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OMBUDSMAN

Department of Agriculture, Fisheries and Forestry

ADMINISTRATION OF VARIOUS GRANTS SCHEMES

December 2009

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

REPORT NO. 19|2009

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EXECUTIVE SUMMARY

Since May 2008, the Ombudsman's office has received a steady number of complaints in relation to executive grant schemes developed by the Department of Agriculture, Fisheries and Forestry (DAFF) and administered by Centrelink. This report deals with complaints about the administration of three schemes: the Murray-Darling Basin Irrigation Management Grant, Tobacco Grower Adjustment Assistance Package 2006, and the Exceptional Circumstances Exit Grant Package 2007.

There were common themes identified in the investigation of the complaints. One problem area was the failure of DAFF, the responsible policy agency, to publish the grant guidelines and to provide adequate advice to claimants. The problem became worse when changes were made to the grant criteria after the scheme commenced, and were then applied retrospectively to deny grant applications that had been lodged prior to the change being implemented. A related problem is that the eligibility criteria and guidelines were not always well thought out or clearly drafted.

There was also a failure to make relevant information about programs publicly available and to update the public about changes to the grants in a timely manner. It is likely that some complainants would have arranged their affairs differently had they had knowledge of the eligibility criteria and amendments to those criteria.

The issues raised in this report echo those raised in the Ombudsman's recent *Executive schemes* report. That report dealt with the general issue of government funding schemes set up by executive action rather than under an act of parliament. An increasing number of schemes are being established in this way. While there are a number of advantages to an agency in administering schemes of this nature—principally in the flexibility for the agency in establishing, altering, redefining and dismantling the scheme as circumstances require—that flexibility has the potential to adversely affect the rights of members of the public.

Executive schemes often lack many of the checks and balances on government power inherent in legislative schemes, such as external scrutiny through the drafting process, and review and appeal rights to courts and tribunals. The lack of such review rights means that the Ombudsman's office is ordinarily the only external review body.

PART 1—INTRODUCTION

Background

1.1 Between May and October 2008, the Ombudsman's office received a number of complaints about three executive grant schemes:

- Murray-Darling Basin Irrigation Management Grant (IMG)
- Tobacco Grower Adjustment Assistance Package 2006 (TGAAP)
- Exceptional Circumstances Exit Grant Package 2007 (Exit Grant).

1.2 DAFF is responsible for developing the policy guidelines for these grant schemes. Centrelink administers the schemes by processing applications, deciding who will receive grants based on DAFF policy guidelines, and delivering the payments.

1.3 This office initially investigated a number of individual complaints about Centrelink decisions not to approve grant payments, and in the process conducted more general research about the various schemes.

1.4 While our investigations identified some issues concerning Centrelink's implementation of the schemes, a number of broader policy issues also emerged. The office decided to pursue these policy issues with DAFF in order to address potential systemic issues, as well as obtain meaningful remedies for the complainants involved.

Executive schemes

1.5 This office recently conducted a broader examination of executive schemes such as the IMG, TGAAP and Exit Grant.[1] As discussed in that report, an increasing number of government schemes and programs are being established by executive rather than legislative action. While there are a number of advantages to an agency in administering schemes of this nature—principally in the flexibility for the agency in establishing, altering, redefining and dismantling the scheme as circumstances require—that flexibility has the potential to adversely affect the rights of members of the public.

1.6 One area of concern is that the criteria of entitlement in an executive-based scheme are often not as clear or ascertainable as in a legislative scheme. This can be particularly problematic if the policy documents that constitute the scheme are in a state of flux, or different decision makers are applying different versions of the policy.

1.7 Some of the recommendations in this report may offer solutions to those problems, helping agencies to avoid some of the problems that can arise under executive schemes. For example, recommendations that are relevant to other executive schemes are to foster transparency through the publication of policy guidelines, and to encourage agencies to take responsibility for the delivery of programs by playing a larger role in the process of reviewing complaints about the administration of the program.

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[1] Commonwealth Ombudsman, *Executive Schemes*, Report No 12|2009, August 2009.

PART 2—OUR INVESTIGATION

2.1 Initially we investigated a number of complaints about decisions refusing grants under DAFF's executive schemes. After a set of broader policy issues emerged we provided an issues paper to the department, as a basis for discussion.

2.2 On 30 October 2008, we met with officers from DAFF and discussed generally the issues relating to the grant schemes. It was agreed at the meeting that DAFF would provide a written response to the issues paper, and also arrange for the grant scheme guidelines to be posted on its website. It was also agreed that further meetings would be scheduled to discuss more specific issues relating to individual grant programs.

2.3 Following a series of discussions, DAFF provided a response to the issues paper on 5 February 2009. The response dealt also with additional questions about the IMG we had raised in an email to DAFF on 11 December 2008.

2.4 On 30 July 2009, our office wrote to DAFF, enclosing a draft report and recommendations, and requesting DAFF's comments. On 26 August 2009, we provided an amended draft of one section of the report.

2.5 The department responded to the draft report and recommendations on 4 September 2009 and 22 September 2009. Its response is summarised within the body of this report.

2.6 We also separately investigated several complaints received after we provided the issues paper to the department. On 24 November 2009, in response to correspondence from us concerning one of these complaints, the department provided further relevant information about the IMG.

PART 3—ISSUES IDENTIFIED BY THE INVESTIGATION

Murray Darling Basin Irrigation Management Grants (IMG)

3.1 The issues regarding the IMG predominantly relate to DAFF's promulgation, and Centrelink's implementation, of amendments to the policy guidelines at various dates during 2008.

3.2 Since June 2008, this office has received at least 35 complaints from unsuccessful applicants for the IMG. There were two common themes in those complaints. One was a perception of inequity, on the basis that the complainant's friends or neighbours in a similar situation received the grant when they had not. The other was the complainant's belief, on the basis of the information available to them at the time of lodging their application, that they would be eligible for the grant. Some complainants suggested to this office that the IMG Policy Guidelines had been changed since they lodged their application and, while they had been eligible when they applied, they were now no longer eligible to receive the grant under the new guidelines.

3.3 Initial investigations with Centrelink revealed that DAFF had released more than one version of the IMG policy guidelines. The IMG policy guidelines were first issued on 12 October 2007, following the announcement of the Australian Government Drought Assistance Package on 25 September 2007. DAFF then made changes and issued clarifications to the policy guidelines on the following dates:

- 26 February 2008—email sent to Centrelink with advice about assessing applications from farmers who irrigate from bores or dams
- 28 February 2008—second version of policy guidelines released amending the definition of 'farmer'
- 3 June 2008—third version of policy guidelines released incorporating amendments reflecting advice contained in the 26 February 2008 email
- October 2008—fourth version of guidelines released incorporating amendments to the income and assets test
- 25 March 2009—documentation released to Centrelink clarifying the identification of regulated groundwater sources with reduced water allocations
- 31 March 2009—IMG scheme closed.

3.4 DAFF did not make its policy guidelines publicly available until November 2008, when, at this office's suggestion, DAFF posted them on its website. Instead, Centrelink published a fact sheet that summarised the eligibility criteria in the guidelines. DAFF has advised that this fact sheet remained unchanged throughout the period that the grant program was open for applications. Centrelink's application forms also provided some information about the eligibility criteria, and several versions of these were published.

3.5 DAFF advised our office that it provided no instructions to Centrelink about the retrospective application of new versions of the policy guidelines to applications lodged prior to a change taking effect.

Issue 1: Retrospective change to definition of 'irrigator' and implementation by email

3.6 This office received a number of complaints from applicants for the IMG who irrigated from a dam or bore, and whose claims were refused on the basis that they were not eligible 'irrigators'.

3.7 Clause 1.4(g) of the IMG guidelines initially required that, to qualify as an irrigator, an applicant:

> a. hold an active licence for irrigation entitlement; or
> b. can demonstrate they have derived income from irrigation activities within the three years prior to the date of application; or
> c. can demonstrate they would have derived an income from irrigation activities were water allocations not significantly reduced; or
> d. can demonstrate they have incurred expenses on irrigation activities within the three years prior to the date of application.

3.8 Centrelink advised our office that when the grant was first implemented, there was some confusion about the different types of water licences, for example whether an active licence to take water from a dam on a property was sufficient for eligibility.

3.9 Centrelink sought clarification about this from DAFF, which responded initially by email on 26 February 2008. The email instructed that applicants irrigating from bores or dams on their property (groundwater irrigators) were ineligible, even if they held an active irrigation licence, unless they could also demonstrate that their allocation of water from their bore or dam had been reduced by the regulating authority that issued the licence (see also issue 3 below).

3.10 Many groundwater irrigators in the Murray Darling Basin have had their water allocations formally reduced by their regulating authority. Others, however, who have not had their allocations formally reduced, nevertheless found their ability to access water reduced simply due to the natural impact of the drought, for example because their dams were dry, or their bores were not deep enough to reach what water remained in the basin.

3.11 Prior to February 2008, such applicants were able to demonstrate that they met the definition of 'irrigator' in the eligibility criteria by virtue of the fact that they held an active irrigation licence. However, after DAFF's email, Centrelink applied the new requirement, that the regulator had formally reduced the applicant's allocation. This new test was applied to both the undecided applications Centrelink had on hand, and to subsequent applications.

3.12 The policy guidelines were not updated to reflect this approach until 3 June 2008, when the following paragraph was added (NB—clause 1.3 of the updated guidelines corresponds with clause 1.4 of the original guidelines):

> For the purposes of subsection 1.3(g), farmers whose sole source of irrigation water is a bore/well must demonstrate that the bore/well is regulated **and provide evidence that the allocation to that bore/well has been reduced in the three-year period prior to application** (emphasis added).

3.13 As the guidelines themselves were not publicly available, this change only became publicly visible when the claim form was updated in July 2008. It was amended to require groundwater irrigators to provide evidence that their regulating authority had formally reduced their allocation.

3.14 In our view, good government administration requires that material changes to the eligibility criteria for executive scheme grants should be applied prospectively rather than retrospectively, in the same way that a similar legislative amendment would ordinarily be applied. This means that applications should be assessed against the eligibility criteria as they stood at the time that the application was made. Changes to the eligibility criteria should only be applied to applications made after those changes are made public.[2]

3.15 DAFF accepts this general principle. However, it described the change to the guidelines as a 'clarification' rather than a 'change' of policy. It explained that irrigation management grants were intended to help farmers who drew water from shared sources, and whose allocations were formally reduced so as to ensure that downstream irrigators could also access some water. It was not the government's intent to assist all farmers whose access to water had reduced due to the effects of the drought. This objective was stated in the policy preamble:

> The Australian Government has introduced a programme of taxable grants up to $20,000 for irrigators in the Murray-Darling Basin (MDB) to implement water management strategies to address **reduced water allocations** (emphasis added).

3.16 As the underlying policy intent had not changed, DAFF considered it appropriate that the amendment was applied retrospectively.

3.17 In our view, DAFF has applied the wrong test for distinguishing a 'clarification' from a 'change' of policy. For DAFF, the question is whether the underlying policy intent has changed. In our view, the correct test is whether an amendment makes ineligible a class of applicants who previously were eligible.

3.18 In this case, the new requirement for groundwater irrigators to show not only that they held an active irrigation licence, but also that a regulatory authority had formally reduced their allocation, was clearly a 'change', not merely a clarification, of policy.

3.19 DAFF has the right to review and amend its policy from time to time, but there is a distinct unfairness in applying that change retrospectively to disentitle those who earlier qualified to receive a grant. There is a strong presumption against that result in applying legislation, and there is no reason in principle why a different and less beneficial approach should be taken in administering an executive scheme that is intended to confer rights upon the public. Consistent with that view, each application ought to have been assessed in accordance with the policy guidelines that applied at the time it was lodged.

3.20 In our draft report, we therefore recommended that DAFF arrange for each of the applications lodged by complainants affected by this issue to be reconsidered under the policy guidelines in place at the date of lodgement of the application.

3.21 DAFF does not agree with our view. In its response to our draft report, it acknowledged that the policy guidelines could have been more clearly worded to reflect the grant's intent to target only those farmers affected by reduced water allocations. However, it declined to reconsider the affected applications as recommended by our office, on the basis that the claimants who were made ineligible by the amendment were not the intended recipients of grants under the program.

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[2] Commonwealth Ombudsman, *Executive Schemes* Report No 12|2009, August 2009 page 28.

3.22 This office remains of the view that the changes to the policy should only have been applied prospectively. The only guide for correctly determining who should receive a grant or entitlement is a scheme's policy guidelines. When the guidelines are changed, the policy changes.

3.23 A further issue arises in relation to DAFF's use of email to notify Centrelink of the changed approach. DAFF explained that, where Centrelink identifies an issue requiring policy guidance, it endeavours to provide its response as soon as possible. It therefore considered that it was appropriate for it to clarify this issue by email, as the quickest and most effective way for it to clarify the issue, pending formal revision of the guidelines and application forms.

3.24 DAFF also advised that this approach did not disadvantage existing applicants because, between the date of the email and when the new claim forms became available, Centrelink contacted each affected applicant and invited them to provide evidence that a regulator had formally reduced their water allocation.

3.25 DAFF advised that it was unable to indicate how many of the applications lodged prior to the guidelines and forms being changed in June and July 2008 were decided on the basis of the new criteria. While Centrelink was able to ascertain how many claims were rejected on the basis that the applicant was 'not an irrigator', it was unable to provide any further breakdown as to which specific criterion each applicant failed to meet. This data can apparently only be obtained by reviewing each individual case file.

3.26 A related matter is that there was an unreasonable delay in DAFF publicly notifying the change by issuing new policy guidelines and a new application form. The change was first notified to Centrelink in February 2008, in reply to a query from Centrelink. The new policy guidelines and application form were not issued until July 2008. It is an important principle of law and good administration[3] that any amendment of the eligibility rules for a government benefit or entitlement should be publicly notified as soon as practicable.

3.27 DAFF accepted that there was an undue delay between the issue of the clarification email, and the release of updated guidelines and forms. However, it believed that no applicants were disadvantaged by the delay because, as noted above, Centrelink had contacted applicants to request evidence of reduced water allocations in the interim period.

Issue 2: Retrospective change to the definition of 'farmer'

3.28 This office received several complaints from people whose IMG applications were rejected because they did not contribute a significant part of their labour and/or capital to their farm enterprise, and/or they did not derive a significant part of their income from their farm enterprise.

3.29 Clause 1.4(a) of the IMG policy guidelines initially required that, to qualify, an applicant must 'be a farmer as defined for Exceptional Circumstances Relief Payment purposes'. The *Farm Household Support Act 1992* sets out the criteria for

[3] Such as the *Legislative Instruments Act 2003* s 25, which requires that legislative instruments be publicly notified on the Federal Register of Legislative Instruments 'as soon as practicable' after being made.

the Exceptional Circumstances Relief Payment (ECRP). Section 3 of that Act defines a 'farmer' as:

> A person who has a right or interest in the land used for the purposes of a farm enterprise.

3.30 On 28 February 2008, clause 1.4(a) was amended to require that, to qualify, an applicant must 'meet section 8A(1)(b)(i) of the *Farm Household Support Act 1992'*. Section 8A(1)(b)(i) of that Act provides that a person is qualified for exceptional circumstances relief payment in respect of a period if the person:

> (A) is a farmer; and
> (B) contributes a significant part of his or her labour and capital to the farm enterprise; and
> (C) derives a significant part of his or her income from the farm enterprise; and
> (E) is an Australian resident.

3.31 In other words, the amended guidelines drew attention to the more restrictive criteria in s 8A(1)(b)(i). To qualify, an applicant would need to show that they were a 'farmer' who had a right or interest in land used for the purposes of a farm enterprise (s 3), and that they contributed a significant part of their labour and capital to, and derived a significant part of their income from, the farm enterprise (s 8A(1)(b)(i)).

3.32 This was an important change, at least in the guidance given to applicants as the eligibility criteria for a grant. Centrelink applied the new policy requirements to outstanding applications made before that day, and rejected a number of them on the basis that the applicants, who had a right or interest in land used as a farm enterprise, did not contribute significant labour to, or did not derive significant income from, the farm.

3.33 It is DAFF's view that the amendment to clause 1.4(a) was a 'clarification', not a 'change' of policy. It advised this office that it always intended to use the s 8A criteria to determine IMG eligibility, and that the clarification simply removed an 'ambiguity' in the original version of the guidelines. As the underlying policy intent had not changed, DAFF considered it appropriate that the amendment was applied retrospectively. It declined to reconsider the affected applications as recommended by our office.

3.34 During the course of this investigation, this office expressed the view to DAFF that the change to the guidelines should only have been applied prospectively. We argued that some applicants had believed that they qualified for a grant by meeting the definition of 'farmer' in s 3. However, after responding to our draft report, and in response to our investigation of a separate complaint, DAFF provided further information relevant to this issue. It pointed out that the Centrelink fact sheet and application forms always clearly identified the need for applicants to meet the significant labour, capital and income tests. It also explained that Centrelink had in fact consistently assessed claims against the eligibility requirements set out in s 8A(1)(b)(i) of the *Farm Household Support Act 1992*, even though these were not initially expressly identified in the IMG guidelines.

3.35 Except in one respect, we therefore accept DAFF's characterisation of this amendment to the policy guidelines as a 'clarification' rather than a 'change'. The exception relates to how the 'significant income' test was to be applied. In the original guidelines, clause 1.4 went on to explain:

> [P]roviding an applicant meets all other eligibility requirements, it is not necessary that *they demonstrate they derive a* significant part of his or her income from the farm enterprise.

Thus, under the original version of the guidelines, the 'significant income' test, in effect, did not apply at all.

3.36 However, when the guidelines were amended to refer to s 8A(1)(b)(i) of the *Farm Household Support Act 1992*, the equivalent explanatory paragraph was also amended. Under the new provision, the significant income test *did* apply, unless:

- the applicant had previously derived a significant part of their income from the farm enterprise
- that proportion of their income had declined, and
- 'the reason for [that] decline ... is directly attributable to reduced water allocations in the three years prior to application'.[4]

3.37 This change excluded at least two classes of people who previously would have been eligible if they had met the other criteria. The first class is farmers who had never derived a significant proportion of their income from their farm, for example because they were still developing a new farm enterprise. The second class is farmers who had previously derived a significant proportion of their income from their farm, but that proportion had declined for reasons other than reduced water allocations, for example the drought's effects more generally, or depressed prices for their crops.

3.38 This supports the view put by this office that the amendment to the guidelines concerning the significant income test's application was a 'change', not merely a clarification, of policy. On this view, each application ought to have been assessed in accordance with the policy guidelines that applied at the time it was lodged.

Issue 3: Requiring evidence of a reduced water allocation by a regulatory authority

3.39 A number of farmers complained that the requirement that water allocations must have been formally reduced was itself unreasonable. We do not express a view on that issue in this report, but note the issue as it arose in a few complaints. We accept that DAFF always intended to target the grant in this way, and that this is now clear in the policy guidelines.

3.40 Those who complained about this issue held active irrigation licenses, but were unable to access their water allocations because their bores or dams were dry. An IMG grant would have helped them adjust their irrigation systems and farming practices to cope with less water, in just the same way as those with formally reduced allocations

3.41 As noted above, DAFF explained that irrigation management grants were always intended to help farmers whose allocations were formally reduced so as to ensure that downstream irrigators could also access some water. There is a political imperative and public interest in managing the shared water resources in the Murray-Darling Basin, which spans three States. It was a government policy choice to give priority to those farmers drawing water from shared resources who experienced reduced allocations as a result of intervention by a regulating authority. In short, the government does not have unlimited capacity to assist drought-affected farmers.

[4] In addition, the applicant was also required to show either that they had received some income from irrigation activities in the past three years, or that they would have derived income from irrigation activities had their water allocations not been significantly reduced.

Issue 4: Regulated and unregulated water sources

3.42 After this office provided the issues paper to DAFF we received a complaint made on behalf of a number of Queensland irrigators whose IMG applications had been refused on the basis that they did not draw their water from a 'regulated water source'. Supporting documentation was provided by one irrigator which appeared to demonstrate that their bore was regulated, and that the regulatory authority had reduced their water allocation, yet their IMG application had been refused.

3.43 DAFF advised that 'regulated water sources' are those under the control or management of a regulatory authority where there is a mechanism for a regulatory body to set annual allocations to irrigators and to enforce any reduction in allocation, while 'unregulated water sources' are water sources where there is no such mechanism for water allocations to be reduced or for reductions to be enforced.

3.44 DAFF also advised that it had provided policy advice to Centrelink on 3 March 2009 to assist it to identify regulated groundwater sources in Queensland, and that it was in the process of developing similar advice about regulated groundwater sources in New South Wales, Victoria and South Australia. DAFF has since provided our office with a copy of the advice issued to Centrelink for all States on 25 March 2009.

3.45 DAFF further advised that, in light of this policy advice, Centrelink was reviewing the application from the irrigator whose documentation was provided to this office, together with 91 other Queensland applications that were previously rejected for the same reason. DAFF also indicated that applications from other States which were currently under consideration by Centrelink, as well as those already rejected for the reason 'not an eligible irrigator', would be reassessed by Centrelink having regard to the updated policy advice.

3.46 Based on DAFF's advice to Centrelink, it appears that the Queensland irrigator whose circumstances this office investigated will now be recognised as drawing their water from a 'regulated water source', and as having had their water allocation formally reduced. Accordingly, our office is satisfied that DAFF appears to have appropriately resolved this issue insofar as Queensland groundwater irrigators are concerned.

Tobacco Growers Adjustment Assistance Package 2006

3.47 Under the Tobacco Growers Adjustment Assistance Package 2006 (TGAAP), Tobacco Restructuring Grants up to $150,000 were made available to tobacco growers to help them to move into alternative business activities where they undertook to exit the tobacco industry for at least five years.

3.48 The terms of the TGAAP which applied to Victorian tobacco growers were accepted by a vote of Victorian tobacco cooperative shareholders on 26 October 2006. These terms provided that each shareholder was to receive a payment of $7 per share, up to a cap of $150,000 per shareholder. Share transfers were frozen after that date. The package was formally released for applications in March 2007.

Issue 5: Transmission of shares on death—non publication of policy

3.49 This office received complaints on behalf of three former Victorian tobacco growers who became beneficiaries of their deceased relatives' estates between 26 October 2006 and May 2007. In these cases, both the deceased and their beneficiaries were shareholders as at 26 October 2006, and both would have been entitled to receive an individual payment up to the $150,000 cap.

3.50 However, Centrelink decided that the entitlement of the beneficiary shareholder would be capped at $150,000, citing the following TGAAP guideline:

> If a person is a beneficiary of an estate that includes shareholdings in a tobacco cooperative and that person is also a shareholder in his or her own right, then, for the purposes of the cap, the person's shareholding shall be taken to include any additional shares he or she would receive as beneficiary of the estate.

3.51 This provision had not been announced publicly prior to the scheme being accepted by Victorian tobacco growers in October 2006. Nor did DAFF publish the guidelines, or refer to this limitation in the publicly available information about the grant. The first the complainants knew of this limitation was when they received their decision letters from Centrelink notifying them that their grant had been capped at $150,000.

3.52 We asked DAFF whether it had included the guidelines in its statement under s 9 of the *Freedom of Information Act 1982* (FOI Act), and made them available for inspection and purchase as required by that section. If not, we asked whether DAFF agreed that s 10(1) of the FOI Act potentially applied to these applications.

3.53 Section 10(1) provides that a document that is not published or made available as required by s 9 cannot be applied to disadvantage a person if he or she was not aware of the document and could have taken action to avoid its effects. Section 10(1) of the FOI Act provides in full:

> If a document required to be made available in accordance with section 9, being a document containing a rule, guideline or practice relating to a function of an agency, was not made available, or was not included in a statement made available at each Information Access Office, as referred to in that section, before the time at which a person did, or omitted to do, any act or thing relevant to the performance of that function in relation to him or her (whether or not the time allowed for publication of a statement in respect of the document had expired before that time), that person, if he or she was not aware of that rule, guideline or practice at that time, shall not be subjected to any prejudice by reason only of the application of that rule, guideline or practice in relation to the thing done or omitted to be done by him or her if he or she could lawfully have avoided that prejudice had he or she been aware of that rule, guideline or practice.

3.54 In our issues paper, we suggested that the complainants who approached our office were prejudiced because DAFF's failure to publish the guidelines deprived them of the opportunity to take lawful action to maintain the separate entitlement of each shareholder. We suggested that a shareholder who was aware of the contents of the guideline might have amended their will to distribute their share interests amongst their family members, so as to avoid or minimise the effect of the cap.[5]

3.55 In response to our issues paper, DAFF acknowledged that it had failed to include the guidelines in its statement under s 9 of the FOI Act. It undertook to include reference to this requirement in the next version of its *Grants Management Handbook*, to ensure that grant guidelines are included in future s 9 statements, and to publish the grant guidelines on its website.

3.56 However, DAFF also argued that it would not be responsible management of public money to encourage shareholders to change their wills in order to maximise

[5] We acknowledge, as DAFF pointed out in its response, that any such beneficiaries must themselves have been shareholders on 26 October 2006, as only persons who were shareholders as of that date were eligible to apply for the grant.

their family's benefits. We did not agree. In the first place, any change to a will would not have been intended to create or maximise a benefit, but rather to maintain a benefit that already existed. Furthermore, it is well established that people have the right to take lawful action to structure their affairs to be able to obtain government assistance, minimise their tax, or maintain their entitlements. Indeed, the purpose of s 10 is to ensure that people have access to information so they can so structure their affairs.

3.57 We therefore recommended in our draft report that the department arrange for the relevant applications to be reconsidered, on the basis that s 10(1) applied to the failure to publish the TGAAP Guideline. DAFF acknowledged in response that the TGAAP guidelines took longer than expected to finalise and, once approved, they should have been made publically available. It also accepted that people have the right to take lawful action to structure their affairs to maintain their entitlements.

3.58 DAFF disagreed, however, that s 10(1) of the FOI Act applied to these applications. First, DAFF suggested, s 10 was inapplicable to these particular complaints as the people named in the complaints had died before the policy guidelines were approved on 2 March 2007. Accordingly, there were not any unpublished guidelines that those persons could have been aware of, prior to their deaths. However, the information available to our office indicates that, in at least one case, the deceased shareholder died some time after policy guidelines were approved on 2 March 2007.

3.59 In any case, DAFF argued, s 10 does not apply in these circumstances. It correctly pointed out that s 10 only protects from prejudice the person who had the capacity to take action to avoid the prejudice. In these cases, that person was the deceased shareholder, who could have changed their will to distribute their shares amongst other shareholders in a way that would avoid or minimise the effect of the cap. Neither the actual beneficiary, nor the potential beneficiaries, could themselves have taken any effective action to avoid the prejudice. Section 10 therefore does not protect the actual beneficiary from the prejudice of the cap being applied to him or her.

3.60 The Ombudsman's office has accepted this point, and has not persisted with the recommendation that DAFF reconsider these applications. We have nevertheless included a discussion of the issue in this report to draw attention to an important point of principle. The objective of s 10 of the FOI Act is to ensure that an unpublished policy is not applied by an agency to the detriment of a member of the public. There was clearly a detriment that could have been avoided to the family of the shareholder who died after the policy guidelines were approved on 2 March 2007. However, the person who could have taken action to avoid the detriment (the deceased) was different to the person who suffered the detriment (the family beneficiary). Because of that legal nicety s 10 was inapplicable. It is likely that the deceased would have altered his bequests had he been aware of the unpublished rule. It is inherently unsatisfactory for family beneficiaries to learn later that the amount of the grant they reasonably expected to receive was reduced because of DAFF's unpublished rule.

Issue 6: Requirement to hold shares in a co-op

3.61 This office received two complaints from tobacco farmers who were refused the grant because they did not hold shares in a tobacco co-operative.

3.62 DAFF advised that the policy intention underlying the requirement that applicants hold shares in a tobacco co-operative was to ensure that only bona fide

tobacco producers would receive the grant. It also explained that it did not advise the Government to adopt this particular way of implementing the policy. Rather, this decision was made at the political level.

3.63 The evidence in the cases of the two complainants to this office suggests that they were indeed bona fide tobacco producers. It also appears that a small number of other bona fide tobacco producers are not shareholders and are therefore ineligible for TGAAP.

3.64 The two complainants to our office (as well as several other farmers) applied to the Department of Finance and Deregulation (DOFD) for an Act of Grace payment equivalent to what they would have received under the TGAAP. An Act of Grace payment is a discretionary payment which the Minister for Finance and Deregulation can make to a person in situations where the Minister considers that special circumstances exist warranting payment. Such special circumstances can include those in which the government considers it has a moral, rather than legal, obligation to provide redress to an individual in relation to the unintended, unfair or anomalous effect of government legislation or policy.

3.65 Decisions about whether to approve payments under the Act of Grace scheme rest with the Minister for Finance and Deregulation, or his delegate. However, as a part of the decision-making process, agencies usually provide advice on the merits of a claim. The Minister for Finance and Deregulation then makes the final decision.

3.66 In each case our office investigated, DAFF had advised DOFD to refuse the Act of Grace application. Our office is aware of at least three previous cases in which DOFD departed from DAFF's advice, and made Act of Grace payments to tobacco growers who similarly did not hold shares in the tobacco co-operative. On the face of the matter, this is an inequitable outcome for those refused a grant, which includes the two complainants to this office.

3.67 These two complainants appear to meet the underlying policy objective, that is, they are tobacco growers who could be encouraged by a grant to move into alternative business activities. It seems that only a small number of growers are in this position and are ineligible because they are not tobacco co-operative shareholders.

3.68 In our draft report, we therefore recommended that the department either reconsider these complainants' applications, or reconsider supporting Act of Grace payments to them.

3.69 In response, DAFF rejected our recommendation. It indicated that it did not consider that either of the complainants to our office had a compelling case to warrant an Act of Grace payment. However, it did not provide any additional justification for the policy requirement that applicants hold shares in a tobacco co-operative, other than to say that this was a deliberate policy decision of government.

3.70 In the circumstances, this office has not been satisfied by the explanation given by DAFF as to why the limitation to shareholders was initially included. Nor is it clear why DAFF did not recommend Act of Grace payments for these growers to redress unfair and inequitable outcomes of the scheme. There does not appear to be any rational explanation for these decisions.

3.71 DAFF's stance on this point effectively means the complainants to this office have received inconsistent treatment by government compared to other similarly placed individuals, resulting in unreasonably harsh and inequitable outcomes.

Exceptional Circumstances Exit Grant Package 2007

Issue 7: Requiring a continuing interest in a particular farm enterprise

3.72 The Exceptional Circumstances Exit Grant (Exit Grant) is a payment of up to $150,000 to farmers in an exceptional circumstances (drought) declared area, who are in financial difficulty and have decided to sell their farm and quit (exit) farming.

3.73 Under clause 1.5(b) of the Exit Grant policy guidelines, a person must have had a right or interest in '**the** farm enterprise' (emphasis added) for at least five years immediately prior to exiting the industry. Clause 1.2 of the policy guidelines also indicates that only farmers who have owned their farm for at least five years can apply.

3.74 This office received three complaints from longstanding farmers who had been found to be ineligible for the grant because they had not owned their current farm for at least five years. In order to reduce their debt or respond to the drought, they had at some point during the preceding five years downsized or restructured their farming enterprise and moved to a different farm, before deciding to exit farming altogether.

3.75 DAFF initially explained the requirement that the applicant have had a right or interest in '**the**' (as opposed to '**a**') farm enterprise for at least five years on the basis that the grant is targeted at farmers who face particular barriers to exiting farming either because of their attachment to their particular farm, and/or to farming 'as a way of life' more generally. The fixed nature of the capital in a farm can be a barrier to adjustment. In DAFF's view, a farmer who has changed farm properties in the last five years is not part of that target group. Farmers in that position do not have the same long-term attachment to a farm that can inhibit adjustment and exit, or they have demonstrated that they can more readily deal with adjustment and change.

3.76 We questioned whether the criteria are well designed to achieve the policy objective of targeting the grant at farmers with particular barriers to exiting farming. The premise underlying the grant criteria is that a person who has owned a farm for only five years has demonstrated an attachment either to a particular farm, or to farming as a way of life. By contrast, the criteria exclude a person who has been farming for many years, has remained in farming, but has downsized their farm to reduce debt. It could be said that that action indicates the person's deep-seated emotional attachment to farming as a way of life.

3.77 We also noted the Productivity Commission's recent observation that relatively few farmers have qualified for the Exit Grant:[6]

> At December 2008, around 100 applicants had received an EC exit package from nearly 500 processed claims. One reason for the low uptake of the package is the grant's strict eligibility requirements. The program also fails to address the non-monetary reasons why many farmers remain on the farm—the lack of formal recognition and portability of the skills

[6] Productivity Commission, *Government Drought Support*, Inquiry Report No. 46, 27 February 2009, page 32.

> learned during farming and the reluctance to move away from the family home and local community.

3.78 In our draft report, we therefore recommended that the department consider amending the Exit Grant eligibility requirements to better target those farmers intended to be assisted to exit farming. We also recommended that, if the department did amend the guidelines, then it reconsider the three applications discussed in this section of the report.

3.79 In response, DAFF narrowed its explanation of the intended target audience for this grant, advising us that 'The exit grant is not intended to support people who simply have a long-term attachment to farming.' It advised that it had re-examined the cases identified by our office, and had concluded that each of the applicants fell outside of the target group for the program. It declined to offer a remedy to these applicants.

3.80 Our office maintains the view that the policy criteria were not well designed to achieving the objective of assisting drought-affected farmers with a significant long-term financial and personal investment in the land to leave farming. The grant was made available to farmers with only a five-year history of farming, while excluding some farmers with long-term farming backgrounds and significant skill-related and emotional barriers to exiting farming.

General issues

Issue 8: Publication of grant information

3.81 As noted above, it was not DAFF or Centrelink's practice to make the DAFF executive grant scheme guidelines publicly available. There were also, at times, significant delays between when guidelines changed and when the publicly available information was updated to reflect the changes.

3.82 DAFF has now accepted the principle that it should make its executive grant scheme guidelines available online, and it has updated its *Grants Management Manual* to include this requirement. The new *Commonwealth Grants Guidelines* released in July 2009 now make it mandatory for agencies to make grant guidelines publicly available, including on their website, where members of the public and/or organisations are able to apply for the grant.[7]

3.83 In response to our draft report and recommendations, DAFF also advised that it has initiated processes to ensure that grant program guidelines are clear and unambiguous and are made available publicly. DAFF indicated that its new program guidelines are now assessed by the department's Corporate Legal Unit to ensure they reflect the policy intent, and provide applicants with all necessary advice. Once finalised, the department now posts its guidelines on its website and lists these in annual statements in accordance with its obligations under s 9 of the FOI Act.

3.84 DAFF has also indicated that it is currently revising these processes to ensure they align with the new Commonwealth Grant Guidelines and best practice principles set out in our office's *Executive schemes* report. It stated that it is also amending its Grant Management Handbook to provide further detailed instruction to staff on planning and implementing programs and monitoring and review processes.

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[7] Department of Finance and Deregulation, *Commonwealth Grant Guidelines*, July 2009, paragraph 3.24.

3.85 The executive scheme guidelines discussed in this report, and which remain open for applications, are now available on DAFF's website. However, we note that the guidelines for some other current grant schemes are not available on DAFF's website. For example, the guidelines for DAFF's *Exceptional Circumstances Professional Advice and Planning Grants* are not currently available publicly.[8] Thus, while DAFF appears to have accepted the point in principle, it needs to take further steps to implement this principle in relation to all of its executive schemes.

3.86 In our view, where DAFF's grant programs are administered by Centrelink, it is also important that the guidelines are available through Centrelink's website, and it is DAFF's responsibility to ensure this happens.

3.87 In responding to our draft recommendations, DAFF agreed with this principle and indicated that Centrelink also supported the publication of program guidelines. It additionally acknowledged the need for changes to policy guidelines to be widely publicised.

Issue 9: Internal review

3.88 In our view, DAFF is responsible for ensuring that Centrelink makes high-quality decisions in deciding applications lodged under executive schemes for which DAFF has policy responsibility. An element of that responsibility is to be active in identifying problems arising in Centrelink decision making under the scheme, and in providing support and advice to solve those problems.

3.89 DAFF currently appears to provide only limited support, in the form of providing policy advice in response to requests from Centrelink's Rural Policy and Programs Team, which is responsible for conducting the final level of internal review. (Apart from complaints to the Ombudsman, there is no external merit review of executive scheme decisions by a body such as the Administrative Appeals Tribunal.)

3.90 A different approach to consider would be for DAFF itself to make the final review decisions, rather than Centrelink's Rural Policy and Programs Team. This would ensure that the quality of explanation provided would be improved and DAFF would be more quickly alerted to emerging issues. This would also avoid the risk of DAFF providing policy advice to Centrelink without the benefit of having considered all the relevant circumstances of each case in context.

3.91 DAFF accepted these suggestions in responding to our draft report. It acknowledged the need for unsuccessful grant applicants to be provided with adequate advice on why their claim was not successful.

3.92 To address these issues, DAFF indicated that it will ask its program areas to consider appropriate review mechanisms when establishing arrangements with other agencies involved in administering grants, and would actively monitor the efficacy of those mechanisms.

3.93 Centrelink also suggested that the Social Security Appeals Tribunal (SSAT) be given the power to review some of DAFF's executive scheme decisions. In our view, SSAT review of executive scheme decisions would be a positive advancement in addressing a number of the problems encountered through the administration of executive schemes. We would be interested to learn what further steps DAFF intends to take to work out whether this approach is viable.

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[8] See http://www.daff.gov.au/agriculture-food/drought/assistance/advice (last accessed 10 December 2009).

PART 4—CONCLUSION AND RECOMMENDATIONS

4.1 The growing prominence of grant schemes administered by DAFF makes it all the more important that such schemes are administered well. It is foreseeable that the use of these schemes will increase in coming years, particularly in response to economic and climate changes.

4.2 The following general criticisms are made in this report of the administration of executive schemes for which DAFF has policy responsibility:

- policy guidelines for the schemes, and amendments of the guidelines, have not always been published in a timely manner
- amendments to those guidelines have been applied to applications lodged prior to an amendment being formally made or published
- guidelines have not been well drafted in all instances; for example, it has not always been clear which class of applicant is eligible to receive a grant; and limitations on who is eligible for a grant have sometimes led to decisions that seem harsh or inequitable when compared to other decisions
- DAFF does not play an active enough role in the review of decisions made under its grants programs.

4.3 I make the following recommendations for action by DAFF.

Review of administrative procedures and practices

Recommendation 1

The department revise its procedures to ensure that the guidelines for executive grant schemes for which the department has policy responsibility are carefully drafted, promptly published and not applied retrospectively when amended.

Recommendation 2

The department play a more active role in deciding or resolving requests for review of decisions made under executive grant schemes for which the department has policy responsibility, and in monitoring complaints relating to the administration of those schemes.

4.3 DAFF accepted these recommendations in its response to our draft report.

4.4 I welcome DAFF's positive response to these recommendations. However, its response to our other draft recommendations was disappointing. Of particular concern is DAFF's position in relation to the IMG complaints affected by Issues 1 and 2 of this report. While DAFF agreed with the general principle that changes to policy guidelines should not be retrospectively applied, our office and DAFF continue to differ in our opinions about what constitutes a 'change' in policy.

4.5 As the Commonwealth Grants Guidelines state:

> Criteria for eligibility should be straightforward, easily understood and effectively communicated to potential applicants. This helps avoid frustration and potential costs to applicants, and assists potential applicants to develop and submit applications that are not ineligible ...[9]

4.6 The retrospective changes to eligibility criteria that occurred in these cases do not comply with this principle.

[9] Department of Finance and Deregulation, *Commonwealth Grants Guidelines, July 2009,* page 27.