expressed concern that agencies tend to seek legal advice on claims when this advice is not warranted, thus delaying the claims settlement process.

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19. The Attorney-General's *Legal Services Directions* specify a monetary threshold for the settlement of legal liability claims beyond which external legal advice is required. That threshold is \$25,000. Whether that threshold constitutes an appropriate threshold for seeking legal advice in relation to the determination of a particular CDDA claim will depend on the circumstances of each case, including the complexity of the claim.

Limitations of the scheme

20. The CDDA Scheme is not available to Commonwealth authorities and companies that have a separate legal identity to the Commonwealth and operate under the *Commonwealth Authorities and Companies Act 1997*.
21. The CDDA Scheme does not oblige the decision maker to approve a payment in any particular case. However the decision whether to approve or refuse a payment must be publicly defensible having regard to all the circumstances of the case.
22. Because the CDDA mechanism is a mechanism of last resort, the Scheme does not apply:
 - to any claims for monetary compensation where it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated. Such claims should be settled in accordance with the criteria prescribed by the Attorney General's *Legal Services Directions on Handling Monetary Claims*; or
 - where it is reasonable to conclude that there is an administrative review mechanism which has the capacity to provide a remedy for the defective administration⁶; or
 - to overcome the effects of specific legislative provisions that are found to be flawed. Legislative problems or anomalies should be dealt with through statutory remedies either by seeking amendment of the relevant legislation, with retrospective effect to bestow the benefit on the claimant if appropriate, or by considering the matter under the act of grace provisions of the *Financial Management and Accountability Act 1997* (FMA Act); or
 - to offset the payment of a recoverable debt owed to the Commonwealth, even if the debt arose because of defective administration. Such claims should either be considered under the relevant, specific legislative provisions or, if none apply, be considered by the agency for deferral of recovery (write-off) under section 47 of the FMA Act, or be referred to Finance for waiver consideration under section 34 of the FMA Act.

⁶ This reflects the fact that if appropriate legal or legislative mechanisms (whether in the nature of court action or administrative appeal) are available to a claimant, they should generally be pursued. However, this does not mean that a claimant should be forced to pursue legal action in circumstances where that legal action is unlikely to succeed, or where that legal action will not provide a remedy for the defective administration.

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Criteria for defective administration

23. Subject to the 'Limitations' specified above, the CDDA Scheme can be applied if a Minister, or an authorised officer, forms an opinion that an official of the agency acting, or purporting to act, in the course of their duty, has directly caused the claimant to suffer detriment or as a result of defective administration.

Defective administration is defined as follows:

- a specific and unreasonable lapse in complying with existing administrative procedures; or
- an unreasonable failure to institute appropriate administrative procedures; or
- an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or reasonably capable of being obtained by the official to give); or
- giving advice to (or for) a claimant that was, in all the circumstances, incorrect or ambiguous.

When are actions 'unreasonable'?

24. In relation to the first three criteria, a lapse in complying with existing procedures, failure to institute procedures or failure to give advice will only amount to defective administration where that lapse or failure is 'unreasonable'.
25. An unreasonable lapse or failure is one where the actions of the officer(s) involved are considered to be contrary to the standards of diligence that the agency expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.
26. Circumstances may arise where instances of administrative omissions or errors may not be regarded as unreasonable when considered in isolation from each other, but may be considered as constituting defective administration when considered in totality and in the context of the combined impact of the omissions or errors on the client involved. Each assessment of whether there has been defective administration is dependent on the facts of a particular claim.
27. In relation to the fourth criterion, where advice or information given to a claimant was incorrect or ambiguous, it is not necessary for an element of unreasonableness to be present for the action to fall within the definition of defective administration.

Standards of conduct

28. In assessing whether defective administration has occurred, consideration should be given (where applicable) to compliance with the Australian Public Service values and Code of Conduct (the Code) as set out in sections 10 and 13 of the *Public Service Act 1999*⁷.
29. The general thrust of section 13 requires Australian Public Service employees to:
 - behave honestly and with integrity, care, and diligence, and treat everyone with respect and courtesy;
 - comply with all applicable Australian Acts;
 - deliver services fairly, efficiently, impartially, and courteously, and
 - use Commonwealth resources in a proper manner.
30. The Australian Public Service Commission can provide further guidance on standards of conduct.

Evidence of defective administration

31. Determining whether or not defective administration has occurred in individual cases can be difficult because:
 - there may be lengthy delays between the date of the alleged defective administration, the date its effect became apparent, and the date the complaint was lodged;
 - reliance on the overall experience and competence of the official who provided advice may need to be qualified by contemporary records. In addition it may need to be balanced against the low likelihood of the official recalling one conversation among thousands some months later and the high likelihood of the claimant remembering what he or she heard (whether or not what was heard was the same as what was said);
 - there may be insufficient written evidence available to support or refute the claimant's allegations; and
 - the claimant's assessment of financial detriment may appear unfounded and unreasonable.
32. Each case must be decided on its own merits. Where insufficient evidence of defective administration exists, a judgement must be made about the plausibility of the claimant's account of his or her actions and the plausibility

⁷ This does not mean that such consideration would require that action be taken under the Code, or that the Code would be applicable to the majority of claims.

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of the allegations against the agency. In making such a judgement the following guidance is offered:

- the likelihood that wrong advice could have been given in the particular situation - taking into account the experience of the staff involved and whether the particular statutory provisions, procedures, benefits, or entitlements were well known, or whether information was readily available or new;
 - whether the officer's and claimant's account of events seem plausible (eg whether the claimant's subsequent actions were consistent with the advice he or she alleges was provided by the agency);
 - the consistency of the allegations made;
 - whether the passage of time could have distorted the officer's and/or claimant's recollection of events; and
 - whether there has been confusion or misinterpretation of advice rather than defective administration per se, although some client misinterpretations will result from poorly constructed advice.
33. Documentary or incontrovertible proof of defective administration should not be an essential requirement. However, there must be sufficient evidence to enable the decision maker to be satisfied that defective administration has occurred.
34. If there is evidence available to the claimant, the claimant must provide it to the agency concerned. If the claimant does not provide sufficient evidence, the decision maker may request further particulars from the claimant.

Definition of detriment

35. Detriment means quantifiable financial loss that a claimant has suffered.
36. There are three types of detriment:
- detriment relating to a personal injury including mental injury (personal injury loss);
 - economic detriment that is not related to a personal injury (pure economic loss); and
 - detriment relating to damage to property.

Personal injury loss

37. A claimant who is covered under the *Safety, Rehabilitation and Compensation Act 1988* or the *Military Rehabilitation and Compensation Act 2004*, is not entitled to claim for personal injury loss under the CDDA Scheme.

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38. While the majority of claims for personal injury will relate to a legal liability, in some cases where there is no legal liability, a claimant may seek compensation under the CDDA Scheme for financial detriment such as hospital and medical expenses related to treatment of the injury and loss of income as a result of being unable to work due to that injury.
39. Compensation is not payable for grief or anxiety, hurt, humiliation, embarrassment, disappointment (no matter how intense the emotion may be) that is unrelated to a personal injury.
40. A claimant may seek compensation for financial detriment related to a *recognised* psychiatric injury suffered as a result of defective administration. In this context, compensation will generally be payable if it was reasonably foreseeable that a person of 'normal fortitude' might suffer psychiatric injury as a result of the defective administration.
41. "Normal fortitude" refers to a person who is not suffering from a psychiatric illness and who has no predisposition to psychiatric injury⁸.
42. If a person of "normal fortitude" might have suffered psychiatric injury, compensation is payable for the whole of the claimant's financial detriment, even if the psychiatric injury (and consequent financial detriment) suffered was more severe than would have been expected.
43. Any payment for the above losses is subject to the requirement that there is no 'double dipping' and therefore some allowance will need to be made if the claimant is entitled to payments from insurance such as health or personal injury insurance.

Pure economic loss

44. Pure economic loss refers to financial detriment suffered which is unrelated to any physical injury to the claimant or damage to the claimant's property.
45. Financial detriment should be distinguished from financial disappointment: eg where a formal assessment results in the amount of an entitlement being less than a 'ballpark' figure given to a person at the time he or she made inquiries. A claimant does not suffer financial detriment merely because he or she was not granted a benefit after being advised he or she was entitled to that benefit.
46. If the pure economic loss claimed is directly caused by alleged incorrect or ambiguous advice, compensation will only be payable if the agency should have appreciated the implications for the claimant by giving incorrect or ambiguous advice *and* it was reasonable in all the circumstances for the claimant to seek and rely upon the advice.
47. Pure economic loss can arise from a lost opportunity. The opportunity lost may be, for example, loss of an opportunity to earn a capital gain (for example

⁸ Given the different functions and different clientele which agencies deal with, agencies may decide in some cases to use thresholds that are lower than the test of 'normal fortitude'.

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by investing in shares, a business or a property); or to earn income (for example, interest on a savings account).

48. In these circumstances, compensation will only be payable when the agency could reasonably have foreseen the type of opportunity that, as a result of the agency's defective administration, the claimant lost.
49. Lost opportunity claims can be particularly difficult to determine, both in establishing whether the opportunity was lost at all, and if so, the amount lost. The onus is on the claimant to provide very clear evidence of the lost opportunity (including the quantum).

Loss arising from property damage

50. Detriment includes financial loss arising from damage to property.

Has defective administration caused detriment?

51. Compensation for detriment suffered by a claimant is only available where it has arisen as a direct cause of the defective administration. Claims for compensation must be considered on their own merits and on a case-by-case basis.
52. The claimant's detriment must have been caused, in a common sense view, by the agency's actions or omissions.
53. While in many cases the detriment being claimed will flow naturally from the agency's defective administration, there are situations in which the decision maker will need to carefully consider whether there is a causal link with the agency's acts or omissions. For example, there may be evidence of defective advice resulting in a detriment, but the cause of that loss stemmed from the acts or omissions of the claimant and/or another agency.
54. In addition, the *type* of detriment suffered by the claimant must have been reasonably foreseeable by the agency⁹.

Claimant's own actions

55. The actions of a claimant are important in considering:
 - whether he or she contributed to, or caused, the detriment suffered; and
 - the appropriate level of compensation
56. The following factors are provided as a guide only in deciding if the amount of compensation should be reduced because of the actions of the claimant:

⁹ The cause need not necessarily be the only cause of the loss, but must not be too remote as there must be a direct relationship between the defective administration and the loss.

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- the claimant's age, health and knowledge of dealing with the issues concerned, including knowledge of English;
 - whether the claimant gave false, misleading or incomplete information which the agency could not have been reasonably expected to challenge or clarify;
 - whether there was any unreasonable delay between receiving and acting on the administrative error. Where repeated delays were experienced because of a claimant's inaction, the cumulative effect should be considered.
 - whether the advice provided to the claimant was informal and no reasonable person would have relied on it;
 - where it is evident that there has been defective advice, consideration also needs to be given to whether compensation should be paid in full or in part, if the correct information was available to the claimant from another source to which there was access, or if it would have been reasonable for the claimant to inquire further.
57. In considering a claimant's actions, it is important to take into account the claimant's specific circumstances and the factors that influenced his or her actions, rather than adopting an assumed normative model of 'usual' behaviour.
58. If it is considered the claimant contributed to his or her situation, then depending on the extent of the claimant's contribution to the detriment suffered, this may justify a reduction in the level of compensation.

Limits on payments

59. There is no financial ceiling on the quantum of any CDDA payment.

Determining the level of compensation

60. Offers of compensation to claimants should be calculated on the basis of what is fair and reasonable in the circumstances and in consideration of the fact that the Commonwealth should not take advantage of its relative position of strength in an effort to minimise payment.
61. The overarching principle to be used in determining the level of compensation is to restore the claimant to the position he or she would have been in had defective administration not occurred.
62. As mentioned above, the claimant's own actions are a relevant consideration for the decision maker to take into account.

Quantifying financial detriment

63. In general, claims of financial detriment must be substantiated and must *always* be substantiated with appropriate documentation for lost opportunity

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claims. In considering the type and amount of evidence required to substantiate the claim, the nature and size of the expenses involved should be taken into account.

64. Where expenses are low, then a reasonable estimate may be appropriate. It may not, however, be necessary for the costs to have been incurred through dealing directly with the agency. Instead, it is possible that such costs have been incurred as a result of obtaining professional or similar advice from outside providers.
65. If, for some reason, it is impracticable for a claimant to demonstrate all or part of the detriment suffered, the decision maker should make a reasonable judgement about the level of the detriment, taking account of all relevant factors.

Interest payments

66. Interest is only payable if it forms part of a lost opportunity claim, for example, in cases where the lost opportunity has arisen because an agency has been unduly slow in settling a claim. In these cases, interest may apply from the date of the defective administration. The rate of interest is a matter for the agency to determine.
67. Interest does not otherwise apply to CDDA payments.

Taxation implications

68. As a general rule, where any component of a compensation payment relates to a detriment that would have been assessable for income tax purposes, that component will be assessable income.
69. If applicable, compensation should be paid on a pre-tax basis, for example, by compensating for the gross income amount in loss of earnings cases.
70. The claimant should be advised that tax may be payable on CDDA compensation and that it is the claimant's responsibility to declare all taxable income. Claimants should be advised to seek independent financial advice or contact the Australian Taxation Office if they are unsure of their tax obligations.

Settlement of claims

71. Each claimant should be provided with an adequate explanation of the reasons for a decision to accept, partially accept, or reject his or her claim. However, there are circumstances where it is not possible to reach a decision, for example, where contact has been lost with the claimant. In these cases, the agency has the discretion to treat the matter as finalised after reasonable efforts have been made to contact the claimant.

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72. Advice on the right to seek assistance from the Commonwealth Ombudsman (Ombudsman) should be provided to all claimants both before and after the determination of their claim.
73. In order to protect the interests of the Commonwealth, compensation under the CDDA Scheme can only be paid where the claimant agrees in writing not to pursue further compensation in relation to the circumstances of the claim. This agreement should be in the form of a deed of release. These will need to be tailored to the circumstances of the claim. If a claimant does not accept a particular offer, or sign a deed of release, the offer can be withdrawn.
74. In some circumstances, it may be considered necessary to seek an indemnity from the claimant in relation to any legal action by any other person in relation to the claim.
75. It is recommended that legal advice be sought in drafting deeds of indemnity.
76. While it would be inappropriate and ineffective to exclude a person from complaining to the Ombudsman as part of a settlement, the Ombudsman would be unlikely to investigate a matter that has been settled on the basis that no additional claims would be made.
77. Where only part of the claim is settled by a payment under the CDDA Scheme, claimants should provide a deed of release for that part of the claim.

Review and reconsideration of claims

78. As CDDA decisions are not made under an enactment or law, decisions are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (the AD(JR) Act). However, they are potentially subject to judicial review by the Federal Court under subsection 39B(1) of the *Judiciary Act 1901* (Cth).
79. Some agencies have an internal right of review mechanism, which can be requested as a matter of course. Agencies can also choose to reconsider a claim if it is determined that reconsideration is warranted. This would be confined to circumstances where additional supporting information became available.
80. Where the claimant does not accept the decision, it is open to the decision maker to consider the matter again, but they are under no obligation to do so. If the claimant provides additional evidence to support his or her claim, then as a matter of common sense, the decision maker should reconsider the matter.

The Commonwealth Ombudsman's role in CDDA claims

81. The Ombudsman has a role in making suggestions or proposals in relation to CDDA requests where the Ombudsman, or his or her delegate, has investigated an agency action and considers that a financial remedy would be appropriate.

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82. In these cases, the Ombudsman or the delegate explains the suggestion or proposal to the agency concerned by references to apparent instances of defective administration. If an agency acts on such a suggestion, it usually avoids the formality of a report and recommendation pursuant to section 15 of the *Ombudsman Act 1976*¹⁰.
83. Where the circumstances of a case do not clearly fall within the exact criteria for defective administration, but the agency concerned agrees with the Ombudsman that detriment has occurred as a result of defective administration and the agency is inclined to compensate a claimant, a proposal or recommendation by the Ombudsman supporting compensation is sufficient basis for payment.
84. An agency must consider any proposal or recommendation made by the Ombudsman but is not bound by it.

The Ombudsman's role as a complaint or oversight mechanism

85. A person whose claim has been refused, or who has rejected an offer as insufficient or subject to unreasonable conditions, may complain to the Ombudsman. The Ombudsman may investigate and, if the Ombudsman considers it appropriate to do so, propose that a decision be changed.
86. When considering a matter related to an agency decision under the CDDA Scheme, the Ombudsman takes a similar approach to that which is taken in other cases involving an agency's exercise of discretion. There is no separate set of Ombudsman's office processes for CDDA matters and the Ombudsman's powers (to make a suggestion or recommendation which the decision maker may decide whether to adopt) are the same as in other cases.
87. The Ombudsman has no power to overturn or vary an agency's decision.
88. In a CDDA case, the Ombudsman would first consider whether the agency action complained of (for example, the refusal of a CDDA payment) should be investigated, having regard to the factors set out in section 6 of the *Ombudsman Act 1976* and the circumstances of the case. If the Ombudsman investigated, typically she/he would consider whether the decision maker gave proper and fair consideration to the matter, in particular:
 - the answers may be ascertainable from the complainant's account (including agency letters), an analysis of the agency files and discussion with the decision maker and the people who provided advice to him/her.

¹⁰ The Ombudsman is an important part of the Federal administrative law system. The Ombudsman has the power to investigate complaints about defective administration, or the way particular CDDA claims have been considered.

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The Ombudsman will generally be less inclined to investigate after a CDDA claim has been settled by a payment.

- the Ombudsman will be less inclined to consider (and propose changes to) the quantum offered where the agency seemed to have a reasonable basis for its offer (for example, by reference to an entitlement or opportunity lost or legal advice on a fair settlement amount). The Ombudsman and staff consider each case on its own merits and structure investigations to enable an informed decision to be made on those merits.
- where a person is dissatisfied with a payment which has been through the CDDA process, the Ombudsman would give considerable weight to any release signed by the person and would be likely to decline to investigate.
- while an agency is not obliged to alter its decision because of an Ombudsman proposal or recommendation, the agency should be aware that the Ombudsman may exercise powers to bring the matter to the attention of the Chief Executive Officer of the respective agency, the portfolio Minister, the Prime Minister and the Parliament.

Funding and reporting

89. In general, CDDA payments should be funded through Departmental Appropriations and reported under an appropriate agency outcome. The number and quantum of payments should be reported in the agency's financial statements.

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ATTACHMENT A – APPENDIX A

CLAIM FORM - COMPENSATION UNDER THE COMPENSATION FOR DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION SCHEME (THE CDDA SCHEME)

Name:	
Address:	
Contact details:	Home: Work: Mobile:
Agency claiming against:	
Please describe the facts which give rise to your claim against the Agency (you may attach separate documentation if there is insufficient space).	
Please advise of other appeal avenues you have pursued (eg Courts, Tribunal, Internal Review) and the status or outcomes of those appeals.	
Are you seeking compensation for personal injury? Please identify the injury suffered and the amount which you are seeking in compensation. (Note 1)	Yes <input type="checkbox"/> No <input type="checkbox"/>
Are you seeking compensation for pure economic loss? (Note 2) Please identify the economic loss suffered and the amount which you are seeking in compensation. (Note 3)	Yes <input type="checkbox"/> No <input type="checkbox"/>
Are you claiming you lost an opportunity? (Note 4) Please identify the opportunity lost and the amount which you are seeking in compensation. (Note 5)	Yes <input type="checkbox"/> No <input type="checkbox"/>

Last Updated 17 April 2008

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NOTES FOR CLAIMANTS - COMPENSATION FOR DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION

NOTE 1:

You may seek compensation for pecuniary losses (eg hospital and medical expenses and/or loss of earnings while you were unable to work because of your injury).

You may seek compensation for losses related to a recognised psychiatric injury if a person of normal fortitude would have suffered the injury as a result of the defective administration.

You may **not** seek compensation for mere grief or anxiety, no matter how intense it may be.

You may seek compensation for 'pain and suffering', a non-pecuniary loss, which is a nominal amount paid to compensate for worry, upset, anxiety and frustration **arising from an injury**, the associated medical treatment and actual awareness of pain.

NOTE 2:

Pure economic loss is financial loss unrelated to any personal injury or damage to your property.

NOTE 3:

If the economic loss results from alleged defective advice, the agency should have appreciated the implications for you, by giving the incorrect or ambiguous advice *and* it must have been reasonable in all the circumstances, for you to have sought and relied upon the agency's advice.

NOTE 4:

You can claim compensation for an opportunity you allege you have missed because of an agency's defective administration (eg to invest, receive capital gain, dividends or interest).

NOTE 5:

Compensation will only be payable if the agency could reasonably have foreseen the type of opportunity that you lost as a result of the defective administration.

Claims for lost opportunity are difficult to determine and you must provide very clear evidence of loss to support your claim.

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PLEASE ATTACH ALL RELEVANT DOCUMENTATION IN SUPPORT OF YOUR CLAIM.

Date:

.....
Claimant's signature

Please note that CDDA payments may be taxable. Please contact the Australian Taxation Office or otherwise seek independent financial advice to determine your own circumstances.

More information can be found at Attachment A to Finance Circular 2006/05. Basically the CDDA Scheme is an administrative scheme, established to enable Australian Government (Federal) agencies to compensate persons or organisations where 'defective' actions (or inaction) of agencies has directly caused a detriment.

APPENDIX 2—AGENCY TIMELINESS STATISTICS

The ATO

The ATO aims to acknowledge receipt of a compensation claim in writing within three business days of receipt. Processing standards are 28 days for claims of \$10,000 or less, and a timeframe to be agreed with the claimant for claims in excess of \$10,000. We understand that it is proposed these standards be changed to 28 days for claims up to \$2000, 60 days for \$2000–\$25,000 and as agreed with the claimant for claims greater than \$25,000.

The ATO's Legal Services Branch reports performance to the ATO Executive through the *Corporate Assurer's Statements*. The performance reporting does not appear to be wholly aligned with the standards. While performance against the three day acknowledgment standard is reported, processing is only reported in terms of finalisation within six and 12 month periods.

Information from the March 2008 Corporate Assurer Statement, which was provided to the Ombudsman, indicated that improvements had been made in performance over the previous 12 months.

One hundred per cent of acknowledgements were being achieved within three days by December 2007, compared with 42% in July 2007. Eighty five per cent of cases were being finalised within six months from March 2008 compared with 78% in April 2007, and 100% were being finalised within 12 months from December 2007 compared with 90% in June 2007.

Additional data provided to us, showing the average age of on hand and finalised claims for the 2007 calendar year, indicates that the average age of claims finalised during that period was 86 days and the average age of claims on hand was 98 days.

We do not know how successful the ATO was in meeting its 28 day or 'as agreed' finalisation service standards.

Centrelink

Centrelink aims to acknowledge receipt of claims within seven days and to determine all claims within 90 days of receipt. It notes that this will not always be possible if the claim is complex, further evidence is required or the matter is subject to an appeal. Centrelink does not have a general statement about how it will manage timeframes in these circumstances.

We were advised that the fact that claimants placed pressure on Centrelink to be timely provided an incentive for Centrelink to resolve CDDA claims as quickly as possible. While the average time taken to resolve cases between for the period July 2007 to March 2008 was 80 days, some 32% of cases take in excess of 90 days.

The CSA

The CSA has one service standard, and aims to advise customers of the outcome of their claim within six weeks (42 days) of receiving the claim. A compensation officer will advise the customer if this timeframe cannot be met.

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Of 70 cases finalised in the 2006–07 financial year only 15, or approximately 21.5%, were finalised within this timeframe.

CSA advised that the 42 day standard was established in 2001. It explained that the reasoning behind it was that it was consistent with the CSA's service standard for resolving a complex case (28 days) with a further 14 days allowance for the time it took to progress the case through the decision maker and then to notify the customer of the CSA's decisions.

The CSA's case officers are required to prepare a compensation tracking spreadsheet for each claim. This information is also uploaded to the department's Compensation Share Drive, which is accessible to all Regional Compensation Officers (RCOs). Timeframes are closely monitored via an excel spreadsheet by the central unit. Nevertheless, CSA acknowledged it had consistently been unable to finalise a satisfactory proportion of the claims within six weeks and that this has led to complaints and resulted in the Ombudsman's office recording administrative deficiency against the CSA in complaints about CDDA claims handling.

The CSA explained that there were a number of factors contributing to the delays with these claims. Firstly, the complexity and nature of many claims are such that a lesser timeframe would be unreasonable and inappropriate. Second, it is common for further information to be required from the claimant. The CSA explained that there are too few cases to justify allocating officers to this workload on a full time basis in each State office. Consequently, it takes longer for staff to build up the necessary experience in managing claims. Further, because staff typically have a range of duties, conflicting priorities can lead to delays in resolving claims. The CSA undertakes to keep the customer informed of progress, but is not always successful.

APPENDIX 3—CENTRAL COORDINATION

The ATO

Compensation claims are all handled within the ATO's Legal Services Branch. The ATO advised that there had been a surge in compensation claims following the release of the 2001 Finance circular, and acknowledged that they were ill-equipped to deal with them. There were no dedicated staff handling these claims, authorisations of payments was not well supported, and CDDA claims were being given lower priority than litigation cases. Changes have been implemented to address these concerns.

While it was recognised that improvements still needed to be made, including to information management (such as enhanced case monitoring), and that their policy documents were in need of updating, the ATO expressed the view that coordinating claims through a centrally coordinated unit within the Legal Services Branch had provided a streamlined and more effective system.

In addition to maintaining records centrally, a small central team, all legally qualified, deal with the vast majority of cases. Small claims remain the responsibility of staff in the branches and are usually turned around within a few days. The central legally qualified team now makes greater use of internal legal advisers, rather than external legal advice. ATO compensation decision-making employs similar practices and guidelines to its approach to the settlement of commercial disputes. The unit takes a dispute resolution approach and trained mediators are used where necessary. All internal reviews are done within the branch by a staff member not originally involved in the case. As a quality control measure, the Assistant Commissioner responsible for the unit reviews all negative determinations before the final decision is communicated to the claimant.

Centrelink

Like the ATO, Centrelink manages CDDA matters within a small centrally located unit as part of the Legal Services and Procurement Branch, which monitors case management, training and provides quality assurance for all decisions. A number of case officers are situated in the regions but report directly to the head of this unit.

Regular monthly or bi-monthly teleconferences are conducted to keep all case officers informed of key issues. An annual conference is held so that case managers can meet together to discuss matters and receive training. Most staff are legally qualified and are recruited to this function because they have extensive knowledge of Centrelink business systems and demonstrated analytical skills. Additional legal training is provided by Centrelink's external legal partners.

Customer compensation officers are required to prepare submissions for the decision maker in accordance with a standard format, which has recently been updated.

The CSA

Claims are usually received through correspondence processing units, and once identified as compensation claims are referred to local Regional Compensation Officers (RCO) at the APS 6 level for attention. The RCO initially processes the claim by contacting the customer and preparing a preliminary submission. The RCO seeks signoff from a State Manager who forwards the submission to CSA's Escalated Complaints (EC) team located in CSA's National office. The EC team then reviews the preliminary submission and conducts further investigations as required. The final submission is reviewed and approved by the Branch Director, prior to the Deputy General Manager making a decision. The EC team prepares the decision letter for the customer and finalises the claim.

Bi-monthly phone hook-ups led by the National office staff provide staff with an opportunity to share case studies and discuss critical issues.

APPENDIX 4—CSA SUBMISSION TEMPLATE

Compensation Submission

To Jennifer Cooke
Deputy General Manager
Service Delivery

From XX
State Manager

Customer
CSID Please indicate if RACS
Date claim received
Date to National Office

How to use the template

1. Don't use the template as a checklist, try to answer the questions. Think of the submission as telling a story to the reader.
 2. Try to put only relevant information into the submission. In most cases, a full case history will not be needed.
 3. Don't double up on the information if you have included in one section unless you need to provide further analysis around the information. If you find yourself repeating information, think about what the information really relates to (ie. investigation/analysis/events)
 4. Delete all the prompting points upon completion. Also ensure that your state manager's signature and date are placed on the submission.
- National office will also require a copy of the customer's claim.

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<p>1. Allegation: What does the customer allege occurred?</p> <p>Have you:</p> <ul style="list-style-type: none"><input type="checkbox"/> Contacting the customer to discuss the allegations (if necessary)?<input type="checkbox"/> Acknowledged the claim with a letter and/or phone call? Have you advised the customer of a possible timeframe and that if this will not be met you will be in contact with them?<input type="checkbox"/> Read the customers claim?<input type="checkbox"/> Reframed the customer's allegations in appropriate language? <p>In this section you must summarise the allegations made by the customer that relate only to the compensation claim.</p> <p>Your language should reflect the customer's perspective, there should be no comment by you on the merits of the claim in this section.</p>
<p>2. Events relating to the claim</p> <p>Have you:</p> <ul style="list-style-type: none"><input type="checkbox"/> Identified the interactions between the CSA and the customer that are relevant and critical to the claim?<input type="checkbox"/> Concisely summarised the events that relate only to the claim?<input type="checkbox"/> Identified any other events that impact upon the claim?<input type="checkbox"/> Summarised them in chronological order? <p>Please do not commence analysis in this section – DATES AND FACTS only (Avoid using terms like 'he said, she said, XX phoned CSA to confirm – paraphrase)</p>
<p>3. Investigation</p> <p>The investigation gives context surrounding the customer's claim. In this section you need to investigate whether or not CSA has been defective in its administration.</p> <p>Discuss what happened and what should have happened (without restating the chronological history).</p> <p>You also need to examine the customer's claim for loss. Was there a loss? What is the amount of loss?</p> <p>If you need to, have you considered:</p> <ul style="list-style-type: none"><input type="checkbox"/> Contacting the relevant staff to discuss the allegations?<input type="checkbox"/> Contacting any other relevant parties for information.<input type="checkbox"/> Summarising the relevant and critical info provided?<input type="checkbox"/> Reviewing Cuba?<input type="checkbox"/> Obtaining and analysing any other relevant correspondence or documentation?<input type="checkbox"/> Contacting LQA/Legal Services for advice re negligence?
<p>4. Evidence regarding what happened</p> <p>This section should only really be a concise list of evidence used in investigating the claim – to be used, if for example, the Ombudsman request any related documents or evidence used to make decision. Could be court order, Cuba docs, PIs.</p>

Compensation submission: SURNAME and MONTH/YEAR

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List the evidence that supports/refutes the allegations at point 1

Have you attached:

- Letter/statement of allegations?
- Supporting documentation provided by the customer?
- Critical Cuba documents
- Other critical documentation such as
 - Fraud reports
 - Call transcripts
 - CSA documents such as file notes, letters, notices, publications
 - Staff statements
 - Privacy breach reports

5. Analysis: Discuss your findings

This is where you use the information contained in the investigation section and discuss whether or not there is a causal link between CSA's actions and any financial loss.

For compensation to be payable under the Compensation for Detriment Caused by Defective Administration (CDDA) scheme, a claimant must demonstrate that they have suffered a loss as a result of CSA's actions.

A thorough investigation into XX's complaint has revealed that CSA did not comply with its standard procedures when XX... On this basis, I am satisfied that defective administration has occurred.

Further, XX claims a financial loss of XX.

Did the defective administration actually cause the financial loss?

It may be appropriate to refer to the investigation section to avoid repetition.

Is there a case for Legal Liability?

If yes, explain.

Please note that if compensation is being considered because of a privacy breach, CSA has a legal liability to pay compensation only to the person whose privacy was breached.

If no, has any defective administration occurred?

- If there has been defective administration, was it:
 - Unreasonable lapse in complying with existing procedures
 - Failure to have proper procedures in place
 - Failing to give advice
 - Incorrect or ambiguous advice

If no defective administration has occurred are there other issues related to:

- Poor customer service
- Process
- Inappropriate conduct by staff

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<ul style="list-style-type: none"> • Other agency flaw • Dissatisfaction with a CSA decision
<p>6. Recommendation for resolution</p> <p>If legal liability/defective administration has occurred, have you considered:</p> <p><input type="checkbox"/> Apology</p> <p><input type="checkbox"/> Improvements to CSA process</p> <p><input type="checkbox"/> Feedback to staff</p> <p><input type="checkbox"/> Escalation to HR/FPT</p> <p>Have you specified and justified the quantum?</p> <p>If no defective administration has occurred or there is no legal liability have you</p> <p><input type="checkbox"/> Provided an explanation to the customer</p> <p><input type="checkbox"/> Considered alternate remedies AOG/Waiver?</p> <p><input type="checkbox"/> Fixed any errors?</p> <p><input type="checkbox"/> Considered an apology</p> <p><input type="checkbox"/> Feed back to staff</p> <p><input type="checkbox"/> Considered improvements to CSA process and escalated these appropriately [provide information about outcomes]</p> <p><input type="checkbox"/> What steps are being taken to restore the customer’s confidence in CSA and ensure ongoing management of the case?</p> <p><input type="checkbox"/> If compensation is to be offered what is the recommended amount?</p> <p>** be creative – is this a systemic issue, can it be resolved through training/feedback etc.</p> <p>** the recommendation section should be on the same page as the signature block. The decision maker needs to clearly see what recommendations they are signing off on. Further, if an offer is made, the finance section requires a copy of the recommendation and the signature.</p>

Name		Date	
Site		Position	
Phone		Fax	

Recommendation supported by:

Recommendation approved/not approved by:

XX
 State Manager
 State
 Date: please ensure this is completed

XX
 Jennifer Cooke
 Deputy General Manager
 Service Delivery
 Date:

Compensation submission: SURNAME and MONTH/YEAR

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ABBREVIATIONS AND ACRONYMS

AAT	Administrative Appeals Tribunal
ADJR Act	<i>Administrative Decisions (Judicial Review) Act 1977</i>
ATO	Australian Taxation Office
CDDA	Compensation for Detriment caused by Defective Administration
CSA	Child Support Agency
CSAOFI	CSA Opportunities for Improvement
CSO	Customer service officer
EC team	Escalated complaints team
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
Judiciary Act	<i>Judiciary Act 1903</i>
NADRAC	National Alternative Dispute Resolution Council
NSA	Newstart allowance
RCO	Regional Compensation Officers (CSA)
SES	Senior Executive Service
SSAT	Social Security Appeals Tribunal