

Making things right

DEPARTMENT OF EDUCATION AND TRAINING:
COMPENSATION FOR ERRORS MADE BY
CONTRACTED SERVICE PROVIDERS

March 2015

Report by the Commonwealth Ombudsman,
Mr Colin Neave, under the *Ombudsman Act 1976*

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EXECUTIVE SUMMARY

This is a report on our investigation of two complaints about the then-Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education (DIICCSRTE) (now the Department of Industry and Science and referred to in this report in the present tense as DIS). The complaints centred on DIS's reviews of applications made under the Australian Apprenticeships Incentives Programme (AAIP).

Following the conclusion of those investigations, Machinery of Government changes resulted in policy responsibility for apprenticeship programmes being transferred from DIS to the Department of Education and Training (DET). This means that, while our original investigations were focused on DIS, the recommendations in this report are directed to DET as the department with current responsibility for the AAIP.

In 2013 and 2014 the Ombudsman's office received complaints from representatives of two businesses that had been refused employer incentives under the AAIP. The complainants said that they had received incorrect or ambiguous advice about their eligibility for employer incentives from Australian Apprentices Centres (AACs), who were contracted by DIS to administer AAIP payments. On the basis of this advice they employed and trained apprentices and incurred associated expenses. When the employers later lodged the requisite applications for payment, those applications were refused on the basis that they were not, in fact, eligible for the anticipated payments.

DIS reviewed both decisions and decided that – although it was likely they had been given incorrect or ambiguous advice – the applicants did not satisfy the eligibility criteria for the claimed incentives. The Department advised the complainants that, even if their businesses had suffered a loss as result of the AACs' mistakes, it did not have any way of compensating them.

The Department maintained this position in response to our investigation. It also advised that, had one of the complainants received the correct advice in time to change their course of action to ensure they would be eligible for the payment, the Department may have refused to grant the payment in any case, on the ground that the complainant would have engaged in 'manipulation' of the criteria.

Our investigation concluded:

- both complainants could make a reasonable case that the AACs had made mistakes that caused them to suffer real and/or expectation losses
- the AAIP includes exceptional circumstances arrangements that might provide a practical remedy to one of the complaints, but DIS was unwilling (or perhaps believed it was unable) to use those arrangements in that complainant's case
- the Department has a moral responsibility to compensate parties who suffer a loss as a result of AACs' mistakes, but does not currently have any arrangements under which it could assess or pay these claims.

The Ombudsman has made three recommendations.

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The first recommendation seeks to strengthen the current potential administrative remedy, by clarifying the discretion for a decision maker to waive one or more of the eligibility criteria for an AAIP benefit if they are satisfied that a mistake by DET or AAC staff prevented the applicant from satisfying the relevant criteria.

The second recommendation concerns the implementation of a Departmental scheme under which DET could compensate AAIP applicants who have suffered a loss as a result of a mistake by an AAC or agent.

The third recommendation is that DET review its internal policy guidance to ensure applicants are not unreasonably penalised for revising their course of action in response to changes in benefit eligibility, by being deemed to have engaged in 'manipulation'.

The Report also highlighted the fact that the Australian Government's whole-of-government Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) does not apply where mistakes are made by contracted service providers, rather than Australian Government officials. We intend to raise this wider issue with the Department of Finance, which is the policy department responsible for the CDDA Scheme.

DET has accepted the intent of the first and third recommendations, and outlined its plans to address the underlying issues of concern.

DET did not accept the second recommendation, as it considers this issue is more appropriately dealt with by the Department of Finance on a whole-of-government level basis.

PART 1—INTRODUCTION

1.1 This report explores issues arising from the Ombudsman’s investigation of two complaints about the then-Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education (DIICCSRTE) (now the Department of Industry and Science, and referred to in this report as DIS).

1.2 Following the conclusion of those investigations, Machinery of Government changes¹ resulted in policy responsibility for the programme central to this report being transferred from DIS to the Department of Education and Training (DET). For the sake of simplicity and to avoid confusion, rather than switching between DIS and DET, this report uses the general terms ‘policy department’ and ‘department’. Use of these terms in the past tense is intended to refer to DIS, while use in the present tense refers to DET. The recommendations at the conclusion of the report are directed specifically to DET given its role as the current policy department.

1.3 In 2013 and 2014, the Ombudsman’s office received complaints from representatives of two businesses that had been refused employer incentives under the Australian Apprenticeships Incentive Programme (AAIP). The complainants said that they had been given incorrect or ambiguous advice about their eligibility for employer incentives by Australian Apprentices Centres (AACs), non-government organisations contracted by the policy department to administer AAIP payments. On the basis of this advice, they had employed and trained apprentices and incurred associated expenses. When the employers later lodged the requisite applications for payment, those applications were refused on the basis that they were not, in fact, eligible for the anticipated payments.

1.4 The policy department reviewed both matters and affirmed the AACs’ original decisions on the basis that, although it was likely that the AACs had given the employers incorrect or ambiguous advice, the employers nonetheless did not satisfy the eligibility criteria for the claimed incentives. The department also concluded that, even if the complainants had suffered a loss as result of the AACs’ mistakes, it did not have any mechanism available for compensating people for mistakes made by its contracted services providers.

1.5 If the policy department had not contracted out administration of the AAIP to non-government bodies, and the actions complained of had been taken by departmental staff instead, then the complainants could make claims under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme).

1.6 The CDDA Scheme provides a mechanism for compensating people where Commonwealth officials have caused them to suffer detriment through defective administration, such as unreasonably failing to give them proper advice. However, the CDDA scheme only applies to actions taken by officials of “non-corporate Commonwealth entities”² such as the policy department. It does not apply to actions taken by non-government organisations contracted by non-corporate Commonwealth entities to deliver services on their behalf.

¹ Department of Prime Minister and Cabinet, [Administrative Arrangements Order](#), 23 December 2014, clause 1 and Part 5

² Department of Finance, [Resource Management Guide 409: Scheme for Compensation Caused by Defective Administration](#), July 2014, clauses 13 and 16.

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1.7 Our office has not assessed whether CDDA claims by the complainants, if they could be made, would succeed. However, we are concerned that a consequence of the policy department's decision to contract out AAIP administration is that members of the public lost the right to access compensation under the CDDA Scheme for mistakes made in the program's administration, and the lack of any alternative mechanism for this.

1.8 The Ombudsman has previously commented on the responsibility of government agencies to ensure the public have access to adequate mechanisms to receive compensation for agency errors.³ This report explores a further facet of that issue; in particular our view that, notwithstanding the existence of the contract between the policy department and the non-government organisations operating the AACs, the department is responsible for ensuring that the public has the same protection against detriment arising from defective administration of its portfolio programmes, irrespective of the particular service delivery method being used.

1.9 This report also builds on past Ombudsman reports about the ways in which government agencies could improve their management of executive schemes.⁴

1.10 This report explores the options for compensation in respect of the actions of the policy department's contracted service providers, and makes recommendations for how these particular complaints – and others like them – might be remedied.

PART 2—BACKGROUND

Australian Apprenticeships Incentives Programme

2.1 The Australian Apprenticeships Incentives Programme (AAIP) is a set of employer incentives and personal benefits, aimed at encouraging individuals to become apprentices and employers to employ them.

2.2 The AAIP is an administrative, rather than statutory scheme. This means that the eligibility criteria and decision-making processes for the various AAIP incentives and benefits are set out in the *Australian Apprenticeships Incentives Programme Guidelines*⁵ (the Guidelines), rather than in legislation.

2.3 The Programme is funded by the Australian Government, overseen by the policy department, and delivered on the Australian Government's behalf by non-government organisations that are contracted to operate Australian Apprenticeships Centres.

The policy department

2.4 The policy department is responsible for, among other things:

- developing policy on support services for Australian Apprenticeships
- developing and providing advice on policy for the AAIP

³ Commonwealth Ombudsman, [Comcare and Department of Finance and Deregulation: Discretionary payments of compensation](#), March 2010.

⁴ Commonwealth Ombudsman, [Executive Schemes](#), August 2009.

⁵ Department of Industry and Science, [Australian Apprenticeships Incentives Program Guidelines](#).

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- tendering and contracting organisations to provide support services for Australian Apprenticeships, and
- monitoring, reviewing and evaluating Australian Apprenticeships Centres' performance and contractual compliance.

2.5 The policy department is also responsible for assessing requests for review of decisions made under the Guidelines.

Australian Apprenticeships Centres

2.6 Australian Apprenticeships Centres (AACs) are operated by private businesses and not-for-profit organisations contracted by the policy department to provide one-stop shops for employers and individuals considering, or already engaged in Australian Apprenticeships.

2.7 AACs are required to deliver information, administration services and support to employers and Australian Apprentices by, among other things:

- providing practical assistance for the duration of the Australian Apprenticeship
- administering incentive payments to employers and personal benefits to Australian Apprentices in accordance with the Guidelines.

2.8 All AACs and their staff are subject to the Australian Apprenticeships Centres Code of Conduct,⁶ which sets out the minimum standards to be applied in their dealings with all interested parties. A central focus of the Code of Conduct is on the provision of 'accurate, current and comprehensive information and advice to employers, Australian Apprentices and other interested persons on:...Australian Apprenticeships Incentives and Allowances...'.⁶

Decision making process

2.9 Applications for AAIP incentives under the Guidelines are decided in the first instance by the AACs. If the AAC decides that an applicant is not eligible for payment, the AAC must provide them with a clear and concise written explanation of the decision. If the applicant believes the decision was incorrect, or that there were exceptional circumstances that affected their eligibility, the applicant may request a review of the AAC's decision.

2.10 Upon receiving a request for review, the AAC is required to reconsider the decision, taking into account the policies and procedures outlined in the Guidelines, as well as any grounds the applicant has submitted in support of their review request. If the AAC identifies an error in the original decision, it must correct the error and give the applicant a revised decision.

2.11 If the AAC upholds the original decision, or the applicant has sought review on the basis of exceptional circumstances, the AAC must refer the claim to the policy department for review. The AAC is required to give the department any evidence provided by the applicant along with any other relevant information, and must make a recommendation regarding the outcome of the review request.

2.12 The policy department then reviews the decision, taking into account the terms of the AAIP Guidelines, and the program's underlying policy intent. Under the

⁶ See: <http://www.australianapprenticeships.gov.au/programme/australian-apprenticeships-centres-code-conduct>

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Guidelines, the department may waive one or more of the eligibility criteria for a particular incentive or benefit, if it considers that the applicant would have met those criteria if not for an exceptional circumstance/s. The policy department must notify the applicant of its decision in writing, providing clear reasons.

2.13 At the time of our investigations, the policy department's review decision letters routinely advised applicants that they may make a complaint to the Commonwealth Ombudsman if they were dissatisfied with the handling of their AAIP application.

PART 3—INVESTIGATIONS

3.1 The Ombudsman investigated two separate complaints about AACs. While the circumstances of the complaints differed, both centred on alleged errors on the part of the respective AAC and sought financial redress for the actual loss and loss of expectation they suffered as a result.

Case Study One: acknowledged incorrect advice leading to possible loss

Mr A is a small business owner who sought advice from his local AAC about assistance available to him under the AAIP if he was to take on a mature-aged apprentice. On the basis of verbal and written advice from the AAC that he would be eligible to receive weekly subsidies under the *Support for Adult Australian Apprentices* incentive, he proceeded to engage the apprentice in employment. However, the AAC subsequently advised Mr A that its original advice was incorrect and outdated, and that the only relevant incentive was a lump sum payable twelve months after the date of the Australian Apprentice's commencement.

Mr A was dissatisfied with the refusal of his application for weekly subsidies and sought a review of the decision by the policy department. Mr A explained that he would not have taken on the apprentice if he had been aware that the subsidies were not available to him. The department responded to Mr A, acknowledging that the AAC had provided him with incorrect advice and advising that it was unable to grant his application or offer him compensation in respect of any losses he may have suffered. The policy department further explained that it had sought assurances from the AAC that its processes would be reviewed to prevent recurrences, and that the department would closely scrutinise those arrangements in the course of its standard monitoring arrangements.

In its response to our investigation the department again acknowledged the AAC's error, and reiterated its commitment to more closely monitoring the AAC in future. The policy department also restated its view that there was no mechanism, under the Guidelines or otherwise, via which it could provide Mr A with the desired apprenticeship payment or compensate him for any consequent losses.

Case Study Two: disputed ambiguous advice leading to possible loss

In late June 2012, Ms M's five employees commenced a Diploma level qualification, upon completion of which it was anticipated Ms M's business would be eligible to receive a Completion Incentive for each employee. However, in late-October 2012 the AAIP Guidelines were changed to require completion before 1 July 2013 in order to qualify for the Completion Incentive.

The AAC wrote to Ms M (and other affected employers) on 1 November 2012 to provide advice of the change to the eligibility criteria. However, the supplementary information provided with the letter related to another payment and Ms M disregarded the letter thinking that the changes were not relevant to her employees. The AAC wrote to Ms M again in May 2013, to remind her that the employees' qualifications would need to be completed prior to 1 July 2013 to be eligible for the Completion Incentive. Ms M says she did not receive the letter but that, even if she had, by that time it would have been too late for her employees to have fast-tracked their qualification to meet the 30 June 2013 deadline.

Ms M's employees completed their qualification in early August 2013 and, as a result of the change in the AAIP, the associated applications for the Completion Incentive were refused.

Ms M sought a review of the AAC's refusal decisions by the policy department. The department affirmed the AAC's decision to refuse the applications for the Completion Incentive and found that – notwithstanding the ambiguous advice in November 2012 – there were no exceptional circumstances to warrant a waiver of the completion date criteria.

In its response to our investigation of Ms M's complaint the policy department explained that, in forming the view that there were no exceptional circumstances, it had taken into account policy advice that a Completion Incentive should only be paid where the apprentice would have completed their qualification 'in normal circumstances' prior to 1 July 2013. As Ms M's employees had not originally intended to complete their qualification prior to 1 July 2013, the department considered payment of the Completion Incentives in those cases would be inconsistent with the policy intention. That policy advice also expressed the view that, even if Ms M had received the relevant information about the AAIP changes and arranged for her employees to complete their qualification prior to 1 July 2013, her applications for the Completion Incentive may have been refused under Section I.B.2 of the Guidelines on the basis that she had manipulated the guidelines to maximise incentives.

PART 4—ISSUES ARISING FROM INVESTIGATION

4.1 In the course of our investigations, three important facts became clear:

- a. the relevant AACs failed to provide clear and correct advice – in one instance the advice was undoubtedly incorrect and outdated, while in the other it was initially ambiguous and then only corrected when it was already too late for the applicant to act on the advice
- b. both complainants have suffered losses in the form of consequential expenses and losses of expectation, and
- c. the policy department considered that it was unable to provide a financial remedy to either complainant under the AAIP Guidelines or via any other avenue.

4.2 The discussion that follows considers:

- the policy department's responsibility to ensure compensation is available for defective administration

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- whether the policy department currently has any mechanism through which it can provide recompense to affected parties, and
- if no compensation mechanism exists, what a suitable model might involve.

4.3 We also make comments about other related issues that came to our attention in the course of these investigations.

Responsibility to provide compensation

4.4 The Australian Government has a general responsibility to provide the Australian public with high-quality services that are fair, efficient and effective. However, even with rigorous processes and procedures in place, an agency or its staff may still make mistakes on occasion.

4.5 Where such mistakes cause somebody to suffer a financial loss, and the agency cannot remedy its error under the provisions of the relevant legislative or administrative scheme, then a range of mechanisms exist through which compensation may be payable, including:

- on the basis of legal liability – where the agency considers there is a reasonable prospect it would be found liable if a matter were litigated
- under the scheme for Compensation for Detriment caused by Defective Administration (CDDA scheme) – where the agency considers it has a moral obligation to compensate a claimant who has suffered a compensable loss as a result of the agency's unreasonable failure or lapse, and
- as an Act of Grace⁷ – where the Finance Minister considers it is appropriate to make a payment to a person because of special circumstances.

4.6 As mentioned earlier, the CDDA Scheme can be accessed by a party who has been affected by an error on the part of a non-corporate Commonwealth entity, but does not apply to loss caused by the actions of non-government organisations, even when the organisation is delivering a service on behalf of a government agency.

4.7 In the case of the AAIP, the policy department has contracted AACs to deliver services and payments on its behalf. It is reasonably open to the department administer the program in this way, and this kind of contracting out of service delivery has become increasingly common.

4.8 However, as a general principle of good government administration, the policy department cannot contract itself out of responsibility for loss when things go wrong. That principle is reflected in the terms of the *Ombudsman Act 1976*, which provides that the actions of Commonwealth contracted service providers are taken to be the actions of the relevant Australian Government agency for the purposes of our Act.⁸

4.9 In our view, the policy department retains the responsibility for ensuring that apprentices and employers receive a high standard of service, even when that service is delivered on the department's behalf by AACs. It follows that, in situations where the AACs make mistakes and the apprentice or employer suffers a loss, we

⁷ Department of Finance, [Resource Management Guide 401: Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act](#), July 2014

⁸ *Ombudsman Act 1976*, s 3(4B).

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expect the policy department to ensure that the affected parties have the same rights and protection against loss as would be the case if the department itself had made the mistake.

Options for proving redress

4.10 One remedy for a situation where defective administration prevents an applicant from satisfying all of the eligibility criteria for a payment or benefit is for decision-makers to have the discretion to waive the relevant eligibility criteria and to grant the payment or benefit where that is consistent with program's underlying policy intent.

Exceptional circumstances considerations

4.11 The AAIP Guidelines already contain such a provision.⁹ Under the AAIP Guidelines, the policy department may waive one or more of the eligibility criteria in deciding an AAIP application, if it is satisfied that there were exceptional circumstances that prevented the applicant from satisfying those criteria.

4.12 While the decision to grant a waiver is discretionary, the Guidelines identify some factors that might give rise to an exceptional circumstances waiver. These include:

- whether the claimant would be eligible for the incentive or benefit payment if it were not for the exceptional circumstance
- whether the exceptional circumstance was out of the control of the claimant
- whether the AAC, the Department or any of its agents provided appropriate advice, information and service to enable the recipient to lodge the claim within the appropriate timeframe.¹⁰

4.13 However, it is not clear that the current provision is sufficiently broad, nor that department staff view the provision as a potential mechanism for remedying mistakes made by its contracted service providers.

Ms M's application

4.14 When the policy department reviewed Ms M's claim, it rejected a waiver of the completion date criteria under the exceptional circumstances arrangements. On the basis of the available facts, our office is not persuaded that that decision was sound.

4.15 In its communications with the policy department regarding Ms M's review request, the AAC acknowledged that:

- the November 2012 letter contained an irrelevant attachment, and the AAC was aware that this error had caused many employers to disregard the letter as irrelevant to their circumstances
- the AAC attempted to counter the impact of the November 2012 letter by sending 'reminder' letters to employers in May 2013.

⁹ *Australian Apprenticeships Incentives Program Guidelines*, section I.C.3 Exceptional Circumstances

¹⁰ *AAIP Guidelines*, section I.C.3 Exceptional Circumstances, fourth dot-point

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4.16 Keeping in mind these acknowledgements, and the availability of the exceptional circumstances arrangements, in our view it was open to the decision-maker to conclude that the ambiguous advice provided to Ms M in November 2012 was an exceptional circumstance that had prevented her from taking suitable action to ensure she met the completion date criteria for the Completion Incentive. For example, had she received appropriate advice in November 2012, her employees may well have been able to fast-track their studies so as to complete by the new due date.

4.17 The examples provided in the Guidelines tend to suggest that the exceptional circumstances provisions were included primarily to allow the policy department to take a compassionate approach in unusual or extraordinary circumstances in the applicant's personal circumstances. However, the inclusion of 'the appropriateness of advice and service provided by the department, AACs and agents' as a relevant consideration demonstrates that it was contemplated that there would be situations where a claimant's application might be adversely affected by the actions of departmental or AAC staff.

4.18 We encourage the policy department to more readily use, and if necessary strengthen, this ground for waiver on the basis of exceptional circumstances.

Mr A's application

4.19 The exceptional circumstances provisions were not relevant in Mr A's case because the subsidy he sought had already been discontinued by the time that he applied. The payment therefore was not available to him, even if one or more criteria were waived.

4.20 In cases where the loss caused by defective administration cannot be addressed by a more flexible application of the AAIP Guidelines, it would be appropriate for the policy department to have access to a scheme for financial compensation.

A scheme for financial compensation

4.21 Both Mr A and Ms M complained of errors on the part of their respective AACs, and alleged that those errors caused them to suffer losses in the form of actual financial losses (in the form of outlays they otherwise might not have undertaken) and loss of expectation (by way of 'lost' entitlement to employer incentives under the AAIP). If those losses had arisen from mistakes made by departmental staff rather than by contracted AACs, it would be open to them to make claims under the CDDA scheme.

4.22 The CDDA scheme is a discretionary mechanism that allows an agency to compensate a person or organisation that has suffered detriment as a result of the agency's defective administration. The scheme rests on the Australian Government's acceptance that it has a moral obligation to compensate those who suffer loss as a result of its defective administration, even if it is not legally liable to compensate them.

4.23 Resource Management Guide 409: *Scheme for Compensation for Detriment caused by Defective Administration* defines 'defective administration' to include, amongst other things:

- c) giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous;
or

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- d) 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).

4.24 Compensation is available under the CDDA scheme where claimant suffers a loss directly as a result of the defective administration.

4.25 While a range of factors can impact on how much compensation is payable, the general principle is that the agency will pay enough compensation to place the claimant back in the position they would have been in, if not for the agency's mistake. Where a claimant has suffered a loss of expectation (that is, they have been denied the opportunity to receive a financial benefit they reasonably believed they would be entitled to), the agency may consider compensating the claimant for any costs incurred in pursuing that benefit.

4.26 Our office has not assessed the prospects of success of CDDA claims by Mr A or Ms M if they were able to access that scheme. However, it is fair to say that both complainants would be well-placed to make reasonable arguments on the questions of both defective administration and compensable loss.

4.27 As it is, Mr A and Ms M cannot access the CDDA scheme because, as noted above, the scheme does not apply to contracted service providers, and there is no comparable scheme available to the policy department that does apply to the AACs.

4.28 In light of this, we recommend that the policy department consider implementing a CDDA-like scheme that would enable it to compensate people and organisations for defective administration on the part of its contracted service providers.

Other issues

Loss

4.29 From these and other investigations, we are aware of the policy department's view that applicants could not be taken to have suffered any loss as a result of being refused a payment under the AAIP. In its response to our investigation of Mr A's complaint, the policy department advised:

payments to employers as part of the AAIP are intended to reward employers for their commitment to training Australian Apprentices. The intention is not to subsidise the cost of training or provide a cash flow to the employer (that is, they are incentives, not entitlements).¹¹

4.30 We accept that AAIP payments are not entitlements. It is also true that compensation is not payable under the CDDA Scheme merely for 'expectation losses', such as not receiving a future benefit that a person expected to receive – even where an agency has directly created that expectation by advising a person that they would be eligible.

4.31 However, we do not agree that this means that would not be any compensable loss in cases such as these. Compensation is payable under the CDDA Scheme for consequential losses, such as outlays and ongoing financial

¹¹ Department of Industry and Science, response of 8 November 2013 to Ombudsman inquiries regarding Mr A, para 3.14

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commitments, which the person would not have made or entered into if not for an AAC's deficient advice or action.

4.32 By their very nature, incentives require an applicant to have done – or at least given an undertaking to do – the incentivised action. It would not be an effective and efficient use of public money for government agencies to simply 'reward' people for taking actions that they would invariably have taken anyway. The point of any incentive scheme is to shape behaviour – to get more people taking the desired action than otherwise would. In other words, the incentive is offered precisely because, in many cases, the action is not one that the person was likely to take without the incentive.

4.33 In this case, incentives were offered to employers to encourage them to employ and train apprentices, and to individuals to encourage them to become apprentices. In their complaints to our office, both complainants advised that, in working towards their respective incentives, they made a number of financial outlays, including employing the apprentices and enrolling them in training. They did so in good faith and relying on the advice given to them by their respective AAC, but asserted that they would not have taken any of the relevant actions if they had been properly informed at the appropriate times.

4.34 If Mr A and Ms M were able to make claims for compensation under a CDDA-like scheme, there would seem to be reasonable grounds for compensation for consequential losses in the form of the costs they incurred in pursuing incentives they had been told by the AACs that they were eligible to receive.

Manipulation vs mitigation

4.35 When the policy department reviewed Ms M's application, the decision-maker was not satisfied that the ambiguous advice given in the November 2012 letter constituted an exceptional circumstance for the purposes of waiving the completion date criteria. One particular factor in this conclusion appears to have been policy advice to the effect that, even if Ms M had been made aware of the changed completion date requirement and fast-tracked the completion of her employees' qualifications, such action would have amounted to a "manipulation" of the Guidelines and rendered the applications ineligible in any event.

4.36 The Ombudsman's office accepts that the Government can, and does make decisions about expenditure to serve the public interest, as it did in tightening the criteria for the Completion Incentive. However, in our view those decisions must be made fairly, and with contemplation of the impact of those changes on the reasonable expectations of those affected by the changes. In general terms this should include providing reasonable notice of changes, as well as allowing affected parties the opportunity to act, where possible, to protect their eligibility for an anticipated benefit.

4.37 On this basis, in our view Ms M's suggestion that, armed with information about the upcoming change at an earlier date, she would have fast-tracked her employees' qualifications, cannot reasonably be classed as 'manipulation'. Rather, we suggest such action would have been a reasonable response to mitigate a potential loss by protecting her business' eligibility for the financial incentive on which its earlier course of action and outlay of expenditure were premised.

4.38 In light of this view, we recommend that the policy department reconsider and, if necessary, amend its policy advice to staff about the appropriate application of section I.B.2 of the Guidelines.

PART 5 – CONCLUSIONS AND RECOMMENDATIONS

5.1 Contracting out service provision is a legitimate strategy for agencies seeking to implement government programs in a cost-effective and efficient way. In this case, by contracting out the AAC role to non-government organisations, the policy department is able to offer a network of over 300 ‘shop fronts’ across Australia, without having to establish a departmental office in every one of those locations.

5.2 However, cost-effectiveness and efficiency should not be achieved by reducing or limiting the rights and protections that members of the public have when things go wrong. The Australian Government has, in the CDDA Scheme, accepted and provided a mechanism for giving effect to its moral obligation to compensate people for loss caused by defective administration.

5.3 In our view, while the policy department can contract out the administration of the AAIP, it cannot contract itself out of the moral responsibility to compensate members of the public for losses caused by the program’s defective administration. Therefore, as its decision to contract out AAIP administration means that it cannot use the CDDA Scheme to give effect to that moral obligation, in our view it needs to develop its own mechanism for doing so.

5.4 Of course, the issue identified in this report, that the CDDA Scheme does not apply to contracted service providers, is not restricted to this department and the AACs. Many other Australian Government agencies, themselves covered by the CDDA Scheme, use contracted providers to deliver services on their behalf. The CDDA Scheme does not apply to those contractors either, and most of those agencies will also lack an effective mechanism for giving effect to their moral obligation to compensate people for loss caused by the defective administration of their contractors.

5.5 This office will raise this wider issue separately with the Department of Finance, the policy department responsible for overseeing the operation of the CDDA Scheme.

Recommendation 1

That DET strengthen the current exceptional circumstances provisions at section I.C.3 of the AAIP Guidelines, along with any internal policy advice, to allow decision-makers unfettered discretion to waive one or more of the eligibility requirements to grant an incentive or personal benefit, where they are satisfied that a mistake made by the Department, an AAC or agent prevented an applicant from otherwise meeting that requirement(s).

5.6 DET’s response to the draft report advised:

In relation to recommendation 1, as the draft report notes at part 4.11, the AAIP Guidelines already contain an exceptional circumstances provision at section I.C.3, which provides the decision maker with an unfettered discretion to ‘review a claim decision to ensure that the best possible outcome is achieved balancing the rights of the claimant with the prudent use of public monies’. This takes into account that the circumstances of the claim may have involved factors which were ‘unusual, uncommon, unexpected or unplanned’ and therefore necessitated a review of the decision. The section goes on to provide examples of possible triggers for review and example scenarios, but these are clearly stated to be ‘not exhaustive; the very nature of exceptional circumstances is that each case must be

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assessed on its own merits.’ Given this, it is difficult to envisage how this discretion might be strengthened further in the wording of the Guidelines, however we can improve our efforts in raising staff awareness in this area by increased training on how to exercise this delegation.

5.7 We understand this to mean that DET accepts that a mistake made by the Department, an AAC or an agent that prevents an applicant from otherwise meeting an eligibility requirement can amount to an “exceptional circumstance”. We welcome this approach, and DET’s commitment to improve staff training and awareness about how to exercise the discretion. We will seek an update from DET in six months about the implementation of that commitment, including assessing the extent to which the training is supported by internal policy guidance, and to what extent the Department is monitoring practical application in decision making (through quality assurance arrangements, for example).

Recommendation 2

That DET implements a CDDA-like scheme to enable it to compensate people and organisations for defective administration on the part of its contracted service providers.

5.8 DET’s response to the draft report advised:

In relation to recommendation 2, the department acknowledges that the availability of a CCDA [sic] Scheme is not currently extended or replicated to cover the actions of contracted service providers. However, it is important to note that in relation to its own defective administration, payments made by the department under CDDA are authorised by sections 61 and 64 of the Constitution. As you know, CDDA aims to correct harm arising from the department exercising its executive powers to make decisions, and such correct is considered the ordinary function of government.

This issue would need to be considered at a whole-of-government level, rather than by any individual department or programme in isolation. The extension or replication of CDDA to cover non-Commonwealth entities would necessarily require legislation to authorise payments. I note that you intend to write separately to the Department of Finance, which has policy responsibility for CDDA. The department considers this appropriate.

5.9 As indicated in [5.5] above, the Ombudsman will pursue the broader issue of the CDDA Scheme’s non-application to contracted service providers with the Department of Finance in the near future.

Recommendation 3

That DET reviews any policy guidance available to its staff regarding the application of section 1.B.2 of the AAIP Guidelines *The Department’s right to withhold or refuse payment*, to ensure that applicants are not unreasonably penalised for revising a previous plan of action in response to a change in payment criteria, in order to maintain eligibility for an anticipated benefit.

5.10 DET’s response to the draft report advised:

In relation to recommendation 3, the department notes your concerns relating to section 1.B.2 and will review this section, along with internal guidance regarding its application

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going forward. Section 1.B.2 of the AAIP Guidelines makes it clear to stakeholders that this programme is not to be seen as an entitlement scheme and in particular provides protection for Australian Apprentices against abusive or criminal conduct during the Australian Apprenticeship.

5.11 We intend to seek an update from DET in six months regarding the revision of section 1.B.2 and the associated internal policy guidance. That update will allow us to check that the relevant section, as well as the associated messaging to staff, adequately addresses the concerns regarding the current approach to ‘manipulation’ that prompted this recommendation.