

FACT SHEET 9

Compensation for detriment caused by defective administration

February 2010

Members of the public can suffer loss or damage because of a government agency's mistake or poor administrative practice. When that happens, they may not always be able to seek a remedy through administrative appeal, litigation or another legal mechanism. The *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA scheme) is an administrative scheme established to allow Australian Government agencies to provide compensation where there is a moral rather than a legal obligation to do so.

Guidance to agencies on how the CDDA scheme operates, the criteria to be applied and the calculation of payments is set out in Finance Circular 2009/09 *Discretionary Compensation and Waiver of Debt Mechanisms*. This fact sheet supplements the circular by setting out best practice principles for handling CDDA claims. The principles are drawn from the Ombudsman's own motion investigation into the administration of the CDDA scheme in 2009 and the office's experience of handling complaints about CDDA claims over many years.

The CDDA scheme

The aim of a CDDA payment is to restore a person to the position they would have been in if there had been no defective administration. 'Defective administration' broadly means an agency's unreasonable failure to comply with its own administrative procedures, institute appropriate administrative procedures, or give proper advice.

Common examples of CDDA payments being made are when a person incurs expenses or loses eligibility for a benefit because of incorrect agency advice; a penalty or debt is wrongly imposed; personal property is damaged or documents are lost by an agency; or a computer error results in a delayed payment or unreasonable delay in approving an application.

A CDDA payment is made at the discretion of the agency to which the claim is made. In deciding whether to make a payment an agency must act reasonably and according to principles of good decision making, discussed below.

The CDDA scheme applies only to Australian Government agencies that are subject to the *Financial Management and Accountability Act 1997*. This includes all departments and many of the large statutory agencies that provide services to or deal directly with the public.

Best practice principles

When dealing with CDDA claims, agencies should keep in mind the following principles.

Visibility and accessibility

Members of the public need to be aware of the options available if they consider they have suffered detriment because of an agency's unreasonable actions, omissions or decisions. Agencies should ensure that comprehensive information on the CDDA scheme is easily accessible to the public—for example, on the agency's website and in its service charter and other publications. All agency staff who deal with members of the public should be aware of how the CDDA scheme operates, including how claims can be made. Claim forms and supporting material should be accessible and easy to use. Agencies should also help applicants to provide relevant and adequate information to support their claim.

Timeliness

CDDA claims need to be handled in a timely manner. Delay can increase the detriment an applicant suffers and lead to increased antagonism. If a matter is complex and will take longer than normal to resolve, the agency should regularly update the applicant on progress of its investigation. Agencies should set timeliness

standards for dealing with CDDA claims and regularly monitor progress against these standards, to minimise the chance of undue delay.

Good communication with applicants

Poor communication can exacerbate an applicant's sense of grievance against the agency. CDDA claims should be acknowledged promptly, the likely timeframe for the agency's response should be made clear at the outset, further information should be sought from the applicant if required, and they should be kept informed of progress in dealing with their matter. The letter advising the applicant of the agency's decision on the CDDA claim needs to be comprehensive and be easy to understand. If the claim has been rejected wholly or in part, the reasons should be clearly explained.

Good decision making

A decision maker should ensure that:

- a CDDA claim is fairly assessed against the criteria set out in the Finance Circular
- all relevant and available information is considered
- if there is a gap in the information an applicant provides, they are invited and helped to provide additional material
- information used to support the agency's decision on CDDA is checked for accuracy and unwarranted assumptions
- the applicant is given the opportunity to comment on relevant adverse information before the final decision is made.

Recordkeeping

Good decision making must be underpinned by good recordkeeping. A decision maker should keep proper records about the process for reaching their decision, including the weight given to different information and assessment against the CDDA scheme criteria. Any contact with the applicant should also be properly recorded. This helps improve transparency and accountability in the process, and allows the agency to analyse its effectiveness and efficiency in dealing with CDDA claims.

A common complaint about the CDDA scheme is that an application is refused because an agency has no record of the incorrect advice that a person claims they received and acted on. An agency

should not presume that advice was not given simply because there is no written record. Nor should an agency presume that an applicant is mistaken because the alleged advice was abnormal. Even experienced and capable staff can give wrong or inadequate advice if they misinterpret a question or are distracted by other issues. A decision maker should consider the plausibility of the applicant's account, including whether the applicant kept any record or acted consistently with the advice they claim to have received.

Agencies can reduce disputes about oral advice by taking precautionary measures. Some agencies record all calls to telephone advice lines. At the least, it is good practice to keep a brief written record of oral advice, particularly in responding to questions about benefits, entitlements and legal requirements.

Avoiding a legalistic approach

If investigation of a complaint reveals that the agency is legally liable, the CDDA scheme is not the appropriate avenue for dealing with the matter. Once a decision is made to treat a claim as a CDDA matter, it should not be handled in the same way as a legal dispute. Decision makers need to remember:

- there is no onus on a CDDA applicant to prove their claim as they would need to prove a legal claim
- in determining a CDDA claim, all relevant information which is readily available should be considered, even if the applicant has not provided it
- a CDDA claim is to be considered from the perspective of a moral obligation and should not involve a 'compensation minimisation' approach
- if the staff handling CDDA claims are located in an agency's legal area or if the agency uses external legal advisers, it should be made clear to all involved, including the applicant, that the matter is not being dealt with as a legal dispute
- a CDDA claim should ordinarily be granted where the material before the decision maker provides a reasonable and proper basis for compensation to be paid—legal concepts and terms such as 'balance of probabilities', 'contributory negligence' and 'conclusive grounds' should be avoided.

Review of CDDA decisions

An agency decision to refuse a CDDA claim cannot be appealed to an administrative tribunal. This makes it particularly important that dissatisfied applicants are advised of other review mechanisms. If a claim is rejected, the applicant should be advised that internal agency review of the decision is available, and that they can also complain to the Ombudsman if dissatisfied with the agency's decision or the handling of their claim.

Support for staff

Staff who deal with CDDA claims need to be skilled and properly trained in investigating claims, assessing information and making decisions, as well as communicating with claimants who may be aggrieved and upset. Training in mediation and other dispute resolution techniques can be useful. Accurate and up to date information and guidance should be readily available in agency manuals, procedural advice and practice statements. Use of standardised document templates can also help to increase consistency in analysing claims, determining levels of compensation and providing reasons for decisions.

Systemic issues

CDDA claims can alert agencies to potential problem areas and opportunities for improving their administrative systems, even in cases where an agency has decided not to grant compensation. Agencies need to ensure processes are in place to report to their senior executives on trends and issues arising in CDDA claims and to draw problems to the attention of relevant business areas.

FURTHER INFORMATION

Commonwealth Ombudsman *Putting things right: compensating for defective administration*, Report No. 11 | 2009

Department of Finance and Deregulation *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09.

More information?

If you would like copies of other Commonwealth Ombudsman fact sheets, more information about the work of the Ombudsman's office, or a more detailed briefing for agency staff, please contact the Director Public Affairs.

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