CONFIDENTIAL

REPORT ON A REVIEW OF THE COMPENSATION FOR DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION SCHEME 2004-05

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Executive Summary

An in-house review of the operation of the *Compensation For Detriment Caused By Defective Administration Scheme* (the Scheme) was conducted by the Department of Finance and Administration (Finance) between August 2004 and March 2005. The review was undertaken in response to the Australian National Audit Office (ANAO), which in Audit Report No. 35, 2003-04: *Compensation Payments and Debt Relief in Special Circumstances,* concluded that Finance should conduct periodic monitoring of the operation of the Scheme.

The Scheme applies to agencies that come within the ambit of the *Financial Management and Accountability Act 1997* (the FMA Act) and provides each portfolio Minister and authorised agency officials with a mechanism to approve payments to persons who have experienced losses caused by agencies' maladministration. The Scheme applies where there is a moral, rather than legal obligation to claimants.

The Scheme was introduced in 1995 by the then Government and had two main aims: to devolve responsibility to individual portfolio Ministers for agency maladministration, and to encourage agencies to continually improve their administrative practices.

While the Scheme operates autonomously in each portfolio, policy and operational guidance has traditionally been provided by Finance. Current guidance is provided in an attachment to Finance Circular 2001/01: *Commonwealth Compensation 'Schemes', Debt Waiver and Write Offs*, which, inter alia, covers the Scheme. The Scheme was previously reviewed, by the Office of the Commonwealth Ombudsman (the Ombudsman), in 1999.

The purpose of the 2004-05 Finance review was to evaluate the effectiveness of the operation of the Scheme in its current form in nineteen Commonwealth agencies over the period 2001-02 to 2003-04. Comments on the Scheme were also provided by the Ombudsman.

Conclusions reached by the review include that:

- the Scheme is still relevant and useful to agencies, particularly those with a large external clientele;
- although the Scheme does not have any financial limits, it is most commonly used to make small payments under $20,000;
- the Scheme is operating in accordance with the main purpose intended by the original 1995 decision, to quarantine claims solely related to defective administration from act of grace claims. For the period of the review, the number of act of grace claims processed for the agencies that used the Scheme extensively, represented only a small fraction of CDDA claims processed by those agencies;
- s 47C [redacted]

- s 47C [redacted]
- [redacted]
- [redacted]

The two recommendations arising from the review are that:

- Finance's CDDA guidelines be revised to include some examples of potential claims, a model 'fact sheet' and application template for claimants, and more detailed guidance for agencies on:
    - considering the circumstances which may give rise to the need to seek legal advice on claims;
    - how the link between non-economic and economic loss can reasonably be established;
    - the implications of claimants having access to statutory mechanisms to provide some level of redress for their losses;
    - how payments for loss of opportunity and loss of interest may be calculated;
    - how avenues for exploring the potential taxation implications of payments may be identified;
    - the importance of the integrity of record keeping and monitoring of claims, including segregating information on CDDA claims from claims for legal liability, as well as splitting CDDA claims into components, in some circumstances, where applicable;
    - the importance of taking the principles of natural justice into account, in informing claimants about their claims and further review rights; and
- the Ombudsman and agencies be advised of the outcomes of the review.

Revision of the CDDA guidelines would most effectively be undertaken after seeking advice from a legal consultant on some of the more complex issues outlined above, such as the link between economic and non-economic losses.

1. PURPOSE OF THE REVIEW

The in-house review of the operation of the Scheme was initiated in response to the ANAO's March 2004 Audit Report No. 35, 2003-04: *Compensation Payments and Debt Relief in Special Circumstances.*

The Audit Report reflected the ANAO's findings of an audit of selected 'compensation' mechanisms, including ex gratia payments, act of grace payments and waiver of debts under sections 33 and 34 of the FMA Act, as well as the Scheme.

With respect to the Scheme, the ANAO concluded that Finance should conduct periodic monitoring of its operation. Finance agreed to conduct a review to establish whether the Scheme was operating effectively. In addition, Finance agreed to undertake future periodic reviews of the Scheme.

The review was undertaken by the Special Claims and Land Policy Branch (Shareholder and Asset Sales Division), consistent with its current responsibility for policy and operational advice on the Scheme, as well as its responsibilities regarding other discretionary powers for act of grace payments and waiver of debts.

The recommendations of the Audit Report relating to ex gratia payments are being implemented by the Finance and Banking Branch (Financial Framework Division), which has taken responsibility for promulgating guidance on ex gratia payments.

The review focused on identifying:

- the extent to which the Scheme had been used in recent years (2001-02 to 2003-04);
- the internal processes put in place by agencies for assessing claims;
- agency satisfaction with the Scheme;
- issues which may require guidance from Finance; and
- whether the fact that the Scheme was introduced ten years ago, in 1995, means that its parameters require re-assessment by the Government.

2. BACKGROUND

The Scheme is purely administrative, that is, it does not have a legislative basis. However, it provides each individual portfolio Minister and agency officials (authorised by him or her), with a mechanism to approve payments to persons who have experienced losses caused by agencies' maladministration. The Scheme applies in circumstances where the Australian Government has no legal obligation to a person who has made a claim of defective administration, but nevertheless considers that there is a moral obligation to that person.

The purpose of establishing the Scheme was to simplify previous arrangements for handling defective administration claims under the act of grace provisions of the former *Audit Act 1901* (which, in 1997, were subsequently incorporated into the FMA Act). The act of grace provisions allow for the Minister for Finance to approve payments "in special circumstances". Up until 1995, these provisions were used to capture all claims based on moral grounds.

The Scheme was established as a result of a September 1995 proposal to the Government from the then Minister for Finance, following extensive consultation with the Ombudsman

to devolve the power to determine claims related to defective administration to individual portfolio Ministers. The aim was to segregate these claims from other claims for act of grace payments. In addition, it was considered that autonomy over managing defective administration claims would provide an incentive for agencies to continually strive for improvements in their administrative efficiency and effectiveness.

Relationship with act of grace claims

Since its introduction, the Scheme has been applied to cases that relate solely to agencies' administrative procedures, while the act of grace provisions have been reserved for cases that also, or instead, involve broader issues, such as whether the operation of a particular law has had an unintended or inequitable effect in a claimant's particular circumstances.

Act of grace claims are considered under section 33 of the FMA Act and are all determined in the Finance portfolio (irrespective of which agencies have carriage of the matters concerned). In addition, because decisions on act of grace claims are made under an enactment, they are subject to the appeal provisions of the *Administrative Decisions (Judicial Review) Act 1977*, which enable act of grace claimants to challenge decisions in the Federal Court.

Therefore, while CDDA consideration and act of grace consideration both examine issues relating to moral responsibility, the mechanisms differ in that claimants have no right of (legislative) review in relation to a decision made under the Scheme. Nevertheless, decisions made under the Scheme must be publicly defensible and are reviewable by the Ombudsman.

Criteria for approving payments under the Scheme

The criteria which apply are that a payment can be approved in circumstances where a client of an agency has sustained 'detriment', including economic losses, or non-economic losses, if the Minister or authorised official determining the claim is satisfied that the loss involved arose from:

- a specific or 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 the circumstances, incorrect or ambiguous; or
- an unreasonable failure to give to (or for) a claimant, the proper advice that was within the official's power and knowledge to give (or that the official was reasonably capable of obtaining).

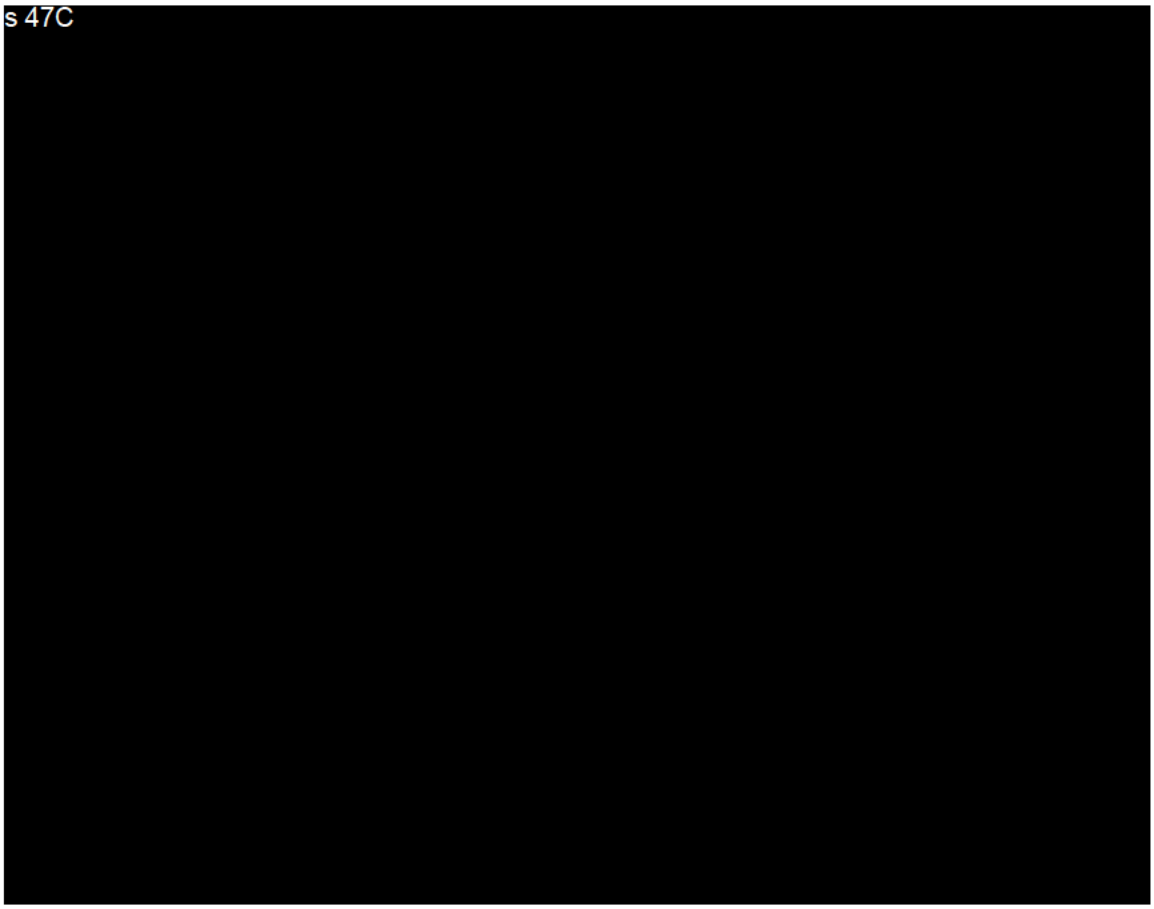
In this context, 'detriment' is defined as:

- 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 a quantifiable financial loss, the decision-maker may make whatever assumptions as to the amount, including with respect to the claimant's actions to

minimise or contain the loss, that are necessary and reasonable in all the circumstances; and

- non-economic damage.

s 47C



Finance's policy advisory role

The Government decision that established the Scheme did not give Finance any explicit role in oversighting the operation of the Scheme. However, it was noted that guidance in the form of 'best practice' should be promulgated. This has traditionally been prepared by the area of Finance (now the Special Claims and Land Policy Branch) that deals with act of grace and waiver claims. Original guidance on the Scheme was articulated in the (now redundant) Estimates Memorandum 1995/42, which explained the purpose and nature of the Scheme.

The Special Claims and Land Policy Branch has some ongoing contact with agencies on CDDA matters, firstly because agencies routinely seek oral advice on particular cases, and secondly because some claimants request act of grace consideration for losses that should be considered in the CDDA context. These cases are subsequently referred to the relevant agencies to determine and are monitored to check that they have been resolved.

However, generally, the Scheme operates completely independently from Finance, in accordance with the intentions of the original Government decision to devolve responsibility in this area to individual portfolio Ministers.

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