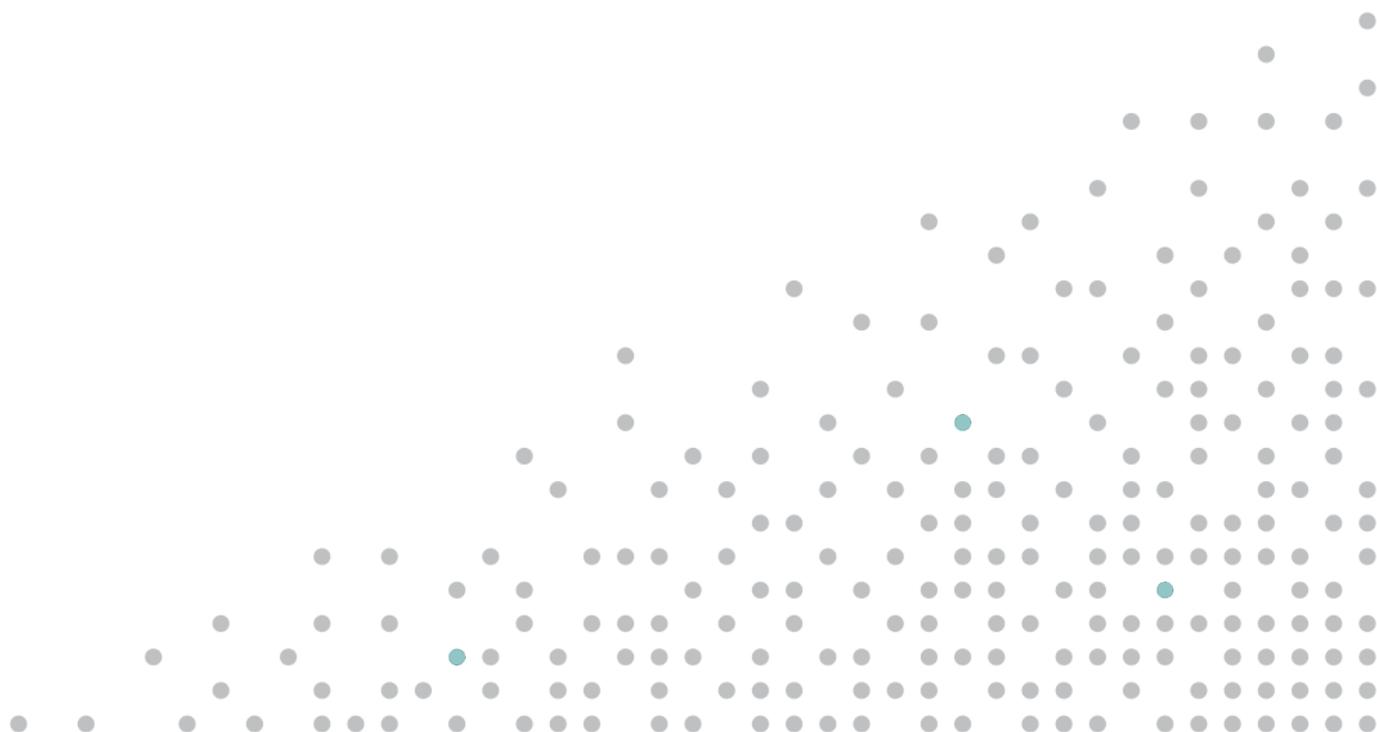




Australian Government
Department of Finance



Scheme for Compensation for Detriment caused by Defective Administration

Resource Management Guide No. 409

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The words '**must**', '**required**', '**requires**' and '**requiring**' denote mandatory compliance by accountable authorities/officials. The use of the words 'could', 'may', 'encouraged' or 'consider' convey non-mandatory guidance. The guidance to which these words relate may or may not be applied by accountable authorities/officials in their approach to resource management, depending on the operating circumstances of the entity and its appetite for risk.

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Audience

This guide is relevant to staff in non-corporate Commonwealth entities who deal with requests for financial assistance under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme).

Key points

This guide:

- assists staff of non-corporate Commonwealth entities in managing and determining CDDA Scheme claims
- replaces the version published in June 2014.

Resources

This guide is available on the Department of Finance website at www.finance.gov.au.

Members of the public who are considering making a claim under the CDDA Scheme against a Commonwealth entity are encouraged to visit that entity's website for information.

Employees of a Commonwealth entity can seek policy advice from the Discretionary Payments Section in the Department of Finance about how to manage a CDDA Scheme claim, at sfc@finance.gov.au or on 1800 227 572.

Other relevant publications include:

- Resource Management Guide No. 401: *Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act*.
- A fact sheet about the CDDA Scheme is available at www.finance.gov.au.

Introduction

1. The CDDA Scheme is a discretionary mechanism available to non-corporate Commonwealth entities. It allows an entity to pay compensation when a person or organisation has suffered detriment as a result of the entity's defective administration, when there is no legal requirement to make a payment.
2. The non-corporate Commonwealth entity which is the subject of a CDDA Scheme claim is the entity responsible for considering and making a decision on that claim.
3. The Department of Finance does not manage CDDA Scheme claims relating to the actions of another entity, nor does it review CDDA Scheme decisions made by other entities.
4. The Commonwealth Ombudsman reviews complaints about decisions made under the CDDA Scheme.
5. CDDA Scheme claims are one of a number of options available to persons in claiming compensation against non-corporate Commonwealth entities. This Guide provides information about some of these options, including act of grace claims, and the extent to which they interact and/or preclude consideration of CDDA Scheme claims.

Part 1 - The CDDA Scheme

Who decides? Authority of decision-makers

6. The CDDA Scheme operates on the basis of authority provided to individual portfolio ministers under the executive power of sections 61 and 64 of the Constitution.
7. Portfolio ministers decide applications made under the CDDA Scheme. A portfolio minister may authorise an official in a portfolio entity to consider and decide applications made under the CDDA Scheme.
8. The minister's authority is to be conferred expressly and must be given separately from the minister's general authorisations to incur expenditure. This requirement is in recognition of the special and potentially sensitive nature of decisions made under the CDDA Scheme for which the entity and its minister may be held accountable.
9. Where a decision-maker is a person other than a portfolio minister, the decision-maker acts for and on behalf of the relevant minister; that is, the decision-maker is an agent of the minister and not a delegate. Only the portfolio minister or authorised official can decide claims under the CDDA Scheme.
10. A finding of no defective administration can only be reached by an authorised decisionmaker.
11. Where a portfolio minister has responsibility over multiple entities, an authorisation will generally need to be provided by the relevant portfolio minister to a relevant official in each entity.

12. Entities can contact the Discretionary Payments Section in the Department of Finance for advice on drafting an instrument for the relevant portfolio minister to authorise an official to consider matters under the CDDA Scheme.

Coverage of the CDDA Scheme

13. The CDDA Scheme is only available in relation to non-corporate Commonwealth entities.
14. The CDDA Scheme is not available in relation to:
 - the departments of the Commonwealth Parliament. The act of grace mechanism is used in relation to claims for discretionary compensation from these departments; and
 - corporate Commonwealth entities.
15. The CDDA Scheme is not available to an entity to approve a claim for compensation on any matter that relates to the defective administration of functions and performance of another entity or other body. If there is a dispute between entities as to which of them is to take responsibility for making a decision under the CDDA Scheme, the Department of Finance shall determine which entity shall have carriage of the claim.
16. The Commonwealth uses contracted providers for some services. The actions of contracted providers are not within the scope of the CDDA Scheme. Where a person alleges that the actions of a contracted provider may have caused financial detriment to them, the matter may be considered under the act of grace mechanism.

What does the CDDA Scheme do?

17. The CDDA Scheme provides that if a minister or an official authorised by the minister forms an opinion that an official of the entity, acting, or purporting to act, in the course of duty, has directly caused a claimant to suffer detriment, or, conversely, prevented the claimant from avoiding detriment, due to:
 - a specific and unreasonable lapse in complying with existing administrative procedures that would normally have applied to the claimant's circumstances
 - an unreasonable failure to institute appropriate administrative procedures to cover a claimant's circumstances
 - giving advice to (or for) a claimant that was, in all circumstances, incorrect or ambiguous
 - 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)

the minister or the authorised official may authorise a payment to the claimant.

18. The CDDA Scheme is permissive, in that it does not oblige the decision-maker to approve a payment in any particular case. However, the decision to approve or refuse a payment must be publicly defensible, having regard to all the circumstances of the matter.

Relationship with other types of claim against Commonwealth entities

19. If other avenues exist to remedy the defective administration (such as existing Commonwealth legislation or schemes), those options must be investigated before the matter is considered under the CDDA Scheme.
20. The PGPA Act includes discretionary mechanisms, available to individuals or other entities, that are able to provide discretionary financial redress.
21. Entities may receive applications which seek financial assistance under the CDDA Scheme, as well as the act of grace and waiver of debt mechanisms under the PGPA Act.
22. Entities are encouraged to determine the most appropriate mechanism to consider the claim, noting that in some instances claimants may not have a full understanding of the interaction of the different mechanisms available, or may refer, incorrectly, to the different mechanisms interchangeably.
23. The CDDA Scheme is not to be used in relation to:
 - claims that have previously been determined under the act of grace provisions (see below)
 - claims in which it is reasonable to conclude that the Commonwealth would be found liable, if the matter were litigated. Legal matters are considered under the Legal Services Directions 2005 on the basis of legal liability
 - claims to offset the payment of any recoverable debt owed to the Commonwealth — even if the debt arose because of defective administration (see below)
 - claims to overcome the effects of specific legislative provisions that are found to be flawed. Entities can deal with such matters through statutory remedies, either by seeking amendment of the relevant legislation, with retrospective effect to provide the benefit on the claimant (if appropriate), or submitting the matter to the Department of Finance for consideration under the act of grace mechanism.
24. A payment under the CDDA Scheme may also be inappropriate where the payment would effectively supplement a payment where the relevant legislation caps the amount a beneficiary may receive from the Commonwealth. This is particularly applicable where the legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances.

CDDA Scheme claims and act of grace claims

25. While CDDA Scheme claims are managed by the entity to which they relate, act of grace requests are managed by the Department of Finance.

26. The act of grace mechanism and the CDDA Scheme do not have a linear relationship: if there is no claim of defective administration leading to a loss, there is no requirement for a claim to be considered under the CDDA Scheme before it can be considered under the act of grace mechanism.
27. However, if a claim is made for an act of grace payment on the basis that an entity's defective administration has caused a loss, the matter may be considered by the relevant entity under the CDDA Scheme in the first instance. Where the Department of Finance receives act of grace claims of this nature directly from a claimant, these will be forwarded to the relevant entity for consideration under the CDDA Scheme.
28. The act of grace mechanism is not used to review CDDA Scheme decisions. The Commonwealth Ombudsman is the appropriate channel to investigate complaints regarding decisions under the CDDA Scheme.
29. The act of grace mechanism may not be used for 'top-up' payments made under the CDDA Scheme, and vice versa.
30. If a claimant alleges defective administration and also asserts special circumstances, it is most appropriate to consider the claims of defective administration first under the CDDA Scheme. Remaining matters that do not relate to claimed defective administration can then be considered by the Department of Finance under the act of grace mechanism following the finalisation of the CDDA Scheme claim.

CDDA Scheme claims and debts

31. The CDDA Scheme must not to be used to offset debts that are owed to the Commonwealth, even if those debts have arisen due to defective administration.
32. If a person has incurred a debt due to defective administration and does not consider that they should have to repay it, the matter can be forwarded to the Department of Finance for consideration under the waiver of debt mechanism (subsection 63(1) of the PGPA Act).
33. However, the PGPA Act:
 - requires the accountable authority of non-corporate Commonwealth entities to pursue recovery of debts, even if those debts have been incurred due to defective administration
 - does not oblige a decision-maker to waive a debt that has been incurred due to defective administration.
34. Guidance on the waiver of debt mechanism can be found in Resource Management Guide No. 401: *Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act*.

Part 2 - Considering claims under the CDDA Scheme

Processing a CDDA Scheme application

35. Applications under the CDDA Scheme can be made by individuals, businesses and other bodies.
36. Entities are encouraged to ask each claimant to address the following areas in their CDDA Scheme application:
 - how the entity's actions or inactions were defective
 - details of the detriment being claimed, including an explanation of how the amount claimed is calculated and any relevant documentation in support of the claim; and
 - how the defective administration directly caused the loss.

Entities can create application forms to assist potential claimants in setting out their claims.

37. In complex cases where some of the issues involved can be verified more easily than others, it may be practical to split an application into components which can then be determined separately.
38. A flow chart is available at Attachment A as an example of how an application made under the CDDA Scheme could be processed and determined. An entity's internal documentation may also provide relevant advice on the process of considering a CDDA Scheme application.

Procedural fairness, privacy and other principles of administrative decision-making

39. Each request under the CDDA Scheme must be determined on its own merits.
40. Prior to a decision being made on an application, the entity must ensure that the claimant is afforded procedural fairness. This includes, but is not limited to:
 - providing an opportunity for the claimant to present their claims or allegations in writing
 - providing an opportunity for the claimant to view and comment on all relevant information, material and/or documents that will be considered by the decision-maker
 - making a decision that is free from bias.
41. For further guidance and best practice advice, entities may wish to refer to the Commonwealth Ombudsman's publication relating to complaint handling (www.ombudsman.gov.au/docs/better-practice-guides/onlineBetterPracticeGuide.pdf).

42. In accordance with the principles of the *Privacy Act 1988*, all aspects of an investigation must be treated as confidential to ensure adequate protection of the claimant's privacy.

Obtaining legal advice

43. It is open to an entity to seek legal advice on CDDA Scheme matters. A claim can be decided on a non-legal basis, even if legal advice is sought.
44. The decision-maker must consider relevant legal practice and principle prior to making a payment that relates to non-financial detriment (see Determining detriment below).
45. If a deed of release and indemnity is considered appropriate in the circumstances, entities may consider it appropriate to seek legal advice in drafting such a document.

Determining defective administration

46. An unreasonable lapse or failure is one where the actions of the official(s) involved are considered to be contrary to the standards of diligence that the entity expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.
47. Cases may arise where individual instances of administrative omissions or errors may not be regarded as unreasonable when considered in isolation from each other, but may constitute defective administration when considered in totality and in the context of the combined impact of the omissions or errors on the claimant.
48. Where advice or information given to a claimant was incorrect or ambiguous, it is not necessary for an element of unreasonableness to be present for the action to fall within the definition of defective administration.

Supporting documentation

49. Documentary or incontrovertible proof of defective administration is not an essential requirement. However, there must be sufficient evidence to enable the decision-maker to form the opinion that defective administration has occurred.
50. It is open to an entity to seek further information from a claimant as considered appropriate. There is no obligation on entities to actively seek out information beyond what the claimant has provided.
51. If a document relevant to the claim is found by an entity, it cannot be disregarded simply on the basis that it was not provided by the claimant. Procedural fairness requires that the substance of documents (relevant to the claim) held by the entity but not known to the claimant is shared with the claimant.
52. Where evidence of defective administration is limited, an assessment must seek to balance the plausibility of the claimant's account of their actions and the plausibility of the allegations against the entity, as well as other possible explanations, in order to determine what is more likely than not to have occurred.

53. The following considerations are provided as a guide but must not limit in any way an entity's assessment:
- the likelihood that wrong advice could have been given in the particular situation, taking into account:
 - the experience of the entity officials involved
 - understanding and knowledge of the relevant statutory provisions, procedures, benefits, or entitlements
 - availability and familiarity of relevant information
 - whether the claimant's subsequent actions were consistent with the advice that the claimant alleges was provided by the entity
 - the consistency of the allegations of defective administration made by the claimant
 - whether the passage of time could have distorted the officer's and/or claimant's recollection of events
 - whether advice has been misinterpreted by a claimant (although some claimant misinterpretations will be caused by poorly constructed advice).

Determining detriment

54. Compensation is only available under the CDDA Scheme where the detriment found to have been suffered by a claimant has arisen as a direct result of the defective administration.
55. "Detriment" is considered as the amount of quantifiable financial loss, including opportunity costs, that a claimant can demonstrate was suffered despite having taken reasonable steps to minimise or contain the loss. If, for some reason, it is impracticable for a claimant to demonstrate all or part of the quantifiable financial loss, the decision-maker may make whatever assumptions as to amount, including with respect to the claimant's actions to minimise or contain the loss, that are necessary and reasonable in all the circumstances.
56. Where compensation is to be approved for non-financial detriment (such as for pain and suffering, inconvenience or other 'qualitative' elements of that nature), the decision-maker is not to approve the payment without first having regard to relevant legal principle and practice in arriving at an appropriate amount for such payment.
57. Financial detriment can be distinguished from financial disappointment - for example, where a formal assessment results in the amount of an entitlement being less than a "ballpark" figure given to a person at the time they made inquiries. A claimant does not suffer financial detriment merely because they were correctly not granted a benefit after being advised that they would receive that benefit, or if a debt was raised due to a benefit being incorrectly paid.
58. If an authorised officer has determined that no defective administration has occurred, it may not be necessary to consider the issue of detriment.

59. It is open to a decision-maker to find that there has been defective administration but that the claimant has not suffered detriment, and therefore that no compensation is payable. That a mistake has been made by an entity or an official of an entity does not automatically mean compensation is payable under the CDDA Scheme.

Economic loss

60. Pure economic loss refers to financial detriment suffered by a claimant that is unrelated to any damage or physical injury to the claimant or their property.
61. If the pure economic loss claimed is directly caused by incorrect or ambiguous advice, compensation will only be payable if the entity loss should have been foreseeable by the entity and it was reasonable in all the circumstances for the claimant to seek and rely upon the advice.
62. Pure economic loss may arise from a lost opportunity. For such matters, compensation will only be payable when the entity could reasonably have foreseen the type of opportunity that, as a result of the entity's defective administration, the claimant lost.
63. Lost opportunity claims can be particularly difficult to determine, both in establishing whether the opportunity was lost at all, and if so, the amount lost. In these cases, it is appropriate to place the onus on the claimant to provide very clear evidence of the lost opportunity (including the quantum).

Non-economic loss

64. Non-economic loss claims may relate to personal injury (including psychiatric injury), emotional distress or damage to reputation.
65. Compensation for personal injury loss would be generally limited to the types of personal injury compensable in legal practice and principle. Entities must look to legal principle and practice when determining an appropriate amount to quantify the claimant's loss.
66. Compensation under the CDDA Scheme is not payable solely for grief or anxiety, hurt, humiliation, embarrassment, disappointment, stress or frustration that is unrelated to a personal injury which is being compensated under the CDDA Scheme, no matter how intense the emotion may be.
67. If an individual is entitled to other payments related to their injury, it is unlikely that they would be considered to be suffering detriment. A payment under the CDDA Scheme may not be appropriate if the payment is used to supplement another entitlement related to an injury, on the basis that a person will not be compensated more than once for an injury.

Determining the level of compensation

68. There is no financial limit on the amount of compensation payable under the CDDA Scheme.

69. If an entity's defective administration is found to have resulted in a claimant suffering detriment, the overarching principle to be used in determining an appropriate level of compensation for a claimant is to restore the claimant to the position they would have been in had defective administration not occurred.
70. Offers of compensation to claimants are calculated on the basis of what the decision-maker considers is fair and reasonable in the circumstances. The Commonwealth is required not to take advantage of its relative position of strength to minimise payment.
71. Generally, the following amounts are not included in calculating the quantum of a payment under the CDDA Scheme:
 - costs incurred as a result of engaging legal, financial or other professional services to assist in the preparation of the application
 - other incidental costs incurred in the preparation of a CDDA Scheme application, which may include, but are not limited to, the cost of travel, telephone calls, photocopying, or postage and courier services
 - components for interest.

Supporting documentation

72. Claims of financial detriment must be substantiated with appropriate documents. Claimants can be encouraged to provide independent supporting documents with their application.
73. In considering the type and amount of evidence required to substantiate the application, entities can take account of the nature and size of the compensation requested.
74. If, for some reason, it is impractical for a claimant to demonstrate all or part of the detriment suffered, the decision-maker can exercise their judgement to make a reasonable assessment about the level of detriment, taking into account all relevant factors.

Claimant's own actions

75. The claimant's own actions may be a relevant consideration for the decision-maker in determining the level of detriment that has been suffered, including considering what actions were taken to mitigate a loss. The decision-maker may consider whether the claimant contributed to, or caused, the detriment suffered and whether it is appropriate to adjust the compensation amount on this basis.
76. In considering a claimant's actions, the decision-maker is required to take into account the claimant's specific circumstances and the factors that influenced their actions, rather than adopting an assumed normative model of "usual" behaviour.

77. The following considerations are provided as a guide in deciding if the amount of compensation can be reduced because of the claimant's actions:
- the claimant's knowledge of dealing with the issues concerned
 - whether the claimant gave false, misleading or incomplete information which the entity could not have been reasonably expected to challenge or clarify
 - whether there was any unreasonable delay between receiving advice and acting on the administrative error. Where repeated delays were experienced because of a claimant's inaction, the cumulative effect can be considered
 - whether the advice provided to the claimant was informal and no reasonable person would have relied on it due to its informality.
78. Where it is evident that there has been defective advice, it is relevant to consider whether the correct information was reasonably available to the claimant from another source, or if it would have been reasonable for the claimant to inquire further.

Part 3 - Following a decision

Information provided to claimants

79. Entities are required to provide claimants with an adequate explanation of the reasons for a decision to accept, partially accept, or reject an application, as well as review options and the right to seek assistance from the Commonwealth Ombudsman (www.ombudsman.gov.au).
80. Entities must note that the act of grace mechanism is not a review mechanism for decisions under the CDDA Scheme.

Making payments

81. In general, CDDA Scheme payments are funded through departmental appropriations and reported under an appropriate entity outcome.

Deeds of release and indemnity

82. An entity may request an individual to release the Commonwealth from possible legal action in relation to the circumstances of the CDDA Scheme application. The agreement would normally be in the form of a deed of release.
83. Deeds of release are tailored to the circumstances of the application. If a claimant does not accept a particular offer of compensation, or sign a deed of release, it is open to the entity to withdraw the offer.
84. Where only part of the application is settled by a payment under the CDDA Scheme, an entity may request that a claimant agree to a deed of release for that part of the application.

85. Entities are required to advise claimants to seek independent legal advice in cases where a deed of release and indemnity is proposed.

Taxation implications

86. Entities are encouraged to ensure the claimant is advised that: tax may be payable on CDDA Scheme payments; it is the claimant's responsibility to declare all taxable income; and the claimant could seek independent financial advice or contact the Australian Taxation Office if they are unsure of their tax obligations.
87. If applicable, compensation would normally be paid on a pre-tax basis, for example, by compensating for the gross income amount in loss-of-earnings cases.

Part 4 - Review of CDDA Scheme decisions

Internal review

88. It is open to entities to determine whether to implement formal internal review mechanisms for decisions made under the CDDA Scheme.
89. Entities may also choose to determine whether reconsideration is warranted on a case-by-case basis.
90. If a claimant provides pertinent new evidence, facts or argument to support their application, reconsideration may be appropriate.

Commonwealth Ombudsman

91. Decisions made under the CDDA Scheme are reviewable by the Commonwealth Ombudsman, either following a complaint from a claimant or as an own-motion investigation.
92. An entity must consider any proposal or recommendation made by the Ombudsman but is not bound by it. The Ombudsman has no power to overturn or vary an entity's decision. The Ombudsman may exercise powers to bring the matter to the attention of the accountable authority of the respective entity, the portfolio minister, the Prime Minister and the Parliament.

Judicial review

93. As CDDA Scheme decisions are not made under an enactment or law, decisions are not amenable to judicial review under the Administrative Decisions (Judicial Review) Act 1977. However, they may be subject to judicial review under section 75 of the Constitution or section 39B(1) of the Judiciary Act 1903.

Appendix A – Flow chart for matters considered under the CDDA Scheme

