To compensate or not to compensate?

Own motion investigation of Commonwealth arrangements for providing financial redress for maladministration

Report under s 35A of the *Ombudsman Act 1976*

September 1999

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ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACS	Australian Customs Service
AFP	Australian Federal Police
A-G's	Attorney-General's Department
AGPS	Australian Government Publishing Service
AGS	Australian Government Solicitor
AP	Australian Postal Corporation
APS	Australian Public Service
ATO	Australian Taxation Office
CAC Act	Commonwealth Authorities and Companies Act 1997
CDDA	Compensation for detriment caused by defective administration
CEI	Chief Executive's Instructions
CEO	Chief Executive Officer
CES	Commonwealth Employment Service
CSA	Child Support Agency
CSA (UK)	Child Support Agency in the United Kingdom
DEETYA	Dept of Employment, Education, Training & Youth Affairs
DETYA	Department of Education, Training and Youth Affairs
DEWRSB	Dept of Employment, Workplace Relations & Small Business
DFCS	Department of Family and Community Services (formerly DSS)
DoF	Department of Finance (now DoFA)
DoFA	Department of Finance and Administration
DHAC	Department of Health and Aged Care (formerly DHFS)
DHFS	Department of Health and Family Services (now DHAC)
DIMA	Department of Immigration and Multicultural Affairs
DIST	Department of Industry, Science and Tourism
DLO	Office of the Defence Legal Organisation (Department of Defence)
DSS	Department of Social Security (now DFCS)
DSS (UK)	Social Security Benefits Agency in the United Kingdom
FAC	Federal Airports Corporation
FMA Act	Financial Management and Accountability Act 1997
FMAR	Financial Management and Accountability Regulations 1997
HIC	Health Insurance Commission (including Medicare)
NZ	New Zealand
OLSC	Office of Legal Services Co-ordination (A-G's)
SSAT	Social Security Appeals Tribunal
PSMPC	Public Service and Merit Protection Commission
TFN	Tax file number
UK	United Kingdom

EXECUTIVE SUMMARY

1. This report is based on an investigation of the adequacy of arrangements for most Commonwealth agencies to provide financial redress for maladministration. Successive Ombudsmen have expressed concern about these arrangements for years. The report analyses them; comments on how well they are operating; considers the principles on which they are based and the changing context in which they operate; compares them with new arrangements in the United Kingdom (UK); and makes recommendations to improve their cost effectiveness and efficiency.

Problems with current arrangements

Resource intensive and costly

2. While the Ombudsman receives few complaints involving compensation requests and recommendations each year[1], they are resource intensive and time consuming for agencies and the Ombudsman alike. The resources expended in dealing with most of these complaints far outweigh the amount of compensation involved.

No clear statement of general principle that individuals who suffer a loss should expect redress

3. The various schemes for providing financial redress are based on a variety of principles[2] which, if interpreted broadly and as a whole, indicate that the government expects that individuals should be compensated if they suffer loss as a result of maladministration or special circumstances. But that general principle is not stated plainly anywhere.

4. As a consequence, agencies appear to hold different views about whether members of the community should expect compensation when they have suffered detriment as a consequence of maladministration:

- some believe their customers have a right to be compensated if the agency's action was defective: their service charters refer to the customer's right to seek compensation in certain circumstances;
- others are concerned that the 'flood gates' will open if their customers know that compensation is a possible remedy: that general view may affect their consideration of the merits of individual circumstances.

5. In some cases where there is no defective administration but there are special circumstances, the agency concerned supports an act of grace payment, but the Department of Finance and Administration (DoFA) may reject it as not coming within their narrow interpretation of rules they have devised for such payments[3]. We believe agencies should be responsible and accountable for making their own decisions about compensation. They should have the full range of powers to do so, in a customer service context where reasonable

[1] Approximately 2% of all complaints finalised in 1997 and 1998.

[2] See chapter 5.

[3] Act of grace payments and waiver of the right to recover a debt owed to the Commonwealth can only be approved by the Minister for Finance and Administration or his delegates in DoFA, under the present FMA Act compensation arrangements. Centrelink is authorised to waive recovery of debts in circumstances specified in the *Social Security Act 1991* and the *Student Assistance Act 1973*.

service standards are expected, and where providing redress when things go wrong is regarded simply as one aspect of good administration.

No generally accepted standards of service outcomes expected of agencies

6. There is no common understanding or acceptance of what constitutes standards of service and administration acceptable to the government and the community, against which maladministration can be measured. Consequently, there are no generally accepted standards for measuring whether a compensation payment would be 'publicly defensible'[4], a requirement for compensation for defective administration.

7. These are key concepts relevant to Ombudsman investigations and the various compensation mechanisms. The Ombudsman has a statutory obligation to report to an agency if he believes particular action should be taken to rectify, mitigate or alter the effects of the agency's unlawful, unreasonable, oppressive, or unjust action[5]. Because there are no agreed objective standards against which these concepts can be measured, they can become the subject of debate between the Ombudsman and the agencies concerned lasting months or years in some cases. We often have to argue from first principles as a consequence.

8. Our impression is that agencies believe we recommend compensation too readily, without understanding the constraints under which they operate. By contrast, we believe agencies could provide compensation more often than they do, by adopting a more flexible, customer focused approach, based on a broad interpretation of the powers available to them and by reference to standards they set themselves, for example, in their service charters.

9. A more flexible approach would complement the greater willingness by governments and industry to view compensation for service delivery failures as a way of strengthening accountability for service delivery. The move to industry based ombudsmen in the telecommunications, banking, private health insurance and energy industries, backed in some cases by the power to penalise an agency for failure to meet defined service standards, indicates a changing relationship between governments and the community. These moves encourage a more commercial and customer focused attitude towards service failures, compared with the traditional government approach of protecting their revenue base.

Rules are applied inconsistently

10. Although the compensation mechanisms should encourage consistency in decision making, this investigation highlighted the fact that they are applied inconsistently. They can be interpreted broadly enough to enable agencies to pay compensation in all cases where they believe it is warranted, or narrowly enough to exclude any request, depending on the agency's approach to compensation generally or in individual cases.

Dismissive, defensive approaches to assessing compensation requests

11. Difficulties also arise when the agency concerned has no written evidence to corroborate a customer's version of the events leading to their financial loss. As indicated in our report about oral advice[6], some agencies rely on their lack of records of discussions with their customers to reject a request to consider compensation, apparently without considering the customer's credibility or the consistency of the customer's actions with their version of what took place.

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[4] Meaning 'fair' or 'just'.
[5] See section 15 of the *Ombudsman Act 1976* .
[6] *Issues Relating to Oral Advice: Clients Beware*, a report under s 35A *Ombudsman Act 1976*, December 1997.

12. It is reasonable for an agency to rely on their knowledge of the experience and skills of the particular staff involved, to test a customer's assertions about what happened. But it is unreasonable to refuse to entertain the idea that the customer's version may be correct, simply because there is no documentary evidence to corroborate it and because the agency has a general belief or hope that none of their staff would act in the way the customer says they did.

Agency approaches to Ombudsman investigations

13. For the Ombudsman to be effective, there has to be an element of trust and cooperation between his office and the agencies whose actions we investigate. Agencies must be able to have confidence that the Ombudsman will investigate complaints of alleged defective administration thoroughly and impartially, before drawing any conclusions or making any recommendations for remedial action. By the same token, the Ombudsman must be able to trust that the agency will cooperate with his staff during an investigation; will not withhold relevant information; and will consider both a conclusion that the agency has acted defectively and a recommendation for remedial action with an open mind. Trust and respect must be earned on both sides. Achieving it will not lead to the Ombudsman automatically accepting an agency's assertions or the agency accepting the Ombudsman's conclusions without due consideration, but it should lead to a more balanced approach to considering financial remedies.

14. The Ombudsman and agencies may have to do more to ensure that the facts are clear before any conclusions are drawn and recommendations made. Any dispute about the facts can then be clarified as early as possible during an investigation. Once the facts are agreed, the focus can then shift to a remedy, if one is warranted. Much time and effort can be saved for agencies and the Ombudsman if they provide full details in response to our initial requests.

15. Some agency staff involved in Ombudsman investigations may not fully understand his role as an impartial investigator. We receive responses from agencies referring to our 'representations on behalf of' a complainant. This confuses the Ombudsman's role with that of members of parliament, who do make representations on behalf of their constituents, without necessarily investigating the merits of their complaints. Such responses do not inspire confidence that the agency has properly considered the matters we put to it.

Complexity of current arrangements for compensation

16. The investigation clarified that most of the difficulties we experience are caused by the inconsistent approaches agencies use when applying the compensation mechanisms, rather than the mechanisms themselves. Nevertheless, the existing 'system' for providing financial redress, viewed as whole, is complex and difficult to understand.

17. One reason is that the 'system' comprises a mix of statutory and non-statutory mechanisms, each with different rules. There are four separate mechanisms for providing compensation and two for providing relief from repayment of debts owing to the Commonwealth. They have evolved from an incremental progression in government thinking about financial redress for maladministration and a pragmatic approach to addressing perceived problems[7]. This can cause problems, eg, a non-statutory mechanism such as the defective administration scheme cannot be used to override a statutory

[7] Attachment B describes the current 'system' for providing compensation and how parts of it developed.

mechanism such as waiver of recovery of a debt, despite the fact that the debt may have arisen solely from defective administration.

18. It is not easy to keep in mind the different concepts and requirements, eg, to differentiate between the rules relating to legal liability and defective administration. That contributes to confusion for agencies and their customers in understanding the different schemes and the principles underpinning them. Submissions to agency decision makers sometimes reflect those confusions and indicate that some staff responsible for investigating and reporting on compensation requests appear not to have adequate skills or training to do so competently.

19. We (and some other agencies) believe DoFA unduly limit the exercise of the broad powers to make act of grace payments and to waive the Commonwealth's right to recover debts. DoFA adopt a theoretically pure approach to compensation and waiver requests that does not always give adequate weight to the practicalities of modern life. While DoFA's decisions may appear logical in theory, they may also be unfair in individual circumstances.

Limitations in backdating provisions in the Social Security Act 1991

20. Most complaints handled by the Ombudsman's office where compensation is sought and warranted relate to the provision of income support. In the past, 50% of our recommendations for compensation for lost income support were rejected. In 1997 and 1998 Centrelink accepted 80% of our recommendations. If that trend continues, it will indicate an important and welcome change in approach to compensating customers who have lost income support.

21. Regardless of that change, the investigation confirmed that there is a particular problem with current limitations in backdating provisions in the *Social Security Act 1991*[8]. They operate unfairly in some circumstances and give rise to requests for compensation. The existing compensation rules, in combination with present interpretations of common law principles relating to negligence, prevent payment of compensation in these cases.

22. Centrelink and the Department of Family and Community Services (DFaCS) indicated that the former Department of Social Security (DSS) were unsuccessful several years ago in having the arrears provisions amended to provide discretion for the agency head to pay arrears up to twelve months. We believe the Government should consider this matter afresh[9].

Agency responses

23. We contacted all Commonwealth agencies with whom we have regular dealings about compensation for maladministration, eg, Centrelink, DFaCS and the Child Support Agency (CSA). We also contacted agencies who are responsible for some aspects of the current compensation 'system', eg DoFA and the Attorney-General's Department (A-G's)[10].

24. DoFA believe the existing schemes are appropriate and do not require major change, but indicated that they are considering whether the act of grace and waiver powers should be devolved to agency heads. They indicated that they are prepared to consider other adjustments to the present 'system'.

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[8] The Ombudsman's 1995-96 annual report describes this problem.
[9] The debate is canvassed in chapter 6.
[10] Attachment D provides a full list of Commonwealth agencies contacted during the investigation.

25. Most agencies represented at a meeting hosted by the Ombudsman in April 1999[11] agreed that:

- they could 'live with' the current 'system' if it were explained more simply and interpreted sensibly;
- agencies themselves are in the best position to manage their own risks;
- devolution of the act of grace power to agency heads would accord with the philosophy underpinning the FMA Act and the accountability regime it established. This would authorise chief executive officers of agencies to provide compensation in all possible circumstances.

26. Opinions varied on how compensation matters could be dealt with more effectively:

- some agencies support the idea of moving to a more integrated compensation scheme;
- some believe a more integrated explanation of the existing rules would suffice, as it would make the current arrangements easier to understand and apply;
- some believe the current arrangements are adequate, because they allow for compensation in all cases where these agencies believe it is warranted;
- A-G's expressed strong reservations about any blurring of the distinction between payments made on the basis of a legal liability and those paid under other mechanisms, but saw merit in including a cross reference to the other mechanisms in the text of the Commonwealth's policy on handling monetary claims.

27. Other suggestions agencies agreed with at the meeting in April 1999 were:

- decision makers need a principle based guideline rather than a prescriptive set of 'rules'. Agency guidelines on compensation would then consist of a set of general principles (those on which the current mechanisms are based) with examples of the kinds of circumstances in which compensation is warranted and those in which it is not[12];
- complaints involving compensation may be resolved more quickly by meetings between the Ombudsman's office and the agency concerned, with discussion focusing on areas of factual dispute between the agency and the Ombudsman, or proposed remedies; and
- an agency's acceptance of the Ombudsman's conclusion that there had been defective administration and his recommendation for compensation should be a sufficient basis for payment under the CDDA scheme[13].

Overseas experience we can learn from

28. We considered overseas arrangements for providing financial redress for maladministration. Those in the UK appeared most relevant.

29. The UK Ombudsman's 1997-98 annual report[14] describes progress in working with income support agencies to define maladministration in practical terms and to reduce delays in

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[11] See Attachment E for a list of agencies represented and a summary of the discussion.

[12] The guidelines issued by the Social Security Benefits Agency in the UK [DSS (UK)] are an example: *'Financial Redress for Maladministration (Revised September 1998)'*, Volume 1, published by HM Stationery Office in December 1998.

[13] The mechanism for providing compensation for detriment resulting from defective administration. The CDDA guidelines will need to be clarified or amended to implement this suggestion.

[14] *'Parliamentary Commissioner for Administration, Fifth Report - Session 1997-98'*, London: The Stationery Office. The Commissioner is also known as the Parliamentary Ombudsman. We have abbreviated his title to 'the UK Ombudsman'.

resolving compensation requests. The DSS (UK) guidelines[15] on financial redress for maladministration:

- include the UK Ombudsman's descriptions of what kinds of circumstances constitute maladministration;
- set a context in which to consider 'official error' including six basic principles on which redress should be based;
- provide for payment of compensation for unreasonable or exceptional delay in paying income support; and
- contain indicators of delay for particular kinds of benefits, determined in relation to the department's published service standards.

30. Agencies agreed during our meeting in April 1999 that adapting the UK experience to Australian circumstances may improve the effectiveness of the existing compensation arrangements here.

Conclusions

31. The compensation mechanisms provide adequate power to pay compensation whenever it is warranted, but they are difficult to understand and are applied inconsistently.

32. The complexity of the existing 'system', viewed as a whole, does little to promote a sound understanding of the principles underpinning compensation or a flexible approach to providing it. Some agencies apply a narrow, inflexible interpretation of the rules which is out of step with the government's increasing focus on providing good customer service. This does not compare favourably with the more flexible approach now apparent in the UK.

33. Appropriate compensation arrangements can provide a powerful incentive to improve service, as demonstrated by the UK experience.

34. The Ombudsman will initiate discussions with relevant agencies to adapt the UK compensation arrangements to our circumstances.

35. Backdating provisions in the *Social Security Act 1991* are restrictive and operate unfairly in some circumstances. They do not adequately take into account the risks people face in falling through the income support net, in a complex, highly targeted legislative regime. If the provisions were amended to allow backdating for up to twelve months, many complaints we receive about lost income support could be resolved without the need to consider compensation. We understand that DSS estimated that it would cost about $1,000,000 dollars annually. This would be a cost effective measure in view of the size of the social security budget and the resources currently expended in trying to resolve these disputes.

36. The CDDA guidelines should be modified to ensure that if the agency concerned agrees with the Ombudsman that there has been detriment caused by defective administration (however they define it) that would be a sufficient basis for paying compensation. This proposal is consistent with arrangements during the trial devolution of the act of grace power from December 1988 to October 1995.

37. Consistent with the philosophy of devolution underpinning the FMA Act, agencies themselves should be responsible and accountable for exercising the full range of powers,

[15] op cit.

including act of grace and waiver, to provide financial redress for maladministration and in special circumstances.

38. Improving the administration of compensation arrangements will involve:
- agencies adopting a flexible, customer focused approach to providing compensation, consistent with good administration and service delivery, whenever it appears that their actions have resulted in financial or other loss to a customer that could be remedied by financial compensation;
- agencies providing adequate training and clear guidelines for staff who are involved in investigating, providing submissions or making decisions on requests or recommendations for compensation;
- agencies providing clear, adequate reasons for rejecting a compensation request;
- agencies ensuring that their staff understand the Ombudsman's role and cooperate with his investigations;
- the Ombudsman negotiating standards with agencies about the kinds of actions and circumstances against which defective administration can be measured, where compensation is an appropriate remedy, similar to the DSS (UK) approach;
- the Ombudsman continuing to monitor his investigation and reporting procedures to ensure consistent, high quality investigations and recommendations; and
- the Ombudsman establishing a review team to examine and benchmark his investigation and reporting procedures for complaints involving consideration of financial compensation.

39. The Ombudsman will monitor the outcome of compensation requests finalised in 1999-2000, to ascertain whether there have been any discernible changes in outcomes or agencies' approach and if not, what kinds of reform are required.

40. If these measures do not result in improved outcomes, a complete overhaul of the existing arrangements may be required.

41. The investigation resulted in several recommendations to improve the effectiveness of the compensation schemes and to amend provisions in the income support legislation that operate unfairly in some circumstances.

Recommendations

1. The backdating provisions in the *Social Security Act 1991* should be amended to allow Centrelink discretion to backdate income support payments for up to twelve months in some circumstances.
(See paragraphs 6.52 to 6.60)

2. DoFA should
- **recommend devolution of the act of grace and waiver powers to agency heads;**
- **consult with agencies about arrangements for effective devolution; and**
- **clarify the guidelines for providing compensation for detriment caused by defective administration, to ensure that if the Ombudsman and the agency concerned agree that there has been detriment caused by defective administration, that is a sufficient basis for paying compensation.**
  (See paragraphs 6.38; 6.50 to 6.51; and 6.61 to 6.62)

3. Agencies should:

- **interpret the rules of the various compensation schemes broadly and flexibly;**
- **cooperate with Ombudsman investigations to ensure that all relevant facts are known as early in the investigation as possible;**
- **approach requests or recommendations for compensation with an open mind;**
- **provide adequate reasons for rejecting a compensation request or recommendation;**
- **assess training needs of staff who handle Ombudsman complaints and investigate compensation requests, and provide training to meet those needs in conjunction with training programs for staff dealing with client feedback;**
- **revise their guidelines on compensation for maladministration so that staff and members of the public can understand the principles on which the compensation 'system' is based and how a request or recommendation should be assessed; and**
- **discuss with the Ombudsman ways to adapt the DSS (UK) approach to providing financial redress for maladministration, consistent with the existing compensation schemes.**

(See paragraphs 6.21; 6.25; 6.37; 6.39 to 6.45; and 7.36)

1. BACKGROUND

Introduction

1.1 The Commonwealth Ombudsman is an independent statutory officer, whose position was established by the *Ombudsman Act 1976.* His role is to consider complaints from people who believe they have been adversely affected by the defective administration of a Commonwealth agency. He:

- investigates complaints where appropriate, using a broad range of powers, eg, to inspect files, copy documents and question people on oath;
- aims to resolve complaints in an impartial and effective way and achieve fair outcomes;
- seeks appropriate remedies;
- promotes improved administration by Commonwealth agencies;
- gives priority to complaints:
  - which are the most serious;
  - which raise systemic problems in government service delivery;
  - where there is no other appropriate means of redress to solve the person's problem; and
  - where it is likely that a useful outcome can be achieved.

1.2 Where the Ombudsman believes an agency has acted defectively he can recommend remedial action, but he has no power to overturn the agency's action. The Ombudsman Act allows for agencies to dispute the Ombudsman's analysis of the facts or his conclusions in a particular case and to reject his recommendations. The Ombudsman relies on mutual respect and persuasion to effect a remedy and while it is his job to recommend one whenever he believes it is warranted, it is up to the agency to provide one.

1.3 The Ombudsman is authorised to investigate any action relating to a matter of administration by a Commonwealth agency, regardless of whether he has received a complaint about it. Such investigations are known as 'own motion investigations'.

1.4 This report is based on an own motion investigation of the adequacy of mechanisms available to Commonwealth agencies to provide financial redress for maladministration. It arose from our investigations of individual complaints where we had asked agencies to consider providing financial redress as a remedy for defective administration. Our recommendations for compensation have met with varied success.

1.5 The investigation followed a report we issued in December 1997[16] concerning risks to members of the public in seeking and relying on oral advice from Commonwealth agencies. Expanding on themes explored in that report, we issued a discussion paper in August 1998[17] on the need for agencies to accept a fair share of the risks of things going wrong in their service delivery activities. Our annual reports in recent years have canvassed some of the difficulties involved in using the existing avenues for providing compensation for losses resulting from Commonwealth maladministration.

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[16] op cit.

[17] *Balancing the risks: providing information to customers in a self-assessment income support system*, a discussion paper issued by the Ombudsman in August 1998.

Aims of the investigation

1.6 In undertaking the investigation the Ombudsman sought to:

- assess the overall adequacy of the existing compensation mechanisms available to most Commonwealth agencies[18] for providing financial compensation for maladministration;
- consider relevant international practices; and
- make practical recommendations for improving the existing system for providing compensation for maladministration.

1.7 Not every error constitutes defective administration warranting financial compensation. The rules for providing compensation are contained in several different schemes that have developed over time[19]. The Ombudsman's view is that when an agency's action results in financial or other loss to a customer warranting compensation, paying it should be seen as simply another aspect of good administration and service delivery to customers. One aim of the investigation was to promote acceptance of that view among Commonwealth agencies.

Scope of the investigation

1.8 The investigation focused on the avenues available to Commonwealth agencies subject to the *Financial Management and Accountability Act 1997* (the FMA Act). The regime established by the FMA Act applies to most of the major Commonwealth departments and agencies. There are four separate mechanisms available to FMA Act agencies to provide financial compensation when things go wrong. The main focus of the investigation was the operation of these mechanisms, but we also considered whether the Commonwealth's powers to waive the recovery of debts owing to it could be administered more effectively.

1.9 Other Commonwealth agencies not subject to the FMA Act are subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). They include the Australian Postal Corporation (AP); the Health Insurance Commission (HIC); Comcare; and the Federal Airports Corporation (FAC). Their enabling legislation provides them with a separate identity from the Commonwealth and legal ownership of their moneys, regardless of whether they receive government budget funding.

1.10 Agencies subject to the CAC Act can therefore be sued in their own right (not as the Commonwealth) and control their own funds through their own bank accounts. They can make arrangements for compensation in a particular case to the extent their enabling legislation allows. Compensation avenues available to CAC Act agencies were not covered in the investigation, because of the variety of laws and regulations under which these agencies operate and because the Ombudsman has no power to investigate complaints about some of them anyway. Compensation avenues available to those agencies would be an interesting subject for further research.

How we conducted the investigation

1.11 In mid 1998 the Ombudsman wrote to relevant agencies seeking their comments on difficulties we had experienced in resolving complaints where compensation was involved. Attachment C summarises that letter and agencies' responses.

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[18] These are agencies subject to the *Financial Management and Accountability Act 1997*.

[19] See chapter 4 and Attachment B for details.

1.12 We analysed our records of all complaints finalised in the two year period 1 January 1997 to 31 December 1998, where the subject of compensation for financial loss was one of the matters discussed[20].

1.13 In March 1999 the Ombudsman issued a discussion paper[21] to relevant agencies, referred to in this report as 'the discussion paper'. It set out our understanding of the compensation rules, outlined the results of the investigation to that point and included some tentative conclusions and recommendations. Much of the technical material in this report is taken direct from the discussion paper. In essence, the main question posed was whether the current 'system' for providing compensation was broken and needed to be replaced.

1.14 In April 1999 the Ombudsman hosted a meeting with Commonwealth agencies with whom we have most frequent contact about compensation requests, to discuss matters raised in the discussion paper[22].

1.15 This report takes into account the written responses provided by agencies to the Ombudsman's 1998 letter and the views they expressed during the meeting in April 1999 and subsequently.

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[20] Attachment A comprises the results of that analysis.

[21] *To compensate or not to compensate? That's the question....but what's the answer?,* Discussion Paper, March 1999.

[22] Attachment E summarises the main issues discussed during that meeting.

2. CIRCUMSTANCES LEADING TO REQUESTS FOR COMPENSATION FOR FINANCIAL LOSS

2.1 This chapter provides an outline and examples of circumstances in which people contact the Ombudsman when they have suffered a financial loss. Where it is established that there is a problem requiring a remedy, the agency will usually acknowledge the problem (whether it was caused by their action or not) and undertake to correct it if possible. Other remedies include

- an apology;
- an explanation of how and why the problem occurred and what steps the agency has taken to avoid it recurring;
- remission of a penalty;
- a change in the agency's procedures;
- writing off or waiving recovery of an overpayment or other debt owing to the Commonwealth where the law allows; and
- a payment of financial compensation where the client has suffered financial or non-financial loss as a direct consequence of the agency's maladministration or because there are special circumstances.

2.2 Requests for financial compensation are rare compared with other remedies. Our records indicate that the Ombudsman's office finalised a total of 45,528 complaints in the two year period 1 January 1997 to 31 December 1998. There were 1,020 finalised in that period where the question of compensation[23] for financial or non-financial loss was one of the matters discussed between the investigation officer and the client. We investigated 595 of those complaints, 20 others were withdrawn and we declined to investigate the remaining 405, either because the client had not yet asked the agency concerned to consider their problem or there was no basis on which we could recommend compensation.

2.3 Because the available avenues and agency approaches to compensation mean that it is rarely paid, we do not usually suggest that clients ask agencies for it. On the contrary, in most cases investigation officers find themselves 'hosing down' client expectations about getting financial compensation for the consequences of an agency's mistake. There is no point in raising expectations that are rarely fulfilled.

2.4 The following tables indicate what we know about outcomes of requests or recommendations for compensation and waiver for complaint files closed between January 1997 and December 1998. We do not always know the outcome.

2.5 As well as instances where we refer a client back to the agency as a starting point, there are other circumstances where we do not pursue the matter to a final outcome. For example, if we have investigated a complaint to the point where we are satisfied that there has been defective administration, we may not know or be readily able to ascertain the extent of the client's loss. In these circumstances we tell the agency and the client that we are satisfied there has been defective administration and that the agency should provide a remedy. We suggest that the client approach the agency themselves to ask for compensation when they have worked out the extent of their own loss. Some clients let us know the outcome, particularly if they are unhappy with the agency's response. Others do not contact us about the matter again.

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[23] The general concept of 'compensation' used here includes waiver of the Commonwealth's right to recover a debt owing to it.

2.6 **Table 1** indicates for the main agencies[24] concerned, the number of complaints where compensation was discussed but we declined to investigate, because it was clear that either the client had not yet discussed the problem with the agency or there was no basis for us to recommend compensation.

Agency	Total	Not raised with agency	No basis for us to recommend compensation
Centrelink	173	147	26
Austpost	50	43	7
DSS	28	26	2
CSA	59	56	3
ATO	23	16	7
DEETYA	13	10	3
Defence Army, Air Force, Navy	10	2 Defence 7 Army 1 Air Force	-
Telstra	7	7	-
DVA	5	4	1
AFP	4	2	2
DIMA	4	4	-
Comcare	3	3	-
DHFS	3	3	-
DPIE	2	-	2
Total	384	331	53

[24] Attachment A provides details of complaints about **all** agencies where compensation was one of the matters discussed.

2.7 **Table 2** indicates for the main agencies concerned, the number of complaints involving compensation where we did investigate, and the financial outcome so far as we know.

Agency	Total	No basis for us to recommend compensation	Agency response to client's request for compensation [25]			Agency response to client's request for waiver			We suggested[26] compensation		We suggested waiver			Agency provided other remedy
			A	R	U	A	R	U	A	R	A	P[27]	R	
Cent'link	166	48	8	2	38	12		1	19	4	20	4		10
Austpost	96	9	44	3	14				11					15
CSA	88	20	16	1	36	1		3	3	1	2	1		4
DSS	74	10			10	1		1	23	21		2	3	3
ATO	59	3	2		2									52[28]
DEETYA	24	2			2	2		1	7	2	4	1	1	2
AFP	20	3	8	1	5				1					2
Defence	11	1 Army 2 Navy	1AF[29] 1D	-	1AF				1D 2Army					2Army
DIMA	13	4							6	1				2
DVA	6					1			2		1			2
ACS	5								4					1
DHFS	4	1							2				1	
DPIE	4	2							2					
Total	570	105	79	7	109	17		6	83	29	27	8	5	95

2.8 Tables 1 and 2 indicate that compensation requests arise most often in relation to income support lost or otherwise forgone. Centrelink, the Child Support Agency (CSA) and the former Departments of Social Security (DSS), and Employment, Education, Training and Youth Affairs (DEETYA) account for 65% of the total. The difference in outcomes between DSS and Centrelink is interesting, with DSS accepting 50% of our recommendations and Centrelink accepting 80%. Although striking, this difference should be treated cautiously because complaint numbers are small, fluctuating from year to year, and Centrelink had only

[25] The columns headed 'agency response to client's request for compensation/ waiver' refer to complaints we investigated where we did not suggest or recommend direct to the agency that they consider compensation. The agency may already have been considering compensation when we contacted them, or we may have suggested that the client discuss compensation direct with the agency after we had concluded that there had been defective administration. The letters indicate that the agency accepted (A) or rejected (R) the client's request for compensation or waiver or that we are unaware of the outcome of their request (U).

[26] 'Suggested' here includes instances where we wrote to an agency head recommending that they consider providing compensation, as well as less formal approaches to the agency concerned. The Ombudsman rarely resorts to formal reports under section 15 or 16 of the Ombudsman Act.

[27] This indicates that the agency waived the recovery of part of a debt or overpayment.

[28] We received complaints in 1995 and 1996 about actions of Australian Tax Office (ATO) auditors in their audits of 52 taxpayers involved in a scheme promoted by a tax agent. Our investigation resulted in the ATO agreeing to reverse its assessments for the 52 taxpayers by granting them an extension of time to lodge an objection to the assessments. This exemplifies 'other' remedies available, depending on the legislation agencies administer.

[29] These letters indicate Air Force (AF) and Department of Defence (D).

been operating for sixteen months when these statistics were compiled. If the trend continues, it will indicate an important and welcome change in approach to compensating customers for lost income support by the agency that is now the main service provider.

2.9 We can infer that only a few people who complain to us about other matters are interested in financial compensation as part of the remedy, apart from those who complain about lost or damaged mail items involving Australia Post[30]. Most people simply want the problem resolved and some assurance that it will not happen again. But we do receive a small, steady stream of complaints about agencies' contracting practices, particularly from small businesses contracted or tendering to provide services to agency customers, that suffer losses they claim have resulted from the agency's administration of the contract or tender procedures.

2.10 Because agencies are not always prepared to accept the version of events outlined by their customers, the existence of objective evidence and the credibility of individual customers are crucial. If there is no objective evidence, agencies rely on their knowledge or their assumptions about how well their staff know their job and the laws they administer. In those circumstances a customer's credibility can be vital to achieving a favourable outcome. The Ombudsman's report on oral advice[31] outlines some of the difficulties people face in those circumstances.

2.11 The following summaries typify the complaints we receive where compensation is one of the issues involved. They indicate a range of circumstances in which compensation may be considered by an agency and either approved or refused.

Case Studies

Child Support Agency (CSA)

Case study 1

The 'payer' disputed paternity of a child for four years until DNA testing finally proved he was not the father. He incurred $8,000 in legal costs that the payee was ordered to pay. His solicitor advised him to accept the payee's offer of $4,000. He asked the CSA to compensate him for the balance of $4,600 because he believed they were negligent in accepting a statutory declaration from the payee purporting to bear his signature, acknowledging paternity. The CSA denied liability and refused to pay compensation.

Our investigation revealed that the CSA had only seen a photocopy of the declaration of paternity, not the original. They had not done anything to investigate the payer's protests that he had not signed any declaration.

The CSA agreed to pay compensation for its defective administration of $4,000 for unrecovered legal costs and a further $600 costs that the 'payer' had incurred trying to recover the whole costs from the payee.

Case study 2

The payee wrote to the CSA seeking compensation for a delay of two years in registering her application for assessment. The CSA had evidence that they received the application in 1993 and accepted that they had lost it and did not assess the liability until the payee complained in 1995 about their failure to collect anything. The CSA then assessed the payer's liability for

[30] They made up 15% of complaints involving some discussion of compensation.

[31] op cit.

1993 and 1994 based on his taxable income two years earlier. The payee said he earned more in 1993 and 1994 than he had two years earlier. She sought a review of the liability for those years. The review officer decided there was no just cause to review the earlier period.

Our investigation indicated that there was no basis to argue for compensation for the CSA's delayed assessment because it was impossible to quantify the payee's loss during that time. It was difficult to determine what the payer's liability would have been in that period and in any event, he had accumulated large arrears since the assessment and may not have paid anything anyway. The CSA could not be held responsible for that.

Department of Employment, Education, Training and Youth Affairs (DEETYA)[32]

Case study 3

The client participated in the Self Employment Development Scheme (SED) which involved an agreement that she receive Newstart Allowance from DSS for 12 months while she was establishing a small business. The client opened her shop in September 1996. The managing agent and the Commonwealth Employment Service (CES) conducted regular reviews and agreed that her activities complied with the SED requirements. DSS then determined that she was no longer eligible for Newstart Allowance because she worked in her shop full-time. DSS cancelled her payments. She had to close her business. She asked DEETYA for compensation for the costs she incurred in setting up the business as a consequence of their wrong advice.

Our investigation revealed that there had been a major breakdown in communication between DSS and the CES. DSS had cancelled several SED participants' Newstart Allowance payments once they started to operate their businesses full-time. The CES had told the clients and their managing agents that they would be entitled to Newstart Allowance for 12 months until their businesses became viable.

DEETYA agreed to compensate the client $2,900 being the value of Newstart Allowance forgone.

Department of Social Security (DSS)

Case study 4

DSS cancelled the client's Mature Age Allowance in August 1994 when they wrongly assessed his pension fund as an asset. He was not aware of DSS's error until May 1995. DSS then acknowledged their error and reinstated his payments from May 1995. DSS said they could not backdate the payments because he had not exercised his right to seek a review of the cancellation decision at the time. The SSAT recommended compensation. DSS refused.

Our investigation revealed that the information DSS had provided was insufficient to enlighten their customer about how they had calculated his payment and how the laws on pension funds operated in his circumstances. Without that information he did not have any reasonable basis on which to ask for a review of the decision to cancel his payments.[33]

We recommended that DSS compensate the client but they refused.

Case study 5

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[32] Employment programs such as NEIS which were provided by DEETYA are now provided by the Department of Employment, Workplace Relations and Small Business (DEWRSB).

[33] Our discussion paper cited at footnote 17 addresses this problem in detail.

The client's husband died in August 1996. DSS told her they would pay her 14 weeks' bereavement payment. In January 1997 the client discovered that DSS had cancelled her Wife Pension after the 14 weeks. The client then claimed Widows Allowance and asked for payment of the 7 weeks' worth of payments she had lost in the meantime. The SSAT recommended that DSS compensate her. DSS declined.

We recommended that DSS compensate the client for the loss she suffered as a result of their failure to advise her that her Wife Pension had been cancelled and their failure to suggest that she test her eligibility for an alternative form of income support.

DSS agreed that these failures constituted a breach of their duty of care and compensated the client $830.

Case study 6

Clients complained that DSS had stopped their pension payments after they had been overseas for more than six months. The legislation had earlier been amended to deal with difficulties in monitoring payments to pensioners overseas. It required a pensioner to notify DSS that they intended to go overseas, so that DSS could check their entitlement to payment while they were away. DSS would then give them a departure certificate. If a pensioner had not received a certificate, the amendment had the effect of suspending their pension payments after six months away until their return.

The clients had gone overseas intending to stay for a short time but had been unable to return for some unpredictable and pressing reason, such as sudden illness, having to care for a relative unexpectedly, or being unable to travel because of war. DSS was aware of other people in the same position. In some instances a review tribunal or the Ombudsman's office found errors in the process, eg, some clients had received wrong advice from DSS before they left Australia. Compensation could be paid to these people for loss resulting from defective administration. But in many cases the legislation had its intended outcome: payments were suspended, without any defective administration.

We argued that the amendment was unjust in these circumstances and should not have applied to people prevented from returning by unforeseen circumstances beyond their control. It was clear that this was an unintended consequence because Parliament amended the provision after these cases came to light. The new amendment allowed a limited discretion to continue payments, but did not apply retrospectively. We wrote to DSS, then the Minister for Social Security and eventually the Prime Minister, arguing that it was unjust that people affected by the initial amendment should miss out on payments for the period when their pensions had been suspended.

The government agreed to compensate the people affected.

Centrelink

Case study 7

The client received Parenting Payments from Centrelink until June 1998. She declared all her earnings and her husband's. Centrelink overpaid her a large amount. She had tried to repay Centrelink repeatedly but they refused to accept it. Centrelink subsequently asked her to repay an old debt of $65 and kept asking her and her employer about her earnings. Centrelink wrote to her employer who returned the information in the required format. Centrelink wrote again asking for the same information in a different format. They had also made similar requests by phone. The client said her employer was getting annoyed and told her he had complained to the Ombudsman about Centrelink's repeated demands. The client said she

handled money at work and the implication that she had defrauded Centrelink may have jeopardised her job.

The client was pregnant when she contacted the Ombudsman's office about the overpayment. She would need Parenting Payment again when the baby was born and did not want any further trouble. She was also worried that her employer may not keep her job available if he thought she was dishonest.

Our investigation revealed that the employer had not provided an itemised account of the client's wages for the financial year. But there was a discrepancy between the total amount of earnings Centrelink took into account (for her Family Payment and Parenting Allowance and for her husband's Newstart Allowance) and the amount the employer said she had received. We asked Centrelink to check the amounts the client and her husband had declared.

Centrelink checked and concluded that the client had been overpaid $2,000 but decided they would waive recovery of it anyway.

Case study 8

The client incurred an overpayment of the Family Tax Payment from June 1997 until June 1998 because Centrelink believed her earnings were less than they actually were. The client said she told Centrelink what her actual earnings were and was told in return that her entitlement would be $30.80 per fortnight. Centrelink refused to waive recovery of the overpaid amount despite their computer records indicating that the client had notified their Teleservice centre of her actual earnings. Centrelink argued that the client would have received regular written advice from them, including a standard paragraph telling her how her payments were calculated and that if she earned over a specified amount she would not be entitled to any payments. For recovery of the overpayment to be waived Centrelink would have to be satisfied that it resulted exclusively from their own error and that the client received it in good faith. There must be no fault on the client's part, including not reading Centrelink's letters properly.

Our investigation revealed that none of Centrelink's letters to the client included the standard paragraph. Centrelink could not explain why.

Centrelink agreed to waive recovery of the $520 overpayment because it resulted from their defective administration.

Case study 9

The client did not receive his regular Austudy payment from Centrelink and only received $5 of the supplementary payment he was expecting. Because the full payment did not go into his bank account he incurred bank charges. The client said he had an appointment to see his doctor about chest pains he had experienced when he had been trying to sort out the payment problems with Centrelink. He wanted compensation from Centrelink.

Our investigation revealed that the problem lay with Centrelink's computer system.

Centrelink said that the client would have to put his claim for compensation in writing and supply evidence of the bank charges and the costs for any medical treatment he had received.

Australian Federal Police (AFP)

Case study 10

The client complained that the AFP had lost or failed to return his property, including a gold chain. The AFP's internal investigation concluded that the complaint was not substantiated.

Our investigation concluded that the AFP's failure to document the contents of the safety deposit box and to issue receipts for the client's property contributed significantly to its loss and jeopardised its recovery. We advised the client of the avenues through which he could seek compensation.

Case study 11

The client sought a written apology and compensation for damage to a security door during a search of his premises.

The complaint was conciliated and the AFP paid $320 compensation and provided a written apology.

Department of Immigration and Multicultural Affairs (DIMA)

Case study 12

The client wanted a refund of $2,040 fees charged by our Moscow embassy for English language teaching that she did not receive after she arrived in Australia. The assessment of her English language skills in Russia indicated that she did not have a functional standard of English so she was required to pay the fee. The assessment on her arrival in Australia was that she did have a functional standard of English and was therefore not eligible for tuition. The client complained to us that DIMA was taking a long time to decide whether to refund the money.

Our investigation revealed that there were 35 other immigrants in the same circumstances (not all from Russia). There was no provision in the migration laws for refunding the fees.

DoFA agreed to make act of grace payments to all the migrants concerned.

Case study 13

The client had received Australian passports between 1957 and 1981 in Pakistan but was later told in 1985 that he was not an Australian citizen. He arrived in Australia in 1987 on a temporary entry permit and applied for citizenship. Federal Court proceedings in 1993 determined that the client had been an Australian citizen since 1949. He then sought payment of DSS entitlements for the period 1988 to 1992 when he was supported by friends in Australia during his battle to have his Australian citizenship recognised. DSS rejected his claim because he had not lodged claims for income support during that time (he was prevented from doing so until his Australian citizenship was recognised).

The Administrative Appeals Tribunal (AAT) referred the client to the Ombudsman. Our investigation revealed that DIMA was already considering
his claim as a compensation request on the grounds of defective administration.

The Minister approved compensation for the period 1990 to 1992 when the client would have been eligible for age pension, but refused compensation for the period 1988 to 1990 when he may have been able to claim unemployment benefits. The Minister refused compensation for that period because he could not be sure that the client would have met all the eligibility rules for unemployment benefits.

Department of Health and Family Services (DHFS)

Case study 14

A group of child care centres in Tasmania had jointly sought government funding to engage a consultant to provide financial and management advice for community based long day care centres faced with withdrawal of the government's operational subsidy. DHFS advised the group that all the centres would be able to claim the travel subsidy for the consultant. But previously the adviser's brief had indicated that the subsidy would only be available for 'rural and remote' centres. When all the centres claimed the travel subsidy 19 of them were not classified as rural or remote and their claims were refused.

Our investigation indicated that the advice given to the child care group was wrong or ambiguous and caused the 19 centres financial detriment.

DHFS accepted our recommendation to pay the travel subsidy to those centres.

Department of Finance and Administration (DoFA), CSA and DSS

Case study 15

In 1995 the CSA asked the client to repay $1300 they had paid her as child support in 1994. The CSA said they had no authority to waive recovery of the debt. The client had received the money in good faith, had spent it supporting her children and believed it was unfair that she had to pay it back.

The CSA had paid the money because DSS had wrongly applied the rules for parents who separate after 1 October 1989 to the client, although she had separated from the children's father before that date. DSS had changed the date of separation which the client had put on a child support assessment application form they had given her, from '1985' to '1992'. She had separated from her second partner in 1992 and DSS mistakenly assumed he was her children's father. DSS referred the altered form to the CSA who assessed the children's father's child support liability and collected $1300 of it. DSS should have queried the 1985 date with the client and suggested that she apply to a court for a maintenance order, instead of simply changing the date. It was not until 1995 that CSA realised this, concluded that it had no power to assess the liability, refunded $1300 to the children's father, and asked the client to repay that amount.

Later in 1995 the CSA intercepted the client's tax refund to recover part of the debt. DSS then acknowledged their mistake. The client got a court order in 1996 for maintenance of $60 per week but because the children's father had no capacity to pay more than that, the magistrate adjourned indefinitely her application for payment of the $1300 that the CSA had already paid her for the period since 1992. By 1997 the payer was unemployed and had not paid any of the maintenance ordered in 1996. The CSA said they would ask DoFA to waive recovery of the client's debt.

We suggested that DSS consider paying the client compensation because their action had resulted in her losing the opportunity to apply for maintenance between 1992 and 1995, when the children's father was employed. If she had obtained a court order in 1992 she would have been entitled to the amount the CSA had paid her in 1994. DSS said they were concerned that the client may be double dipping if they paid her compensation and DoFA later waived recovery of the debt. DSS later asked DoFA to waive the debt. DSS had considered compensating the client under the CDDA rules but could not do so because the rules prevent CDDA compensation to offset repayment of debts even if they resulted from defective administration. (Waiver is the statutory power available in these circumstances and cannot be over-ridden by an administrative compensation scheme.)

DoFA rejected the waiver request. They believe maladministration is not enough to satisfy the exceptions to the Commonwealth's policy to recover all debts wherever possible. The exceptions DoFA accepts are (1) where recovery would be inequitable because it would leave the debtor worse off financially than if the payment had not occurred, and (2) recovery would cause the debtor unreasonable hardship. DoFA suggested that if the children's father got a job the client could return to court and ask for an order for the period 1992 to 1996. DoFA also said that waiver of the client's debt would circumvent the child support objectives, to ensure that children received financial support that their parents are liable to provide. If DoFA approved waiver that would amount to the Commonwealth paying the liability for the period concerned rather than the children's father. DoFA suggested that if the client could not afford further court action and was refused legal aid the CSA could consider writing off the debt.

We asked DoFA to explain why they had waived recovery of a debt to resolve a similar complaint but refused in this case. DoFA said that in the earlier case the CSA had overpaid the client for more than five years before discovering the error (whereas in this case it was three years). DoFA believed that pursuit of maintenance through the courts was no longer viable in that case because of the time that had elapsed (five years). That did not apply in this case because the magistrate had only adjourned the matter indefinitely. DoFA believed that left an avenue open to the client to seek arrears in the future.

3. GENERAL CONTEXT IN WHICH COMPENSATION REQUESTS ARISE

The goalposts are shifting all the time

3.1 Many changes have taken place in the Australian Public Service (APS) environment in recent years, reflecting the general pace of social change. The context in which APS agencies now operate encompasses new management approaches and themes including:

- micro-economic reform, improved productivity and efficiency, competition policy, contestability, contracting out, outsourcing and privatising government programs and services eg, the employment services jobs network;
- separating core policy functions from service delivery (the purchaser/ provider model), eg between Centrelink and the Departments of Family and Community Service (DFaCS); Employment, Workplace Relations and Small Business (DEWRSB); and Health and Aged Care (DHAC);
- improved responsiveness to governments and the community, eg, the call centre approach to providing advice and information quickly and cheaply;
- focusing on outcomes and effectiveness, eg, visions, missions and service charters;
- transparency and increased accountability, eg, devolved financial decision-making under the FMA Act; establishment of the CDDA scheme to compensate customers for detriment caused by defective administration; and
- best practice and managing risk rather than avoiding it, eg, using computers to assist decision makers, by automating the administration of rules: known as rule based systems or more commonly as expert systems[34].

3.2 Agencies responsible for service delivery focus on activities that assist decision makers to 'get it right the first time'[35]. The focus of service provider agencies is changing from the traditional approach of providing more and more training and developing improved handbooks and guides to legislation for staff, to making innovative use of technology to assist their staff in the decision making process wherever possible[36].

3.3 Despite these changes, income support legislation has tended to get more complex every year. As income support payments are more closely targeted to people in specific circumstances and the 'rules' become more detailed and complex, it is difficult for the Ombudsman's office and service providers to keep up with the changes, both intended and unintended. The Federal Court commented on the *Social Security Act 1991* in 1993, stating that '...the increasingly complex society in which we all live very often demands that legislation be expressed in a complex form. That is the factor which will so often operate to

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[34] *'Electronic Service Delivery: Achieving Accuracy and Consistency in Complex Transactions'*, Peter Johnson, paper presented to the National Conference of the Institute of Public Administration Australia, Hobart 1998.

[35] Fortunately the income support laws provide review and appeal mechanisms allowing decisions to be challenged and varied if the decision maker got it wrong the first time. But as indicated in our discussion paper cited in footnote 17, these rights are illusory if customers have insufficient information about a decision to know it is wrong and should be challenged.

[36] See the description of Centrelink's move to the 'life event' model in our report, *'Balancing the Risks: Own motion investigation into the role of agencies in providing adequate information to customers in a complex income support system'*, a report under section 35A of the *Ombudsman Act 1976*, issued in September 1999.

prevent simplicity in legislative drafting...'. The court described the Act as '...a maze of provisions made the more complex by prolix definitions, provisos and exceptions...'[37].

3.4 It is a relief to note that three Bills were introduced into Parliament in June 1999 to simplify aspects of the social security legislation. One deals with technical rules relating to various matters including information gathering and the date of effect of determinations; another consolidates existing social security international agreements; and the third deals with consequential amendments. We understand that the amendments should reduce the legislation by about 500 pages.

APS values and standards of conduct

3.5 Within a context of continuing change, all agency staff are required to act in accordance with the APS values and standards of conduct. In February 1998 the *Public Service Regulations*[38] set out updated values and conduct expected of public servants. Regulation 5 describes the APS as:

- having the highest ethical standards;
- accountable for its actions, within the framework of Ministerial responsibility, to the Government, the Parliament and Australian public;
- responsive to government in providing frank, honest, comprehensive, accurate and timely advice and implementing the government's policies and programs;
- delivering services fairly, effectively, impartially and courteously to the Australian public;
- focusing on achieving results and managing performance.

3.6 Similarly, the code of conduct established by Regulation 7 includes requirements to:

- act with care and diligence in the course of APS employment;
- treat everyone with respect and courtesy, and without harassment, when acting in APS employment;
- comply with all applicable laws, when acting in APS employment;
- disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with the employee's APS employment;
- use Commonwealth resources in a proper manner;
- not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment; and
- behave at all times in a way that upholds the good reputation of Australia.

3.7 More detailed guidance to APS staff is available in a document[39] published by the Public Service and Merit Protection Commission (PSMPC) in March 1997, which includes the following advice:

> '*Duty of care*' '...In doing your work you are expected to take reasonable care in giving information or advice. For example, the information and advice must be accurate and useful to the inquirer. When there are doubts about the reliability of the information,

[37] *Blunn v Cleaver* [1993] 31 ALD 28, quoted by Sandra Koller, Welfare Rights Centre, Sydney, in *'Income Security Law Conference Paper: Targeting, Accountability and Review, The holes but not the cheese: An overview of trends in income support law'*, 20.2.98.

[38] See Regulations 5 and 7; and *APS values* and *APS Code of conduct*, issued by the PSMPC, February 1999.

[39] *'the essentials number three: APS values and standards of conduct'*, AGPS, Commonwealth of Australia 1997, ISBN 0 644 473 797.

or where the advice is of a conditional nature, you should always make this known to the inquirer'.

'Fair and equitable decisions' '...In making decisions, the onus is on you to act according to the law, establish the facts, properly exercise powers, be prompt, be fair and apply the rules of natural justice (ie, the requirement to act fairly, in good faith, without bias, and to give each person affected the opportunity to state his or her case and contradict any statement prejudicial to his or her case). You should administer programs equitably, avoid malice, and, where appropriate, explain the reasons for your decisions....'.

'*Other legislation and agency-based requirements'* '...Where your work involves applying the provisions of legislation, you must understand all the requirements of that legislation that relate to the performance of your official duties. Agencies will have specific instructions on the application of legislation....'.

'*Failure to comply with requirements'* '...If you are found to have breached the code of conduct, your agency may decide to take misconduct action against you.'.

3.8 These are very high standards for public officials to meet in a constantly changing environment. As complaints to the Ombudsman indicate, they are not always met and it is unrealistic to expect that they always will be.

Service charters

3.9 Service charters reflecting APS values and standards form part of the government's initiatives to develop a more open and customer-focused public service. All Commonwealth agencies providing services to the public are required to publish a service charter, including statements about what they will do if they fail to meet their service standards.

3.10 A service charter assumes reciprocal responsibilities and obligations between the agency and its customers. Agencies set out their service standards and expect their customers to be honest in return and to comply with legislative requirements such as notifying any change in their circumstances.

3.11 The ATO and CSA service charters refer to separate leaflets explaining the avenues available to customers who want financial compensation. We are not aware of any other comparable agency charters containing a reference to the possibility of compensation for failure to meet service standards. The CSA told us it is important that such initiatives do not engender unrealistic expectations in customers or staff, that financial compensation will automatically follow an agency error. There has to be some element of defective administration or special circumstances to attract a payment of compensation under the current rules.

Maintaining good customer relations

3.12 We believe compensation is an important aspect of customer relations. In an era when agencies are subject to resource constraints, risk management approaches have become an integral part of sensible cost-effective management. There is greater acceptance that a small proportion of errors will occur from time to time and agencies are expected to plan for this. It is too costly to introduce the checks and balances required to guarantee getting it right all the

time. The APS is involved in creating administrative structures which accept that there will be some degree of error in agencies' activities.

3.13 It follows that when errors do occur and members of the public are adversely affected by poor administration, the administrative 'culture' should promote a willingness to redress the situation in an appropriate way. A customer focused culture would emphasise quality of service and recognise the risk management environment in which agencies operate.

3.14 We are not advocating that agencies should be profligate in spending taxpayers' money. Compensation is only warranted in limited circumstances, where an apology or a willingness to change a decision is not an adequate remedy. Best practice in this regard involves a willingness to maintain good customer relations by:

- acknowledging a problem readily whenever one occurs;
- being prepared to try to remedy the problem in a way that is fair and helps to instil confidence and respect in government; and
- recognising that this may include paying some form of compensation on occasions.

Customer expectations

3.15 Customer expectations that agencies will compensate them for mistakes appear to be rising, with some agencies noting increasing requests for compensation from their customers in recent years. Clients whose requests for compensation are refused sometimes become angry or upset because they believe that if the shoe were on the other foot and it was a government agency asking them to repay money they owed, sometimes including interest, there would be no question that they would have to pay. Government edicts that people who receive income support should fulfil their part of specified 'mutual obligations' may increase client expectations that government agencies will fulfil their obligations too.

3.16 Moves to set up industry based ombudsmen in the telecommunications, banking, private health insurance and energy industries indicate a greater willingness by governments and industry to view compensation for service failures as a way of strengthening accountability for service delivery. Some industry ombudsmen have been given the power to penalise an agency for failure to meet defined service standards.

3.17 These moves indicate a changing relationship between governments and the community. They encourage a more commercial and customer focused attitude towards service failures, rather than the traditional government approach of protecting their revenue base.

3.18 It may become necessary to include some customer service guarantees in agency service charters, to indicate the kinds of circumstances when compensation would be payable. Some private sector companies and Telstra have embraced this idea in recent years. It may spread to other public sector service delivery agencies too.

4. CURRENT FRAMEWORK FOR PROVIDING COMPENSATION

Overview of current arrangements

4.1 This chapter sets out our understanding of relevant aspects of the financial regime to which most Commonwealth agencies are subject, established by the *Financial Management and Accountability Act 1997* (the FMA Act) and associated legislation[40].

4.2 Agencies subject to the FMA Act have four mutually exclusive avenues available for considering requests for financial compensation. To understand or explain why a request for compensation was rejected, agency staff and their customers need at least a rudimentary understanding of these arrangements. Customers are left confused and angry if they do not understand the reasons for an agency's refusal to provide compensation.

4.3 The four avenues available to pay compensation are known as:

- settlement of monetary claims against the Commonwealth ('legal liability');
- compensation for detriment caused by defective administration;
- act of grace payments; and
- ex gratia payments.

4.4 These mechanisms are described in more detail below. Two have been authorised by Parliament, while the others rely on government or ministerial approval and are therefore administrative mechanisms deriving their authority from the executive power of the Commonwealth:

- act of grace payments are authorised by section 33 of the FMA Act;
- the Attorney-General's directions on handling monetary claims are authorised by section 55ZF of the *Judiciary Act 1903*;
- the scheme for providing compensation for defective administration was approved by the Government in 1995 as a non-statutory, administrative mechanism; and
- making ex gratia payments is also a non-statutory, administrative mechanism, requiring government approval.

4.5 In addition to paying compensation, agencies have power under the FMA Act to write off the recovery of debts to the Commonwealth in some circumstances. The Minister for Finance and Administration and Administration and delegates in his department also have the authority under the FMA Act to waive the Commonwealth's right to recover a debt in some circumstances. Some other agencies (eg, Centrelink) administer legislation that provides for waiver of the recovery of a debt in certain circumstances. In the present context, write-off and waiver are important measures for providing financial redress where the debt arises as a result of defective administration or other agency error.

4.6 To understand the particular mechanisms for providing compensation it is important to understand the general framework established by the FMA Act. Attachment B explains that framework and is based on documents DoFA provided to Commonwealth agencies when the FMA Act came into operation in January 1998 and on information provided by A-G's during the investigation. Attachment B also provides a more detailed explanation of the existing compensation, write off and waiver mechanisms.

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[40] The *Auditor-General Act 1997*.

4.7 What follows is a summary of the main features of these mechanisms as we understand them. They are all separate mechanisms with different rules. If a compensation request fits within the rules of one mechanism, any financial compensation must be considered in accordance with the rules of that mechanism. It is not possible to look to one of the other mechanisms to 'top up' or increase the compensation offer.

Current mechanisms for providing compensation

1. Settlement of monetary claims against the Commonwealth

4.8 The Commonwealth's policy for handling monetary claims applied from January 1998, when the repeal of the *Audit Act 1901* (including the former Finance Direction 21/3) became effective. The policy was replaced recently, following an amendment to the *Judiciary Act 1903,* which empowers the Attorney-General to issue Legal Services Directions (LSDs) in relation to 'Commonwealth legal work'[41]. The Attorney-General issued LSDs effective from 1 September 1999, which (among other things) direct FMA Act agencies to handle monetary claims in accordance with the *Directions on Handling Monetary Claims*.

4.9 Paragraph 4.4 of the LSDs provides that monetary claims against the Commonwealth or the agency (other than claims that are to be determined under a legislative or contractual mechanism) are to be handled in accordance with the *Directions on Handling Monetary Claims* set out in Appendix C of the LSDs. The Directions provide that a claim can be settled if settlement would be in accordance with legal principle and practice. Paragraph 4.2 of the LSDs provides that claims are to be handled and litigation is to be conducted by the agency in accordance with the *Directions on the Commonwealth's Obligation to Act as a Model Litigant* set out in Appendix B of the LSDs.

4.10 FMA Act agencies are required to comply with both these Directions (as well as others not relevant here). Other non-FMA Act agencies, generally Commonwealth authorities within the meaning of the CAC Act, are required to comply with the Model Litigant Directions.

4.11 An agency may settle a claim under $10,000 on the basis of a common sense view that the settlement is in accordance with legal principle and practice. No external legal advice is required. Claims above $10,000 can be settled if the CEO or authorised officer agrees with written advice from the Australian Government Solicitor (AGS) or other legal adviser external to the agency, that the settlement is in accordance with legal principle and practice. Essentially, a claim can be settled if there is at least a meaningful prospect of liability.

4.12 Under the Judiciary Act only the Attorney-General can enforce the LSDs (section 55ZG(2) of the Judiciary Act). But the FMA Regulations assist in ensuring compliance with the *Directions on Handling Monetary Claims*. FMA Regulation 9 (FMAR 9) allows agencies to approve the expenditure of public money if they are satisfied that such expenditure is in accordance with the policies of the Commonwealth. FMAR 13 allows an agency to pay public money if such payment is approved under FMAR 9. A failure to comply with the *Directions on Handling Monetary Claims* may render the person approving the expenditure in breach of FMAR 9 and 13, in addition to the agency concerned being in breach of the Judiciary Act.

[41] See the *Judiciary Amendment Act 1999.*

4.13 Case study 5 in chapter 2 is an example of compensation paid in accordance with the directions on settling monetary claims.

2. Compensation for detriment resulting from defective administration

4.14 In 1995 the Commonwealth government approved a scheme for providing compensation for detriment suffered as a direct result of defective administration by a Commonwealth agency subject to the FMA Act (the CDDA scheme). The essential features of this scheme are:

- the detriment can be financial or non-financial loss;
- the definition of defective administration usually requires an element of unreasonableness (eg, an unreasonable failure to do something; or an unreasonable action of some kind), although clear cases of wrong or ambiguous advice are also included in the definition;
- any compensation payment for non-financial loss must be determined in accordance with legal principles and practice; and
- the scheme does not apply to any claim where the Commonwealth would be found legally liable if the matter went to court.

4.15 Case studies 1, 13 and 14 in chapter 2 are examples of compensation payments made under the CDDA rules.

3. Act of grace payments

4.16 Section 33 of the FMA Act provides authority for the Minister for Finance and Administration (or his delegates) to approve a payment in special circumstances. Such payments can be made to anyone for any reason but DoFA limits the circumstances in which they approve them to three broad categories:

- where legislation produces unintended, anomalous, inequitable, unjust or otherwise unacceptable results in the particular circumstances; or
- where the matter is not covered by legislation but it is intended to introduce such legislation and, in the particular case, it is desirable to apply the benefits retrospectively; and
- where the particular circumstances of the case lead to a conclusion that there is a moral obligation on the Commonwealth to make a payment.

4.17 Case study 12 in chapter 2 is an example of an act of grace payment.

4. Ex gratia payments

4.18 Ex gratia payments require approval by the government and are usually reflected in a specific appropriation. They usually take the form of payment schemes which have guidelines and rules developed for a group of individuals suffering a particular class of losses. This contrasts with the individual nature of most act of grace payments.

4.19 Case study 6 in chapter 2 is an example of ex gratia payments.

5. Write off

4.20 Section 47 of the FMA Act requires agencies to pursue the recovery of debts unless they have been written off under the authority of another statute (eg, the *Social Security Act 1991*) or they are considered irrecoverable at law or uneconomic to pursue.

4.21 Contrary to popular belief write off does not extinguish the debt[42]. It is simply an accounting method for removing a bad debt from the accounts. If circumstances change later the agency may take action to recover the debt.

4.22 Case study 15 in chapter 2 is an example of how write off and waiver can be used to redress financial detriment resulting from maladministration.

6. Waiver

4.23 Section 34 of the FMA Act authorises the Minister for Finance and Administration(and his delegates in DoFA) to waive the Commonwealth's power to recover a debt. Section 34 does not contain any conditions or limitations or specify any particular circumstances. DoFA most often waive a debt if they are satisfied that there is a moral obligation on the Commonwealth to do so. DoFA will usually consider waiver where it would be inequitable to recover the debt, eg, if the person would be worse off if the agency recovered the debt than

[42] Writing off a debt is not the same as 'writing off' a car.

if they had not received the money in the first place, or where the person would suffer unreasonable financial hardship if they were required to repay the debt.

4.24 There are also separate waiver provisions in particular statutes that allow agencies administering those statutes to waive the recovery of a debt in specified circumstances. Centrelink can waive some debts in circumstances specified in the *Social Security Act 1991* and the *Student Assistance Act 1973*. By contrast, the CSA and ATO have no general power to waive debts, although a taxpayer can apply to the Tax Relief Board to provide relief from a tax liability. The CSA has referred some requests to DoFA for waiver of debts and overpayments in child support matters. Case study 15 in chapter 2 is an example.

5. PRINCIPLES RELEVANT TO COMPENSATION AND OMBUDSMAN RECOMMENDATIONS

5.1 This chapter outlines our understanding of the principles on which the existing mechanisms for providing compensation are based. It also sets out the principles on which the Ombudsman's recommendations are based. It is helpful to keep these principles in mind when considering how effective the compensation arrangements are in achieving their objectives.

5.2 Not every mistake by a Commonwealth agency constitutes defective administration, a concept implied but not defined specifically in the Ombudsman Act as action that is unlawful, unreasonable, unjust, oppressive, improperly discriminatory, based on a mistake of law or fact, or otherwise wrong. Whether an error constitutes defective administration will depend on all the circumstances.

5.3 Not every error warrants financial compensation. It is usually only available where the person has suffered a quantifiable loss as a direct consequence of defective administration or special circumstances. The compensation rules are based on the principles enunciated below. They provide for compensation to be paid whenever:

- an agency is satisfied that the Commonwealth is legally liable; or
- an agency accepts that there has been defective administration; or
- DoFA agrees that there are special circumstances; or
- the government is satisfied that a group of people has suffered particular losses.

1. Settlement of monetary claims against the Commonwealth

- Legal principle and practice form the basis for any settlement of a claim against the Commonwealth, regardless of the amount claimed.

- Settlement requires the existence of at least a meaningful prospect that the Commonwealth is liable for a claim based on a cause of action where the remedy may include damages or restitution. Such causes of action include torts (eg, negligence); contract (to the extent that there is no contractual mechanism to resolve the dispute); equity (eg, breach of fiduciary duty); and statutory provisions (eg, breach of the Privacy Act).

- Settlement cannot be effected merely to avoid the cost of defending what is clearly a spurious claim.

- Factors to be considered in assessing a fair settlement include:
  - the prospects of the claim succeeding in court;
  - the costs of continuing to defend the claim; and
  - any prejudice to the government in continuing to defend the claim (eg, the risk of disclosing confidential information).

5.4 In addition to the principles underpinning the directions on handling monetary claims, the following principles are enunciated in the directions on the Commonwealth's obligation to act as a model litigant:

- The Commonwealth should act honestly and fairly in handling claims, by paying legitimate claims without litigation, where it is clear that liability is at least as much as the amount to be paid.

- The Commonwealth should not take advantage of a claimant who lacks the resources to litigate a legitimate claim.

2. Compensation for detriment resulting from defective administration

- The community expects Commonwealth agencies to administer legislation responsibly and reasonably and to provide accurate, unambiguous information and advice. Members of the public rely on Commonwealth agencies to do so.

- When a Commonwealth agency has acted unreasonably or provided wrong or ambiguous information or advice and those actions caused a person financial (and sometimes non-financial) loss, the community expects the agency to make good the loss even though its actions do not amount to a legal wrong.

3. Act of grace payments

- Parliament expects the Minister for Finance and Administration to make payments to individuals if he believes there are special circumstances warranting it.

- Such payments should promote equal treatment of all members of the community and should not be used to advantage some people over others.

- Such payments are based on moral principles where there is no other avenue for redress available.

4. Ex gratia payments

- The inherent Constitutional power of the Commonwealth government to redress the effects of particular negative circumstances can be used to provide relief to a group of people affected where there is no other avenue available.

5.5 In addition to compensation an agency may consider whether recovery of a debt owing to the Commonwealth should be pursued. A decision can be made not to pursue a debt, based on the following principles.

5. Write-off of debts[43]

- Paying money out of the Treasury without Parliament's authority is illegal and there is a duty to recover such payments if possible, including money paid by mistake.

- Debts owing to the Commonwealth are debts to the community at large and represent a cost to taxpayers if not recovered.

- Everyone should be treated equally unless the law specifies otherwise. Failure to recover a debt to the Commonwealth would unfairly advantage the person who retains the money illegally paid, compared with those who have repaid their debts and those who have received only their proper entitlements.

- All practical measures should be taken by the Commonwealth to recover debts owing to it.

- There are circumstances where it is not in the interests of the Commonwealth to pursue recovery of a debt (eg, where it would cost more to recover the debt than the amount of the debt itself); or where it is irrecoverable legally (eg, because the right to sue for the debt is prevented by the expiration of time specified in a statute); or it is irrecoverable practically (eg, because the debtor is impecunious or there is some doubt about the Commonwealth's ability to prove the debt).

- Where there is a possibility that the circumstances which led to the non-recovery of a debt will change, write off is a proper basis for managing the debt, by deferring recovery, eg, until the debtor's financial circumstances improve. It removes the debt from the agency's books for the time being.

6. Waiver of the right to recover a debt

- The Commonwealth's right to recover a debt owing to it can be waived where the Minister for Finance and Administration (or other authorised person) believes the debt should not be recovered because of special circumstances.

- Waiver is a concession granted to a debtor where recovery would be inequitable or cause unreasonable hardship. If a debtor received the money in good faith, changed their position in reliance on that money, so that they would suffer a loss or manifest injustice if required to repay it, repayment will not be required. To compel the debtor to refund the money in these circumstances would make them the sufferer and insurer of the payer's error.

7. Ombudsman recommendations

5.6 Section 15 of the *Ombudsman Act 1976* sets out the principles underpinning the Ombudsman's recommendations for remedial action. It authorises the Ombudsman to report to an agency, after an investigation, where he is of the opinion that the agency's action:[44]

- appears to have been contrary to law;

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[43] In addition to the material on waiver published by DoFA, the comments under headings 5 and 6 take into account information in the AGS publication, *'Debt Management: New Responsibilities under the Financial Management and Accountability Act 1997'*, by Michael Murray, Senior Solicitor, AGS Sydney, 5.2.98.

[44] The term 'action' is used here to include any action, omission, decision or recommendation of an agency, relating to a matter of administration.

- was unreasonable, unjust, oppressive or improperly discriminatory;
- was in accordance with a rule of law, a statutory provision or a practice but the rule, provision or practice itself is unreasonable, unjust, oppressive or improperly discriminatory;
- was based on a mistake of law or fact;
- was otherwise wrong in all the circumstances;
- involved the exercise of a discretionary power for an improper purpose or on irrelevant grounds;
- involved the exercise of a discretionary power where irrelevant considerations were taken into account or relevant considerations were not taken into account; or
- involved the exercise of a discretionary power but the complainant or another person were not given reasons for the way the power was exercised when they should have been.

5.7 The Ombudsman **must** report to an agency if he is of the opinion that:

- the agency's action should be referred to an appropriate authority for further consideration;
- some particular action could and should be taken to rectify, mitigate or alter the effects of the agency's action;
- a decision should be varied or cancelled;
- a rule of law, statutory provision or practice on which the agency's action was based should be altered;
- reasons for a decision should have been given but were not; or
- any other thing should be done in relation to the action.

5.8 The Ombudsman is obliged to give reasons for his opinions and may make whatever recommendations he thinks fit.

5.9 None of the existing compensation mechanisms available to Commonwealth agencies is expressed in the same terms as section 15 of the Ombudsman Act. But taken as a whole they espouse similar principles.

5.10 It is reasonable to expect an agency to accept the Ombudsman's recommendation to pay compensation where it is based on the principles set out in section 15 and where the agency can meet the recommendation by applying the rules of any of the compensation mechanisms. As indicated in the following chapter, we experience difficulty when an agency's view of what is reasonable or unreasonable, or where DoFA's view of what constitutes special circumstances, differs from the Ombudsman's.

6. OMBUDSMAN'S EXPERIENCE OF CURRENT ARRANGEMENTS FOR PROVIDING COMPENSATION

6.1 This chapter details our experience of the compensation 'system' and examines problems we have encountered in resolving complaints when we believe financial redress is warranted.

6.2 Complaint statistics set out in Attachment A indicate that for files closed in the two years 1997 and 1998, agencies rejected 28% of our recommendations for compensation and 12.5% of our recommendations for waiver. These statistics should be considered cautiously because the actual numbers of complaints involved are small, particularly as regards waiver, and they fluctuate from year to year. A 72% success rate may sound quite high, but it is achieved partly because we usually only recommend compensation when we believe there are strong grounds for paying it. Occasionally we ask an agency to consider compensation in less certain circumstances, when it is not clear from past experience what their response might be. Against this background, a 28% 'failure' rate is cause for concern.

6.3 Based on past experience, we do not recommend compensation in circumstances where we consider it will be rejected. There is little point in raising individual cases if an agency has rejected recommendations in similar circumstances in the past. If we believed change was warranted in these circumstances we would try a different way to achieve it, eg, by undertaking a general 'own motion' investigation or major project such as this one, or by taking the matter up as a systemic problem requiring a general remedy for the individuals concerned, as illustrated by case study 6 in chapter 2.

Problems affecting financial compensation

6.4 Based on information in the discussion paper, a participant at the meeting in April 1999 provided the following summary of problems affecting compensation recommendations. It covers many of the matters we raised:

- disagreements over the Ombudsman's investigation and analysis, or his conclusions, resulting in refusal by an agency to accept his conclusions or recommendations;

- reluctance by agencies to pay compensation, even where they accept the Ombudsman's conclusions, where they do not regard themselves as legally obliged to pay;

- the nature of advice from A-G's or the AGS;

- restrictions on the use of available schemes to pay compensation and the lack of mechanisms broad enough for compensation to be paid in all appropriate cases;

- agencies' capacity to refuse to accept an Ombudsman recommendation for reasons which they do not have to justify, and the difficulties for the complainant and the Ombudsman in pursuing compensation in these circumstances;

- the alleged lack of available mechanisms for agencies to pay compensation in some circumstances, which combines with the Ombudsman's unwillingness to point to specific mechanisms for payment;

- different types of compensation:
  - in some cases a person missed out on a payment to which they would have been legally entitled (eg, if they had used the statutory review procedures) and the recommended compensation amounted to no more than that amount;
  - in other cases the Ombudsman recommends financial compensation for injury or costs involved in pursuing the case, or other compensation which is not covered by the person's legal entitlements; and

- centralisation of act of grace payments in DoFA, where specific criteria apply, and agencies responsible for defective administration are able to pass the responsibility for payment (or for refusing a payment) to DoFA.

6.5 The following discussion expands these themes and canvasses the main issues raised during the investigation. Attachment C summarises the Ombudsman's initial views on these issues and agencies' responses.

Resource intensive and time consuming

6.6 Theoretically the existing arrangements provide adequate power to pay compensation whenever it is warranted. The general principles underpinning the compensation schemes provide for payment whenever:

- an agency is satisfied that the Commonwealth is legally liable; or
- that there has been defective administration; or
- DoFA agrees there are special circumstances; or
- the government is satisfied that a group of people has suffered particular losses.

6.7 In practice it has not been easy to persuade agencies that compensation is warranted in individual cases. Although few in number, much time and effort is expended by agencies and the Ombudsman in these cases, with some taking many months or even years to finalise, particularly if there are strongly held differences of opinion between the Ombudsman and the agency concerned about the merits of a case.

6.8 We accept that agencies should not accede to a recommendation they do not agree with, simply to avoid the effort and costs of further dispute. By the same token, we cannot ignore the Ombudsman's statutory obligation to pursue a remedy we believe is warranted, simply because it might involve a long and difficult process for us, the complainant and the agency concerned. But the 'war of attrition' we find ourselves engaged in at times does little to engender mutual respect or trust. We need to find a more efficient, cost effective way of dealing with these complaints. Recommendations in the Executive Summary address this.

6.9 One suggestion was that there is room for more behind the scenes negotiation, for the Ombudsman's office to gather unresolved complaints together for discussion with the agency concerned. We have done this occasionally but could do it more often. This approach is probably most effective to discuss a remedy, after we have reached a conclusion that there has been defective administration, but it may also be a useful method for resolving factual disputes.

Can the present rules provide compensation in all circumstances

6.10 When we began the investigation we had formed the impression, from various agencies' responses to our compensation recommendations, that there were gaps in the existing 'system'. Agencies told us that although they were sympathetic to the clients' predicament, they did not have the power to provide compensation in the circumstances where we had recommended they should. Responses from some agencies to the Ombudsman's 1998 letter reinforced that view. But others said they believe the existing schemes provide adequate power to pay compensation whenever it is warranted[45].

6.11 Most agency representatives at the meeting in April 1999 agreed that the existing schemes provide adequate power to meet any request for compensation that is warranted. They did not believe the 'system' is broken but agreed that some elements should be clarified.

6.12 In these circumstances it is difficult to argue that additional or different powers are required. The 'myth' that there is no power to pay in particular circumstances appears to have been laid to rest as a result of the investigation. The real issue is about the approach by some agencies to applying the rules. Paragraphs 6.17 to 6.23 expand this argument but there is a threshold question to consider first.

Different interpretations of concepts relevant to compensation and Ombudsman investigations

6.13 Differing interpretations of the concepts underpinning both Ombudsman investigations and the compensation mechanisms are a major problem. There is no generally accepted definition of the concepts in section 15 of the Ombudsman Act: 'unreasonable', 'oppressive', 'improperly discriminatory', and 'unjust' actions. Whether an action is unreasonable, for example, will depend on all the circumstances, including the constraints within which the agency is required to work, as well as their customer's circumstances. Determining whether an action was unreasonable requires a subjective assessment of what action would have been reasonable in all the circumstances. Ideally, to work out what actions are 'unreasonable' or 'unjust' we should be able to refer to standards of administration or service that the government and the community accept as reasonable and just. 'Defective administration' should be measurable by reference to a common understanding of what constitutes acceptable standards of administration.

6.14 At present there are no generally accepted standards against which we can measure whether a compensation payment is 'publicly defensible'[46], a requirement for compensation for defective administration. If you asked a range of agency officials to consider whether a particular action constitutes 'an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances'[47], you would receive a variety of answers.

6.15 These are key concepts for both Ombudsman investigations and the various compensation mechanisms. As noted in chapter 5, the Ombudsman has a statutory obligation to report to an agency if he believes particular action should be taken to rectify, mitigate or alter the effects of the agency's unlawful, unreasonable, oppressive, or unjust actions. Because there are no agreed objective standards against which these concepts can be measured, they can become the subject of debate between the Ombudsman and the agencies

[45] See Attachment C for details.
[46] Meaning 'fair' or 'just'.
[47] One category of defective administration specified in the CDDA rules.

concerned, lasting months or years in some cases. Time and resources are wasted having to argue from first principles in many cases.

6.16 This contrasts with the system now operating in income support agencies in the UK where there are clear, published standards against which maladministration can be measured. Chapter 7 provides details.

Inconsistent approaches to applying the compensation mechanisms

6.17 The compensation rules can be applied broadly enough to pay compensation in any circumstances that warrant it, or narrowly enough to exclude payment in almost any circumstances. Which approach is adopted may depend on the decision maker's own values or the guidance provided by the agency's Chief Executive's Instructions (CEIs) or other guidelines.

6.18 This accords with our experience of handling complaints involving compensation since 1995, when the Ombudsman welcomed the new arrangements for providing a remedy for losses resulting from defective administration[48]. The CDDA scheme made agencies responsible for remedying their own defective actions and gave them a method for doing so. It heralded what we hoped would be a new era, with agencies adopting a reasonable approach to paying compensation, without the need to persuade DoFA to make act of grace payments in most cases. That hope has not always been realised.

6.19 If an agency believes the individual circumstances warrant compensation, the existing avenues can be interpreted broadly enough to allow payment. But if the agency does not believe a payment is warranted, our arguments in favour of compensation can be rejected by the decision maker adopting a very narrow, restrictive view of the rules for each mechanism, particularly the CDDA scheme. Similarly, 'special circumstances' for act of grace purposes is a subjective concept incapable of definition, but in most cases when we believe there are special circumstances DoFA disagrees.

6.20 Before Centrelink was established, the major income support agencies tended to interpret the rules narrowly and rejected our recommendations for compensation as often as they accepted them. That approach was frustrating for agency customers and the Ombudsman's office alike. The statistics in Attachment A indicate that Centrelink[49] accepted 82% of our recommendations for compensation or waiver in cases finalised in 1997 and 1998. That is a welcome change from the approach taken by the former DSS (who accepted about 50% of our recommendations) and it will be interesting to see whether the higher rate is maintained.

6.21 We cannot always predict an agency's response because they do not always give clear reasons for accepting or rejecting a recommendation. This may be because they do not want to create a 'precedent', even though payments are often made under the discretionary CDDA rules rather than the settlement of claims rules which require the agency to accept legal liability.

6.22 Compensation recommendations are based on our conclusion that there has been defective administration but in most cases we do not specify the particular mechanism that should be used to pay it. We give reasons for concluding that compensation is warranted and leave it to the agency to determine which avenue is appropriate for providing payment.

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[48] Attachment B describes the background to the CDDA scheme.

[49] Centrelink began operating officially in September 1997.

Experience has shown that if we suggest a particular mechanism, an agency unwilling to pay compensation will focus their attention on finding reasons for that mechanism being inappropriate. They reject our recommendation without necessarily considering whether compensation is warranted under any of the other mechanisms. We then have to decide whether there is any point in pursuing the matter by suggesting they consider the other mechanisms, and if so, mounting arguments relevant to them.

6.23 This kind of cat and mouse routine is tedious, inefficient and costly for us and bewildering for clients. Agencies do not always deal with claims promptly[50] and clients find it very difficult to understand why it takes so long to resolve their complaint.

Defensive approach to defective administration and compensation

6.24 We have concluded from these experiences that there are few agencies willing to consider the possibility of their own defective administration with an open mind. Most react defensively to a suggestion that they have acted wrongly and caused their customer a loss warranting compensation. They do not appear to approach these suggestions with a real concern for the customer's circumstances. Their main focus appears to be protecting the agency, rather than responding to the customer's dissatisfaction or distress. We would prefer agencies to start by considering whether there has been a breakdown in their practices rather than how to avoid a compensation payment.

6.25 This perception was discussed during the meeting in April 1999, with general agreement that the spectrum of response ranges from defending the indefensible to compensating for every error, regardless of whether it amounts to maladministration. It was agreed that extreme reactions at either end of the spectrum are unjustified and that agencies should apply the rules sensibly and flexibly.

6.26 There is no magic solution to this problem. Suggestions during the meeting were that:

- disagreements about our conclusions should be sorted out by discussion with the agency before we propose any remedy;
- where the impasse persists there may be a need for a 'circuit breaker' of some kind, such as an ad hoc panel of interested bodies such as DoFA and A-G's or an independent expert, to whom the matter could be referred for an opinion; and
- agencies should provide clear explanations of their decisions to accept or reject a recommendation for compensation.

6.27 We intend to monitor agency responses for the next two years to see whether complaint outcomes indicate that there has been any improvement in handling compensation matters. If not, we may need to consider further reforms.

Inconsistencies in providing 'interest' in compensation payments

6.28 Agencies vary in their approach to including a component akin to 'interest' for unreasonable delays in providing compensation; or to reimburse interest the person actually outlaid if they had to borrow money as a consequence of the agency's actions; or to compensate a person for the value of money they had not had the use of. Agencies fall into two camps: those who believe an interest component can be paid, depending on the circumstances, and those who believe it can and should only be paid if there is a legal requirement to do so. For the latter, interest would be payable on compensation in settlement

[50] See Attachment B for details of the Commonwealth's policy on the settlement of monetary claims, including the requirement to act as a model litigant.

of a monetary claim but not on compensation paid under the CDDA rules. Agencies who pay 'interest' use different methods to calculate the rate.

6.29 The income support agencies argue that most compensation payments they make relate to underpayments of income support and the Social Security Act makes no provision for interest as part of an arrears payment. They argue that a customer who receives compensation should not end up in a better position than one who received their income support after a successful review or appeal. We acknowledge that statutory reviews and appeals can take a long time to finalise and that no interest is payable on a successful outcome, but in our experience most reviews do not take as long as most compensation matters. Delays aside, a payment resulting from a statutory review or appeal procedure is conceptually different from a compensation payment. Compensation involves reparation for the agency having done something unlawful (eg, negligent) or amounting to defective administration: more than simply making a wrong decision that can be fixed via the review and appeals procedure.

6.30 The approach taken by our income support agencies contrasts sharply with the DSS (UK) approach[51] to compensation. The Ombudsman will take this up with agencies when discussing the advantages of the DSS (UK) approach, before the end of this year.

Technical complexities and relationships between the existing mechanisms

6.31 We asked agencies to consider whether the 'system' could be improved by integrating the existing separate mechanisms into one comprehensive scheme based on the principles underpinning the existing schemes and the Ombudsman Act. Problems arise because there is a lack of clarity in the current mechanisms, including the fact that as a 'package' they are difficult to understand and explain. It is easy to confuse concepts relevant to one scheme with those relating to another. In addition, it is not easy to understand the implications of the mix of statutory and non-statutory schemes.

6.32 A-G's pointed out during the meeting in April 1999 that our explanation of the 'technical' basis for settling a monetary claim was wrong. We had thought it was based on the legislative authority of the FMA Regulations[52], whereas before 1 September 1999 it was actually based on the Commonwealth's executive power. The former policy on handling monetary claims, authorised by the government, was the basis for settling monetary claims. The FMA Regulations provided a means of ensuring compliance with that policy. Our mistake, although regrettable, is a good illustration of the point we were making.

6.33 The differences between the rules for the various mechanisms are not always easy to understand or apply. It is easy to blur the distinction between defective administration and the moral obligation DoFA require, to make an act of grace payment. It is also difficult to understand the differences between the rules for settling a monetary claim and the CDDA rules for considering a claim for defective administration.

- To make an act of grace payment the Minister for Finance and Administration (or his delegates in DoFA) must be satisfied that there are special circumstances warranting the Commonwealth making a payment. One of the criteria DoFA use to decide this is whether, in the special circumstances, there is a moral obligation on the Commonwealth to pay. It is difficult to find a moral obligation where there has been no defective administration by the Commonwealth. Otherwise, why should the Commonwealth be

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[51] See chapter 7.

[52] Because FMAR 9 and FMAR 13 allow public officials to pay out money in accordance with Commonwealth policies.

more morally obliged to pay than anyone else? The difficulty here is DoFA's view that an act of grace payment is not appropriate where there has been defective administration: the CDDA scheme was established to authorise payments in those circumstances. This means that there will be very few circumstances where act of grace payments can be made, on DoFA's limited interpretation of what constitutes 'special circumstances'.

- The CDDA scheme authorises financial compensation for non-financial damage, but the amount must be determined by having regard to relevant legal principles and what the courts have awarded to successful plaintiffs for comparable damage. This is so despite the fact that the CDDA scheme provides compensation for detriment caused by defective administration that falls outside the boundaries of legal liability. It requires either an element of unreasonableness, or clear error or ambiguity in advice provided. Difficulties arise because the most analogous legal principles for 'defective administration' are often those applicable to the tort of negligence.

6.34 The following example illustrates this difficulty in applying the CDDA scheme. Take a case where a CDDA payment is considered appropriate to compensate for the detriment caused by wrong or ambiguous advice. Does the requirement[53] to consider legal principle in assessing the amount mean that because negligent mis-statement can only give rise to damages for economic loss, the CDDA payment cannot include a component for non-financial loss, even though the scheme provides for payment of such loss and the agency's customer may have suffered it? This remains a mystery.

6.35 Questions then arise as to how and when the CDDA scheme fits in anyway. Most requests for compensation relate to defective administration of some kind, whether it amounts to negligence or not. Agency guidelines[54] suggest that officers consider the request for compensation by first examining whether payment could be made for legal liability under the policy (now directions) on handling monetary claims; secondly by considering the request under the CDDA scheme; and finally by considering it under the act of grace arrangements.

6.36 That order of consideration may be the most logical, as act of grace is a mechanism of last resort and a CDDA payment is not available where the Commonwealth would be legally liable. But as we discuss in chapter 7, it is not the only way of dealing with compensation matters. DSS (UK) look first to their non-statutory scheme for providing financial redress for official error, because most requests they receive for compensation relate to losses resulting from some kind of official error. Their scheme, like our CDDA scheme, is also not available where there is legal liability. The DSS (UK) guide for considering financial redress for maladministration contrasts strikingly with our compensation arrangements. It specifies particular circumstances which DSS (UK) accepts as official error warranting compensation. During the meeting in April 1999 agencies agreed that this may be a useful model to pursue.

6.37 Despite the difficulties, most agencies agree that they could 'live with' the current arrangements if they were explained more simply and interpreted sensibly. One suggestion was that agency guidelines on compensation consist of a set of general principles and examples of the kinds of circumstances in which compensation is warranted and those where it is not.

6.38 Agencies agree that they are in the best position to manage their own risks and most support devolution of the act of grace power to agency heads, as this would provide them

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[53] See the description of the CDDA scheme in Attachment B.

[54] Examples are the ATO, CSA and Centrelink guidelines for handling requests for compensation for maladministration.

with the full range of powers available to approve a compensation payment in any circumstances. Devolution accords with the philosophy and accountability regime established by the FMA Act. DoFA indicated that they are considering whether to recommend devolution of both the act of grace and waiver powers. Agency representatives at the meeting in April 1999 supported devolution of both powers.

Disputes about the facts

6.39 Unless there is a reasonable, objective approach to determining the facts in each case it is impossible to have any meaningful discourse with an agency about compensation. The Ombudsman's office and the agency concerned need to be confident that the investigations they each conduct are fair and that their conclusions are soundly based. To draw any conclusions we need to be confident that we know what happened, so far as possible.

6.40 Investigation practices can differ but most of those involving compensation can be summarised as follows:

- when we receive a complaint we ask the client to give us as much detail as possible about what led to the problem;
- we then assess whether we need further information from the agency to help us work out whether we should investigate the matter;
- if so, we contact the agency and ask for their comments on the complaint;
- depending on their response we decide whether to take further action;
- if all the information indicates no defective administration[55] we tell the complainant there is no reason to investigate further and explain why;
- we let the agency know we will not investigate the matter further;
- but if all the information indicates that there may have been defective administration, we put the facts, as we understand them, to the agency for response;
- if the agency accepts that their actions resulted in a loss to the client we suggest that the agency consider possible remedies, including compensation if we believe it is warranted;
- if the agency does not accept that the client's loss resulted from their actions we ask them to explain why, if they have not done so already;
- sometimes the agency's reason is that they have no written record[56] of what happened but they are confident that their staff would not do or say what the client says they did or said;
- sometimes we reach an impasse, with the agency refusing to accept responsibility for the loss and the Ombudsman's office unable to persuade them to change their view, even

[55] The problem may relate to the intended consequence of legislation, or it may result from their own or someone else's actions, not the agency's. We suggest that the client discuss the matter with their federal member if they believe the legislation should be changed. There may also be other action we can suggest.

[56] Our report on oral advice (op cit.) discusses the problems for clients in corroborating their version of the events when an agency has no written record of oral advice provided.

where the client's actions were completely consistent with their version of what the agency did or said and inconsistent with the agency's version.

6.41 In some cases where we believe the client and the agency have provided all the relevant information, we conclude that there has been defective administration and make a recommendation for compensation. But the agency then rejects our conclusion about the facts, because their own records or staff tell a different story. It appears that in these circumstances the agency has not checked the facts thoroughly until they received our conclusion and recommendation. If they had checked more thoroughly much earlier, when we first sought their comments, much time and effort could have been saved.

6.42 One way to address this problem is to ensure that both Ombudsman and agency staff who handle complaints have adequate training and skills to consider them objectively. Comments made during and after our meeting with agencies in April 1999 indicate that we need to address negative perceptions in some agencies about the quality of our investigations, for an improved working relationship to develop. One suggestion was that the Ombudsman set up a small interdisciplinary review team, comprising Ombudsman staff and other experts in relevant fields, to examine and possibly benchmark the Ombudsman's investigation and reporting procedures. The Ombudsman welcomes this suggestion and agrees that it may help to clarify our approach and the reasons for agency resistance to accepting our compensation recommendations. The Ombudsman intends to monitor the quality of our investigations more closely and provide clearer guidance to our staff on handling these complaints.

6.43 We believe agencies should also assess the skills and training needs of their staff who handle Ombudsman complaints and other requests for compensation. Our examination of submissions prepared for compensation decision makers indicates that they are sometimes objective, seeking the truth, but at other times they are self-serving. Paragraph C.70 in Attachment C indicates the kind of action required and the CSA's response[57].

6.44 Lack of skill or training in investigative fact finding can lead to making questionable assumptions about the credibility of the person claiming a loss; or about the competence of the particular staff members involved in providing the information or advice that led to the problem; or about an objective fact such as whether a letter contained a particular standard paragraph or not. Better skills in these areas may obviate the need for compensation requests altogether in some cases and help agencies to 'get it right the first time' as well as pick up the pieces more effectively if something does go wrong. With agencies now handling more compensation requests themselves, without having to refer them to AGS for advice[58], improved investigative skills and an objective focus are essential for fair outcomes. Ombudsman staff liaise regularly with some agencies and participate in their staff training, and can do so for other agencies if they believe it would assist.

6.45 Ombudsman and agency staff need to

- approach a complaint impartially, with an open mind;
- consider the complainant's credibility and whether their actions were more consistent with their version of the events or with the agency's version;
- consider all the information available, and all the circumstances, not ignore the bits that do not fit their usual assumptions or their own values;

[57] The CSA and Centrelink told us they have instituted national training programs for staff involved in handling compensation requests.

[58] Agencies are only required to seek external legal advice on requests for more than $10,000.

- consider whether, in all the circumstances, it is more likely than not that the complainant's or agency's version of events rings true: a criminal standard of proof beyond reasonable doubt is not required or reasonable.

Lack of understanding of the Ombudsman's role

6.46 Agency submissions to their decision makers and responses to our investigations indicate that not all agency staff who handle Ombudsman recommendations for compensation understand his role as an impartial investigator of alleged maladministration. For the Ombudsman to work as an effective part of the administrative law system, agency staff must have at least a rudimentary understanding of his role in investigating complaints and improving public administration. Constraints on resources available to public sector agencies, including the Ombudsman's office, mean that we are now more than ever an avenue of last resort.

6.47 Part of our role is to effect improvements through the feedback we can provide to agencies and parliament from our experience of handling complaints. We know most agencies are required to operate under stringent resource constraints that lead to cutting corners and taking risks. To remain relevant and to effect necessary changes to agency practices we cannot afford to be pedantic about every mistake. While being realistic we also need to remain impartial, although that is not always as easy as it sounds. Agencies may regard us as nitpicking and unreasonable about the difficult circumstances in which they work, while at the same time some of their customers may regard us as useless because we did not take up the cudgels on their behalf.

6.48 We receive responses from agencies that refer to our 'representations on behalf of' a complainant. This appears to confuse the Ombudsman's role with that of members of parliament, who do make representations on behalf of their constituents, without necessarily investigating the merits of their complaints. Such responses do not inspire confidence that the agency has properly considered the matters we put to it.

6.49 There has to be an element of trust and cooperation between the Ombudsman's office and agencies whose actions we investigate. Agencies must be able to have confidence that we will investigate any complaint of alleged defective administration thoroughly and impartially, before drawing any conclusions or making any recommendations for remedial action. By the same token, the Ombudsman must be able to trust that the agency will cooperate with his staff during an investigation; will not withhold relevant information; and will consider with an open mind both a conclusion that the agency has acted defectively and a recommendation for remedial action. Trust and respect must be earned on both sides. Achieving it will not lead to the Ombudsman automatically accepting an agency's assertions or the agency accepting the Ombudsman's conclusions without due consideration. But it should lead to a more balanced approach to considering financial remedies.

6.50 One agency suggested[59] that the CDDA guidelines could be clarified to ensure that if the agency concerned agrees that there has been defective administration, the Ombudsman's recommendation alone could be a basis for payment. There was support in principle for this suggestion during the meeting in April 1999. Comments we have received from agencies since then indicate that the proposal itself requires some clarification.

6.51 In our view, the suggested amendment would simply provide more flexibility to the existing provisions. The CDDA guidelines would require amendment to add a category. It would provide that the agency would be authorised to pay compensation if, following their own investigation, they agreed with the Ombudsman that there had been defective administration directly resulting in detriment to the customer, whether or not the agency's

[59] See paragraph C.76-77 of Attachment C.

action fell within one of the other CDDA categories. The agency would retain its autonomy to determine whether there had been defective administration, as well as the delegation to decide whether they would pay compensation. Other considerations would remain relevant, including assessment of the detriment caused and how to quantify it.

Limitations on backdating payments in social security legislation

6.52 Our discussion paper *'Balancing the Risks'*[60] describes the difficulties people face in obtaining arrears of pension entitlements when they do not seek a review of a Centrelink decision within thirteen weeks. This limitation applies even if a person had no basis for knowing they should seek a review, because information about the decision was inadequate. Our report on issues relating to oral advice[61] discussed the problem in detail. Case study 4 in chapter 2 illustrates it. The limitation on backdating can also prevent payment of arrears even when the person did have adequate information about the decision but because of other circumstances did not seek a review of the decision within thirteen weeks.

6.53 We believe the statutory limitation provisions are unfair, unjust and unreasonable in some circumstances. They prevent people from receiving income support they would otherwise have been legally entitled to, even though there were valid reasons for their failure to use the statutory review procedures within the time limits prescribed. Centrelink and DFaCS indicated that DSS had been unsuccessful several years ago in having the arrears provisions amended. We understand the proposal was to provide discretion in the Social Security Act for the Secretary to pay arrears up to twelve months in appropriate circumstances. We understand that the proposal was rejected more for philosophical than budgetary reasons. The argument is that the social security system is not intended to provide people with potentially large capital sums and that payment of significant arrears would result in people getting more than they should in accordance with policy.

6.54 We reject that view. Providing a discretion to pay arrears in limited circumstances for up to twelve months would effect a more balanced outcome between fairness to the customer and management of government revenue. It would provide customers with the amount of income support their circumstances would have entitled them to receive under the legislation, or for those with arrears extending longer than twelve months, a part of what they were entitled to. Such a provision would not open the floodgates for spurious claims because only genuine, credible circumstances would have any chance of approval.

6.55 While it may be argued that paying arrears in these circumstances could be seen as a windfall to the person concerned, it can just as easily be argued that refusing to pay arrears is a windfall to the Commonwealth, that does nothing to increase community respect for governments or public administrators. We see people who are angry or cynical because they have been refused a compensation payment because they could have used the review provisions but didn't, for valid reasons.

6.56 The basis for refusing compensation in these circumstances is a principle established in an English case in 1989, known as the *Jones* case[62]. The principle is this: where a public

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[60] op cit. Section 80 of the *Social Security Act 1991* is the first relevant provision, setting out the date of effect of determinations for age pensions. Section 80(3) provides that if a person applies for review of a decision more than 3 months after the Secretary notifies them of it, a favourable determination takes effect from the date they sought review. Each type of pension or benefit has similar provisions.

[61] op cit. See pages 67 to 70 of that report.

[62] *Jones v UK Department of Employment* [1989] QB 1; [1988] 2 WLR 493; [1988] 1 All E. R. 725, C.A. Followed in *Coshott v Woollahra Municipal Council* [1988] 14 NSWLR.

official exercises a statutory power that is subject to a specific statutory right of review or appeal, the exercise of that power in good faith will not give rise to a common law action for negligence.

6.57 By way of example, a Centrelink officer may make a wrong decision on a pension entitlement and notify the customer of the amount they will be paid. From Centrelink's letter and their own knowledge (or lack of knowledge) and experience of pension entitlements, the customer may not see any reason to query the amount. If the customer discovers six months later that they have been underpaid for some reason they were unaware of, they cannot claim compensation for the loss, because they should have used the review provisions in the Social Security Act to have the decision changed, by asking for a review within three months of being notified of the wrong decision.

6.58 Most people receiving income support need as much as they can legitimately get at the time they make a claim or when their circumstances change. If they believe a decision is wrong they will use the review provisions to challenge it as soon as possible. Few people who have reason to believe a decision is wrong would deliberately choose not to ask for a review. If a customer has no reason to believe the decision is wrong, compensation is the only possible avenue for obtaining the 'arrears' if they discover the mistake more than thirteen weeks after they were notified of the decision. But agencies rely on the *Jones* principle to refuse compensation in most of these cases.

6.59 If the proposal to amend the legislation were accepted, many Centrelink customers who now approach us for help to get compensation would at least end up with some arrears, up to twelve months worth depending on the circumstances. In the Ombudsman's opinion that compromise would be fair. It may also alleviate some of the anger and cynicism towards governments that people express when they are refused payments they believe they had a statutory right to receive.

6.60 In cases where it is clear that the loss of entitlement resulted directly from an agency's unlawful action or defective administration it would be open to the agency to provide further redress by making a payment under the relevant compensation rules.

Waiver of recovery of debts

6.61 Case study 15 in chapter 2 illustrates why customers would benefit if agencies themselves had the power to waive recovery of debts. While it is true that the exercise of the power by DoFA maintains consistency in how and when it is exercised, it is also true that no single agency can be fully aware of all the circumstances where it would be reasonable to waive a debt. Even though DoFA receive advice from the agency concerned when considering a request for waiver, they may not be fully aware of the practical consequences of a refusal to waive the debt for the individual concerned. In our experience the main focus of DoFA's consideration appears to be whether the debtor would suffer unreasonable financial hardship in repaying the debt.

6.62 DoFA told us they are considering whether it would be in the Commonwealth's interests to recommend that the Minister for Finance and Administration devolve his act of grace and waiver powers to agency heads. If agency heads had these powers they would have the full range of powers available to provide financial redress where it is warranted. During the meeting in April 1999 there was general support for devolution.

7. INTERNATIONAL COMPARISON

The UK Ombudsman's experience

7.1 In seeking ways to improve the effectiveness of our compensation arrangements, we discovered that the UK Ombudsman had encountered some of the problems we have. According to his 1995 annual report a UK parliamentary committee reported[63] in January 1995 on the practices of government departments in providing redress for maladministration. The UK government responded in March 1995 largely accepting the committee's recommendations.

7.2 The UK government:

- accepted that the Treasury guidance on redress was out-dated and confirmed that it was being revised;
- agreed that agencies providing services to the public should produce internal written guidance on the consideration of redress in maladministration cases;
- affirmed the principle that agencies should seek to identify all those affected by maladministration and offer appropriate redress;
- accepted that agencies should have systems in place to prevent the recurrence of administrative failings;
- acknowledged the desirability of greater consistency among agencies in granting redress, including rates of interest, where appropriate; and
- accepted that financial compensation for worry and distress should be available in exceptional cases.

7.3 Another element of the UK government's response was that staff instructions should emphasise that where mistakes have been made, the priority of the organisation would be to avoid a 'blame culture', to encourage the ready admission of mistakes, the provision of swift and effective redress and steps to ensure that a similar failure did not recur. The UK Ombudsman welcomed that approach because it encourages prompt, polite and positive handling of complaints at the local level and avoids fostering the attitude that a complaint is a personal affront.

7.4 The UK Ombudsman's 1995 annual report noted that:

- departments were being consulted on the revision of treasury guidelines on redress for maladministration and that a revised version was due to be issued in 1996; and
- both the Inland Revenue and Social Security Benefits Agency [DSS (UK)] were reviewing their internal guidance on redress.

7.5 The UK Ombudsman's experience was similar to ours in that most requests for compensation for maladministration relate to income support. His 1997-98 annual report indicates that he had experienced similar difficulties to ours in trying to achieve remedies based on the principles underpinning Ombudsman recommendations in the face of limitations in the available compensation mechanisms. He stated the principle he applies in all cases where injustice has been caused by maladministration: where possible, to seek to have the person who has suffered the effects of maladministration put back into the position they would have been in if the maladministration had not occurred.

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[63] *'Maladministration and Redress'*, a report on the Inquiry by the Select Committee on the Parliamentary Commissioner for Administration, SC: First Report, 1994-95, HC 112.

7.6 Applying that principle had led the UK Ombudsman to make various recommendations for redress going beyond the scope of an agency's existing non-statutory arrangements for compensating people who had suffered financial loss, wasted expense, or inconvenience and distress as a result of the agency's shortcomings. The UK Ombudsman said that after discussions in 1997 with the head of DSS (UK), outstanding issues of principle were resolved, though there were some matters remaining to be settled and still some cases of delay in providing a remedy. DSS (UK) subsequently revised their guidelines for providing financial redress for maladministration.

Major incentives for improving compensation arrangements

7.7 We understand[64] that the impetus for improving the DSS (UK) compensation arrangements came from five main areas:

(a) The Customer Charter movement which promoted the idea that citizens deserve good standards of service and redress when it is not achieved.

(b) The creation of agencies accountable for operational outcomes.

(c) The corporate vision within DSS (UK) that customers be paid their proper entitlements when they were due: encapsulated in the phrase 'right person, right money, right time'.

(d) Some very large examples of citizens being disadvantaged, including the way the CSA (UK) and the disability living allowance were introduced. The UK Ombudsman's review of the CSA (UK)'s shortcomings was very critical.

(e) The introduction by privatised utilities (energy, telecommunications and rail) of simple compensation schemes for service defects.

7.8 We understand that the UK Cabinet Office and Treasury made clear that good service was expected, appropriate compensation was to be paid and that agencies had to find compensation within their ordinary budgets. These changes coincided with tight budgets and growing awareness that the administrative costs of getting things wrong (complaint review requests, appeals, overloaded offices, ombudsman complaints) was too high.

7.9 We understand that DSS (UK) required local managers to meet the costs of compensation from within the budgets of the units responsible for the maladministration. That helped to raise the profile of the agency's drive to do things correctly and sent a very strong signal for effective management to local managers and their staff. The new compensation arrangements provide an incentive to improve performance and although they have resulted in more payments in the short term they should also save money in the long term. We understand that clearance times have improved within DSS (UK) partly as a result of the new compensation arrangements.

DSS (UK) Guide to Financial Redress for Maladministration

7.10 In December 1998 DSS (UK) published the most recent edition of Volume 1 of their guide to financial redress for maladministration. It is instructive to see how similar problems have been addressed in another country with similar concepts of government services and standards and similar systems for investigating complaints and providing redress. The guide provides a concrete example of how our current arrangements could be made more effective.

[64] Background information on the establishment of the DSS (UK) scheme was provided by Mr David Riggs, Chief Financial Officer for the Australian Government Solicitor. Mr Riggs was the Finance Director for DSS (UK) from 1991 to 1998.

7.11 It is obvious that the guide was developed after consultation with the UK Ombudsman. We corresponded with DSS (UK) during the investigation to clarify some of the differences between our compensation arrangements and theirs. The guide applies to all DSS (UK) agencies[65] and comprises two volumes.

- Volume 1 states the general principles on which financial redress is based; lists examples of maladministration and sets a context in which to consider 'official error'; describes the circumstances in which financial redress should be considered and payments made; and includes methods of calculating payment.

- Volume 2 contains internal administrative procedures to be followed for processing requests for compensation, authorising payment and completing financial returns.

7.12 Volume 1 is available to members of the public to read at every DSS (UK) office and can be purchased from the government stationery office. Volume 2 is only available at DSS (UK) offices responsible for completing monthly, six monthly and annual returns. It is not available for purchase but anyone who asks to see it can do so at a relevant DSS (UK) office.

7.13 The guide applies to discretionary, ex gratia payments where there is no legal liability to compensate the person concerned. It covers the same territory as our CDDA and act of grace payment arrangements, namely, compensation for loss caused by defective administration or special circumstances[66]. As with our arrangements, consideration of compensation for legal liability remains separate and outside the scope of the guide.

7.14 The guide sets out four categories for considering payments to redress maladministration:
- loss of statutory entitlement;
- actual financial loss;
- delay; and
- consolatory payments.

7.15 These are discussed briefly in this chapter. DSS (UK) pointed out that they have a 'safety net' clause, where 'sympathetic treatment can be considered regardless of whether or not maladministration has occurred'. Although there is no statutory basis for that clause, in all other respects it appears to equate with the act of grace power contained in our FMA Act.

Advantages compared with our compensation arrangements

7.16 The major differences between the UK guide and our arrangements are:
- it sets out the DSS (UK) timeliness standards or targets for finalising claims in each category of pension or benefit and indicators of delay (if these indicators are exceeded compensation should be considered, although it is not paid automatically for delay);

[65] The DSS (UK) includes their Child Support Agency; Benefits Agency; War Pensions Agency; Employment Services Agency; Contributions Agency; and Independent Tribunal Service.

[66] The DSS (UK) guide does not apply to one category where DoFA would approve an act of grace payment here, namely, a payment made when, because of official oversight, current legislation does not reflect the intentions of ministers but statutory payments cannot be made pending legislative amendment. Payments of that kind are not made in respect of maladministration and are therefore outside the scope of the DSS (UK) guide, which defines this category as 'extra-statutory payments'. But although they are not payments within the scheme described in the guide, these extra-statutory payments are recorded and monitored as if they were within the guide. (No compensation arrangements are perfect!).

- it gives specific examples of maladministration and provides definitions for some of the circumstances in which compensation is payable, whereas our schemes generally do not;
- it provides for consolatory payments for gross inconvenience, gross embarrassment and severe distress, gives examples and a range of potential payments.

7.17 The guide also sets out six basic principles that should be followed when considering redress:

- all mistakes are admitted and put right;
- arrangements for considering redress are made public;
- redress is fair and reasonable;
- as far as possible, redress restores the customer, or in very exceptional circumstances a third party, to the position they would have been in but for the official error; and
- due account is taken of the needs of the customer and protection of the public purse.

7.18 The advantage of these differences is that the UK Ombudsman does not have to argue for compensation from first principles every time, because there are agreed standards regarding:

- what constitutes actual loss;
- when interest is payable;
- what constitutes loss of a statutory entitlement;
- what constitutes unacceptable delay; and
- what forms of maladministration may attract a consolatory payment for gross inconvenience resulting from persistent error; gross embarrassment, humiliation or unnecessary personal intrusion; and severe distress.

7.19 The impression we gained from DSS (UK) is that compensation for maladministration is regarded as part of the service they provide to their customers. They told us the guide is written with the hope that it is easy to understand by both staff and customers alike.

7.20 We told DSS (UK) that the distinctions here between legal liability and defective administration are not always easy to discern and that in our experience some agency staff appear confused by the different criteria. In response DSS (UK) said they had read our comments about the cross over between legal liability and defective administration with great interest. They had seen that the vast majority of legal claims have arisen where there is perceived to have been maladministration and that a remedy is available under the departmental arrangements.

7.21 We understand from those statements that DSS (UK) considers compensation requests in terms of their non-statutory guidelines first, to see if a remedy is available. If not, they then refer the matter elsewhere for consideration of legal liability. Under our arrangements the reverse occurs, with agency guidelines stating that legal liability should usually be the first consideration. If there is no legal liability, CDDA should then be considered, with act of grace a last resort. The main advantage of the DSS (UK) approach is that compensation can be offered relatively quickly, without admitting legal liability. While some care is needed in adopting that approach the risks appear to be minimal in most cases.

7.22 The DSS (UK) guide provides for financial redress for the following categories of maladministration.

Loss of statutory entitlement

7.23 This category refers to cases where official error has led to a customer losing entitlement to a benefit they would otherwise have received, if the error had not occurred or the case had been actioned within a reasonable time. The guide states that this will usually occur because of:

- misdirection (providing wrong, misleading or wholly inadequate advice); or
- defective legislation (where a previously unrecognised defect in the law means that a group of customers are unable to get a benefit it was always intended they should receive)[67].

7.24 One example of misdirection is 'when a claim for income support was made 3 years late, good cause for the late claim was accepted because the customer had been wrongly advised by DSS (UK), but the claim could only be backdated for 3 months under the legislation. As benefit would have been claimed earlier and therefore awarded for the full period if correct advice had been given, a special payment would be due for the period of the exclusion: in this example for 2 years and 9 months.'

7.25 A payment for loss of statutory entitlement attracts interest for loss of use of the payment in the same way as arrears of a statutory benefit, where the relevant criteria are met, as outlined in paragraph 7.28. The approach taken by DSS (UK) to paying interest differs from the approach by the former DSS (now DFaCS) and Centrelink here. When we have asked for an interest component to be included as a remedy for the delay in paying income support in similar circumstances, the response has usually been that:

- the income support legislation makes no provision for payment of interest; or
- compensation is usually paid in a lump sum, whereas if the defective administration had not occurred the customer would have received the money in fortnightly payments and would not have been in a position to invest them to earn interest. Receiving a lump sum is adequate compensation, without the need to add a component to compensate for delay.

7.26 These arguments fail to recognise that compensation is not a payment under the income support legislation, as are arrears payable after a successful review or appeal. Compensation is a payment of 'damages' for not having received income support at the appropriate time. In our view the two concepts are quite different. If an interest component were payable either as a general rule or in specified circumstances under the CDDA scheme, it may serve as an additional incentive to improve service, similar to the DSS (UK)'s experience.

Delay

7.27 The guide defines what 'delay' means for the purpose of providing financial redress. Payments for delay recognise a customer's loss of use of a sum of money which they would have enjoyed but for the agency's error. They are calculated in the form of interest on arrears of benefit; refunds of national insurance contributions; or exceptionally in certain categories of CSA (UK) payments, using the average shares rate supplied by the Building Society Commission. The guide states that it is not necessary for a customer to claim such a payment or state that a loss has occurred. Where arrears accrue, the agency should consider such a payment automatically in all cases.

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[67] Compensation payments for defective legislation are 'extra-statutory' payments, outside the scope of the DSS (UK) guide. See footnote 66.

7.28 The 'trigger' points for redress are usually the department's clearance targets for the relevant benefit. The guide contains target dates (number of working days) for finalising claims for each type of benefit. They are indicators of intended performance but they are not guarantees. Failure to finalise a claim within the target date will not necessarily give rise to a compensation payment because each case is considered on its own merits. To assist that consideration, objective indicators of delay (number of months) are set out in the guide for each type of benefit. These indicators are calculated by multiplying the clearance target time by 3, subject to a maximum period of 12 months. For example, if the clearance target for an incapacity benefit were 30 working days, the delay indicator would be 4 months.

Actual financial loss

7.29 This refers to cases where the agency's maladministration has directly caused the customer to incur additional expense, which would not have been incurred otherwise, for example, in pursuit of their claim for a benefit; or where a payment delay results in bank charges.

Consolatory payments

7.30 The guide defines each of the consolatory payment categories and gives examples of the factors to be considered in determining whether a payment should be made. The scales for consolatory payments were derived in consultation with DSS (UK) solicitors and are designed to provide relatively quick and equitable redress.

7.31 The following example illustrates how one category of consolatory payments is defined in the guide:

'Gross inconvenience resulting from persistent error'

- Frequent and unnecessary disruptions to benefit payments.
- Repetitive requests for information.
- Official and repetitive loss of information.
- Excessive use of own time (where there is no actual financial loss).
- Mishandling of complaints.

7.32 The guide explains the factors relevant in considering financial redress for this category of payments as:

- whether there has been persistent error and if so, how serious it was;
- in cases of delay, whether the customer contacted DSS (UK) about it;
- how long the errors persisted;
- what impact they had on the customer;
- whether the customer contributed to the situation; and
- what amounts have been paid in similar cases.

7.33 The following examples illustrate what is meant by 'persistent error' for the category of 'gross inconvenience':

- If there were individual errors in 1984/87/90 these could be regarded as regular but would not be considered persistent.
- There may be repeated delays in receiving benefit payments due to error over a period of 2 to 3 months which may be regarded as persistent error.
- There may be repeated failures to deal with correspondence fully, but you would expect the period of time and frequency of such errors to be greater than a case where the department

has failed persistently to pay benefit in a timely way, before you consider a consolatory payment.

- You may have a combination of more than one of these examples of gross inconvenience and you have to have regard to the individual circumstances in each case.

7.34 The guide sets out the range of payments for each category of consolatory payments:

- For gross inconvenience resulting from persistent error the range of payments is 50 to 150 pounds sterling, with an expected maximum of 250.
- For gross embarrassment, humiliation or unnecessary personal intrusion the range is 50 to 500 pounds, with an expected maximum of 750. An automatic payment of 100 pounds is made when the CSA (UK) issues a maintenance inquiry form to a wrongly identified 'non-resident parent'.
- For severe distress the range is 50 to 1,000 pounds, with an expected maximum of 2,000.

Exceptional cases not covered by the guide

7.35 The guide states that exceptional cases may arise which have a very strong case for sympathetic treatment but which are not specifically covered by the criteria contained in the guide. It states that such cases should not be rejected automatically but should be referred to DSS Headquarters.

7.36 There was general agreement at our meeting with agencies in April 1999 that the UK approach is a useful basis for further discussion about how to improve our compensation arrangements. The Ombudsman will contact agencies about this. We believe it would be a much more efficient use of time and resources to develop a range of agreed standards with individual agencies than to keep on reinventing the wheel.

ATTACHMENT A

COMPLAINTS CLOSED 1.1.97 TO 31.12.98 INVOLVING COMPENSATION FOR ALLEGED MALADMINISTRATION

A.1 The tables appearing on the following two pages provide information taken from the Ombudsman's records of complaints finalised in the two years 1 January 1997 to 31 December 1998.

A.2 The tables refer to **all** complaints finalised in that period where the subject of compensation for maladministration was discussed. They therefore include complaints we received regarding actions of CAC Act agencies, although the compensation mechanisms that were the focus of the investigation do not apply to them. As stated in chapter 1 the investigation focused on compensation mechanisms available to FMA Act agencies. The information about complaints concerning actions of CAC Act agencies is included simply to provide the whole statistical picture about complaints where financial redress was discussed.

A.3 The tables describe whether we investigated the complaint or not and indicate the reasons for not investigating, either because the matter was not raised first with the agency concerned or because there was no basis on which we could recommend compensation. Where we did investigate, the tables indicate

- where there was no basis for us to recommend compensation;
- whether it became clear during the investigation that the agency was considering compensation or waiver, although we had not suggested they do so (perhaps because the client had already asked them to, before approaching the Ombudsman): in many of these cases we do not know the outcome of the agency's deliberations;
- whether we suggested or recommended that the agency consider compensation or waiver, and if so, what the outcome was; and
- whether the agency provided some other appropriate remedy to resolve the complaint.

A.4 These statistics should be treated with some caution because the number of complaints is relatively small and fluctuates from year to year.

AGENCY[1]	TOTAL	LAPSED	NOT INVESTIGATED		INVESTIGATED													
			1. Not raised with agency	2. No basis for us to recommend compensation	1. No basis for us to recommend compensation	2. Agency response to client's request for compensation			3. Agency response to client's request for waiver				4. We suggested compensation		5. We suggested waiver			6. Othe remed provide
						Agreed	Rejected	Unknown	Accepted		Rejected	Unknown	Accepted	Rejected	Accepted		Rejected	
									Part	Whole					Part	Whole		
Centrelink	344	5	147	26	48	8	2	38		12		1	19	4	4	20		10
DSS	105	2	26	2	10		1	10		1		1	23	21		2	3	3
CSA	150	3	56	3	20	16	1	36	1			3	3	1	1	2		4
ATO	82		16	7	3	2		2										52
DEETYA	39	2	10	3	2			2	1	1		1	7	2	1	4	1	2
AFP	25	1	2	2	3	8	1	5					1					2
DEFENCE &	4D 12A		2D 7A		1A			1D					1D					
A;AF;N[2]	3AF 2N		1AF		2N	1AF		1AF					2A					2A
DIMA	18	1	4		4								6	1				2
DVA	11		4	1						1			2			1		2
DHFS	8	1	3		1								2				1	
ACS	6		1										4					1
DPIE	6		2		2								2					
COMSUPER	4		2	1														1
A-G'S	5		2		1								1					1
DFAT	4		2		2													
DAS	2			1														1
DoE	2		1					1										
DoFA	2		1		1													
DIST	2		2															
ABS	1				1													
FAM COURT	1		1															
FED COURT	1		1															
TOTAL	839	15	293	46	101	35	5	96	2	15		6	73	29	6	29	5	83

AGENCY[1]	TOTAL	LAPSED	NOT INVESTIGATED		INVESTIGATED													
			1. Not raised with agency	2. No basis for us to recommend compensation	1. No basis for us to recommend compensation	2. Agency response to client's request for compensation			3. Agency response to client's request for waiver				4. We suggested compensation		5. We suggested waiver			6. Othe remed provide
						Agreed	Rejected	Unknown	Accepted		Rejected	Unknown	Accepted	Rejected	Accepted		Rejected	
									Part	Whole					Part	Whole		
AUSTPOST	151	5	43	7	9	44	3	14					11					15
TELSTRA	8		7															1
HIC	6		2	2	2													
ASIC	5		1		4													
COMCARE	5		3					1					1					
ANCA	1					1												
ANRC	1				1													
ASA	1					1												
AUSTRADE	1				1													
CASA	1		1															
NGA	1												1					
TOTAL	181	5	57	9	17	46	3	15					13					16

1. Agencies listed from Centrelink to Federal Court are subject to the FMA Act.
Agencies listed from Australia Post to the National Gallery of Australia are subject to the CAC Act.

2. A; AF; N. Army; Air Force; Navy
ABS Australia Bureau of Statistics
ANCA Australian National Conservation Agency (now the Biodiversity Group; formerly National Parks and Wildlife Service)
ANRC Australian National Railway Corporation
ASA Air Services Australia
ASIC Australian Securities and Investment Corporation
AUSTRADE Australian Trade Commission
CASA Civil Aviation Safety Authority
DAS Department of Administrative Services (now DoFA)
DoE Department of Environment
DFAT Department of Foreign Affairs
DPIE Department of Primary Industry and Energy
DVA Department of Veteran's Affairs
FAM COURT Family Court of Australia
FED COURT Federal Court of Australia
NGA National Gallery of Australia

ATTACHMENT B

FMA ACT FRAMEWORK AND MECHANISMS FOR PROVIDING COMPENSATION

B.1 Understanding the compensation mechanisms requires an awareness of the general framework established by the FMA Act. The following comments are based on documents DoFA provided to Commonwealth agencies when the FMA Act came into operation in January 1998 and on information provided during the investigation by A-G's.

Financial Management and Accountability Act 1997

B.2 The FMA Act is one of three statutes that replaced the *Audit Act 1901*.[68] It is accompanied by FMA Regulations and Orders which replaced the Finance Regulations and Directions. Together they complement the contemporary public sector environment which DoFA sees as emphasising outcomes rather than process, devolution rather than centralisation, flexibility rather than restriction, and innovation rather than stagnation.

B.3 The massive reduction in rules, regulations and directions under the Audit Act regime provides agencies with greater flexibility and autonomy to achieve desired outcomes. But the FMA Act is also designed to strengthen and clarify the lines of accountability of agencies to the executive and to parliament. It establishes the general principles agencies are required to follow and leaves the details to regulations, orders and chief executive officers (CEOs) to determine.

B.4 CEOs have a range of powers and responsibilities under the FMA Act. Section 44 requires them to manage their agencies in a way that promotes the proper use of Commonwealth resources, where 'proper use' is defined as 'efficient, effective and ethical use', although those terms are not defined.

B.5 Section 52 of the FMA Act authorises regulations to be made to enable CEOs to give instructions to officials in their agencies on any matter on which regulations may be made under the Act. Financial Management and Accountability Regulation 6 (FMAR 6) provides that CEOs are authorised to give instructions to their staff on any matter necessary or convenient for carrying out or giving effect to the FMA Act or Regulations, particularly on handling, spending and accounting for public money; commitments to spend public money; and recovering amounts owing to the Commonwealth.

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[68] The other two are the *Auditor-General Act 1997* and the *Commonwealth Authorities and Companies Act 1997.*

Chief Executives' Instructions (CEIs)

B.6 While the FMA Act, Regulations and Orders establish the legislative framework for financial management across the APS, the CEIs determine the frameworks that apply within each agency. They must not be inconsistent with the FMA legislative framework. Because they carry the force of law the officials to whom they apply must comply with them.

B.7 DoFA issued a model set of CEIs in 1997 to assist agencies in developing their own by 1 January 1998, when the FMA Act came into operation. The accompanying advice from DoFA states that the development of an agency's CEIs will necessarily involve a risk management approach. DoFA stated that while a strongly prescriptive approach minimises the risks of mistakes, non-compliance and inconsistent decision-making, it can also increase costs because of the procedures, checks and controls that have to be followed and can impair flexibility and thereby hinder effective and efficient resource usage. DoFA suggested that it is essential for agencies to identify and assess the risks associated with the various areas of financial management and to make decisions about what to include in CEIs, based on the benefits and costs of different approaches and on judgments about acceptable levels of risk.

B.8 Each agency subject to the FMA Act should have issued their own CEIs by 1 January 1998, including instructions on handling requests for financial compensation and the recovery of debts, in accordance with the following general requirements of the existing avenues for responding to requests for compensation.

Current mechanisms for providing compensation

B.9 The avenues available to Commonwealth agencies for providing financial compensation and redress when things go wrong are set out below under the following headings:

- settlement of monetary claims against the Commonwealth;
- compensation for detriment caused by defective administration;
- act of grace payments;
- ex gratia payments;
- write off; and
- waiver.

B.10 Each mechanism is exclusive of the others and has its own rules.

1. Settlement of monetary claims against the Commonwealth

B.11 In 1997 when the Audit Act was scheduled to be repealed because it was being replaced by the FMA Act, the Attorney-General approved a policy to replace Finance Direction 21/3, which until then had contained the rules for settling monetary claims against the Commonwealth. That policy was the Commonwealth's policy on handling monetary claims

until 31 August 1999. It authorised agencies to make payments on the grounds of legal liability. From 1 September 1999 a new mechanism (which is generally reflective of the former policy) replaced the Commonwealth's administrative policy with a set of directions that now have the force of law[69].

B.12 The Attorney-General issued Legal Service Directions (LSDs) pursuant to section 55ZF of the *Judiciary Act 1903*, effective from 1 September 1999, to Commonwealth agencies subject to the FMA Act[70]. Among other matters, the LSDs cover claims and litigation by or against the Commonwealth or FMA agencies. The LSDs provide that claims are to be handled and litigation is to be conducted by agencies in accordance with the *Directions on the Commonwealth's Obligation to Act as a Model Litigant*, at Appendix B of the LSDs. They also provide that monetary claims against the Commonwealth or an agency are to be handled in accordance with the *Directions on Handling Monetary Claims*, at Appendix C of the LSDs. The LSDs are now the mechanism for making a compensation payment on the grounds of 'legal liability'.

B.13 The *Directions on Handling Monetary Claims* apply where a claim cannot be settled by reference to a particular statute (eg, for worker's compensation claims administered by Comcare) or under a mechanism provided by contract (eg, an arbitration of a disputed contractual right). The Directions require settlement to be in accordance with legal principle and practice, regardless of the amount claimed. That requires at least a meaningful prospect of liability. Settlement cannot be effected merely to avoid the cost of defending a clearly spurious claim[71].

B.14 If the decision-maker believes there is a reasonable prospect that a court would find the Commonwealth liable, the elements to be taken into account in determining a fair amount to pay include:

- the prospects of the claim succeeding in court (if the prospects are low the amount offered to settle the claim will probably be lower than if the prospects were higher);
- the costs of continuing to defend the claim; and
- any prejudice to the government in continuing to defend the claim (eg, a risk of disclosing confidential government information).

B.15 Agency CEOs (and their delegates) can authorise the settlement of minor claims (up to $10,000) if they are satisfied on the basis of a common sense view that the settlement is in accordance with legal principle and practice. It is a matter for the agency to decide whether to obtain legal advice, either from in-house or external lawyers for minor claims.

B.16 If a claim, together with any related claim, cannot be settled for $10,000 or less it is to be treated as a major claim. They can only be settled

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[69] What follows is information provided by A-G's during the investigation.
[70] A limited number of directions apply to non-FMA Act agencies.
[71] Although in private legal practice spurious claims are sometimes settled to avoid the higher costs that would be incurred to defend them.

if the agency receives written advice from the Australian Government Solicitor (AGS) or a legal adviser external to the agency, that the settlement is in accordance with legal principle and practice, and if the agency's CEO (or their delegate) agrees with the settlement. This requirement is to assist in achieving consistency in handling claims and to ensure that the Commonwealth's legal position is protected.

B.17 If a claim raises exceptional circumstances which justify a departure from the normal mechanism for settling a claim, the agency concerned should refer the matter to the Office of Legal Services Coordination (OLSC) in A-G's. The Attorney-General or his delegate may permit a departure from the normal policy, but may impose different or additional conditions as the basis for doing so. FMA Act agencies are required to report to the Attorney-General or OLSC on significant issues that arise in the provision of legal services, especially in handling claims and conducting litigation. These issues will include matters where:

- the size of the claim, the identity of the parties or the nature of the matter raises sensitive legal, political or policy issues, with a 'whole of government' dimension; and
- a significant precedent for other agencies could be established, either on a point of law or because of its potential significance for other agencies.

B.18 Commonwealth agencies are required to act fairly and honestly in handling claims, in accordance with the *Directions on the Commonwealth's Obligation to Act as a Model Litigant*. The Directions require the Commonwealth, as a party to litigation, to act with complete propriety, fairly and in accordance with the highest professional standards. The requirement does not preclude the Commonwealth from acting firmly and properly to protect the Commonwealth's interests, or from taking all legitimate steps in testing or defending claims made against it.

B.19 For the Commonwealth to act as a model litigant requires:

- dealing promptly with claims and not causing unnecessary delay;

- paying legitimate claims without litigation, including making partial settlements of claims or interim payments where it is clear that liability is at least as much as the amount to be paid;

- acting consistently in the handling of claims and litigation;

- endeavouring to avoid litigation wherever possible;

- where it is not possible to avoid litigation, keeping the costs to a minimum, including by:
    - not requiring the other party to prove a matter the Commonwealth knows to be true; and
    - not contesting liability if the Commonwealth knows that the dispute is really about quantum;

- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;

- not relying on technical defences unless the Commonwealth's interests would be prejudiced by the failure to comply with a particular requirement;

- not undertaking and pursuing appeals unless the Commonwealth or the agency believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and

- apologising where the Commonwealth is aware that it or its lawyers have acted wrongfully or improperly.

B.20 The Ombudsman's experience is that agencies do not always live up to the LSDs on handling claims, particularly the Directions to act as a model litigant and deal with claims promptly.

B.21 The LSDs provide legislative authority to settle a claim in the circumstances outlined and can be enforced by the Attorney-General. The FMA Regulations provide an additional avenue for ensuring compliance with the *Directions on Handling Monetary Claims*. FMAR 9 requires that a person covered by the FMA Regulations must not approve a proposal to spend public money unless satisfied that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient and effective use of the public money. FMAR 13 requires that a person must not enter into a contract, agreement or arrangement under which public money is or may become payable unless the proposal to spend public money has been approved under FMAR 9.

2. Compensation for detriment caused by defective administration : the CDDA scheme

B.22 In October 1995 the government approved the Minister for Finance's proposal to establish an administrative mechanism allowing agencies to compensate anyone who is adversely affected by the defective administration of a Commonwealth agency. A decision-maker is therefore exercising the executive power of the Commonwealth whenever he or she decides to make or refuse a payment under the CDDA scheme. The rules and limitations approved by the government are as follows.

Circumstances in which payments can be approved

B.23 The CDDA scheme applies if a Minister (or an official specifically authorised by the Minister to approve payments under the scheme) concludes 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 prevented them from avoiding detriment, for one of the following reasons:

- a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant's circumstances; or

- an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances; or

- giving advice to (or for) a claimant that was, in all the circumstances, incorrect or ambiguous; 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 was reasonably capable of being obtained by the official to give).

B.24 The government approved the following definition of 'detriment':

- the amount of quantifiable loss, including opportunity costs, that a claimant can demonstrate was suffered despite having taken reasonable steps to minimise or contain the loss. If, for some reason, it is impracticable for a claimant to demonstrate all or part of the quantifiable loss, the decision-maker may make whatever assumptions as to amount, including with respect to the claimant's actions to minimise or contain the loss, that are necessary and reasonable in all the circumstances; and
- non-financial damage.

B.25 The CDDA scheme is permissive, in that it permits but does not oblige the decision-maker to approve a payment in any particular case. But the decision whether to approve or refuse a payment is required to be publicly defensible, having regard to all the circumstances. The government encouraged agencies to seek guidance as to good practice and procedures from the Ombudsman, legal advisers, or DoFA, as necessary[72].

Limitations

B.26 The government imposed the following limitations on decision-makers under the CDDA scheme:

- Where a Minister confers authority on an official to approve payments under the scheme, that authority must be conferred expressly, separately from the Minister's general authorisations to incur expenditure. This requirement recognises the special and potentially sensitive nature of decisions that may be made under the scheme, for which the agency and its Minister may be held accountable.

[72] See Attachment A to DoFA's Estimates Memorandum 1995/42, dated 21.12.95, *'Establishment of a scheme for compensation for detriment caused by defective administration'*.

- Where compensation is approved for non-financial damage (including pain and suffering, inconvenience, solatium[73], or other qualitative elements of that nature) the decision-maker is not to approve the payment without first having regard to relevant legal principle and practice in arriving at an appropriate amount for payment. The government recognised that in a discretionary scheme across all agencies, there would inevitably be a high risk of inconsistency of assessment between decision-makers, of claims for non-financial loss. If the inconsistencies were significant justifiable criticism would be levelled at the Commonwealth. To minimise that risk the government agreed that decision-makers should take legal advice, including from 'in-house' sources, as to what courts had awarded to successful plaintiffs for comparable damage.

- The scheme does not apply to any claim where it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated. Such claims should be considered in accordance with the Commonwealth's rules and policy for settling or defending legal claims.

- The scheme is not available to overcome the effects of specific legislative provisions that are found to be flawed. Legislative problems or 'mistakes' were to be overcome only by legislative remedies, rather than by non-statutory means. Amendment of the particular legislation, with retrospective effect if necessary to provide a benefit to the claimant, or resort to the Minister for Finance's statutory act of grace power are two legislative remedies available.

- The scheme is not available to offset the payment of any recoverable debt owed to the Commonwealth, even if the debt arose because of defective administration. Various statutes contain power to waive debts to the Commonwealth and should not be circumvented by administrative action under the CDDA scheme.

- The scheme is not available to an agency to approve a claim for compensation on any matter which impinges on the defective administration of functions and performance of another agency or other body. If there is a dispute between agencies as to which of them is to take responsibility for making a decision under the scheme, DoFA will decide which agency should handle the claim. The environment of agencies' accountability to which the scheme contributes would be defeated if one agency inappropriately paid compensation for the mistakes of another. Similarly, justice to the claimant would be delayed if such a dispute were unacceptably protracted. The disputing agencies should inform DoFA as soon as practicable that a dispute exists.

[73] Defined in the 1992 second edition, Australian Concise Oxford Dictionary, as 'a thing given as a compensation or consolation'; and in Earl Jowitt's 1959 first edition, A Dictionary of English Law, as 'solace: a sum paid to an injured party over and above the actual damage by way of solace to his wounded feelings'.

- The scheme is not available to meet claims which had previously been determined under the act of grace provisions. An administrative remedy should not be used to 'top up' or reverse statutory act of grace decisions.

B.27 The CDDA scheme applies to agencies subject to the FMA Act (those operating on the Commonwealth Public Account as the administrative or executive arm of the Commonwealth). It does not apply to agencies subject to the CAC Act because their legal identities are separate from the Commonwealth and they have recourse to whatever remedies are available under their enabling legislation.

Background to the establishment of the CDDA scheme

B.28 Until the CDDA scheme was established, an act of grace payment was the only remedy available where a person suffered a financial loss as a result of maladministration but the Commonwealth had no legal liability to compensate them. Requests for compensation were considered in the act of grace context by the Minister for Finance, his department or, from 1988 to 1995 in cases where the Ombudsman had recommended a compensation payment, by the Secretary of the agency concerned. Payments were considered appropriate where the circumstances imposed a moral obligation on the Commonwealth to make a payment, eg, to redress the financial effects of maladministration.

B.29 Because the CDDA scheme replaced what had become a particular category of act of grace payments (those made to compensate losses arising from maladministration) this section refers to the act of grace arrangements that preceded the CDDA scheme. The current act of grace arrangements are described below under the heading 'act of grace payments'.

B.30 As the Ombudsman's 1987-88 annual report indicates, previous Ombudsmen had commented on the reluctance of successive Ministers for Finance to approve act of grace payments to persons who had suffered a loss as a result of defective administration. A former Ombudsman had proposed that legislation be introduced to allow the Prime Minister to direct that an act of grace payment be made if the Ombudsman had recommended it. The impetus for that proposal was the perception that there was increasing disregard for the Ombudsman's recommendations for act of grace payments.

B.31 The Ombudsman's view in 1988 was that such recommendations are only made after very careful consideration of all the issues involved and that as a matter of policy, the Ombudsman did not lightly recommend the payment from consolidated revenue when no legal liability in the Commonwealth exists. It remains true today that if such recommendations are consistently disregarded, the status of the Ombudsman is diminished.

B.32 The matter was pursued with the Prime Minister and his department in 1987-88 and they supported the need to resolve it. In June 1988 the Ombudsman was informed that a new approach to determining act of grace payments was to be adopted.

Trial devolution of the act of grace power

B.33 For a trial period of two years from December 1988 the responsibility for act of grace payments was devolved from the Minister for Finance and the Department of Finance (DoF) to the relevant departments. The Minister appointed heads of agencies as 'authorised persons' under s 34A of the *Audit Act 1901*[74] to approve act of grace payments to a maximum of $50,000. Under those arrangements if the Ombudsman recommended an act of grace payment the agency's authorised person was required to seek and consider DoF's views before making their decision.

B.34 Those arrangements placed the responsibility where we believe it should lie, with the agency concerned. DoF no longer had the final say on whether an act of grace recommendation should be followed but the agency concerned had the benefit of DoF's views. It also put the act of grace remedy on the same footing as all other remedies, requiring the Ombudsman to persuade the agency concerned (rather than anyone else) that it was the appropriate remedy in the circumstances.

B.35 The Ombudsman's 1988-89 annual report indicates that DoF and other agencies were by then progressively prepared to take a more relaxed approach and that some were beginning to demonstrate a more generous attitude. In November 1989 the Ombudsman made a submission on act of grace payments and the related question of waiver of overpayments to the Joint Parliamentary Committee on Public Accounts in the course of its inquiry into DoF. The Ombudsman suggested that, subject to certain constraints, the most efficient and effective way to manage act of grace payments would be for agency heads to be authorised to give effect to his recommendations to make such payments, if the agency recognised that it had made a mistake and that an act of grace payment was the appropriate remedy.

Evaluation of the trial devolution of the act of grace power

B.36 The 'two year' trial devolution continued for almost seven years until October 1995 when the government established the new CDDA scheme. DoF had evaluated the trial arrangements in 1991-92 and did not support them being made permanent. A Senate committee considered DoF's draft report and suggested lower levels of devolution, so that DoF's agreement would be required for an agency head to approve any payment over $5,000. The Ombudsman's 1991-92 annual report indicates that the trial arrangements had improved the effectiveness and efficiency of departments in acting to remedy deficiencies revealed in his investigations.

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[74] Section 34A of the *Audit Act 1901* was the precursor to s 33 of the FMA Act. It provided the authority for the Minister for Finance and other 'authorised persons' to approve act of grace payments.

Birth of the CDDA scheme in 1995

B.37 Consistent with an environment of increased accountability, the government's decision to establish the CDDA scheme in October 1995 authorised agencies to provide a financial remedy for the effects (financial and other) of their own defective administration. It enhanced their flexibility and accountability for these kinds of payments. The government acknowledged that future requests for compensation for the effects of defective administration would no longer be considered under the statutory act of grace power. The Minister for Finance revoked the appointments of agency heads as 'authorised persons' under s 34A of the *Audit Act,* as part of the policy changes accompanying the CDDA scheme's introduction.

B.38 Under the CDDA scheme each Minister, or any official specifically authorised by a Minister, has the power to determine whether a compensatory payment should be made to a person for the effects of defective administration. Payments approved under the scheme are recorded against a separate appropriation item set up by DoFA for each agency. That replaced the use of the agency's generic act of grace item for payments of this kind.

DoFA's views about the new arrangements

B.39 The government approved the definitions, rules and limitations for the CDDA scheme as set out above. DoFA were still authorised to consider claims not meeting the CDDA rules under the statutory act of grace provisions. But DoFA's advice[75] to agencies states clearly that if an agency rejects a claim for compensation for defective administration DoFA will not consider it under the act of grace power if they believe the claim does relate to defective administration. In DoFA's view, the CDDA scheme should be used to determine those claims.

B.40 It is interesting that DoFA's advice to agencies states that where there is disagreement as to whether there is defective administration in a particular case, or which agency should consider a claim for compensation, DoFA will determine the matter. The Ombudsman's office has seen some claims referred to DoFA to consider under the act of grace provisions where the agency has rejected payment under the CDDA scheme and where DoFA have sent the claims back to the agency to reconsider under that scheme. The decision on whether to compensate or not, still rests with the agency concerned, regardless of whether DoFA believe the CDDA scheme is the most appropriate one.

B.41 DoFA's advice to agencies states that in the scheme's initial stages agencies may need additional information about how it should operate and whether particular cases fall within its ambit. DoFA recommended that where an agency receives a claim for compensation they should consider it under the new scheme if it relates to defective administration.

[75] In DoFA's Estimates Memorandum 1995/42.

It would depend on the facts whether the claim should be considered for settlement under the legal liability provisions. DoFA acknowledged that there would be a need to clarify the boundaries between the CDDA scheme and the other avenues available to resolve claims for compensation, because the CDDA scheme was limited to claims where there was no legal liability but there was an element of defective administration. DoFA offered to provide advice where agencies were not sure whether a claim fell within the CDDA scheme.

B.42 DoFA's advice to agencies stated that the Secretary had accepted ethical principles proposed by the Ombudsman for the operation of the scheme.

B.43 During our meeting with agencies in April 1999 DoFA indicated that the CDDA scheme was intended as a last resort. DoFA hoped that agencies would fix systemic problems that triggered the compensation payments but some just keep making payments instead of fixing the problems. In response, one agency indicated that the cost of fixing the problem may be too high, compared with the costs of the resulting CDDA payments they make.

Ethical framework for decisions under the CDDA scheme

B.44 Because the CDDA scheme is administrative and therefore not subject to judicial review, the Ombudsman was concerned that it should operate fairly, consistently with the principles of natural justice applicable to the exercise of statutory discretions. The ethical framework proposed was that CDDA decision-makers should adhere to the following principles:

- offers of compensation should be calculated on the basis of what is fair and reasonable in the circumstances and the Commonwealth should not take advantage of its relative position of strength in an effort to minimise payments;

- claimants should be provided with adequate information on the details of any offer and at least summary reasons for the Commonwealth's acceptance, partial acceptance or rejection of their claim;

- claimants should not be required to waive their rights where only a partial settlement is made;

- advice on the right to review by the Ombudsman and the process for obtaining reasons for decisions should be provided to all claimants; and

- the taxation implications (if any) of payments should be taken into account when determining the quantum of the payments so as to place the claimant in the position he or she would have been in but for the effect of the defective administration.

Ombudsman's view of the new arrangements

B.45 The Ombudsman welcomed the new arrangements in 1995 because they made agencies responsible for providing a remedy for defective administration and gave them the method for achieving that. But our experience of the CDDA scheme since then has been mixed, with some agencies taking a broad, flexible approach to the rules and limitations and others taking a narrow, inflexible approach.

3. Act of grace payments

B.46 Section 33 of the FMA Act provides the authority to make act of grace payments. It authorises the Minister for Finance and Administration, and any officer to whom the power is delegated, to approve a payment if they believe the special circumstances warrant it. This provides a broad discretion to the executive arm of government to make payments for purposes not specifically sanctioned by Parliament. The only statutory requirement is that there be special circumstances.

B.47 According to DoFA's advice to agencies[76] act of grace payments are special 'gifts of money' by the Commonwealth, akin to the royal prerogative to make grace and favour payments. They are payments that fall outside statutory entitlements, government approved schemes (such as grants in aid), and payments by the Commonwealth under legal liability (including settlement of legal claims). DoFA's view is that act of grace payments are not meant to be used as an alternative to other avenues of redress, but rather as a remedy in special circumstances, to ensure consistency and equity in the impact of government activities.

B.48 Act of grace payments can be made to anyone for any reason, but typically they provide fair and just remedies to persons who have been unfairly disadvantaged by government activities, but who have no other avenue for redress. There is no legal entitlement to an act of grace payment.

Circumstances in which DoFA approve act of grace payments

B.49 While there are no formal guidelines for the exercise of the act of grace power, DoFA limit the circumstances in which they will approve payments to the following three broad categories:

- where legislation produces unintended, anomalous, inequitable, unjust or otherwise unacceptable results in the particular circumstances; or
- where the matter is not covered by legislation, but it is intended to introduce such legislation, and it is considered desirable in the particular case to apply the benefits of the proposed legislation retrospectively; or

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[76] '*Act of Grace Payments*', issued to Commonwealth agencies by DoFA in November 1997.

- where the particular circumstances of the case lead to the conclusion that there is a moral obligation on the Commonwealth to make a payment.

B.50 The act of grace power is usually only available for agencies subject to the FMA Act. Some agencies subject to the CAC Act have other options available depending on their enabling legislation.

B.51 An act of grace payment is not available where there is another legal means of making a payment (eg, where the person has a statutory entitlement, or where the Commonwealth is legally liable, or where the CDDA scheme applies because there has been defective administration). DoFA believe that by conferring on an individual a benefit not specifically sanctioned by Parliament, act of grace payments extend the existing body of law, and are inevitably looked to as precedents against which to assess future requests.

B.52 DoFA avoid making act of grace payments that could be seen as circumventing legislative provisions, or establishing a payments scheme to remedy legislative or program deficiencies. In those circumstances DoFA believe it is preferable to consider amending the legislation or program to address the deficiencies and, if necessary, the government can approve ex gratia payments to compensate people adversely affected already.

B.53 Successive Ombudsmen have expressed the view that the act of grace power should be available to individual agencies, not confined to the Minister for Finance and Administration and delegates in his department. DoFA's view is that, while the Minister can delegate any of his powers under the FMA Act to CEOs or other officials, he has paramount authority over, and responsibility for, the management of public money. DoFA believe that when the Minister exercises the act of grace power he is expressing his ultimate overarching responsibility for providing all act of grace payments under s 33 of the FMA Act. DoFA acknowledge that the Minister could impose conditions if he delegated the power, but they believe it would be difficult to articulate workable conditions that could usefully be applied, because of the discretionary nature of the power and the fact that it could cover any aspect of Commonwealth administration.

4. Ex gratia payments

B.54 According to DoFA[77], the main difference between act of grace and ex gratia payments is the basis on which they are approved. Act of grace payments are statutory payments authorised by the FMA Act, whereas ex gratia payments are administrative. They are approved by the government under its inherent constitutional powers, and are reflected in a specific appropriation.

[77] See DoFA's '*Act of Grace Payments*', November 1997.

B.55 Another difference is that act of grace requests involve consideration of an individual's claim and whether it would be equitable to make a payment in the special circumstances. Ex gratia payments are not necessarily specific to one individual, do not require an individual claim and often take the form of schemes which have guidelines and rules developed for particular classes of losses. Because they require government approval, ex gratia schemes are rarely used.

5. Write off

B.56 Section 47 of the FMA Act requires agencies to pursue the recovery of debts unless they have been written off under the authority of another statute (eg, the *Social Security Act*) or they are considered irrecoverable at law or uneconomic to pursue.

B.57 Writing off a debt is a management accounting response to the fact that some debts cannot be recovered, similar to writing off bad debts in the private sector. Contrary to common belief, writing off a debt does not expunge it, but in most cases merely defers its recovery to a later date when the circumstances that led to non-recovery change, eg, the debtor's financial circumstances improve.

6. Waiver

B.58 Section 34 of the FMA Act authorises the Minister for Finance and Administration and any officer to whom he delegates the power to waive the Commonwealth's right to recover a debt. Although that section contains no conditions or limitations, the most common broad circumstance in which the waiver power is used is where the particular circumstances of the case lead to the conclusion that there is a moral obligation on the Commonwealth to waive recovery of the debt.

B.59 A waiver may be made unconditionally or on the condition that the debtor agrees to pay an amount to the Commonwealth in specified circumstances. If a waiver of more than $100,000 is proposed, the Minister for Finance and Administration must consult an advisory committee set up in accordance with section 59 of the FMA Act.

B.60 Information published by DoFA[78] indicates that most requests for waiver involve overpayments, especially overpayments of salary and allowances to Commonwealth employees. DoFA usually only waive recovery of debts in the following circumstances:

- where recovery would lead to an inequity, eg, where it would leave the person worse off financially than if the overpayment had not occurred - such as an employee who had unwittingly received an overpayment of an allowance and had spent it for the purpose for which it was intended; or

[78] *'Waiver of Recovery of Debts Due to the Commonwealth'*, issued to Commonwealth agencies by DoFA in November 1997.

- where recovery would lead to unreasonable hardship - a genuine and continuing inability to make repayments without the debtor's standard of living declining to the point where they can no longer sustain themselves with the basic necessities of life.

B.61 DoFA's view is that because the waiver of a debt is a discretionary power, similar to the act of grace power, it should not be seen as a means of circumventing specific legislative provisions or of providing remedies for legislative or program deficiencies. Rather, it should only be used where there are special circumstances, to ensure equity in the impact of government activities.

B.62 As indicated earlier, some other agencies including Centrelink also have the authority to waive the recovery of debts in particular circumstances, where the legislation they administer specifies this.

ATTACHMENT C

OMBUDSMAN AND AGENCY CORRESPONDENCE ABOUT PROBLEMS WITH EXISTING ARRANGEMENTS

C.1 It has not been easy to distil consistent patterns from most agencies' responses to individual requests for compensation. DoFA are the most consistent, in their approach to exercising the act of grace power. For other agencies it is difficult to know whether they will accept a recommendation for compensation in a particular case or not, because agencies do not always give adequate reasons for rejecting a recommendation for compensation.

C.2 We know from past experience that there are circumstances where there would be no point in making a recommendation because the particular agency would be bound to reject it. In those cases we usually take up the general issue giving rise to the compensation request with the agency concerned. If necessary we report on the problem in the Ombudsman's annual report or in submissions to parliamentary inquiries or other bodies.

Ombudsman's letter to major agencies in mid 1998 and their responses

C.3 To find out what agencies themselves think about the compensation arrangements, in the latter half of 1998 the Ombudsman wrote to agencies we deal with regularly, notifying them that he had decided to conduct an investigation into the adequacy of the existing compensation mechanisms. He asked them to comment on some of the issues causing us concern.

C.4 The Ombudsman's letter indicated the main difficulties we experience with each of the existing avenues for providing compensation. Subsequently the project officer met with representatives from several agencies in October 1998 to discuss some of the matters covered in the investigation to date.

C.5 Ten of the fourteen agencies contacted provided a formal response. These responses are summarised in this chapter under separate headings for each of the matters raised by the Ombudsman.

C.6 In addition, the Department of Defence provided a copy of a report on their review of the operation of the CDDA scheme within the Department conducted in September 1997. The CSA provided copies of their national quarterly report on compensation claims for the period 1 April to 31 July 1998; case notes of decisions on compensation requests made between 6 April and 31 July 1998; and the minutes from their national compensation forum meeting on 22 July 1998. The ATO and Centrelink provided copies of their compensation guidelines. A-G's provided copies of the

Commonwealth's policies for handling monetary claims; pleading statutes of limitations; and acting as a model litigant.

1. Ombudsman Act standards

C.7 The Ombudsman's letter canvassed some of the matters raised in chapter 6. It also stated that we make recommendations on the basis of the standards set out in section 15 of the Ombudsman Act, as described in chapter 5. The Ombudsman stated that we do not see a problem in recommending a payment of compensation merely because an agency, or the Commonwealth as a whole, has an administrative difficulty in deciding which payment mechanism would be appropriate. It is for the agency receiving the recommendation to decide how to respond to it and to arrange for that response to be implemented. We see any difficulty in doing so as possibly being a result of an excessively narrow scheme or the development of narrow standards within an existing scheme.

Agency responses

C.8 **DEETYA, DFaCS, DoFA** and **DHAC** commented specifically on this aspect of the Ombudsman's letter.

C.9 **DEETYA** stated that compensation claims are considered under FMAR 9 and the CDDA scheme, both discretionary schemes where specific delegates make the decisions. The delegates must be able to determine issues personally, without acting under influence or dictation and are required to take into account a number of factors that will impact on their agency. While any recommendation from the Ombudsman is included in a submission to the delegate, it does not follow that they will approve payment on that basis alone. There will be times when the delegate does not agree with the Ombudsman's views. It is the agency's prerogative to decide how to respond to the Ombudsman's recommendation and arrange for the response to be implemented.

C.10 **DoFA** noted that the primary purpose of the Ombudsman's recommendations is not to specify the mechanism agencies should adopt to redress particular circumstances, but to bring the Ombudsman's perspective on those issues to the attention of the agencies concerned. DoFA are conversant with the section 15 standards on which our recommendations are based and acknowledge that unless both claimants and agencies have a clear understanding of the form, structure and inter-relationship of the mechanisms used to provide compensation, apparent anomalies can themselves represent sources of additional grievance.

C.11 **DFaCS** noted that the Ombudsman proposed to make recommendations for paying compensation based on section 15 of the Ombudsman Act, in situations where he may be applying standards that have no equivalent in any of the established Commonwealth compensation schemes, and that he would report where compensation is not paid in these circumstances. They noted that this is a matter for the Ombudsman and he may see it as an effective way to bring about change in the compensation arrangements in the long term. But it may not be the

most constructive way to proceed because it may require action by agencies that is inconsistent with the FMA Act and Regulations. DFaCS stated that the Ombudsman's office has sometimes achieved its best results by working cooperatively with an agency to resolve a problem that both agree exists. The opportunity for such cooperative action may be diminished if the suggested approach is used on a regular basis. It is not open to a Commonwealth officer to make a compensation payment not supported by the existing schemes. DFaCS indicated the penalties imposed by the FMA Act for applying public money otherwise.

C.12 DFaCS said that FMAR 10 provides that a spending proposal cannot be approved if it is not authorised by the provisions of an existing law, but it is unlikely that the Ombudsman Act could be considered an existing law for this purpose because it confers only recommendatory and reporting powers in a remedial sense.

C.13 DFaCS also said that complainants who see the Ombudsman's office pressing a Commonwealth agency for compensation on their behalf may develop unrealistic expectations that it will be forthcoming and their frustration and disappointment can be greater when it is not. The complainant should only be told that the Ombudsman recommended compensation at the end of the Ombudsman's discussions with the agency concerned. DFaCS discussed similar problems with the SSAT which, as a result, now communicates compensation recommendations to Centrelink or DFaCS in documents separate from the reasons for decision.

C.14 **DHAC** said that the Ombudsman's letter raised a question whether his recommendations for compensation should be constrained by possible absence of a lawful Commonwealth mechanism for making a compensation payment. They said it would be difficult for the Commonwealth to implement a recommendation for which there was no lawful mechanism and it would be more practicable if recommendations were couched in terms of lawful mechanisms. It is a matter for the government to ensure that mechanisms are available to implement recommendations consistent with section 15 of the Ombudsman Act. But making a recommendation that was otherwise proper and reasonable, in the absence of a lawful mechanism, may spur the development of one.

2. Act of grace payments

C.15 The Ombudsman's letter outlined the following difficulties.

- Because they require action by DoFA or the Minister for Finance and Administration rather than the agencies concerned, those agencies can avoid taking responsibility for the consequences of their actions.

- The fact that all requests for act of grace payments have to be considered by DoFA slows down the resolution of the problem.

- Restricting the act of grace power to the Minister for Finance and Administration and his department is inconsistent with the FMA Act's emphasis on devolution and prevents responsible agencies themselves

from providing remedies in all circumstances. It could be argued that this reduces the incentive for agencies to get it right in the first place.

- The fact that large act of grace payments (over $100,000) can only be made after the Minister for Finance and Administration or DoFA have considered a report from a committee comprising the heads of DoFA, the Australian Customs Service (ACS) and the agency concerned, may involve a conflict of interest (the head of the responsible agency could not provide an independent view). In addition there seems little role for the ACS in determining whether an act of grace payment would be appropriate.

Agency responses

C.16 Most agencies supported the Ombudsman's view that responsibility should rest with them for compensating individuals who suffer financial loss as a result of their actions.

C.17 The **ACS** and **Centrelink** supported devolution of the act of grace power to agency heads, to ensure that compensation payments can be made in all relevant circumstances. **DFaCS** said they would have no objection to reinstating the devolution arrangements in place between 1988 and 1995[79]. They have had very few recent cases where they have disagreed with DoFA's decision but they understood that Centrelink had disagreed quite frequently[80].

C.18 The **ATO** and **CSA** stated that the existing arrangements are adequate to provide compensation whenever they believe it is warranted. The ATO stated that when the CDDA scheme was introduced it was clearly intended to all but replace the act of grace arrangements for matters relating to defective administration. They have proceeded on that basis and see limited scope for the act of grace provisions at this stage, but agreed that there was some merit in the proposal to devolve the act of grace power. By comparison, the Public Service Commissioner has delegated limited powers under the *Public Service Act 1922* to agencies to make payments to satisfy claims by public servants arising from their employment[81].

C.19 **DEETYA** and **DIST** did not comment specifically about devolution of the act of grace power, but DEETYA's response implies that they believed the current compensation arrangements are adequate.

C.20 **Defence** was the only agency to state clearly that DoFA should retain the act of grace power, because that provides an independent review of claims and ensures consistent application of the principles involved.

C.21 The **ACS** suggested that an obvious solution to the difficulties the Ombudsman had outlined would be to provide agencies with a general power to make compensation payments in circumstances covered by all

[79] See Attachment B for a description of those arrangements.
[80] Centrelink informed us later that this perception was incorrect.
[81] These claims cannot be met by the act of grace mechanism because alternative power exists under the Public Service Act.

three existing mechanisms, with a requirement to identify the basis for payment in their annual reports (eg, faulty advice, unintended consequence of a regulation, etc). The ACS stated that there would have to be some basic rules for such an arrangement, including consultation with relevant agencies if a payment would be likely to set a precedent affecting them, and seeking legal advice before paying large amounts.

C.22 The ACS encouraged a review of the existing arrangements and supported decentralisation and devolution of the act of grace power in the context of a single arrangement for compensation. They stated that a key problem with the current act of grace mechanism is the requirement that DoFA make the decision. In their view, the delegation of the power to compensate under the CDDA scheme to all agencies on the public account and the direction of the FMA Act is at odds with the centralised nature of the act of grace mechanism.

C.23 **Centrelink** and **DHAC** agreed with the former Ombudsman that the advisory committee for payments over $100,000 should comprise the heads of the departments of Prime Minister and Cabinet, A-G's and DoFA. DHAC suggested that they could co-opt the relevant agency head if necessary.

C.24 **DHAC** did not have strong views on whether the act of grace mechanism should be exercised only through DoFA, but they saw clear advantages in restoring the power to other agencies through delegation. They said the requirement to refer requests to DoFA adds another layer in communication to the process which may not be justifiable, at least for small amounts. DHAC said that reserving a decision for the Minister for Finance and Administration is understandable where large amounts are involved but it would be consistent with current principles of devolution and local responsibility to delegate the act of grace power.

C.25 DHAC agreed that the act of grace power should not be used where another power was available but said there are risks in construing that exclusion too rigidly. DHAC believe that if there is uncertainty as to whether another power is available but there is a clear case consistent with act of grace principles, there would be no harm in proceeding expeditiously by act of grace rather than indulging in arid debates as to which mechanism is preferable. They gave an example of having corresponded last year with DoFA about which mechanism was appropriate for paying someone compensation and considerably delaying payment in the process.

C.26 DHAC agreed that act of grace payments do not set a precedent, but said it is naive to expect that if similar circumstances arose again there would not be an expectation of a payment. By contrast, DHAC thought it too easy to use the 'floodgates' argument to avoid making a favourable decision to make a compensation payment. But they did comment that if agencies are considering act of grace payments from their own resources they may be more cautious than when they are asking another agency to pay.

C.27 **DoFA** agreed that it would be possible for the Minister for Finance and Administration to impose conditions if he delegated the act of grace power, but said that the discretionary nature of the power and the fact that it covers every aspect of Commonwealth administration, make it difficult to articulate useful, workable conditions. Regardless of rigorous definitions or guidelines about what constitutes a moral obligation on the Commonwealth, the decision remains subjective. It is interesting, in view of DoFA's firm view that the act of grace power is properly the province of the Minister for Finance and Administration rather than other Ministers and CEOs, that their response indicates they are considering whether it should be devolved this year.

C.28 DoFA stated that 'special circumstances' do not have to be unique but act of grace is not an appropriate method for addressing administrative or legislative deficiencies that involve a reasonable number of people. It would not be fair to pay one person who requests an act of grace payment when there are possibly many more in similar circumstances who have not asked for a payment. But it could equally be argued that it is manifestly unfair to deny a payment to a person which is judged warranted, simply because there are others with identical claims.

C.29 DoFA also stated that the CDDA scheme was not intended to replace the need for agency heads to be delegated the act of grace power. It was specifically established to allow agency heads to make gratuitous payments to people adversely affected by defective administration, but it does cover the complaints about wrong oral advice that used to be considered in the act of grace context.

C.30 DoFA stated that there is no conflict of interest if an advisory committee for payments over $100,000 includes the head of the agency responsible for the problem (or their delegate) because DoFA always seek advice from the responsible agency anyway before deciding whether to make a payment. Involvement of the agency head in considering large payments maximises the consideration of salient information and allows the Minister to make a fully informed decision in the interests of the claimant and the Commonwealth, including the agency concerned. In DoFA's view, the inclusion of the head of ACS (or their delegate) in the advisory committee provides a further independent view from an agency experienced in protecting revenue collection and the broader community interest.

3. Settlement of monetary claims

C.31 The Ombudsman's letter raised the following difficulties.

- In some cases we have queried the level of discounting applied to reflect the risks of litigation, when the agency concerned has acknowledged that they would clearly be found liable.

- The administrative effort and legal consideration applied to determining whether to settle a claim sometimes exceeds any compensation that might be awarded.

- Difficulties can arise in applying the general proposition in the *Jones* case[82] that the exercise of a reviewable statutory power in good faith will not give rise to a common law action for negligence. An example in the income support field is where Centrelink makes a wrong decision about a pension entitlement and underpays the customer but the customer does not exercise their statutory right to seek a review of the decision. The customer cannot use the common law to claim that Centrelink was negligent and should therefore pay damages because the statute provided a right of review that the customer could have exercised to challenge the wrong decision. The difficulty is that in some instances the customer does not have enough information about the basis for an agency's decision to know that it was wrong and, therefore, that they should seek a review of it[83]. By the time they realise the mistake it is too late to recover the amount they would otherwise have been entitled to, because the legislation contains time limits for obtaining full arrears. The full implications of this general principle are not yet clear. It may be that Commonwealth officers in service delivery agencies may have a common law duty of care to their customers in some circumstances and that a breach may give rise to a negligence claim.

Agency responses

C.32 The **ACS** stated that agencies should have a broad discretion to settle claims and apply discounting in accordance with the Commonwealth's role as a model litigant and using common sense commercial principles.

C.33 The **ACS** pointed out that accepting liability is only one factor to be considered in the context of discounting. They and the **ATO** pointed out that there needs to be willingness on both sides to resolve a problem without resorting to litigation.

C.34 The **ACS** suggested that if both parties agree to settle, the Ombudsman's office should not query the outcome unless there are exceptional circumstances. Otherwise a potential litigant could gain an advantage through an 'appeal' to the Ombudsman without having to take the risk or expense of litigation.

C.35 The **ATO** stated that the principle in the *Jones* case is that there is no common law duty of care where there is a specific statutory right of appeal in particular circumstances. It cannot be stated more broadly than that. In their view the *Jones* principle is good law in Australia. Whether a duty of care exists where there is a statutory right of review will depend on the facts of each case. It may be necessary to look at the nature of the review rights available under the statute and compare that to the potential remedies at common law. If the statutory review mechanisms provide remedies that fall far short of those available at common law, the courts would tend to be more willing to find that a duty of care exists. The ATO

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[82] Held in *Jones v UK Department of Employment* [1989] QB 1 and followed in *Coshott v Woollahra Municipal Council* [1988] 14 NSWLR.

[83] Case study 4 in chapter 2 illustrates this. See also our discussion paper *'Balancing the risks'*, cited in footnote 17.

referred to the High Court's decision in *Northern Territory v Mengel*[84] confirming that governments and public officials are liable in accordance with the same general principles that apply to private individuals.

C.36 **Centrelink** stated that in settling legal claims they seek to provide a fair outcome for the customer. All claims for more than $10,000 are handled by one unit at national level so that consideration of legal liability, CDDA or possible act of grace payment is an integral part of the process for dealing with each customer's claim. Claims involving legal liability (and the CDDA criteria since November 1998) for sums less than $10,000 are determined in the area offices by senior officers and area managers.

C.37 **DEETYA** agreed that delays can occur but said that the procedures are laid out in legislation and guidelines that must be followed because public funds are involved. There are no short-cuts available.

C.38 **Defence** stated that legal questions not already answered in the material available to the decision-maker are clarified through the office of the defence legal organisation (DLO). Claims are referred to the DLO for an opinion on whether there is legal liability if the matter involves significant amounts; if it required skills to be applied by the person taking the action and the exercise of care and diligence; and if there has been a loss or detriment suffered. If the DLO believes there is a legal liability the matter is referred to the appropriate delegate specified in the CEIs. If the claim involves compensation for non-financial loss it is referred to the DLO for advice on likely quantum, to provide consistency and accountability and for making such payments publicly defensible.

C.39 **DFaCS** stated that they tried unsuccessfully four years ago to convince A-G's to modify its views that the *Jones* case was applicable in the circumstances of their customers. Viewed objectively the proposition in *Jones*, that there is no duty of care in making a decision where the decision is subject to merits review, makes some sense. It may be seen to do no more than embody the experience DFaCS and its customers have had in the review and appeals process more generally. DFaCS has no experience with discounting settlement offers to reflect the risks of litigation.

C.40 **DHAC** commented that where legal liability is totally clear and the agency concedes it, the claimant would be able to hold out for the full compensation without having to accept any discount. In less certain cases the claimant, with adequate advice, should be able to make their own assessment of the discount they would accept to obtain a certain and prompt result. That is what happens between private parties and there is no reason for the Commonwealth to adopt a more generous approach, provided it does not abuse its power.

C.41 DHAC also said that while the principle in the *Jones* case may be good law in Australia, it is not consistent with good administration that

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[84] [1995] 129 ALR 1

the mere existence of a right of review should relieve a decision-maker of a duty to be reasonable and careful.

C.42 **DIST** suggested that the government's decision to raise the ceiling on claims that can be settled without recourse to external legal advice from $2,000 to $10,000 had reduced the problem that resources expended in considering legal claims can sometimes exceed the amount awarded to the claimant. They suggested that the ceiling could be raised higher for agencies that have their own in-house legal areas.

4. Compensation for detriment caused by defective administration (CDDA scheme)

C.43 The Ombudsman raised the following concerns about the current operation of the CDDA scheme.

- The CDDA scheme came into existence when the devolved act of grace arrangements ceased. But the CDDA rules provide for compensation in a narrower range of circumstances than the act of grace mechanism. They cannot be used to overcome the effects of anomalous legislation or to compensate for circumstances that warrant sympathy but where it is not clear that defective administration was the cause.

- While some concepts encompassed in the CDDA scheme relate to legal issues some agencies have imposed irrelevant legal standards on the way they consider CDDA requests.

- Consideration of whether an agency's actions meet the 'unreasonable' test imposed by the scheme is problematic. While the word should be given its usual meaning[85] some agencies appear to require more than that before they will accept that compensation is payable. They appear to apply the interpretation suggested in the *Wednesbury*[86] case, that something was so unreasonable that no reasonable person would have done the same thing.

Agency responses

C.44 The **ACS, ATO, DEETYA, DFaCS** and **DHAC** agreed that the term 'unreasonable' should be given its usual meaning and asserted that this was their usual practice for CDDA purposes.

C.45 The **ATO** commented that although there are specific rules for the CDDA scheme, the ATO interprets them broadly and does not necessarily agree that the scheme must necessarily be narrower than act of grace. The ATO sees the scheme as intended to all but replace the act of grace arrangements and has proceeded accordingly.

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[85] The Australian Concise Oxford Dictionary, second edition, 1992, defines 'unreasonable' as 'going beyond the limits of what is reasonable or equitable', where 'reasonable' means having sound judgment and 'equitable' means fair and just.

[86] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

C.46 By contrast, **DoFA** stated that the scope of the CDDA scheme is deliberately narrower than the act of grace mechanism. They said that cases coming within the CDDA scheme can be readily identified and addressed without recourse to legal principle and practice and without applying the complex criteria against which act of grace claims are examined.

C.47 DoFA also stated that agencies will not always use the same standards or procedures to substantiate claims of defective administration, but it is possible for a person who believes their circumstances have been unfairly limited to consideration under the CDDA scheme to apply direct to DoFA for a decision within the broader act of grace context.

C.48 The **CSA** stated that it has been extremely rare to look to an act of grace payment because circumstances have fallen outside the boundaries of the other schemes.

C.49 **DEETYA** and the **ATO** stated that there has to be some evidence that the matter falls within the CDDA criteria for a payment to be made, ie, that the claimant suffered damage as a result of the agency's actions.

C.50 **Defence** stated that most of their claims under the CDDA scheme relate to conditions of service of Defence employees or defence force members, eg, salary and allowances forgone. The **ATO** indicated that they are receiving increasing numbers of claims from their own staff. But for most agencies, including the ATO, the CDDA scheme is used to compensate their customers rather than their employees.

C.51 **Defence** reviewed their operation of the CDDA scheme in September 1997. The review resulted in a recommendation that a second CDDA delegate be appointed. In the meantime several changes were made to the CEIs to improve the operation of the scheme. One branch of the Department handles all compensation claims, and considers each claim under the most appropriate mechanism after looking at the circumstances as a whole.

C.52 Defence also stated that they accept responsibility for loss resulting from actions they undertook or failed to undertake where they were obliged to take such action. For example, if there is a policy instruction that an official do or not do something to a particular standard, Defence will accept full responsibility for any loss resulting from a failure to meet that standard.

C.53 **DFaCS** said that reasonableness notions are central to negligence in the law of torts and a lower standard than the *Wednesbury* standard is applied there. DFaCS applies the ordinary torts standards in the CDDA scheme and DoFA have agreed with that approach. DFaCS believes a CDDA payment can be contemplated where an officer's lapse or failure to institute procedures or failure to give advice is, in the circumstances, lacking because a reasonable Centrelink or DFaCS officer in that officer's position would have avoided the lapse, instituted the procedures or given the advice.

C.54 **DHAC** stated that the CDDA scheme is useful within its limits. They were considering the question of coverage of the scheme[87]. Most of the decision-making powers that may give rise to compensation requests are exercised by the HIC as delegates of the Minister for Health. The HIC is a statutory body subject to the CAC Act, not the FMA Act, and it is therefore unable to use the CDDA scheme to provide compensation. DHAC did not see any reason in principle why the CDDA scheme should not be an option for CAC Act bodies to consider, although those operating commercially may not often find it appropriate.

C.55 DHAC commented that although the CDDA scheme should not be interpreted in a rigid, narrow or restrictive way it is inevitable that there will be some risk of this. For that reason it is important that the act of grace mechanism not be interpreted restrictively or in a way that the inevitable possibility of apparent overlap between these mechanisms becomes the focus of pointless debate. Devolution of the act of grace power back to agencies may encourage a more comprehensive assessment of a particular matter in the context of both schemes rather than leaving the final decision to DoFA.

5. Ex gratia payments

C.56 The main difficulty the Ombudsman outlined with this mechanism is that it requires a high degree of political will to create an ex gratia payment arrangement[88].

Agency responses

C.57 **ACS, Centrelink, CSA, Defence, DFaCS, DHAC** and **DIST** did not comment on this mechanism.

C.58 The **ATO** stated that they operate a public interest test case program that funds taxpayer costs to varying degrees, to test tax issues of public importance. A panel of people, including academics and tax practitioners, from outside the ATO advises the ATO on the application of such funds.

C.59 **DoFA** stated that the essential difference between ex gratia schemes and act of grace payments is that ex gratia payments are a means for addressing particular losses or classes of losses the government decides are unacceptable, rather than for addressing individual claims against a statutory criterion.

C.60 **DEETYA** interpreted the Ombudsman's comments on this subject as a proposal for a new ex gratia scheme enabling compensation payments to be made more flexibly than under the current avenues. They commented that even if such a scheme were established it would still require some

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[87] As noted earlier, the CDDA scheme is only available to Commonwealth agencies subject to the FMA Act. The Minister for HAC's portfolio covers other agencies, including the HIC, which are subject to the CAC Act and therefore unable to pay compensation for defective administration under the CDDA scheme. DHAC's response raises the question whether those agencies have recourse to the act of grace power, as it is contained in the FMA Act.

[88] In hindsight we should have said that it also requires a high degree of bureaucratic will.

rules and guidelines to ensure that payments were publicly defensible and that agencies adopted a consistent approach.

6. Relationships between mechanisms

C.61 The Ombudsman suggested that the available payment mechanisms do not provide a safety net ensuring that all recommendations for compensation can be considered and accepted or rejected on their merits. He gave the hypothetical example of a complaint where:

- procedures were poorly designed or not followed but the agency concerned does not consider that sufficiently unreasonable to justify a payment under the CDDA scheme;
- there is evidence suggesting that the agency may be legally liable but not necessarily enough evidence to prove liability, hence the agency concerned or the AGS is reluctant to settle the claim; and
- the circumstances were unusual and arouse compassion but the agency concerned or DoFA do not consider them sufficiently different or sufficiently similar to a previous request for compensation to warrant an act of grace payment.

C.62 The Ombudsman suggested that in such cases:

- we prefer to consider the whole circumstances rather than apply a series of complex, sometimes contradictory and arbitrary rules;
- determining which of the schemes is appropriate to authorise the payment is time consuming and wasteful, particularly where an agency rejects payment under one avenue and we then have to persuade them to consider the others;
- even when the agency concerned agrees that the circumstances warrant an act of grace payment because there are special circumstances and none of the other avenues applies, DoFA do not always agree;
- there is sometimes disagreement between the agency and DoFA about which remedy should apply, with DoFA referring the matter back to the agency to consider under the CDDA scheme but the agency refusing because they believe an act of grace payment is more appropriate in the circumstances: the end result is that no payment is made even though both agencies believe one is warranted for different reasons; and
- it is difficult to understand why, if the schemes have different purposes and rules, the CDDA scheme cannot be used where an act of grace payment has already been refused, and similarly, an act of grace payment is not an alternative remedy after a CDDA payment is refused.

Agency responses

C.63 The **ATO, CSA** and **DEETYA** commented that they were not aware of any cases in their own agency where they believed compensation was

warranted but were unable to find a mechanism for payment. The **ATO** commented that it may be that their approach to the CDDA scheme has avoided any difficulties with overlaps or gaps between the schemes to which the Ombudsman referred.

C.64 The **ATO** said that their approach is that no matter should fall between the cracks. They use legal principles in calculating all claims regardless of the avenue used. That approach is required for the settlement of monetary claims but also brings a defensible, clear and consistent approach to calculating CDDA claims.

C.65 The ATO also stated that no compensation mechanism should be used to deal with cases warranting sympathy notwithstanding the lack of a clear cause. In their view actual detriment or damage is necessary in all cases, and fault is also necessary for payments resulting from legal liability and defective administration.

C.66 The ATO stated that one of the difficulties with the existing mechanisms is that there is no single scheme, but instead three distinct schemes. The ATO strives to ensure that claimants are not adversely affected by that difficulty, but the differences between the schemes, including different approval processes, necessarily present some administrative problems.

C.67 The **ACS** stated that the Ombudsman's concerns about legitimate claims falling through gaps in the present schemes were valid. In their view, it is preferable to examine the totality of the circumstances rather than apply a series of complex rules. They agreed that the choice of mechanism should not be allowed to delay or prevent payment and that there is potential for that to occur under the existing arrangements. The ACS agreed that the distinctions between the schemes can be artificial and suggested that devolution of the act of grace power and the possible merger of the present schemes may allow agencies to apply a more flexible mechanism. They suggested that increased flexibility and control by agencies would ensure that a result is achieved when compensation is clearly warranted.

C.68 **Centrelink** commented that all claims for payment under the CDDA scheme had to be forwarded to their national office for consideration prior to November 1998. The Minister had then agreed to extend the CDDA delegation to area managers so that consideration of all claims for monetary compensation could be brought together in the one process at the area as well as the national level.

C.69 The **CSA** and **Defence** stated that they seek legal advice on claims for non-financial loss regarding the amount to be paid. Both the CSA and Defence conducted reviews of their procedures for responding to compensation requests in 1997.

C.70 The **CSA** conducted a review of the timeliness, consistency and quality of decisions relating to compensation claims that resulted in changes to improve the CSA's approach. The new coordinated approach

has proved valuable in collating and sharing information. Since national reporting began in December 1997 the time taken to finalise a compensation request and the number of claims outstanding have reduced. The CSA's review effected the following administrative changes:

- in December 1997 the CSA set up regional units dedicated to compensation matters, under the direction of senior officers;

- since April 1998 the CSA's deputy registrar has been determining all claims for compensation or making recommendations to the Assistant Treasurer where the claim is for more than $5,000 and involves the CDDA scheme;

- compensation is coordinated nationally by the CSA's ministerial liaison unit which is developing a holistic approach to complaints by integrating national management of the CSA complaints service, ministerials, complaints from the Ombudsman, privacy complaints and requests for compensation;

- the CSA's compensation network held two national forums in 1998 and intends to continue these every three or four months;

- the AGS conducted a one day workshop for CSA compensation and legal staff in July 1998; and

- staff working on compensation matters contribute to local forums and information sessions for other staff and can highlight the consequences of not following policy and procedures.

C.71 **DFaCS** agreed that it would be simpler and possibly fairer in many instances if there was a single scheme in place with a comprehensive set of conditions covering all situations where compensation can be paid. But the criteria for the act of grace and ex gratia mechanisms would sit oddly with the more legalistic criteria for FMAR 9 and CDDA payments. The efficacy of act of grace and ex gratia payments may be compromised if they were absorbed into a more legally based, general compensation payment, because they are frequently based on moral or compassionate considerations.

C.72 **DFaCS** and **Centrelink** agree that it should be possible to consider for CDDA payment a claim that has been rejected for an act of grace payment and vice versa.

C.73 **DoFA** agreed that it is important to consider the totality of circumstances affecting an individual who wants compensation from the Commonwealth. But they also stated that each claim needs to be examined within a framework that provides a continuum of benchmarks for differentiating matters for which the Commonwealth

- bears no legal or moral responsibility;
- bears a moral but not a legal responsibility for defective administration;

- may bear a moral but not a legal responsibility for a matter not related to defective administration; and
- bears, or is likely to bear, a legal responsibility.

C.74 DoFA stated that each mechanism serves a valid purpose and should not be viewed negatively. They disagreed with the Ombudsman's view that consideration of compensation involves the application of a series of complex, sometimes contradictory and arbitrary rules. To streamline the process, the initial responsibility for investigating the most appropriate means of addressing a particular case rests with the agency that receives the request. DoFA refer defective administration matters to the agency concerned, with their views.

C.75 **DHAC** commented that the important thing is for these schemes to complement each other to provide a valid compensation mechanism for the cases which do fall between the cracks. They should not be able to be construed so as to further marginalise complainants. DHAC stated that the Ombudsman's concerns about the arbitrariness of the limitations on the use of act of grace payments following refusal of a claim under the CDDA scheme are warranted. The limitations are not so much arbitrary as that act of grace does not apply if there is defective administration, as in any other case where there are other administrative mechanisms to deal with claims against the Commonwealth.

C.76 DHAC also said that rather than seeking to define the precise boundaries of current schemes it would be more constructive to recognise the inherent expectation in section 15 of the Ombudsman Act that a remedy may be appropriate, on the Ombudsman's recommendation, in the kinds of circumstances described in that section. Much of the problem would go away if it were made clear under the CDDA scheme that the Ombudsman's recommendation alone could be a basis for payment with the agreement of the agency concerned. The recommendations of the impartial investigator, moderated by the views of the agency, provides a sound basis for payment.

C.77 DHAC said that there could be difficult issues of statutory interpretation in reconciling the apparent expectation of section 15 of the Ombudsman Act with some of the requirements of the FMA Act. But there is a much less strong case for saying that the implications of section 15 were not intended by Parliament to outweigh regulations made under other legislation, let alone policy decisions by government (act of grace and CDDA). There should be no legal or administrative gap as an impediment to implementation by government of the considered decisions of the Ombudsman in accordance with the provisions of the Ombudsman Act.

7. Interest

C.78 Months or years can pass between the date when a legal or moral obligation arose to compensate a person and the date on which compensation is finally paid. It is reasonable to include a component for interest actually outlaid by the person if they had to borrow money as a

consequence of the agency's actions, or where there has been an unreasonable delay in resolving the request for compensation. It may also be reasonable to include a component for interest forgone, to compensate the person for the time value of money they have not had the use of.

C.79 The Ombudsman's letter to agencies raised the following difficulties regarding agencies' approach to including an interest component in their offer of compensation:

- Some agencies refuse to pay any interest component at all.
- Others use different methods to calculate the rate of interest, including:
    - the rate the Commonwealth would otherwise have had to pay for the money;
    - statutory pre and post judgment interest rates provided in State and Territory civil court legislation;
    - the rate the person could have earned on the principal compensation amount in the meantime;
    - calculations using the consumer price index;
    - payment of an equivalent entitlement at current rates (eg, for lost income support);
    - the rate applicable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.
- The choice of method and date from which interest is calculated can have a dramatic effect on the amount of compensation actually paid.

Agency responses

C.80 **Centrelink, CSA** and **DIST** did not comment on this subject.

C.81 The **ATO, DoFA, DEETYA** and **Defence** stated that an interest component is sometimes included in compensation payments. From discussions with the CSA we know that they include an interest component in some cases and use the same rate as the ATO for CDDA payments, and whatever rate the AGS suggests for legal liability payments.

C.82 The **ACS** stated that interest should be considered case by case, guided by some general principles. They recognised the argument that claimants deserve to be restored to their financial position before the defective administration, but suggested that interest may not be appropriate in some circumstances, eg, where legislation does not provide for interest to be paid and claimants who are dealt with in accordance with the legislation do not receive interest on repayments and refunds. In the ACS's view, where the delay is caused by the claimant it may not be appropriate to compensate them for the results of their own actions.

C.83 The ACS also stated that the appropriate means of compensating for delay will depend on the circumstances, including the nature of the payment (eg, whether it is income in the hands of the recipient) and the timing of valuation of any detriment (eg, if valued at current values it should not be necessary to adjust any payment for the time value of money). The ACS advised caution in attempting to adjust payments for

lost opportunities. They stated that if the compensation mechanisms are rationalised, one reason for delay in resolving such cases will be removed.

C.84 The **ATO** stated that they use the rate in the *Taxation (Interest on Overpayments and Early Payments) Act 1983* which is based on the Treasury note yield and is adjusted every six months. They use that approach because ATO staff are familiar with the principles; the rate used is one that Parliament has agreed recognises the time value of a taxpayer's money; the rate is adjusted regularly, on a consistent basis, externally to the ATO; and past and current rates are readily available to ATO staff.

C.85 **DEETYA** consults AGS when there is a legal liability and the settlement may include an interest component. Payments under the CDDA scheme and act of grace payments can also include interest. DEETYA said it did not have any comment on the rate to be applied. 'Interest' may simply be included as part of an appropriate lump sum rather than paid as a separate item.

C.86 **Defence** calculates an interest component on the full amount of the loss, net of tax, because most of their compensation requests relate to income forgone. They sought DoFA's advice on the rate of interest to use when the CDDA scheme first came into operation. DoFA suggested that the rate used in calculating simple interest should approximate the notional gain the Commonwealth achieved from the delay. Defence decided instead to use compound interest calculations for compensation for all salary and allowance payments forgone, to take into account the fact that the claimant would have made full economic use of their salary or allowance if they had received them at the time they were due. Defence uses the exchange settlement account indicator rates as advised by the Reserve Bank.

C.87 **DFaCS** have not made substantial interest payments a standard element in compensation payments, because most compensation payments they make are in recognition that a person has been underpaid a social security benefit and cannot be paid arrears under the Social Security Act. The Act does not provide for payment of interest as part of an arrears payment. It is difficult to see why interest should be paid in a compensation case. The recipient would be in a better position than a customer who can be paid arrears under the Act. But compensation under FMAR 9 may involve interest especially where the settlement is definitely a substitute for a looming court action. In such cases DFaCS pays the rates prescribed by the law.

C.88 **DoFA** include amounts for loss of opportunity or interest in some act of grace payments and use the Commonwealth's long term bond rate.

C.89 **DHAC** said the appropriate basis for adjusting a compensation payment for delay would depend on the circumstances. To the extent that compensation payments may be discretionary and have regard to subjective issues such as distress, it may be better and simpler to determine a lump sum having regard to all the circumstances. Where a clear legal

liability arose at a given date it would be appropriate to add interest at one of the rates the Ombudsman listed.

8. Taxation implications

C.90 The Ombudsman's letter stated that a lump sum compensation payment may represent money that the agency should have paid to the person over several years. While the *Income Tax Assessment Act 1936* can deal with this through rebate and reassessment mechanisms there can be problems, particularly if the agency providing compensation does not take into account the income tax implications of the lump sum paid.

C.91 According to the ATO's guidelines for handling compensation requests, as a general rule, compensation in the nature of interest or other forms of income is assessable for income tax purposes. We understand that this means that any part of a compensation payment that makes up for lost income is taxable. Where a payment for an un-dissected lump sum includes heads of claim that are capital, the whole amount should be treated as a payment of a capital nature and therefore subject to capital gains tax. The exception is where the compensation is for any wrong or injury to the person themselves. The right to sue is an asset for capital gains tax purposes and the settlement of a claim is the disposal of that asset.

Agency responses

C.92 **Centrelink, CSA, DoFA** and **DIST** did not comment on this subject.

C.93 The **ACS** stated that taxation questions should be approached case by case. Adjustment for taxation effects may not be always be appropriate.

C.94 The **ATO** said they are well aware that compensation payments can have a taxation impact and their compensation guidelines reflect this. They calculate compensation having regard to the tax implications so that the claimant is left with the appropriate net amount. The ATO also advises claimants of the tax implications of payments they receive.

C.95 **DEETYA** stated that questions about taxation as it affects lump sums should be answered by the ATO.

C.96 **Defence** received advice from the ATO that where a compensation payment is made for loss of an amount that would have been assessable income, the compensation payment and any interest component is assessable income. The payment is not a payment for services rendered, but rather to recognise defective administration. Defence is therefore not required to deduct tax instalments but the claimant is obliged to declare the payment as assessable income.

C.97 **DFaCS** are not aware of any adverse taxation effects for social security recipients who have received compensation payments from them. Some payments are taxed as income and others are not (eg, disability support pension and family allowance). The ATO taxes compensation payments paid by DFaCS and Centrelink only where the pension, benefit or

allowance represented by the compensation payment would have been taxed. **Centrelink** has begun to provide for possible taxation effects in its deed of release signed by applicants offered compensation.

C.98 **DHAC** stated that the appropriate test is that the person be placed as far as possible in the position they would have enjoyed if an unfair, defective or unreasonable decision, etc, had not been made.

9. Review of decisions

C.99 The Ombudsman's letter referred to the following matters and asked agencies to comment on the feasibility of a determinative or recommendatory system of merits review of decisions on compensation.

- A person may complain to the Ombudsman about the way any of the compensation schemes is administered. They could also seek judicial review of an act of grace decision under the *Administrative Decisions (Judicial Review) Act 1977*.
- A person may be able to seek judicial review of a CDDA scheme decision under the *Judiciary Act 1903* or the Constitution (as the decision of a Commonwealth officer).

Agency responses

C.100 The **CSA** and **DIST** did not comment on this subject.

C.101 The **ACS** and **ATO** did not believe merits review is appropriate for compensation decisions relating to legal liability, because the claimant could pursue the matter through the courts if necessary. They suggested mediation (ATO) or arbitration or a second opinion (ACS) as more appropriate means for reviewing such decisions where there is no alternative.

C.102 The **ACS** suggested caution in approaching the question of review because it may result in 'ratcheting up' payments or forum shopping.

C.103 The **ATO** said there is little reason to oppose merits review of a CDDA decision or act of grace decisions if that power is devolved to agency heads. The ATO guidelines on compensation identify review avenues and the ATO inform claimants of their review rights when a decision on their claim is made.

C.104 **Centrelink** said their national delegate reconsiders a compensation decision whenever a customer asks for review. Customers are always advised of other avenues available to them for review. Because of the provisions for review and appeal of social security decisions, many customers have had their circumstances assessed several times before a CDDA decision is made. Further review may delay resolution unnecessarily.

C.105 **DEETYA** and **Defence** said they were not aware of any requests for judicial review of their compensation decisions.

C.106 **DEETYA** foresaw difficulties in merits review of compensation decisions if there is no legislative framework but simply policy guidelines that give broad criteria for the delegate to consider. DEETYA suggested that if such a system were to be implemented it would have to be standardised across agencies to ensure a consistent approach.

C.107 **Defence** advises all claimants of their right to seek information under the *Freedom of Information Act 1982* and their right to seek a review by the Ombudsman.

C.108 **DFaCS** said there are only one or two cases taken against the department each year for judicial review of a decision and they are usually discontinued. Complainants find the merits review system far preferable because it is cheaper, faster, more informal and the tribunals have wider powers than the courts and can change a decision even if it was lawful (courts cannot do this).

C.109 DFaCS also commented on the possibility of merits review of compensation decisions. They said that there are arguments in favour of it because these decisions are discretionary. But they also said that some discretionary decisions are not open to merits review for some good reason attaching to the matter to be decided. DFaCS said that the various mechanisms, each with its own set of conditions, might be a reason against merits review, and there are very likely historical reasons why act of grace decisions would not be regarded as appropriate for merits review.

C.110 **DoFA** reconsiders a decision not to make an act of grace payment if the claimant asks them to, particularly in the light of any new evidence or changes in the claimant's circumstances. They do not believe any systematic review of such decisions would be useful because each request for an act of grace payment is examined on its merits, although against broad criteria.

C.111 **DHAC** suggested that apart from judicial review, the Ombudsman's office would normally provide a cost effective method of reviewing decisions under the CDDA scheme. AAT review would be more formal and costly, with the only apparent advantage for a complainant being that it would provide an avenue to the Federal Court for enforcement of a decision.

10. Review of existing compensation arrangements

C.112 The Ombudsman's letter stated that we had asked DoFA whether they planned to review any of the compensation mechanisms and had indicated that we would be interested in contributing to any such review.

Agency responses

C.113 The **ATO, Centrelink, DFaCS, DHAC** and **Defence** did not comment on this matter.

C.114 **DIST** agreed that the number of different schemes and their relationship is overly complex.

C.115 The **ACS** supported a review of the current mechanisms. They would encourage decentralisation of powers along with greater flexibility to ensure claimants are dealt with in an equitable and timely manner.

C.116 The **CSA** believed the current mechanisms are sound and that no changes are necessary.

C.117 **DEETYA** said that any review remains a matter for DoFA.

C.118 **DoFA** said that there are no plans to review the efficacy of the compensation mechanisms, other than the possible devolution of the act of grace power. DoFA said they assess their own administrative processes on an ongoing basis to streamline procedures.

ATTACHMENT D

AGENCIES CONTACTED DURING THE INVESTIGATION

D.1 The Ombudsman wrote to the following Commonwealth agencies in 1998, notifying them that he was investigating matters relating to compensation for maladministration and seeking their comments.

Australian Customs Service (ACS)
Australian Federal Police (AFP)
Attorney-General's Department (A-G's)
Australian Taxation Office (ATO)
Centrelink
Child Support Agency (CSA)
Department of Defence
Department of Employment, Education, Training & Youth Affairs (DEETYA)
Department of Finance and Administration (DoFA)
Department of Health and Family Services (DHFS)
Department of Immigration and Multicultural Affairs (DIMA)
Department of Industry, Science and Tourism (DIST)
Department of Primary Industry and Energy (DPIE)
Department of Social Security (DSS)

D.2 Representatives from the following agencies attended a meeting hosted by the Ombudsman on 23 April 1999. The Department of Veterans Affairs had indicated their intention to attend but were unable to. The names of some agencies changed after the federal election in October 1998, to reflect a changed focus or responsibilities.

Attorney-General's Department (A-G's)
Australian Customs Service (ACS)
Australian Government Solicitor's Office (AGS)
Australian Tax Office (ATO)
Centrelink
CRS Australia (Commonwealth Rehabilitation Service)
Child Support Agency (CSA)
Department of Education, Training and Youth Affairs (DETYA)
Department of Employment, Workplace Relations & Small Business (DEWRSB)
Department of Family and Community Services (DFaCS)
Department of Finance and Administration (DoFA)
Department of Health and Aged Care (DHAC)

ATTACHMENT E

MEETING ON 23 APRIL 1999 - SUMMARY OF DISCUSSION

E.1 Representatives from twelve agencies attended a meeting hosted by the Ombudsman on 23 April 1999 to discuss matters raised in the discussion paper. The meeting followed a similar meeting which discussed related matters raised in the Ombudsman's discussion paper, '*Balancing the Risks*'[89]. This attachment summarises the matters discussed.

Ombudsman's views

E.2 Traditionally the Commonwealth has been tight-fisted in its approach to paying compensation as a remedy for administrative failures. But over time various compensation mechanisms have developed to provide redress for defective administration in particular circumstances. In today's circumstances, where agencies are subject to resource constraints, risk management approaches are becoming an integral part of sensible cost-effective management. There is greater acceptance that a small proportion of errors will occur from time to time and that this is to be expected and planned for. It is too costly to introduce adequate checks and balances to guarantee perfect administration all the time.

E.3 When errors occur and members of the public are adversely affected there should be a customer-focused culture willing to redress circumstances when things go wrong. This would recognise the risk management environment in which agencies now operate and would put more emphasis on quality of service. Agencies need to consider the full range of circumstances and should take a broad, flexible approach in applying the compensation rules.

E.4 Industry ombudsmen set up by governments in recent years have been given the power to penalise an agency for failure to meet defined service standards. These developments indicate a changing relationship between government and the community.

E.5 Best practice in service delivery involves a willingness to seek to keep good customer relations by acknowledging a problem readily when one occurs; being prepared to try to remedy the problem in a way that is fair and instils confidence and respect in government; and recognising that this may include paying some form of compensation on occasions.

E.6 Agencies respond to compensation requests differently. But they should all start by considering whether there has been a breakdown in their system, rather than whether the action is defensible and payment of compensation can be avoided. There needs to be more focus on the

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[89] op cit.

consequences to the customer and less on the needs of the agency: a pro-active rather than a defensive approach.

E.7 Agencies are inconsistent in their approach to compensation. It is difficult for us to predict whether an agency will accept a recommendation for compensation in particular circumstances. We cannot always work out why they accept one and reject another. It would help if agencies gave fuller reasons for their decisions on compensation recommendations.

E.8 The Ombudsman has a statutory responsibility to recommend remedies including compensation where appropriate. Those recommendations should have persuasive force and should not be dismissed lightly. Agencies sometimes give us the impression that they agree with our conclusions but cannot provide compensation because to do so would be outside the rules for the existing mechanisms. If the government does not have the framework to encompass our recommendations, the rules may need to be changed.

E.9 Agencies should have full responsibility for providing compensation, unfettered by inflexible rules or lack of power. Whether we like it or not, sometimes it may be cheaper to settle an argument, regardless of merit. Taxpayers will be out of pocket otherwise. In these circumstances it is better for agencies to have full responsibility for making their own decisions. They would then be directly accountable, would learn from their experience and would be very unlikely to pay compensation unwisely, as they would still be subject to the constraints of the FMA and Auditor-General legislation.

E.10 We need to move to more flexibility in a system that is at present unreasonably inflexible in some circumstances. The rules should be clarified so that compensation is payable if the agency accepts the Ombudsman's conclusion that there has been defective administration and his recommendation for compensation.

E.11 One outcome of the investigation will be that we focus more attention on cases where we recommend compensation.

Agency views

E.12 Service charters provide the framework for compensation but agencies need to comply with the legal rules for providing it. There are two broad categories of people: those to whom the Commonwealth owes money and those to whom it does not. Requests for compensation based on a moral obligation on the Commonwealth fall into two broad categories: those without merit and those where anyone would have sympathy for the person. Requests in the latter category are the most difficult to determine.

E.13 The FMA Act framework fosters devolution rather than centralised control. DoFA are considering whether to recommend that the act of grace and waiver powers be devolved to agencies, because they are in the best

position to know how best to manage their risks. The crucial question is to ensure accountability. Accrual budgeting will promote accountability for the exercise of these powers. There would be some financial limits, with DoFA retaining power in respect to large amounts. Whether a payment would create a precedent is also important. DoFA have tended to consider whether a payment would create a precedent and whether it is in the interests of the taxpayer, that is, whether the Commonwealth has a moral obligation to pay.

E.14 Most agencies have power to write off debts but not to waive recovery of them, whereas DoFA has power to waive recovery but not to write them off. DoFA would rather an agency write off a debt than seek waiver, but they are considering whether agencies should be able to exercise both powers themselves.

E.15 The Ombudsman's role is to draw conclusions about defective administration. He is authorised to recommend a remedy, but his recommendations cannot fetter the agency decision-maker's discretion. DoFA's role is to set the framework for payment of compensation. Both the Ombudsman and DoFA need to discuss the matter.

E.16 If compensation is warranted it would not have been Parliament's intention that the Ombudsman not pursue it because an agency is resistant. Likewise, it would not have been intended that the agency give in to the Ombudsman when they are not satisfied that they should pay. Sometimes resolution of a complaint will be protracted, eg, if there is a dispute about the facts. There is a tension there that needs to be addressed. The Ombudsman's office needs to examine its own methodology. There is a lot of room for behind the scenes negotiation, for the Ombudsman's office to gather a few complaints together for discussion with the agency concerned.

E.17 It was suggested that where there is disagreement between the Ombudsman and the agency concerned, there should be a consultative mechanism to try to break the deadlock. Options include a standing committee; a panel to call on ad hoc; parliamentary committees or staff; and
an independent expert.

E.18 Service charters lead to expectations that compensation will be payable but we need to ensure we are not creating false expectations that lead to disappointment. There is a general perception that Australians are becoming more litigious. We have to be careful of paying unmeritorious claims. Commercial considerations are important but the Commonwealth's policy on handling monetary claims requires some likelihood of succeeding in court. The Auditor-General needs to be satisfied that money has been spent properly.

E.19 There are two ends of the spectrum: defending the indefensible and compensating for every error, regardless of whether it amounts to

defective administration or involves special circumstances. Neither of these extreme approaches is appropriate.

E.20 The existing compensation 'system' is not fundamentally bad, but it needs to be simplified, especially the legal liability and defective administration rules. Agency guidelines are too complex at present. What we need is a set of principle based rules with examples of circumstances in which compensation is and is not payable. The DoFA guideline on the CDDA scheme may be sufficient, if combined with the principles on which legal liability and act of grace payments are made and some examples.

E.21 It would be helpful to negotiate with the Ombudsman's office as suggested in the discussion paper by reference to the DSS (UK) model, but the arrears rules in the social security legislation would remain difficult to overcome. Another interesting approach is in human rights discrimination cases that have gone to a full hearing. These decisions are developing a 'tariff' for particular kinds of discrimination.

E.22 There was general support for the suggestion that the CDDA rules be clarified to ensure that an agency's acceptance of the Ombudsman's recommendation for compensation for defective administration would be sufficient basis for making a payment.

E.23 The CDDA scheme was intended as a last resort, with DoFA hoping agencies would fix the systemic problems that triggered the compensation payments. But it appears that some agencies just keep paying compensation instead of fixing the problems. It was suggested that fixing a problem may sometimes be more expensive than paying the compensation it generates.

E.24 Most agencies did not favour any additional system for review of compensation decisions. Act of grace decisions are subject to judicial review. Most agencies considered that Ombudsman review was sufficient for the other mechanisms.

E.25 The *Jones* decision is a reasonable one but it does have some limits. If an agency wants the protection of statutory review rights to defend an action of breach of duty of care, it must comply with its statutory obligations and give proper notice of those review rights.

E.26 The main points agreed during the meeting were:

- the existing compensation mechanisms are fundamentally sound but need some fine tuning, including the suggestions that agency guidelines be simplified and that the CDDA rules be clarified to ensure that an agency's acceptance of the Ombudsman's conclusion and recommendation is sufficient basis to pay compensation;
- the act of grace and waiver powers should be devolved to agency heads;
- the DSS (UK) model is a useful basis for further discussion between the Ombudsman's office and agencies; and

- compensation cases may be more quickly resolved by arranging meetings between the Ombudsman's office and the agency concerned to discuss outstanding cases.