

The Auditor-General
Audit Report No.35 2003-04
Business Support Process Audit

Compensation Payments and Debt Relief in Special Circumstances

Australian National Audit Office

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of Australia 2004

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Canberra ACT
24 March 2004

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a business support process audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Compensation Payments and Debt Relief in Special Circumstances*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Oliver Winder'.

Oliver Winder
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

| | |
|----------------------|--|
| AAS | Australian Accounting Standard |
| AASB | Australian Accounting Standards Board |
| AFP | Australian Federal Police |
| AGS | Australian Government Solicitor |
| ANAO | Australian National Audit Office |
| APS | Australian Public Service |
| APS Commission | Australian Public Service Commission |
| ASIC | Australian Securities and Investments Commission |
| CAC Act | <i>Commonwealth Authorities and Companies Act 1997</i> |
| CDDA | Compensation for Detriment caused by Defective Administration |
| CEIs | Chief Executive's Instructions |
| Comsuper | Commonwealth Superannuation Administration |
| CSA | Child Support Agency |
| Customs | Australian Customs Service |
| DIMIA | Department of Immigration and Multicultural and Indigenous Affairs |
| DITR | Department of Industry, Tourism and Resources |
| DVA | Department of Veterans' Affairs |
| FaCS | Department of Family and Community Services |
| Finance | Department of Finance and Administration |
| Finance Minister | Minister for Finance and Administration |
| FMA | Financial Management and Accountability |
| FMA Act | <i>Financial Management and Accountability Act 1997</i> |
| FMO(s) | Finance Minister's Order(s) |
| GST | Goods and Services Tax |
| Minister for Finance | Minister for Finance and Administration |

| | |
|-------------------------|--|
| Parliamentary Secretary | Parliamentary Secretary to the Minister for Finance and Administration |
| PM&C | Department of the Prime Minister and Cabinet |
| PS Act | <i>Public Service Act 1999</i> |
| SMHEA | Snowy Mountains Hydro-electric Authority |

Glossary

| | |
|---------------------------------|--|
| Act of grace payments | Act of grace payments are made pursuant to subsection 33(1) of the <i>Financial Management and Accountability Act 1997</i> under which the Minister for Finance and Administration (or delegate) may authorise a payment if he or she considers it appropriate to do so because of special circumstances, and where there is no other viable avenue of redress. |
| Advance to the Finance Minister | The Advance to the Finance Minister is a provision authorised by the annual Appropriation Acts and made available to the Finance Minister as a central contingency fund to provide urgent funding to agencies through the year, for unforeseen circumstances, or because of erroneous omission or understatement. |
| Agency Head | ‘Agency Head’ is defined in section 7 of the <i>Public Service Act 1999</i> as: the Secretary of a Department; or the Head of an Executive Agency; or the Head of a Statutory Agency. These positions cover most agencies operating under the <i>Financial Management and Accountability Act 1997</i> . |
| CDDA scheme | CDDA is an administrative scheme, which was introduced in 1995, providing each Minister (or officers authorised by Ministers) with a discretionary authority to compensate persons who have suffered detriment due to the ‘defective’ actions or inactions of FMA Act agencies within the Minister’s portfolio, and where the claimant has no legal or statutory right of redress. |
| Chief Executive’s Instructions | Instructions issued by the Chief Executive of an agency under the provisions of the FMA Act. |
| Comcover | The Commonwealth’s self-managed fund for insurable risks. |
| Deed of Release | A Deed of Release is a document that is signed by a claimant acknowledging that an offer of compensation has been accepted and that no future claims can be made against the Commonwealth in relation to the particular claim. |

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|---|--|
| Defective administration | <p>Defective administration refers to such actions by an agency official as:</p> <ul style="list-style-type: none"> • an unreasonable failure to institute appropriate administrative procedures; • an unreasonable failure to give proper advice within an official's power and knowledge to give; and • provision of advice that was, in all the circumstances, incorrect or ambiguous. |
| Ex gratia payments | Ex gratia payments are discretionary payments by the Commonwealth to a group of people who may have suffered a financial or non-financial loss. |
| Finance Minister's Orders | In the context of this audit, Orders issued by the Minister for Finance and Administration outlining the requirements and guidance for the preparation of financial statements of Commonwealth agencies and authorities. A new set of Orders is usually issued for each reporting year. Finance Minister's Orders may also be issued for other purposes. |
| Financial Statements | Financial statements disclose information relevant to the assessment of performance, financial position, and financing and investing of a reporting entity, and include information about compliance. In the FMA Act agency context, the term 'financial statements' includes the certified statement by the Chief Executive, the primary financial statements and schedules, and the 'notes to the financial statements'. |
| Legal liability | Where a person or entity is liable under the law, that is, through an enactment, contract or principle of law. |
| Legal Services Directions | Directions issued by the Attorney-General, pursuant to section 55ZF of the <i>Judiciary Act 1903</i> . These Directions set out the requirements for Commonwealth legal services. |
| Payment in special circumstances relating to APS employment | Payments that relate to Commonwealth employment matters under section 73 of the <i>Public Service Act 1999</i> . |

- Waiver of debt A waiver is a special concession granted to a person or organisation that 'expunges' the debt owed to the Commonwealth. Waivers may be made by the Minister for Finance and Administration (or delegate) pursuant to section 34 of the FMA Act or by delegated agency officers pursuant to specific legislation.
- Write-off of debt Debt write-off is a management accounting response to the fact that some debts cannot be recovered, rather than the granting of financial relief to the debtor. Write-off of debt is normally justified on the basis that the debt is not economical to pursue, e.g. where the debtor owes a small amount or is bankrupt or cannot be traced, or the debt is not legally recoverable, e.g. where the debtor resides outside the Commonwealth's legal jurisdiction or the age of the debt is outside the relevant limitation period. Debts written-off can still be recovered at a later date, especially where the financial circumstances of the debtor change.

Summary and Recommendations

Summary

Background

1. The Commonwealth has a number of means by which it may provide compensation or debt relief to individuals or entities that have been disadvantaged by: the effects of legislation; misinformation provided, or actions taken, by Government agencies or staff; or some other negative circumstance. These include mechanisms where legal liability exists and compensation is mandatory, and other mechanisms where the Commonwealth often has a moral, but discretionary, obligation to provide compensation.
2. This report covers a number of the discretionary compensation mechanisms that are available to agencies operating under the *Financial Management and Accountability Act 1997* (FMA Act). It principally deals with two mechanisms enacted in legislation, namely act of grace payments and waivers of debt, and one administrative mechanism, the Compensation for Detriment caused by Defective Administration (CDDA) scheme. This latter scheme provides Portfolio Ministers with the discretion to authorise compensation, where detriment has been caused.
3. The report also discusses, briefly, two other discretionary mechanisms, namely ex gratia payments and payments in special circumstances relating to Australian Public Service (APS) employment.
4. The Department of Finance and Administration (Finance) is responsible for the administration of the FMA Act provisions for acts of grace and waivers of debt on behalf of the Minister for Finance and Administration. Finance provides the policy framework and advice to agencies. As well, it processes all act of grace claims, and most agencies' FMA Act waiver claims up to the point of decision by the Parliamentary Secretary to the Minister for Finance and Administration.¹ Individual agencies are then responsible for implementing the decisions.
5. Individual agencies are generally responsible for the administration of CDDA payments, payments in special circumstances relating to APS employment, and ex gratia payments, and waivers of debt administered under legislation other than the FMA Act. However, policy guidance is provided by central agencies, namely, Finance (CDDA), the Australian Public Service

¹ From March 2002 to the date of preparation of this report, the Parliamentary Secretary was the only person that could authorise payments and waivers, other than for the chief executives of the Australian Securities and Investments Commission and the Commonwealth Superannuation Administration, who could authorise the waiver of certain debts administered by those agencies.

Commission (APS employment) and the Department of the Prime Minister and Cabinet (ex gratia).

Financial and operating significance

6. Individual compensation payments and waivers of debt under each of the mechanisms may range in amount from a few dollars to several million dollars. In total, over the last three financial years, the Australian Government has waived more than \$865 million relating to more than three million debts,² and paid out in excess of \$14 million to more than 3000 claimants (act of grace and CDDA payments). These figures have been aggregated from agency financial statements, as agencies are required to report them in the notes to their financial statements. Although not required to be reported in financial statements, ex gratia payments are known to be often in the millions of dollars, while those payments related to APS employment are understood to be rare.

7. Because the compensation and debt relief mechanisms are discretionary, the Commonwealth must have prudent safeguards in place so that compensation is provided only when warranted. In addition, the Commonwealth has a responsibility to provide compensation in a responsive and timely manner.

8. It is in the context of these competing considerations that the audit of compensation payments and debt relief was conducted. Moreover, the reportable transactions are deemed to be 'material by nature' and, irrespective of the amount involved, must be reported in the financial statements without omission, misstatement or non-disclosure.

9. The accountability framework requires complete disclosure as well as demonstrable and proper stewardship by the Commonwealth in providing compensation to claimants. It is largely by the consistent adherence to the financial reporting requirements that the objectives of accountability, including transparency, are fulfilled.

Audit objectives

10. The objectives of the audit were to:

- assess whether the management of claims for compensation and debt relief under the various discretionary mechanisms for granting relief was in accordance with relevant legislative requirements and Commonwealth guidelines; and

² These figures include two major waivers of debts due from other Commonwealth bodies (\$113 million) and approximately 835 000 debts relating to the waiver of overpayments of Family Tax Benefit and Child Care Benefit (approximately \$435 million).

- determine whether the current administrative policies and procedures, for the various mechanisms of compensation and debt relief, provided for the effective management and reporting of claims made under those mechanisms.

Audit scope

11. The audit was undertaken at five FMA Act agencies that reported act of grace and CDDA payments, and/or waivers of debt in their 2000–01 and 2001–02 financial statements. The selection included Finance, as the responsible administrative policy maker and the main approving agency for claims made under the FMA Act.

Audit conclusion

12. The ANAO concluded that, overall:

- the management of compensatory claims was generally in accordance with the relevant legislative requirements and administrative guidelines; and
- the guidance for the discretionary compensation mechanisms provided a sound basis for the proper management of claims, and for the reporting of the authorised claims that are currently required to be reported publicly.

13. The ANAO also concluded that there was a suitable framework in place providing individuals, entities and communities with the opportunity to seek and obtain financial compensation or relief where they had been disadvantaged by various negative circumstances. Also, agency processes for dealing with claims under the various compensatory mechanisms were generally in accordance with the relevant guidelines issued by Finance, or other central agencies, where applicable.

14. However, there was a need to improve certain aspects of particular compensatory mechanisms and the overall coordination of all the arrangements. Those improvements would provide for greater consistency and accountability across all the mechanisms examined, and for the processing of claims in a more timely manner. In particular, the ANAO considered that:

- the provisions in the FMA Act and Public Service Act regarding the use of money appropriated by the Parliament for the purposes of ‘act of grace payments’ and ‘APS employment payments in special circumstances’, respectively, should be clarified;
- some form of periodic monitoring by Finance of the CDDA scheme should be implemented;

- a broad explanatory framework, or set of guidelines, should be developed for the increased awareness in managing, actioning and reporting of ex gratia payments; and
- recordkeeping systems and practices for both management and accountability purposes could be improved.

15. The ANAO also concluded that the reporting of act of grace and CDDA payments and waivers of debt in some agency financial statements was not always complete and accurate.

16. In addition, the ANAO concluded that there was insufficient monitoring of act of grace, CDDA and waiver claims by agency management. This was particularly evidenced by the slow processing times across all agencies. Accordingly, the ANAO considered that agencies should put in place appropriate performance indicators, and report against them on a regular basis.

Agencies' comments

17. Finance agreed with the conclusions articulated in the report with respect to the current status of the management of compensatory claims and the guidance available on discretionary compensation mechanisms. In addition, Finance agreed with the conclusion that there is value in exploring the means to improve overall coordination of arrangements, particularly: by clarifying the correct source of appropriations for act of grace payments; monitoring the CDDA scheme; and introducing enhanced recordkeeping systems and reporting practices across all agencies.

18. Each of the other agencies involved in the audit also responded positively to the audit report.³

³ Agencies' specific comments are provided in the relevant section of the report to which they refer and/or in Appendix 5.

Recommendations

The recommendations comprise four relating to Finance, including one for the Australian Public Service Commission, and seven for agencies receiving claims for compensation and debt relief. Agencies should consider the recommendations directed at them as part of their risk management approach and their responsibilities in accordance with the legislative and administrative framework applying to the various mechanisms for compensation and debt relief.

Recommendations 10 and 11 are fundamental because of the 'material by nature' financial reporting requirements, as specified by the Finance Minister's Orders.

**Recommendation No.1
Para 2.33** The ANAO recommends that, as there is some doubt about the legality of making APS employment payments in special circumstances from outcome-based appropriations, the Australian Public Service Commission, in conjunction with the Department of Finance and Administration, take early action to clarify the requirements of subsection 73(6) of the *Public Service Act 1999*.

**Recommendation No.2
Para 2.67** The ANAO recommends that, where agencies receive a significant volume of requests for waiver relating to debts imposed under specific legislation they administer, those agencies should evaluate the appropriateness and cost effectiveness of seeking to establish a waiver power under the specific legislation.

**Recommendation No.3
Para 2.86** The ANAO recommends that the Department of Finance and Administration consult with the Department of the Prime Minister and Cabinet and other relevant agencies, with a view to developing a general framework for the processing and reporting of ex gratia payments for greater consistency of action and reporting.

**Recommendation No.4
Para 3.43** The ANAO recommends that, in the interests of efficiency, the Department of Finance and Administration evaluate the advantages and disadvantages of the current system of actioning act of grace payments and waivers of debt compared with other potential systems. The latter could include limited delegations within the Department and/or devolution of authority to agencies.

**Recommendation No.5
Para 4.20** The ANAO recommends that, where applicable, agencies formally assess and address the specific risks associated with claims for compensation payments and debt relief, in conjunction with any broader review of financial management, to ensure that the risks are being mitigated effectively.

**Recommendation No.6
Para 4.37** The ANAO recommends that, where applicable, agencies:

- develop and document procedures for the processing of claims for discretionary compensation payments and waivers of debt; and
- implement appropriate training arrangements for staff involved in the processing of claims.

**Recommendation No.7
Para 5.16** The ANAO recommends that agencies implement appropriate controls for the recording and management of all claims received for discretionary compensation payments and debt relief.

Recommendation No.8
Para 5.35

The ANAO recommends that, where a compensation payment or waiver of debt is granted to one claimant and the circumstances of the claim are likely to apply to other individuals or entities, agencies should conduct a review to establish whether any payments/waivers should be made in relation to other affected individuals or entities.

Recommendation No.9
Para 5.51

The ANAO recommends that, where applicable, agencies determine appropriate performance time indicators for processing discretionary compensation and debt relief claims, and monitor performance against those indicators.

Recommendation No.10
Para 6.12

The ANAO recommends that agencies:

- undertake reconciliations between the supporting documentation on claims for compensation payments and debt relief (best summarised in a claims register) and the general ledger on a periodic basis, including at 30 June each year for annual reporting purposes; and
- reconcile their records with any related annual information provided by the Department of Finance and Administration.

Recommendation No.11
Para 6.30

The ANAO recommends that the Department of Finance and Administration assess whether ex gratia payments and APS employment payments in special circumstances should also be reported in the notes to agencies' financial statements for greater transparency.

Agencies' responses to the recommendations

Recommendations directed at Finance and the APS Commission

19. Finance agreed with all the recommendations of the report that were directed at the Department, that is, Recommendation Nos. 1, 3, 4 and 11.

20. The Australian Public Service Commission (APS Commission) supported the recommendation directed at it (Recommendation No.1) and the recommendation impacting on its policy advising responsibilities (Recommendation No. 11).

21. In addition, the Department of the Prime Minister and Cabinet supported the recommendations impacting on its portfolio responsibilities (Recommendation Nos. 1, 3 and 11).

Recommendations directed at all agencies receiving claims for compensation payments and/or debt relief

22. The other four agencies directly examined in the audit, namely Centrelink, the Department of Family and Community Services, the Department of Immigration and Multicultural and Indigenous Affairs, and the Department of Veterans' Affairs, generally agreed, or agreed in principle, with the other recommendations in the report (Recommendation Nos. 2 and 5 to 10). These recommendations are relevant to all agencies receiving claims for compensation payments and/or debt relief.

23. In addition, Finance agreed with Recommendations Nos. 5 to 10, but did not fully agree with Recommendation No.2.

24. Agencies' full responses to each recommendation are provided following each recommendation in the main body of the report. Finance's comments on Recommendation No.2, together with ANAO and other agencies' comments on the recommendation, are provided at paragraphs 2.68 to 2.72.

Audit Findings and Conclusions

1. Introduction

Background to the audit

1.1 The Commonwealth has a number of means by which it may provide compensation or debt relief to individuals or entities that have been disadvantaged by: the effects of legislation; misinformation provided, or actions taken, by Government agencies or staff; or some other negative circumstance. These include mechanisms where legal liability is deemed to exist, and several discretionary mechanisms covering both compensatory payments and debt relief.

1.2 The discretionary mechanisms include:

- act of grace payments;
- payments under the Compensation for Detriment caused by Defective Administration (CDDA) scheme;
- ex gratia payments;
- payments in special circumstances relating to Australian Public Service (APS) employment;
- waivers of debt;
- debt deferral; and
- payment of debt by instalments.

1.3 Each of the discretionary mechanisms is described below, in general terms, with some being described in more detail in Chapter 2. Examples of act of grace and CDDA payments and a waiver of debt are provided at Appendix 1.

Compensation payment mechanisms

Act of grace payments

1.4 Act of grace payments are made pursuant to subsection 33(1) of the *Financial Management and Accountability Act 1997* (FMA Act) under which the Minister for Finance and Administration (or delegate) may authorise a payment if he or she considers it appropriate to do so, because of special circumstances, and where there is no other viable avenue of redress.⁴

⁴ Department of Finance and Administration, Finance Circular 2001/01, July 2001, Attachment A, p. 3 <www.finance.gov.au/finframework>.

Compensation for Detriment caused by Defective Administration Scheme

1.5 CDDA is an administrative scheme, which was introduced in 1995, providing each Minister (or officers authorised by Ministers) with a discretionary authority to compensate persons who have suffered detriment due to the ‘defective’ actions, or inactions, of FMA Act agencies within the particular Minister’s portfolio, and where the claimant has no legal or statutory right of redress.⁵

Ex gratia payments

1.6 Ex gratia payments are discretionary payments by the Commonwealth to a *group* of people who may have suffered a financial, or non-financial, loss. This contrasts with act of grace payments that tend to be based on an individual claim and paid to an individual. Ex gratia payments are based on the inherent Constitutional power of the Government to redress the effects of particular negative circumstances. Ex gratia programs are approved by the Prime Minister and/or Cabinet and administered by relevant agencies.⁶

Payments in special circumstances relating to APS employment

1.7 Payments in special circumstances relating to APS employment (APS employment payments in special circumstances) relate to Commonwealth employment matters that should be considered under section 73 of the *Public Service Act 1999* (PS Act), rather than the act of grace provisions of the FMA Act. These payments may be authorised by the Public Service Minister (or delegate) even though the payments would not be authorised by law or required to meet a legal liability.⁷

Debt relief mechanisms

Waivers of debt

1.8 ‘A waiver is a special concession granted to a person or organisation that “expunges” the debt owed to the Commonwealth’.⁸ Waivers may be made by the Minister for Finance and Administration (or delegate) pursuant to

⁵ The CDDA scheme was approved by the Government in October 1995 and first promulgated to agencies by the then Department of Finance through Estimates Memorandum 1995/42 in December 1995. The Memorandum outlined the specific kinds of defective action for which compensation could be paid. The current guidelines for the scheme are contained in Finance Circular 2001/01.

⁶ These programs are separate from standing Government programs that provide funding and assistance for victims of natural disasters and severe climatic conditions, namely, the Natural Disaster Relief Arrangements administered by the Department of Transport and Regional Services (which provides funding to the States and Territories), and the Exceptional Circumstances Assistance program administered by the Department of Agriculture, Fisheries and Forestry.

⁷ op. cit., Finance Circular 2001/01, Attachment A, p. 4.

⁸ *ibid.*

paragraph 34(1)(a) of the FMA Act or by delegated agency officers pursuant to specific legislation.

1.9 Waivers of debt may be made for various reasons but are most commonly approved in circumstances where the payment of debt would be inequitable to the individual or entity concerned, or the claimant is suffering financial hardship. Once these debts are waived, they are no longer recoverable by law.

Debt deferral and payment by instalments

1.10 As an alternative to waiver, the Commonwealth may decide, in particular circumstances, to defer the recovery of a debt or to allow the debtor to pay by instalments. Subsection 34(1) of the FMA Act enables the Minister for Finance and Administration to:

- postpone any right of the Commonwealth to be paid a debt in priority to another debt or debts—paragraph (b);
- allow the payment by instalments of an amount owing to the Commonwealth—paragraph (c); or
- defer the time for payment of an amount owing to the Commonwealth—paragraph (d).

Write-off of debt

1.11 Debts may also be written off. However, debt write-off is an accounting response by agency management⁹ reflecting the fact that some debts cannot be recovered, rather than the granting of financial relief to the debtor. Write-off of debt is normally justified on the basis that the debt is not economical to pursue, e.g. where the debtor owes a small amount, or is bankrupt, or cannot be traced; or the debt is not legally recoverable. The latter may occur where the debtor resides outside the Commonwealth's legal jurisdiction, or where the age of the debt is outside the relevant limitation period. Debts written-off can still be recovered at a later date either in full, or in part via instalments, especially where the financial circumstances of the debtor change.

Public accountability through financial reporting

1.12 Compensation or debt relief granted under three of the discretionary mechanisms, namely, act of grace payments, CDDA payments and waivers of debt, is currently required to be reported in Commonwealth reporting entities' annual financial statements. The specific requirement is to report the number

⁹ The chief executives of FMA Act agencies have the power to write-off debts in respect of the operations of their agency under section 47 of the FMA Act.

and aggregate amount of payments/waivers for each mechanism in a note to the financial statements.

1.13 There is no similar requirement in relation to any of the other mechanisms.

Responsibility for the reported mechanisms

1.14 The Department of Finance and Administration (Finance) is responsible for the administration of the FMA Act provisions for acts of grace and waivers of debt on behalf of the Minister for Finance and Administration. Finance provides policy advice to agencies, and processes all act of grace claims and most agencies' FMA Act waiver claims up to the point of a decision being made.¹⁰ Each agency is responsible for implementing the decision.

1.15 Finance also has a policy guidance role in relation to the CDDA scheme. However, the administration of claims under the scheme is handled by each agency under the direction of each Portfolio Minister.

1.16 Each agency is responsible for the reporting of act of grace and CDDA payments and waivers of debt in its financial statements. Finance is only responsible for reporting transactions that relate to its own activities. That is, Finance is not required to report transactions processed for other agencies.

Extent and significance of the compensatory mechanisms

Reported mechanisms

1.17 The total number and total amount of, act of grace and CDDA payments, and waivers of debt authorised under the provisions of the FMA Act, as reported in FMA agency annual reports for the financial years 2000–01 to 2002–03, are shown in Tables 1.1 to 1.4.¹¹ Individual compensation payments and waivers of debt range in amount from a few dollars to several million dollars. As a result, the total amount of payments and waivers may fluctuate significantly from year-to-year.

1.18 Waivers of debt are divided into two tables to show the Australian Securities and Investments Commission (ASIC) details separately, due to the high numbers involved.

¹⁰ The chief executives of the Australian Securities and Investments Commission (ASIC) and the Commonwealth Superannuation Administration (Comsuper) have been delegated to approve certain waivers. The delegation was made by the then Minister for Finance and Administration on 27 June 1999 and took effect from 1 July 1999.

¹¹ Agencies include ASIC and the Health Insurance Commission, which report under the *Commonwealth Authorities and Companies Act 1997*, and which administer monies on behalf of the Commonwealth and make use of the FMA Act provisions for act of grace and/or waiver requests. Agency-by-agency details are provided at Appendix 2, Tables A2.1 to A2.3.

Table 1.1**Act of grace payments—All FMA agencies, financial years 2000–01 to 2002–03**

| 2000–01* | | 2001–02 | | 2002–03 | | Total | |
|----------|---------------|---------|---------------|---------|---------------|--------|---------------|
| Number | Amount \$m | Number | Amount \$m | Number | Amount \$m | Number | Amount \$m |
| 121 | 8.217 | 131 | 1.100 | 121 | 1.323 | 373 | 10.640 |

*Includes three related payments totalling \$6.862 million.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

Table 1.2**CDDA payments—All FMA agencies, financial years 2000–01 to 2002–03**

| 2000–01 | | 2001–02 | | 2002–03 | | Total | |
|---------|---------------|---------|---------------|---------|---------------|--------|---------------|
| Number | Amount \$m | Number | Amount \$m | Number | Amount \$m | Number | Amount \$m |
| 1667 | 1.007 | 540 | 1.252 | 632 | 1.493 | 2839 | 3.752 |

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

Table 1.3**Waivers of debt under the FMA Act—All FMA agencies except ASIC, financial years 2000–01 to 2002–03**

| 2000–01* | | 2001–02** | | 2002–03 | | Total | |
|----------|---------------|-----------|---------------|---------|---------------|--------|---------------|
| Number | Amount \$m | Number | Amount \$m | Number | Amount \$m | Number | Amount \$m |
| 20 | 50.140 | 43 | 63.912 | 167 | 1.654 | 230 | 115.706 |

* Includes one waiver of \$50 million relating to an amount owed by a Commonwealth body.

** Includes one waiver of \$63.682 million relating to an amount owed by a Commonwealth body.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

Table 1.4**Waivers of debt under the FMA Act—ASIC, financial years 2000–01 to 2002–03**

| 2000–01 | | 2001–02 | | 2002–03 | | Total | |
|---------|---------------|---------|---------------|---------|---------------|--------|---------------|
| Number | Amount \$m | Number | Amount \$m | Number | Amount \$m | Number | Amount \$m |
| 17,277 | 2.968 | 20,328 | 3.481 | 22,491 | 4.671 | 60,096 | 11.120 |

Source: Extracted from notes to the financial statements in ASIC annual reports. Amounts rounded.

1.19 Waivers of debt under other legislation¹² reported in FMA agency annual reports for 2000–01 to 2002–03 are shown in Table 1.5.¹³

Table 1.5**Waivers of debt under other legislation—All FMA agencies, financial years 2000–01 to 2002–03**

| | 2000–01 | 2001–02* | 2002–03* | Total |
|---------------|-----------|------------|------------|------------|
| Number | 652,834 | 1,806,909 | 966,721 | 3,426,464 |
| Amount | \$51.470m | \$570.521m | \$119.556m | \$741.547m |

* The large increase in waivers in 2001–02 was mainly due to the Family Tax Benefit and Child Care Benefit waivers of up to \$1000, announced by the Government in July 2001. These waivers, which were reported by the Department of Family and Community Services, were made for approximately 755 000 clients for a total of approximately \$395 million during 2001–02. Further waivers were made under this policy for approximately 80 000 clients for a total of approximately \$40 million during 2002–03.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

1.20 The data in the five tables was aggregated from the numbers and amounts reported in the financial statements of the approximately 75 agencies operating under the FMA Act during the period. Only 32 agencies reported any payments or waivers, indicating that the majority of agencies were unaffected by the reportable compensatory mechanisms during the three years.

Unreported mechanisms

1.21 The ANAO was unable to ascertain the full extent of the use of the other two compensation mechanisms, namely, ex gratia and APS employment payments in special circumstances, during the period, because there is currently no requirement to report them in annual reports. However, it is known that ex gratia programs occur from time to time, for example, for

¹² These waivers were not included in the audit but are shown for information purposes.

¹³ The Health Insurance Commission, although not an FMA agency, is included in Table 1.5 to enable consistency with Tables 1.1 to 1.4. Agency-by-agency details are provided at Appendix 2, Table A2.4.

victims and families of the Bali bombing, and Australian personnel serving in international peacekeeping forces. Further, while APS employment payments in special circumstances are understood to be rare,¹⁴ some are known to have been made.

Previous reviews

Commonwealth Ombudsman

1.22 The Commonwealth Ombudsman released a comprehensive report in September 1999, titled *To Compensate or not to Compensate*, which covered an investigation of Commonwealth arrangements for providing financial redress for individuals or entities where they had been disadvantaged in circumstances beyond their control. The report focused on the compensation avenues available to FMA agencies and included act of grace, CDDA and ex gratia payments, and waivers of debt, as well as the settlement of monetary claims under legal liability, and the write-off of debt.

1.23 The Ombudsman's report identified a number of breakdowns in agencies' treatment of requests for act of grace and CDDA payments, and waivers of debt, namely:

- rules being applied inconsistently;
- agencies not understanding the requirements for administering claimants' requests under the FMA Act guidelines; and
- agencies relying on a lack of evidence and records of incidents to reject claims.

1.24 The report made a number of recommendations directed at Finance as policy maker, and for other agencies to consider.¹⁵

1.25 The Ombudsman's office plays a continuing role in relation to investigation of complaints against Commonwealth agencies, as indicated in its reports subsequent to the 1999 review.

ANAO audits of financial statements

1.26 Financial statement auditors assess the disclosure of act of grace and CDDA payments and waivers of debt in the notes to the annual financial statements of Commonwealth reporting entities. However, in general, this assessment does not include an in-depth examination of internal controls surrounding these payments and waivers, the supporting documentation of

¹⁴ Explanatory Memorandum to the Public Service Bill 1999, paragraph 11.1.3.

¹⁵ A copy of the full report is available on the Commonwealth Ombudsman's website at <www.ombudsman.gov.au>.

individual transactions, nor of any rejected claims. Financial statement audit work would normally only involve close examination of particular transactions, where payment amounts were significant or where waiver amounts were examined in conjunction with accounts receivable and debt recovery action.

Audit objectives, scope, criteria and methodology

Audit focus and objectives

1.27 The ANAO undertook an audit of the administration of the act of grace and waiver of debt powers under the FMA Act, and of the CDDA scheme. The audit also covered ex gratia and APS employment payments in special circumstances due to the similarity of these mechanisms to the act of grace mechanism.

1.28 The objectives of the audit were to:

- assess whether the management of claims for compensation and debt relief under the various discretionary mechanisms for granting relief was in accordance with relevant legislative requirements and Commonwealth guidelines;
- determine whether the current administrative policies and procedures, for the various mechanisms of compensation and debt relief, provided for the effective management and reporting of claims made under those mechanisms; and
- identify better practices and recommend improvements to systems, processes and practices, where appropriate.

1.29 The review of waivers of debt did not cover those claims processed under legislation other than the FMA Act.

Audit scope

1.30 The audit was undertaken at a selection of FMA agencies that reported act of grace and CDDA payments, and/or waivers of debt in their 2000–01 and 2001–02 financial statements.¹⁶ The selection included Finance, as the responsible administrative policy maker and the main approving agency for claims made under the FMA Act,¹⁷ and four other FMA Act agencies. The ANAO also liaised with other agencies, as required.

¹⁶ The 2002–03 financial statements were not available at the time of commencement of the audit (February 2003).

¹⁷ Waivers of debt can also be authorised by the chief executives of ASIC and Comsuper. Refer Footnote 10.

1.31 The audit covered agency management of claims during the period July 2000 to March 2003. The examination of claims covered the entire claim continuum from registration through to investigation, decision, feedback to claimants and reporting in the financial statements. The audit did not review the decisions made for the claims for payment or waiver of debt.

Audit evaluation criteria

1.32 Audit evaluation criteria were developed in order to assess each agency's performance against the audit objectives. In summary, the criteria represent the management environment and internal controls that an agency would be expected to have in place to comply with the relevant legislative requirements, government policies and accepted management principles applicable to the objectives of the audit. Separate audit evaluation criteria were developed for the policy and guidance aspects performed by Finance.

Selected agencies

1.33 As well as Finance, the selected agencies were:

- Centrelink;
- Department of Family and Community Services (FaCS), including the Child Support Agency (CSA);
- Department of Immigration and Multicultural and Indigenous Affairs (DIMIA); and
- Department of Veterans' Affairs (DVA).

1.34 In addition, the ANAO made specific enquiries with the Department of the Prime Minister and Cabinet (PM&C) and the Australian Public Service Commission (APS Commission) on matters relating to those agencies, and with other agencies, as appropriate.

1.35 The total number and total amount of, act of grace and CDDA payments, and waivers of debt authorised under the provisions of the FMA Act, as reported in the selected agencies' annual reports for 2000–01 to 2002–03, are shown in Tables 1.6 to 1.8.¹⁸

¹⁸ Most of the transactions reported by FaCS, as shown in Tables 1.6 to 1.8, were processed by Centrelink (act of grace) and the CSA (CDDA and waivers of debt under the FMA Act). In addition, most of the act of grace payments reported by Finance, as shown in Table 1.6 relate to periodical payments administered by Comsuper, as Finance reports the administered transactions for Government superannuation schemes.

Table 1.6**Act of grace payments—Selected agencies, financial years 2000–01 to 2002–03**

| Agency | 2000–01 | | 2001–02 | | 2002–03 | | Total | |
|--------------|------------|---------------|-----------|---------------|------------|---------------|------------|---------------|
| | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 |
| Centrelink | - | - | - | - | - | - | - | - |
| FaCS | 25 | 137 | 25 | 161 | 25 | 144 | 75 | 442 |
| DIMIA | - | - | * | 1 | - | - | * | 1 |
| DVA | 7 | 39 | 7 | 78 | 4 | 56 | 18 | 173 |
| Finance | 77 | 760 | 67 | 640 | 81 | 857 | 225 | 2,257 |
| Total | 109 | 936 | 99 | 880 | 110 | 1,057 | 318 | 2,873 |

* indicates not disclosed.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

Table 1.7**CDDA scheme payments—Selected agencies, financial years 2000–01 to 2002–03**

| Agency | 2000–01 | | 2001–02 | | 2002–03 | | Total | |
|--------------|------------|---------------|------------|---------------|------------|---------------|------------|---------------|
| | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 |
| Centrelink | 223 | 252 | 255 | 626 | 277 | 659 | 755 | 1,537 |
| FaCS | 8 | 32 | 39 | 48 | 28 | 59 | 75 | 139 |
| DIMIA | 8 | 4 | 5* | 5 | 3* | 7 | 16 | 16 |
| DVA | 4 | 13 | 9 | 50 | 7 | 119 | 20 | 182 |
| Finance | - | - | - | - | - | - | - | - |
| Total | 243 | 301 | 308 | 729 | 315 | 844 | 866 | 1,874 |

* indicates not disclosed, but confirmed with agency.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

Table 1.8**Waivers of debt under the FMA Act—Selected agencies, financial years 2000–01 to 2002–03**

| Agency | 2000–01 | | 2001–02 | | 2002–03 | | Total | |
|--------------|----------|---------------|----------|---------------|------------|---------------|------------|---------------|
| | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 | Number | Amount \$'000 |
| Centrelink | - | - | - | - | 4 | 15 | 4 | 15 |
| FaCS | - | - | 1 | 2 | 9 | 19 | 10 | 21 |
| DIMIA | 1 | 32 | * | 37 | 98** | 1,437 | 99 | 1,506 |
| DVA | - | - | - | - | - | - | - | - |
| Finance | 1 | 50,000 | - | - | 1 | 10 | 2 | 50,010 |
| Total | 2 | 50,032 | 1 | 39 | 112 | 1,481 | 115 | 51,552 |

* indicates not disclosed.

** This is not the number disclosed in the financial statements. Following consultation with agency, the ANAO adjusted the number upwards as the total number disclosed was unclear.

Source: Extracted from notes to the financial statements in agency annual reports. Amounts rounded.

1.36 None of the selected agencies was known to have made any APS employment payments in special circumstances during the three-year period at the time the audit was being planned, and, based on subsequent advice from the agencies, only four payments were made by two agencies totalling approximately \$60 000.¹⁹ As a result, the audit of this mechanism was limited to the legislative and administrative aspects (Chapter 2) and public reporting (Chapter 6).

1.37 Centrelink (on behalf of other agencies) was the only selected agency to have processed ex gratia payments during the period. Centrelink processed ex gratia payments totalling more than \$1.7 million in each of the years 2001–02 and 2002–03. The audit coverage of ex gratia payments was also mainly limited to policy advising and public reporting aspects, but did cover some payments made during 2002–03 to persons affected by the Bali bombing of October 2002.

Audit approach and methodology

1.38 The audit commenced at Finance, where all act of grace and waiver claims are coordinated for consideration by the Minister for Finance and Administration (or a delegate).²⁰ The review at Finance included examination

¹⁹ Based on advice provided by each of the agencies.

²⁰ The Parliamentary Secretary to the Minister for Finance and Administration has performed the role of the Minister in relation to act of grace and waiver claims since 1 May 2000.

of all guidance material, a selection of claims that had been actioned, and general management and reporting.

1.39 The audit methodology at each of the selected agencies was as follows:

- conduct of interviews with relevant members of staff regarding procedures for dealing with claims for discretionary compensation payments and debt relief;
- general assessment of the policies, procedures and records for managing claims;
- examination of individual claims for act of grace, waiver and CDDA against policy guidance issued by Finance, and of ex gratia payments at Centrelink; and
- review of the annual report to ensure the number and amount of claims were reported correctly against the records held by the relevant agencies.

1.40 In addition, information maintained by Finance was cross-checked with the information held by the other selected agencies.

1.41 The audit was undertaken in accordance with ANAO Auditing Standards during the period February 2003 to December 2003 at a cost of approximately \$342 000.

Audit findings

1.42 The ANAO provided each of the selected agencies with an individual report of the audit findings related to each agency prior to the preparation of the proposed audit report on all of the selected agencies. In addition, PM&C, APS Commission and other agencies specifically mentioned in the report were provided with relevant extracts of the proposed audit report for comment.

1.43 The results of the audit, including agencies' specific responses to each of the recommendations, are set out in Chapters 2 to 6. Chapter 2 outlines the findings relating to the legislative and administrative arrangements that are in place. Chapter 3 deals with the processing of act of grace and waiver of debt claims by Finance. Chapters 4 and 5 deal with the preparedness of the other selected agencies for compensation and debt relief claims and the processing of claims by those agencies, respectively. Chapter 6 covers public reporting and accountability of the various compensatory mechanisms.

1.44 The Appendices provide additional information to assist the reader (Appendices 1 and 2), suggested better practices for agency use (Appendices 3 and 4) and agencies' general and/or detailed comments on the audit report (Appendix 5).

1.45 Apart from Finance, and Centrelink and FaCS in relation to ex gratia payments, the audit findings are not attributed to particular agencies.

2. The Legislative and Administrative Framework for Compensation and Debt Relief

This chapter discusses the legislative and administrative framework for compensation and debt relief within the Commonwealth, including legal liability. It also assesses the framework for clarity, completeness, currency, and administrative efficiency and effectiveness.

Introduction

Legal liability

2.1 Although legal liability claims were not within the scope of the audit, they represent an important element of the legislative and administrative framework when considering claims for compensation and debt relief. This is because, if legal liability exists, there is normally no need to invoke any of the various discretionary compensatory mechanisms.

Legal Services Directions

2.2 The Attorney-General has issued Legal Services Directions under section 55ZF of the *Judiciary Act 1903*, effective from 1 September 1999, to apply to Commonwealth legal services.²¹ The Directions set out the framework and requirements for the performance of Commonwealth legal services. Appendix C of the Directions, titled 'Directions on Handling Monetary Claims' outlines the policy for the handling of monetary claims against the Commonwealth or an agency, other than claims that need to be determined under a legislative mechanism (for example, an employee's compensation benefit) or under a mechanism provided by contract (for example, an arbitration of a disputed contractual right).

2.3 Monetary claims covered by Appendix C of the Legal Services Directions are to be settled in accordance with legal principle and practice, whatever the amount of the claim or proposed settlement. A settlement on the basis of legal principle and practice requires the existence of at least a meaningful prospect of liability being established. In particular, settlement is not to be effected merely because of the cost of defending what is clearly a spurious claim. If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include:

²¹ The Legal Services Directions are available on the Attorney-General's Department website at <www.ag.gov.au>.

- the prospects of the claim succeeding in court;
- the costs of continuing to defend the claim; and
- any prejudice to Government in continuing to defend the claim.

2.4 Settlement for amounts not exceeding \$10 000 may be approved by the Chief Executive of the agency (or authorised officer) on the basis of a common-sense view that the settlement is in accordance with legal principle and practice. Where a claim cannot be settled for \$10 000 or less, it is to be treated as a major claim. Such a claim can only be settled after legal advice has been received that the settlement is in accordance with legal principle and practice, and the Chief Executive agrees with the settlement.²²

Recovery of costs through the Commonwealth's insurer, Comcover

2.5 Payment of compensation under the provisions of Appendix C of the Legal Services Directions may be recoverable from Comcover, which was established within Finance from 1 July 1998, as the Commonwealth's self-managed fund for insurable risks. Previously, insurable losses were funded from the Consolidated Revenue Fund, as required.

2.6 Through the payment of premiums to Comcover, the budgets of Commonwealth agencies are protected from the major costs that can arise from claims associated with insurable risks, such as property losses, common law liabilities, and other commercially insurable losses.²³ As a result, where an agency is legally liable to another party, Comcover will indemnify the agency for its own liability, subject to the terms and conditions of the insurance policy, which are set out in the Comcover Policy Manual.

Compensation and debt relief mechanisms

2.7 The remainder of this chapter deals with the compensatory mechanisms which were subjected to audit, namely:

- act of grace provisions under the FMA Act;
- CDDA scheme;
- ex gratia payments;
- APS employment payments in special circumstances under the PS Act; and

²² If an agency considers that a claim raises exceptional circumstances, which justify a departure from the normal mechanism for settling a claim, it should refer the matter to the Office of Legal Services Coordination, within the Attorney-General's Department.

²³ Comcover Policy Manual, 2002–03, p. 2.

- waivers of debt under the FMA Act.

2.8 An individual or any other entity can request a discretionary compensation payment or waiver of debt, either directly, or through a third party.²⁴

2.9 Compensation payments under these mechanisms are not insurable losses. That is, these payments are made at the complete unfettered discretion of the decision-maker, and are permissive in that there is no obligation to provide compensation. Accordingly, Comcover's insurance policies do not indemnify agencies for payments made, or losses incurred, under any of the discretionary compensation mechanisms. The insurance policies provide cover only when a legal liability exists against the Commonwealth.

Audit evaluation criteria

2.10 The ANAO assessed the legislative and administrative framework for the relevant compensation and debt relief mechanisms against the following audit evaluation criteria:

- legislative and administrative provisions should be clearly set out and easy to understand, and cover all possibilities;
- responsibilities for implementing, maintaining and reviewing the mechanisms should have been assigned to appropriate central agencies and personnel; and
- policy and guidelines should have been issued for each mechanism and kept up-to-date for changing circumstances.

²⁴ Requests may be initiated by a range of people, including the claimant, a claimant's legal representative, a claimant's local Member of Parliament and Commonwealth agencies. Where compensation is justified, in view of the circumstances, to a large number of individuals, payments may be made under the *ex gratia* mechanism. This allows the Government to consider and agree to the payment of compensation to the group as a whole.

Discretionary payment powers

Act of grace provisions

2.11 Act of grace payments are provided for under section 33 of the FMA Act as follows:

- (1) If the Finance Minister considers it appropriate to do so because of special circumstances, he or she may authorise the making of any of the following payments to a person (even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability):
 - (a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);
 - (b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).
- (2) If a proposed authorisation would involve, or be likely to involve, a total amount of more than \$100,000, the Finance Minister must first consider a report of an Advisory Committee set up under section 59.
- (3) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.
- (4) Payments under this section are to be made out of money appropriated by the Parliament for the purposes of this section.

2.12 The section was derived from a similar power under the previous legislation.²⁵ Under the FMA Act, the power was conferred on the Finance Minister in his/her own right so that, if it were to be delegated to an official, the Minister could impose legal limits and issue binding directions on its use.²⁶

Special circumstances

2.13 Although 'special circumstances' are not defined in the Act or supporting documents, such circumstances have generally been interpreted as where persons '...may be unintentionally disadvantaged by the effects of Commonwealth legislation, actions or omissions, and have no viable means of redress.'²⁷ As a result, payments are generally made where the Minister (or

²⁵ Section 34A of the *Audit Act 1901*.

²⁶ Under the previous legislation, the Minister was "an authorised person" with the power to appoint officers as "authorised persons" so that, at law, they had co-equal power. Financial Management and Accountability Bill 1996 Explanatory Memorandum, paragraph 31.

²⁷ op. cit., Finance Circular 2001/01, Attachment A, p. 3.

delegate) determines that losses have arisen directly from acts or omissions of the Commonwealth, or the unfair application of legislation in certain circumstances. An example of an approved act of grace payment is provided at Appendix 1.

Payment of claims from appropriations

2.14 Subsection 33(4) of the FMA Act provides for act of grace payments *‘to be made out of money appropriated by the Parliament for the purpose of this section’*. As a result, up to and including the financial year 1998–99, a specific appropriation for the purposes of section 33, for each of the agencies required to make act of grace payments, was provided for in Appropriation Act (No.1) and Appropriation (Parliamentary Departments) Act (No.1), as applicable. However, since the change to outcome-based appropriations (1999–2000 onwards), there have been no specific appropriations for the purposes of section 33.

2.15 Legal advice provided by the Australian Government Solicitor (AGS) to Finance on 22 August 2002 indicated that subsection 33(4) needed to be amended to make it clear that *‘act of grace payments should be made from the agency’s annual appropriation where the purpose of the appropriation covers the purpose of the payment’*. Finance subsequently proposed to change the FMA Act [subsection 33 (4)] to clarify this matter and remove any ambiguity that may have existed, as a result of the introduction of outcome-based appropriations.

2.16 As Finance had not initiated a change to subsection 33(4) at the time the audit started, the ANAO requested further legal advice from the AGS. In response, the AGS advised, in August 2003, that there was some doubt as to whether the Minister for Finance could authorise a payment without reference to the appropriation to be used. But, on balance, the AGS considered that it would be allowable as long as there was a general appropriation covering the purposes of the payment. As a result, agencies now need to determine which appropriation may be legally charged in relation to any particular act of grace payment.

2.17 The ANAO considered that Finance should continue to pursue amendment of sub-section 33(4), or, if this was likely to take some time, advise agencies of the need to include act of grace payments as part of their appropriations in their Portfolio Budget Statements.

2.18 Finance advised, in October 2003, that it would seek to amend the FMA Act.

2.19 All the agencies covered by the audit had included act of grace payments as part of their appropriations in their Portfolio Budget Statements. Accordingly, they were using appropriations where the purpose of the

appropriation covered the purpose of the payment, or an 'appropriate' appropriation, in terms of the AGS legal advice provided to Finance and the ANAO.

Compensation for Detriment Caused by Defective Administration (CDDA) Scheme

2.20 CDDA is an administrative scheme, which enables Ministers to compensate persons who have been adversely affected by the 'defective' action, or inaction, of FMA Act agencies within their portfolio, but who have no other avenues to seek redress. It is a purely administrative (rather than legislative) mechanism to address inequities arising from administrative actions or omissions of the Commonwealth.²⁸

2.21 Defective administration refers to such actions by an agency official as:

- an unreasonable failure to institute appropriate administrative procedures;
- an unreasonable failure to give proper advice within an official's power and knowledge to give; and
- provision of advice that was, in all the circumstances, incorrect or ambiguous.

In essence, the scheme does not apply to any claim where it is reasonable to conclude that the Commonwealth would be liable if the matter were litigated.²⁹

2.22 Prior to the introduction of the CDDA scheme, act of grace powers were used to settle all matters related to defective administration, as well as other issues that might give rise to a moral obligation on the part of the Commonwealth to redress an inequity resulting from the application of Commonwealth legislation.

2.23 The CDDA scheme derived from a trial of devolving act of grace powers to agencies to determine whether devolution would increase the response rate in dealing with claims. As a result of the trial, the scheme was established in 1995 to give the responsible Minister (or agency officers authorised by the Minister) the authority to deal with those claims for compensation resulting from the agency's defective administration, where no legal liability existed.

²⁸ While the CDDA scheme is only available to FMA Act agencies, Commonwealth entities operating under the *Commonwealth Authorities and Companies Act 1997* may make similar-type payments as a matter of business judgement.

²⁹ *op. cit.*, Finance Circular 2001/01, Attachment B, paragraph 10.

2.24 The impact of the introduction of the CDDA scheme was that act of grace requests could be restricted to those persons who have been unintentionally disadvantaged by the effects of Commonwealth legislation, acts or omissions. Also, because the Portfolio Minister, or authorised officer of the relevant agency, has the authority to approve CDDA payments, the administration of dealing with such claims was reduced for some agencies in that the claims did not need to be referred to Finance or the Finance Minister for approval. However, the decision whether to approve or refuse payment has to be publicly defensible. An example of an approved CDDA payment is at Appendix 1.

Ex gratia payments

2.25 ‘Ex gratia’ is a compensation mechanism used when a payment is made ‘out of (the) grace’ of the Government of the day. Under its inherent Constitutional powers and general appropriation powers, the Government may seek at any time to appropriate funds providing ex gratia payments for specific purposes arising from unforeseen and urgent circumstances, where there is no other legal, statutory or administrative avenue of assistance. The authority for ex gratia payments relies on the Executive Government’s residual powers under sections 61 and 81 of the Constitution (which establish, respectively, the Executive powers of the Commonwealth and the power of the Executive to appropriate money). Ex gratia programs are approved by the Prime Minister and/or Cabinet.

2.26 Although the terms ‘ex gratia’ and ‘act of grace’ are often used interchangeably, the mechanisms for approval of the two types of payments are quite different. The ex gratia power is, without statute and by convention, in the hands of the Executive Government. By contrast, the act of grace power relies on the legislative provisions of the FMA Act, which provide for discretionary approval of payments in special circumstances.

2.27 Ex gratia payments are made, usually, to restore equity to a group of persons, irrespective of whether the Commonwealth has any direct moral responsibility for the losses the group has sustained. (The provision of relief for the effects of flood and drought are examples of this type of assistance.) On the other hand, act of grace payments are made, usually, to effectively compensate individuals, in special circumstances, where the decision-maker determines that the Commonwealth has a direct moral responsibility to provide recompense.

2.28 The ex gratia programs considered in the context of this audit are separate from standing Government programs that provide funding and assistance for victims of natural disasters and severe climatic conditions, namely, the Natural Disaster Relief Arrangements administered by the Department of Transport and Regional Services (which provides funding to

the States and Territories), and the Exceptional Circumstances Assistance program administered by the Department of Agriculture, Fisheries and Forestry.

Payments in special circumstances relating to APS employment

2.29 Section 73 of the *Public Service Act 1999* provides that the Public Service Minister may authorise payments because of special circumstances that relate to, or arise out of:

- the payee's employment by the Commonwealth; or
- another person's employment by the Commonwealth.

2.30 A similar, but possibly wider, power was available to the Public Service Commissioner under the previous legislation (*Public Service Act 1922*). That power was considered useful to enable:

- the reimbursement of legal costs incurred by APS employees in the course of, or in connection with, their employment;
- payments in lieu of entitlements lost as a result of incorrect advice;
- the settlement of unfair termination claims; and
- the payment of compensation following a recommendation by the Merit Protection and Review Agency.³⁰

2.31 The arrangements under the revised Act are consistent with (and in many respects, parallel to) the act of grace provisions of the FMA Act, except that they specifically relate to APS employment and that authorisations are limited to \$100 000.³¹

2.32 Subsection 73(6) of the PS Act states that '*payments under this section are to be made out of money appropriated by the Parliament for the purpose of this section.*' As this wording is exactly the same as that in subsection 33(4) of the FMA Act, the ANAO comments in relation to that subsection also apply to subsection 73(6) of the PS Act.

³⁰ Public Service Bill 1999 Explanatory Memorandum, paragraph 11.1.3.

³¹ The consistency with the FMA Act was highlighted in Public Service Bill 1999 Explanatory Memorandum, paragraphs 11.1.4 to 11.1.11.

Recommendation No.1

2.33 The ANAO recommends that, as there is some doubt about the legality of making APS employment payments in special circumstances from outcome-based appropriations, the Australian Public Service Commission, in conjunction with the Department of Finance and Administration, take early action to clarify the requirements of subsection 73(6) of the *Public Service Act 1999*.

Agencies' responses

APS Commission

2.34 The APS Commission supports the recommendation that subsection 73(6) of the PS Act be clarified. The Commission will work closely with the Department of Finance and Administration to include the necessary amendments to the Public Service Act with the Department's proposed amendments to the FMA Act.

Finance

2.35 Agreed. Finance will liaise with the APS Commission and the AGS to expedite clarification of this issue as soon as possible. However, in the context of advice from the AGS in August 2003 that on balance, the AGS considered that authorisation of an act of grace payment (also made in special circumstances) would be allowable as long as there was a general appropriation covering the payment, Finance considers it likely that APS employment payments are similarly authorised.

2.36 Nevertheless, in recognition of the possible uncertainty among agencies about the application of output-based appropriations for the purposes of act of grace payments and APS employment payments, Finance will ensure that the relevant legislation clearly articulates the correct sources of appropriations for these purposes.

PM&C

2.37 PM&C, as portfolio department for the APS Commission, advised that it also supported the recommendation.

Waiver of debt powers

2.38 A waiver of debt is a special concession granted to a person or organisation that 'expunges' the debt owed to the Commonwealth.³² Waivers are made pursuant to section 34 of the FMA Act or, in some instances,

³² op. cit., Finance Circular 2001/01, Attachment A, p. 4.

pursuant to specific legislation.³³ Specific waiver legislation takes precedence over waiver under the FMA Act, that is, agencies should consider waiver under any other legislative provisions, where available, in the first instance.

2.39 Paragraph 34(1)(a) of the FMA Act provides that ‘the Finance Minister may, on behalf of the Commonwealth, waive the Commonwealth’s right to payment of an amount owing to the Commonwealth.’ Further, subsection 34(3) provides that ‘a waiver may be made either unconditionally or on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances’. Neither the section of the Act nor the Explanatory Memorandum to the Bill provides any guidance or limitations, as to the circumstances under which an amount may be waived.

2.40 Guidance provided by Finance in its circulars indicates that a waiver of debt may be approved if the payment of the debt would be inequitable to the individual or entity concerned or the person is in financial hardship. In this regard, it may be determined that it is inequitable to recover a debt which has arisen as a result of an act or omission by a Commonwealth agency and which is outside the control of the person or entity, or where a person or entity is unable to repay, or could not repay without experiencing financial hardship.

2.41 Once debts are waived, they are no longer recoverable by law; that is, the debt is completely expunged. Therefore, the Commonwealth cannot pursue the debt at a later date should the person’s or entity’s financial circumstances improve. An example of an approved waiver is provided at Appendix 1.

Delegations

Minister for Finance powers

Previous legislation

2.42 Under the previous legislation to the FMA Act, the Minister for Finance had, at particular times, delegated the authority to approve act of grace payments and waivers of debt to officers in Finance and in other agencies.

2.43 From December 1988, there had been a trial period, whereby agencies determined their own act of grace cases. A report by Finance in January 1994 on the results of this trial highlighted that there were strong grounds to support the case for devolution particularly to compensate for cases of maladministration. However, the report also indicated that agencies should not have these delegations as many cases were noted where inequitable and

³³ Appendix 2, Table A2.4 provides a listing of specific legislation enabling the waiver of debt.

incorrect decisions were made. Following on from the trial period, the CDDA scheme was introduced in 1995.

FMA Act

2.44 On 16 December 1997 (following the passing of the FMA Act), the then Finance Minister delegated powers and functions under section 62 of the FMA Act to the Finance Chief Executive.³⁴ Subsequently, specific powers delegated from the Minister to the Finance Chief Executive for act of grace payments and waivers of debt were sub-delegated to certain persons within Finance with limits ranging from \$10 000 to \$100 000.

2.45 On 19 March 1999, the Minister delegated his powers to approve act of grace payments and waivers of debts under sections 33 and 34 of the Act respectively, to the Parliamentary Secretary to the Minister for Finance and Administration.

2.46 The September 1999 Ombudsman's Report, *To Compensate or Not to Compensate*, recommended that Finance should devolve the act of grace and waiver powers to agency heads. The main reason put forward by the Ombudsman was as follows:

Consistent with the philosophy of devolution underpinning the FMA Act, agencies themselves should be responsible and accountable for exercising the full range of powers, including act of grace and waiver, to provide financial redress for maladministration and in special circumstances.³⁵

2.47 Although there was no official Government response to this report, Finance did not agree with the recommendation at the time of the report. Finance was mainly concerned with the consistency of approvals by agencies for similar types of claims, if act of grace and waiver approvals were devolved to agencies. Finance considered that the act of grace power was properly the province of the Minister for Finance rather than agency Ministers, as Finance was the central agency administering public money, and as act of grace payments were discretionary.

2.48 Finance considered that, on balance, it would be better to maintain the power to approve both act of grace payments and waivers of debt within Finance to ensure consistency, objectivity and equity in the handling of such claims.

2.49 On 18 March 2000, following the repeal of the previous *Parliamentary Secretaries Act 1980* and subsequent appointment of all Parliamentary Secretaries under section 64 of the Constitution, the Parliamentary Secretary to

³⁴ Chief Executive of the Department of Finance and Administration.

³⁵ Commonwealth Ombudsman, *To Compensate or Not to Compensate*, September 1999, para. 37, p.11.

the Minister for Finance and Administration was advised by the Prime Minister, that powers invested in ‘the Minister’ under portfolio legislation would henceforth be legally available to the Parliamentary Secretary of a portfolio.³⁶ From this time onwards, all decisions taken by the Parliamentary Secretary to the Minister for Finance and Administration, in regard to act of grace and waiver claims, were thus made in his own right, rather than as a delegate of the Finance Minister.

2.50 In June 2000, Finance submitted a Ministerial briefing recommending that agency heads of Centrelink, CSA, Health Insurance Commission and DIMIA be allowed to exercise the delegations for amounts up to \$10 000, as these agencies were seen as frequently receiving claims. The then Minister did not support the proposal.

2.51 Initially, the Parliamentary Secretary had implemented arrangements whereby he considered all claims received by Ministerial correspondence and all other claims over \$100 000. However, from June 2001, the Parliamentary Secretary revised the arrangements so that he considered all claims received by Ministerial correspondence and all other claims over \$10 000.

2.52 Further, from 15 March 2002, the Parliamentary Secretary revised the arrangements so that he considered all claims, irrespective of the value. The new arrangements also required all claims for act of grace payments and waivers of debt to be referred to the Parliamentary Secretary through the relevant agency’s Minister. Finance, however, remained responsible for advising the Parliamentary Secretary on the requests received by agencies. The previous delegations from the Finance Chief Executive to officials within Finance were revoked in December 2002.

Act of grace payments

2.53 Although the present rules are that all act of grace payments must be authorised by the Parliamentary Secretary, payments are funded and reported by the agency to which the case relates. Once an act of grace payment is authorised by the Parliamentary Secretary, Finance notifies the relevant agency so that it can arrange for the payment to be made.³⁷ The granting of approval by the Parliamentary Secretary and funding of the payment by the agency was an issue raised by some agencies, particularly where, for example, the Parliamentary Secretary approved an application for payment that was not recommended by the agency, as the agency may not have an ‘appropriate’ appropriation or funds available to make the payment.

³⁶ The then Minister for Finance authorised the Parliamentary Secretary to exercise the powers of sections 33 and 34 of the FMA Act, as ‘Minister’, on 1 May 2000.

³⁷ *op. cit.*, Finance Circular 2001/01, Attachment C, p. 5.

2.54 Finance advised that, in such cases, the agency merely implements a decision taken wholly at the discretion of the relevant decision-maker who is exercising powers under the FMA Act. Further, Finance advised that, in the event that an agency did not have sufficient funds to make a particularly large payment, additional funds would be provided through the budgetary process. If necessary, funds would be made available under the Advance to the Finance Minister.³⁸

Waivers of debt

2.55 In 1999, the Minister for Finance issued delegations under paragraph 34(1)(a) of the FMA Act to the Chief Executive of ASIC—to waive the right of the Commonwealth to payment of fees under the *Corporations Act 1989*,³⁹ and the Chief Executive of Comsuper—to waive the right of the Commonwealth to payments in respect of a benefit, pension, allowance or other payment under various pieces of legislation.⁴⁰ These delegations were unaffected by the revised arrangements implemented by the Parliamentary Secretary to the Minister for Finance and Administration in March 2002.

Advisory committees

2.56 Under subsections 33(2) and 34(2) of the FMA Act, for act of grace payments and waivers of debt, respectively, if a proposed authorisation would involve, or be likely to involve, a total amount of more than \$100 000, the Finance Minister must first consider a report of an advisory committee⁴¹ set up under section 59 of the FMA Act.

2.57 The ANAO observed that there is currently an anomaly in the legislative requirements, in that subsection 59(2) of the FMA Act requires a representative from the former 'Department of Administrative Services', where Finance or Customs is the responsible agency.

³⁸ The Advance to the Finance Minister (AFM) is a provision authorised by the annual Appropriation Acts and made available to the Finance Minister as a central contingency fund to provide urgent funding to agencies through the year, for unforeseen circumstances, or because of erroneous omission or understatement.

³⁹ The current delegations, issued by the present Minister in 2002, limited the ASIC delegation to amounts of up to \$5000 for one fee under the *Corporations Act 2001*.

⁴⁰ Legislation includes the *Papua New Guinea (Staffing Assistance) Act 1973* and related legislation, and the *Defence Force Retirement and Death Benefits Act 1973* and related administration administered by the Minister for Defence. Comsuper advised the ANAO that its Chief Executive had not used the waiver power delegated by the Minister for Finance from the date of effect of the delegation on 1 July 1999 to the date of preparation of this report.

⁴¹ Finance Circular 2001/01 states that the advisory committee comprises the chief executives (or delegates) of Finance, the Australian Customs Service and the agency that is responsible for the matter on which the committee has to report. Where the claim relates to Finance or Customs, the third member of the Committee should be a delegate of the Attorney-General's Department.

2.58 Finance agreed that, where an advisory committee case involves Finance or Customs, the third member should be drawn from another agency. Finance advised that the amendment of section 59 is included in the current Financial Framework Legislation Amendment Bill, which is being finalised. The proposed amendment to subsection 59(2) is as follows:

Repeal the subsection, substitute:

- (2) If there is no Agency responsible for the matter, or if the responsible Agency is the Department of Finance and Administration or the Australian Customs Service, then the third member of the Committee is to be a Chief Executive nominated by the Finance Minister.

Waiver powers under other Acts

2.59 Certain agencies have the power to waive debts imposed under particular legislation under the authority of that legislation, for example: the Department of Education, Science and Training under section 43A of the *Student Assistance Act 1973*; and the Department of Family and Community Services under section 1237 of the *Social Security Act 1991*.⁴²

2.60 The ANAO noted that some of the waivers, processed by Finance under the FMA Act, concerned detention costs, which are applied by DIMIA under the *Migration Act 1958*. While there were not many such waiver requests, one was a 'bulk' waiver for up to 230 Afghan refugees taking up the Afghan re-integration package. This waiver was approved by the Parliamentary Secretary in November 2002 as 'persons assessed by DIMIA to be eligible for, and who accept, the Afghan reintegration package'.⁴³

2.61 Unlike some other legislation that imposes fees on clients and also provides for waiver of debts that arise as a result of those fees in certain circumstances, the Migration Act contains no discretion for waiver of debts arising from detention costs. In this regard, the ANAO noted that the Migration Act enables regulations to be made providing for the waiver of visa application charges (section 45C(20)(b) refers). Further, the *Migration Regulations 1994* provide officers of the Migration Review Tribunal with a waiver power for application review fees (Regulation 4.13(4) refers).

2.62 Other examples noted during the audit, where FMA Act waivers were sought in relation to fees imposed (or recovery of overpayments) under other legislation, included the Refugee Review Tribunal (application fees imposed by the *Migration Regulations 1994*) and the CSA (recovery of Consolidated

⁴² Other examples are provided in Appendix 2, Table A2.4.

⁴³ DIMIA reported in its 2002–03 financial statements that an amount of \$1 434 387 in relation to 47 claimants had been waived as at 30 June 2003.

Revenue Fund payments made under the *Child Support (Registration and Collection) Act 1988*).

2.63 The ANAO considers that, where agencies are required to impose fees under the acts that they administer, it would be appropriate for officers of those agencies to have the power to waive debts for charges imposed under the relevant legislation. The ANAO considers that this would improve the efficiency of waiver processing, as the agencies themselves would have the appropriate expertise in relation to the charges they were administering. In addition, it would be consistent with the agency power to write-off debts and enable agency officers to distinguish between amounts that should be waived or written-off. In essence, DIMIA was virtually provided with such power in the case of the bulk waiver for detention costs for Afghan refugees.

2.64 The ANAO considers that the prime current example for an agency to be provided with a waiver power, under legislation that it administers, is ASIC. This is because the waiver of debts imposed under the Corporations Act, which is administered by ASIC, currently requires approval under the FMA Act, and because of the very high number of such debts being waived in any year.⁴⁴ The Minister for Finance and Administration has recognised the impracticality of these waivers being referred to Finance for approval, by delegating the FMA Act power to approve waivers in relation to certain debts imposed under the Corporations Act, to the ASIC Chief Executive.

2.65 ASIC maintained that the exercise of the delegation to its Chief Executive and ASIC delegates under the FMA Act, distinct from the Corporations Act, provides ASIC with an expedient and efficient process for granting fee waivers.⁴⁵ Further, the delegation provides ASIC with autonomy and the scope for its staff with specified knowledge and skills of ASIC's practices and procedures to execute waiver powers in accordance with the FMA delegation.⁴⁶

2.66 Accordingly, there are two possible models for agencies currently processing waivers through Finance relating to debts imposed under legislation that they administer, to pursue. Firstly, an agency may seek to amend its legislation to provide a waiver power under that legislation, or secondly, an agency head could request that the FMA Act waiver power be delegated to him or her in relation to certain debts, as in the ASIC case. While

⁴⁴ As shown at Table 1.4, more than 60 000 debts imposed by ASIC were waived during the three-year period 2000–01 to 2002–03.

⁴⁵ Under section 53 of the FMA Act, the Chief Executive of ASIC has delegated the power to waive the right of the Commonwealth to fees payable under the *Corporations Act 2001 (Cth)* to various ASIC officers. Under section 53(2) of the FMA Act, ASIC delegates must comply with the directions of the Chief Executive of ASIC.

⁴⁶ The full text of ASIC's comments on this matter is provided at Appendix 5.

the ANAO considers that both models are appropriate, the first model has the advantage of providing an agency with complete control over its debt management processes. In addition, the first model is currently provided for in most agencies processing significant numbers of waivers. At this time, based on the waivers processed by agencies under the FMA Act, there are only a few agencies, other than ASIC, for which the model might be considered. However, in the future, circumstances may arise where other agencies also need to evaluate the need for a waiver power under legislation that they administer.

Recommendation No.2

2.67 The ANAO recommends that, where agencies receive a significant volume of requests for waiver relating to debts imposed under specific legislation they administer, those agencies should evaluate the appropriateness and cost effectiveness of seeking to establish a waiver power under the specific legislation.

Agencies' responses

Finance

2.68 Finance recognises that, were additional agencies to be provided with specific waiver powers, this may lead, prima facie, to a simplified process for considering claims. However, Finance does not consider that this would necessarily have any benefits for claimants, considering that, in the current environment, where requests are examined under the FMA Act, claimants have the benefit of their requests being considered from an independent perspective, within the Finance portfolio. In addition, when claimants are seeking waiver on the grounds of financial hardship, they have the benefit of their claims being considered in the context of similar claims arising from debts owed to other agencies. Ultimately, any changes to specific legislation would be a matter for the Parliament to determine.

ANAO comment

2.69 The ANAO accepts that Finance is an independent third party in the FMA Act waiver consideration process and that any changes to specific legislation are matters for the Parliament to determine. However, the ANAO considers there would be benefits to both agencies and claimants if agencies that now, or in the future, receive a significant volume of requests for waiver relating to debts imposed under specific legislation, were to establish a waiver power under that legislation. Such a waiver power should increase agency efficiency in dealing with claims and allow a more timely response to claimants. In addition, it would provide those agencies, which, at present, do not have such authority, with a waiver power that is consistent with the waiver powers of several other agencies. Furthermore, as any decision made

under an enactment is subject to review under the *Administrative Decisions (Judicial Review) Act 1997*, claimants, who were unhappy with a decision by an agency under specific legislation, would continue to have the right of appeal, in the same way as if they had made a claim under the FMA Act.⁴⁷

2.70 The ANAO emphasises that the recommendation is not meant to apply to those agencies that have few requests for waiver.

Other audited agencies

2.71 FaCS and DIMIA agreed with the recommendation, while DVA already has its own waiver power under Section 206 of the *Veterans' Entitlements Act 1986*. FaCS and DIMIA advised as follows:

- FaCS, as part of its review to improve its procedures for processing waiver and act of grace claims, will include the monitoring of the legislation associated with the waiver requests.
- DIMIA is of the view that implementation of the recommendation would simplify and improve the current process. However, it would require legislative change.

2.72 Centrelink did not comment on the recommendation. In this regard, the ANAO noted that Centrelink only reported four waivers under any Act for the three-year period of the review and mostly processes waivers that are reported by FaCS or other agencies.

Public Service Minister's power

2.73 On 3 December 1999, in conjunction with the *Public Service Act 1999* coming into operation, the Prime Minister, as Public Service Minister, delegated to agency heads⁴⁸ his power to authorise the making of payments (in special circumstances relating to APS employment) under section 73 of the Act, enabling them to authorise the making of such payments in accordance with the provisions of the section.⁴⁹

⁴⁷ Further commentary on the appeal rights of claimants is provided at Chapter 6.

⁴⁸ 'Agency Head' is defined in section 7 of the *Public Service Act 1999* as: the Secretary of a Department; or the Head of an Executive Agency; or the Head of a Statutory Agency. These positions cover most agencies operating under the *Financial Management and Accountability Act 1997*.

⁴⁹ Under the previous PS Act, the Public Service Commissioner had delegated his power, from 15 March 1998 to all agency heads for exercise in particular circumstances. Prior to this, the only delegation of the Commissioner's power had been to the Secretary of the Department of Employment and Workplace Relations for workplace relations matters.

Responsibility and policies

Responsibility

2.74 Finance is responsible for policy in relation to the FMA Act provisions for act of grace payments and waivers of debt, and provides policy guidance for the CDDA scheme.⁵⁰ Finance is also responsible for the processing of act of grace and waiver claims under the FMA Act, and for providing advice to the Parliamentary Secretary on each claim for determination. Individual agencies are responsible for administering CDDA claims.

2.75 Generally, the Prime Minister and/or Cabinet approve ex gratia payment programs, and PM&C, in conjunction with Finance and/or other agencies, develops policy specifically for each payment program. The ANAO was advised that such policies vary from incident to incident and are altered in accordance with the extent of disadvantage experienced by the group for whom an ex gratia program is to apply.

2.76 The APS Commission is responsible for administrative policy in relation to payments in special circumstances relating to APS employment, while individual agencies are responsible for administration of claims.

2.77 The Minister for Finance and Administration issues requirements and guidelines for the reporting of financial statements of Commonwealth agencies and authorities. These are issued annually as Finance Minister's Orders (FMOs).⁵¹ Finance prepares the FMOs on behalf of the Minister. The reporting of act of grace and CDDA payments and waivers of debt has been a longstanding requirement of the FMOs.

Policy guidelines

Act of grace and CDDA payments, and waivers of debt

2.78 To support agencies in the management and processing of compensation payment and waiver of debt claims, Finance issued guidelines (promulgated via Finance Circular 2001/01 of July 2001 with subsequent amendments). The guidelines provide a consolidated overview of Commonwealth compensatory mechanisms (including legal liability), debt

⁵⁰ Finance advised that no specific role was attributed to it at the time the CDDA scheme was introduced in 1995. However, there has been an expectation from agencies that Finance would provide guidance from time to time and determine any claims involving more than one agency where the respective agencies could not agree. Finance also advised that its current policy advice role had arisen because CDDA and act of grace claims were part of one continuum and that agencies often had difficulty in determining which mechanism should be used.

⁵¹ While FMOs are issued for other purposes, all references to the FMOs throughout this report relate to the requirements and guidelines for the reporting of financial statements of Commonwealth agencies and authorities.

waiver and write-off provisions. They also provide detailed guidance for agencies on act of grace and CDDA payments, and waiver of debts; that is, the mechanisms for which Finance has policy responsibility.

2.79 The development of Finance guidelines in 2001 was, in part, a response to a recommendation of the September 1999 Ombudsman's Report, *To Compensate or Not to Compensate*. That report had detected a number of inadequacies in the advice published by Finance at that time. In particular, the report recommended that Finance should clarify the CDDA guidelines, to ensure that if the Ombudsman and the agency concerned agree that there has been detriment caused by defective administration, that is sufficient basis for compensation. This was later introduced into the Finance guidelines in order to clarify the Ombudsman's role in CDDA claims.⁵²

2.80 In commenting on the audit report, the Commonwealth Ombudsman advised that:

Finance's work on the CDDA guidelines has been helpful to agencies, but it has not disposed altogether of the problem sometimes encountered where an agency agrees as a matter of commonsense that it should pay compensation, but is indecisive about whether it should do so as a legal liability, under the CDDA scheme or through a request for an act of grace payment. Different standards and processes apply to each, although the facts could fit any of them (for example, misleading advice, given negligently, creates a civil liability; misleading advice more generally may fit within the CDDA scheme; and a failure to advise may give rise to a moral obligation). From the perspective of the claimant, the precise characterisation does not matter but these technical arguments can add delay.

The processing of compensation claims is discussed further in Chapter 5.

2.81 The ANAO noted that two of the Attachments to Finance Circular 2001/01, namely, Attachment B (CDDA scheme guidelines) and Attachment C (act of grace payment guidelines), did not reflect the relevant reporting requirements of the FMOs. However, Attachment D (waiver of debt guidelines) indicated that reporting should be in accordance with the FMOs, and therefore provided an appropriate model for amending the act of grace payment and CDDA scheme guidelines.

Ex gratia payments

2.82 Finance has no direct responsibility for the policy, management or approval of ex gratia payments, which typically can involve a number of agencies.

⁵² The guidelines now make specific provision for payment where the agency agrees with the Ombudsman that compensation is appropriate, notwithstanding that the circumstances of the case may not fall into the exact criteria for defective administration, as described in the guidelines.

2.83 At the time of audit, there was no specific policy or procedures on how claims for ex gratia payments should be handled, and no requirement for ex gratia payments to be reported in the notes to the financial statements of agency annual reports. As the need for a particular ex gratia program is determined, specific policy is generally developed by PM&C and Finance, as well as the agency responsible for administering the program.

2.84 The ANAO was advised by Finance that, due to the ad-hoc nature in which ex gratia payments are deemed appropriate, the arrangements to make such payments need to remain flexible so that immediate monetary assistance can be provided when needed. However, the ANAO considers that the development of a set of guidelines, which specified responsibilities, such as the circumstances which may lead to ex gratia payments, which agency takes the lead role, and the general action to be taken by other agencies when an ex gratia payment might be necessary, would assist all agencies involved with dealing with ex gratia payments.

2.85 Finance advised that it was currently revising its guidelines on compensatory payments to provide information on the ex gratia mechanism.

Recommendation No.3

2.86 The ANAO recommends that the Department of Finance and Administration consult with the Department of the Prime Minister and Cabinet and other relevant agencies, with a view to developing a general framework for the processing and reporting of ex gratia payments for greater consistency of action and reporting.

Agencies' responses

Finance

2.87 Agreed. Finance advised that it had already informed PM&C of this issue and that the two departments, as well as agencies involved in the delivery of ex gratia payments (such as Centrelink), would meet early in 2004 to develop a strategy to implement such a framework.

PM&C

2.88 PM&C supported the recommendation, as it considered that implementation of the recommendation would improve the public transparency of ex gratia payments.

Commonwealth Ombudsman

2.89 The Commonwealth Ombudsman also supported the recommendation as its implementation would improve the knowledge of agency staff about the ex gratia option. In addition, the Ombudsman advised that the ex gratia option

may sometimes be relevant in cases where an Ombudsman investigation identifies a systematic flaw.

Payments in special circumstances relating to APS employment

2.90 The then Public Service and Merit Protection Commission (now the Australian Public Service Commission) issued *Public Service Act 1999 Advice No.30: Payments in Special Circumstances* in December 1999, outlining the options available to agency heads for making compensation payments to staff in special circumstances.⁵³

2.91 Among other things, Advice No.30 suggested that agency heads:

- maintain a suitable register of payments authorised under section 73 of the new Public Service Act each year; and
- ensure that payments made under section 73 of the new Act during the financial year are reported in the annual financial statements of the agency concerned.⁵⁴

2.92 Despite the second dot point above, the FMOs have not required payments in special circumstances relating to APS employment to be reported in the financial statements for any year to date.⁵⁵

Review of the CDDA scheme

2.93 The CDDA scheme commenced in 1995. No review or monitoring of the scheme was undertaken until the Ombudsman's review, which was reported in 1999.

2.94 Following on from the Ombudsman's review, Finance conducted a general review of the CDDA scheme for the purposes of developing the guidelines, which were incorporated in Finance Circular 2001/01. All major agencies were consulted as well as the Ombudsman's Office and the AGS.

2.95 The scheme was established as a means of providing Portfolio Ministers with authority for decisions that were previously processed under the act of grace power. It was also established at the time that the act of grace power was withdrawn from agency heads. In view of this, the ANAO considers that some more regular monitoring of the scheme by Finance would have been appropriate for Parliamentary assurance that the scheme was operating as intended. As a minimum, Finance could have monitored the CDDA scheme usage on an annual basis from examination of annual reports

⁵³ The Advice is available on the Australian Public Service Commission's website at <www.apsc.gov.au>.

⁵⁴ *Public Service Act 1999 Advice No.30: Payments in Special Circumstances*, paragraph 21.

⁵⁵ This matter is further discussed in Chapter 6.

and the level of complaints to the Ombudsman through the Ombudsman's annual report or periodic dialogue.

2.96 Finance advised that it had not conducted any regular monitoring of the CDDA scheme, as, apart from providing policy advice, no other role had been articulated for Finance at the time the scheme was inaugurated in 1995. Further, Finance advised that there was no indication during its review in 2000 that the scheme was not operating satisfactorily. However, it advised that it planned to conduct such a review in 2004.

Conclusion

2.97 The ANAO concluded that, while there was a suitable framework in place to ensure individuals, entities and communities had the opportunity to seek and obtain financial compensation or relief where they had been disadvantaged by various negative circumstances, there was a need to improve certain aspects of particular compensatory mechanisms and the overall coordination of all the arrangements. In particular, the ANAO considered that action was needed to:

- clarify the 'act of grace' provisions in the FMA Act, and the 'APS employment payments in special circumstances' provisions in the PS Act, regarding the use of money appropriated by the Parliament for the purposes of those provisions;
- encourage agencies to evaluate the appropriateness of obtaining their own waiver power under specific legislation where they currently obtain waivers under the FMA Act for debts they impose under that specific legislation;
- develop a broad explanatory framework, or set of guidelines, for the increased awareness in managing, actioning and reporting of ex gratia payments; and
- implement some form of periodic monitoring by Finance of the CDDA scheme.

3. Finance Management of Act of Grace and Waiver of Debt Claims

This chapter examines the arrangements within Finance for processing act of grace and waiver of debt claims and reports on the results of audit testing of a selection of claims against those arrangements. It also covers an analysis of the time taken to process claims and of the volume of claims by amount claimed.

Introduction

3.1 The Special Financial Claims Section within Finance processes all act of grace claims and waivers of debt under the FMA Act for all FMA agencies including Finance, except for certain waivers relating to ASIC and Comsuper.⁵⁶

3.2 Finance is responsible for receipting, recording, and collecting information, investigating the claim and providing a detailed brief for consideration by the Parliamentary Secretary for each claim received. Once a decision has been made, it is referred back to the relevant agency for implementation; that is, where claims are approved, the agency makes payment and/or actions the waiver.

Audit evaluation criteria

3.3 The ANAO assessed Finance's control structure for processing of claims against the following audit evaluation criteria:

- policy and procedures should have been developed and kept up-to-date for changing circumstances;
- appropriate recordkeeping systems should have been implemented and maintained for the registering of claims and maintenance of supporting documentation;
- decisions on claims should be based on written reports following investigation by appropriately qualified staff;
- staff awareness programs should be in place for both Finance and agency staff; and
- performance targets should have been established against which actual performance should be measured and/or assessed.

⁵⁶ As indicated in Chapter 1, the Minister for Finance and Administration delegated the power to authorise certain debts to the chief executives of ASIC and Comsuper, from 1 July 1999.

Policy and procedures

Minister-to-Minister policy

3.4 Finance Circular 2001/01 (as amended, in March 2002) states that relevant Ministers should refer act of grace and waiver of debt requests to the Parliamentary Secretary, as from that time the Parliamentary Secretary was the only person authorised to consider such requests. Previously, there was no requirement for agencies to submit claims via their relevant Minister. Also, under the previous arrangements, claims for amounts under \$10 000 could be authorised by officers within Finance.

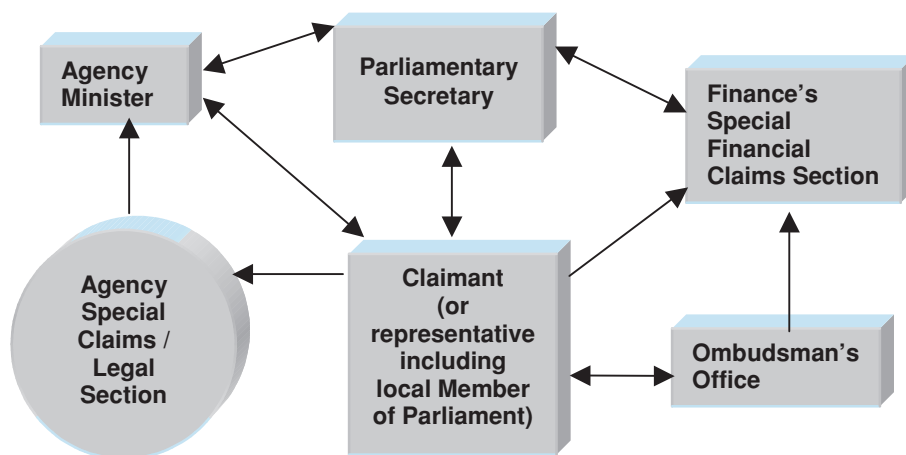
3.5 The changed arrangements required all requests, whether supported by the agencies or not, and regardless of value, to be submitted through the Portfolio Minister and the Parliamentary Secretary. Furthermore, according to legal advice provided by the AGS to the ANAO in October 2003, where an application is made and supporting material is provided, the Parliamentary Secretary has a duty to make a decision in relation to the application; that is, under the law, only persons with the power to authorise claims have the power to reject claims.

3.6 In addition, the amended arrangements for Finance Circular 2001/01 suggested that, to expedite the resolution of requests, agencies should send a copy of the documentation to Finance, at the same time that a Minister refers an act of grace or waiver of debt request to the Parliamentary Secretary.

3.7 The ANAO found that the Parliamentary Secretary also received requests directly, or through Finance or a constituent's local Member of Parliament; that is, without the claim being processed through the relevant agency and Minister. Each of the various ways of receiving claims is shown diagrammatically at Figure 3.1.

Figure 3.1

Flow of requests from/to claimants—act of grace payments and waivers of debt



Source: Constructed by the ANAO from analysis of agencies' claims data.

Finance procedures

General

3.8 When a request for each act of grace or waiver is received, Finance assesses and analyses it from several perspectives prior to advice being developed for the Parliamentary Secretary.

3.9 Finance advised that it ensures relevant stakeholders are aware of particular cases when they are not routine, for example, those claims which involve large amounts of money. Finance has also recognised that its relationships with agencies are important so that claims can be processed as efficiently as possible. As a result, in the second half of 2002, Finance undertook formal visits to a number of agencies to discuss the handling of cases and Finance's reporting requirements.

Written procedures

3.10 The ANAO found that, although Finance staff had a good knowledge and awareness of dealing with act of grace payments and waivers of debt, the procedures for processing claims within Finance were not documented at the time the audit commenced. Procedures are important for general awareness and consistency of approach, particularly where new staff are appointed, and for accountability purposes.

3.11 Finance developed a draft procedures manual during the course of the audit. Finance advised that the main benefit of the procedures manual would be to document and retain corporate knowledge on the processes it had put in

train to investigate cases. Further, 'on the job' training, would now be complemented with written procedures. Nevertheless, Finance advised that these procedures would not completely replace 'on the job' training, as such training was essential in learning how to investigate and analyse the salient facts leading up to the development of recommendations to decline, or approve, claims.

Processing of claims

Receipt and recording of claims

Information from agencies/claimants

3.12 To be able to process a claim, Finance requires: information from the agency against which the claim has been made; details of any relevant legislation against which the claim is made; details of the claimant's circumstances in relation to that legislation; specific details of the Commonwealth's role, if any, that may have directly contributed to the claimant's situation; any background or history of the case; and whether the responsible agency supports the act of grace⁵⁷ or waiver of debt request.

3.13 Finance advised that obtaining the relevant information from the claimant or agency often takes some time. Other difficulties encountered by Finance when processing a claim include the wide variations in the types of claims and the different level of knowledge, within agencies, on how to deal with claims.

3.14 In situations where the agency has provided all the necessary information, Finance analyses the information in order to provide a Ministerial Brief, complete with a recommendation, directly to the Parliamentary Secretary, or via an advisory committee, when required.

Claim register and reporting tool

3.15 Finance utilises two software packages for the management of claims. One of these is a database management system, which is used to record information regarding the claim, as well as to track the status of the claim. This database has been in use since 1999.

3.16 The ANAO found that, although the design, implementation and use of the claims database were appropriate, some discrepancies had occurred during data entry. Finance advised that the database was currently being rebuilt to allow more detailed information to be entered, and to facilitate more comprehensive monitoring and reporting of claims. Finance also advised that

⁵⁷ Finance Circular 2001/01, Attachment C, p. 3.

an auditing feature was being added to the current database. This feature would indicate whether the record has been audited or not. Under this arrangement, all records not audited would need to be checked before sending out any reports to agencies.

3.17 The second software package is an analytical tool designed specifically to produce reports on: the total number of claims for a period of time; the total number of claims for a particular agency; and the total number of approved claims for an agency.

Processing of individual claims

3.18 Using the information in the database for the period July 2000 - February 2003, the ANAO examined 20 applications for waivers (five unsuccessful and 15 successful) and 20 act of grace claims (four unsuccessful and 16 successful) from a range of agencies. Each claim had a separately catalogued file and was cross-referenced to the database.

Compliance with policy

3.19 The ANAO found that Finance had fully investigated each claim in accordance with Finance Circular 2001/01, and provided relevant information to the decision-makers for a decision to be made, except for one case as described below. The ANAO also found that an advisory committee had been used, when required, in all the cases examined over \$100 000.

3.20 The ANAO observed one case, which had been initially submitted to Finance by the relevant agency just prior to the revised arrangements of March 2002 coming into operation, but not finalised in Finance until after the new arrangements took effect, that had not been decided by the Parliamentary Secretary. The agency recommended that the debt (under \$3000) should be waived because the claimant was in financial hardship (and repayment could not be made without significant financial suffering). Although Finance prepared a draft Ministerial Briefing recommending a waiver be approved, the case was not referred to the Parliamentary Secretary for a decision; rather it was referred back to the agency for write-off action. After deliberation, Finance considered that the debt should be written-off because it was uneconomical to pursue. Consideration of the case took some five weeks and highlights that it is not always easy to determine how a claim should be dealt with.

Recordkeeping

3.21 The ANAO found, generally, that the recordkeeping within Finance was of a high standard with all relevant documentation and events being recorded appropriately in most instances.

Processing of unsupported claims

3.22 Some act of grace and waiver of debt claims submitted to the Parliamentary Secretary were not supported by the agencies concerned and/or by Finance.

3.23 One of the agencies covered by the audit adopted an approach of not sending the claims to Finance, where the agency did not support them. Instead, the agency advised each claimant that, although it believed the claim had no merit, the claimant could approach Finance for further consideration. Although this approach may not be consistent with the advice in Finance Circular 2001/01, which requires all claims to be referred to Finance, the ANAO considers that the approach is a sensible one, because it provides the claimant with the agency's view on the reasonableness of the claim and allows the claimant to query the agency's decision with Finance, which has not been party to the claim or to the initial decision. The approach may also reduce the number of claims being submitted to Finance and to the Parliamentary Secretary. Further, it may save resources on the investigation of claims, which may have no merit. However, the approach may be considered contrary to the view that only the decision-maker can reject a claim. As a result, any agency wishing to adopt this approach should give careful consideration to the wording of its responses to claimants so that the claimants cannot interpret the response as a decision to reject a claim. In particular, agencies should ensure that the responses to claimants make reference to the Parliamentary Secretary's role as the decision-maker for these cases.

Actioning of Finance approvals

3.24 The Parliamentary Secretary to the Minister for Finance and Administration decides all act of grace and waiver claims, but has no means of knowing that approved claims have been actioned. Further, there is no requirement in the guidelines for agencies to report back to Finance that they have processed act of grace payments and waiver of debts in accordance with the approvals.

3.25 The ANAO noted that some agencies email Finance, on an ad-hoc basis, that an act of grace payment or waiver has been processed. During the audit, Finance started to institute a system whereby agencies advise Finance of the date the claim was paid or the debt waived, so that Finance would be aware that the action had been completed and would have a complete record of the transaction. Finance advised that these new procedures were implemented from 1 July 2003 and that the dates were being recorded in the database.

3.26 In addition, the ANAO noted that Finance has no way of knowing whether unapproved claims for act of grace payments and waiver of debts are subsequently processed by agencies as CDDA payments or debt write-offs.

3.27 Finance considered that the occurrence of agencies processing an act of grace claim under the CDDA provisions or a waiver of debt claim as a write-off would be highly unusual. Further, as part of its investigation into each case, Finance seeks confirmation that the matter has not, or is not being, dealt with by any other mechanism. However, Finance noted that, in some cases, agencies might have reasons to revisit a matter as a CDDA claim or write-off case, for example, where new or additional information comes to light. Nevertheless, Finance advised that it planned to conduct awareness sessions to educate agencies that processing an act of grace claim under the CDDA provisions or a waiver of debt claim as a write-off is not appropriate.

Staff awareness

3.28 While, in Finance, staff awareness was enhanced by the specialisation achieved in the various types of claims processed, many of the agencies submitting claims did not have similar expertise. As a result, claims were sometimes incomplete. Therefore, processing was delayed while Finance sought additional information. Given this situation, Finance should consider providing a series of awareness sessions for agency staff on the processing, recording and reporting of act of grace payments and waiver of debts so that all agencies are aware of the requirements when submitting act of grace and waiver requests.

3.29 Finance advised that it planned to conduct a general awareness program in early 2004, after seeking interest from relevant agencies.

Analysis of claims processing

Time taken to process claims

3.30 The ANAO found that the time taken to process act of grace and waiver of debt claims varied considerably, and could range from a few weeks up to eight months.

3.31 The ANAO noted that Finance had a benchmark for the processing of claims within 21 days. Up until 2001–02, Finance had a performance target to meet this standard in 90 per cent of cases. It had reported against the target in its annual reports to that time. Finance did not meet the performance target in either 2000–01 or 2001–02. It subsequently revised the target for 2002–03 in the Portfolio Budget Statement for that year. The new target was to complete 50 per cent of cases within 21 days and 70 per cent of cases within 35 days. The results for the 21-day benchmark, as reported in the annual reports for each of the three years, together with the average number of days for processing a claim, as calculated by the ANAO for the relevant periods, are shown at Table 3.1.

Table 3.1**Finance performance indicators and actual times for processing act of grace and waiver of debt claims: 2000–01 to 2002–03**

| | 2000–01 | 2001–02 | 2002–03 |
|---|-----------|-----------|-------------|
| Number of claims finalised | 313* | 222 | 295 |
| Number and percentage of claims, which took 21 days, or less to finalise | 234 (75%) | 142 (64%) | 127 (43%)** |
| Target percentage to be completed in 21 days | 90% | 90% | 50% |
| Average number of days required to finalise each claim | 36 | 35 | 30 |

* This figure includes 103 waivers for the certain fees of one agency, which were processed under one decision on the day of receipt of the request for waiver.

** 183 (62 per cent) of claims were processed within 35 days against the target of 70 per cent.

Source: Finance annual reports, and ANAO analysis of information extracted from the Finance Claims Details Report.

3.32 The reported statistics show a decline in performance from one year to the next in meeting the 21-day benchmark. However, in analysing why the decline may have occurred, the ANAO considered that the 2000–01 performance (75 per cent) was influenced by Finance treating 103 cases for the waiver of certain fees imposed by one agency, which were waived in one decision on the day the request was received, as 103 separate claims. The ANAO calculated that, if the 103 cases had been counted as one, only 59 per cent of claims would have met the performance target for that year. Therefore, using this basis of calculation, there was a five per cent improvement in performance in 2001–02 (64 per cent).

3.33 The ANAO analysed a selection of the data to assess whether the revised procedures effective from March 2002, which changed the appropriate delegate for approving claims under \$10 000 from Finance to the Parliamentary Secretary, had an impact on achieving the 21-day benchmark. In particular, the ANAO compared the speed of processing claims before and after the change in delegation.

3.34 From the data examined, the ANAO concluded that there was no correlation between the time taken to process a claim, the amount of the claim, or the delegated powers. Rather, the ANAO considered that the time taken to process a claim is more a reflection of the complexity of the case and the length of time an agency may take in providing information to Finance.

3.35 However, the ANAO noted that the new performance target for 2002–03 was lower than the results achieved for the previous two years, and yet was not achieved in 2002–03. Furthermore, the results for 2002–03 (43 per cent within 21 days) indicated that there was a significant decline in performance from previous years. At the same time, however, the average processing time improved from approximately 35 days in 2000–01 and 2001–02 to approximately 30 days in 2002–03.

3.36 Finance advised that the majority of all time spent in preparing a case related to time that elapses after it has sought advice from the relevant external agencies. This represents a period during which the case is unable to be progressed, pending the receipt of further information. The timeframe in which agencies are then able to provide the requested information depends on the priorities and pressures on the agency at the time, as well as the level of resources allocated by that agency to deal with claims. Finance advised that these factors, which were outside its control, had significantly impacted on its capacity to meet benchmarks.⁵⁸

3.37 Finance was in the process of developing a new database that would accurately reflect the amount of time spent either requesting or analysing information on cases, and exclude periods during which advice was pending. The new database was expected to be operational by early 2004.

Stratification of claims by amount sought

3.38 Table 3.2 shows the number of claims, categorised by amount sought, that were finalised in the financial years 2000–01 and 2001–02, and from July 2002 to February 2003. The data in the table has been sourced from the Finance claims report for the same periods. The ANAO noted that some parts of this report were incomplete. For example, the briefing number, ministerial number, and amount sought/recommended and approved were missing in certain instances. However, Finance was able to provide much of the missing information directly from its files.

3.39 The ANAO noted that not all entries on the claims report related to a specific claim. Rather, some were information requests whereby Finance was required to provide information. In such situations, the reporting tool is used to track the type of request, e.g. whether it concerns act of grace or waiver, and the status of the request. In Table 3.2, these requests are represented as 'Administrative action only'. For the period July 2002 to February 2003, there were 62 such requests for information.

3.40 The ANAO further noted that not all entries on the claims report indicated an amount sought by the claimant. The ANAO was advised that this

⁵⁸ The time taken by agencies in processing claims is examined in Chapter 5.

is not considered unusual, as the claimant may not know the relevant amount. In order to include an amount for such claims (of which there were 36 cases) in Table 3.2, the ANAO has utilised the amount recommended for each claim.

Table 3.2

Stratification of the number of act of grace and waiver of debt claims by amount sought for the period July 2000 to February 2003

| Amount sought | Number of claims finalised in 2000–01 | Number of claims finalised in 2001–02 | Number of claims in 2002–Feb 2003 | Total number of claims |
|-----------------------------|---------------------------------------|---------------------------------------|-----------------------------------|------------------------|
| Administrative action only* | 8 | - | 62 | 70 |
| \$0 – \$1,000 | 65 | 82 | 45 | 192 |
| \$1,001 – \$2,500 | 26 | 30 | 16 | 72 |
| \$2,501 – \$5,000 | 26 | 24 | 12 | 62 |
| \$5,001 – \$10,000 | 31 | 16 | 19 | 66 |
| \$10,001 – \$100,000 | 44 | 55 | 25 | 124 |
| >\$100,000 | 16 | 15 | 19 | 50 |
| Total Claims | 216** | 222 | 198 | 636 |

* The 'Administrative action only' category refers to: the number of claims for which there was no claim to process but rather an information request which required the sending of correspondence; or those claims which were resolved by the agency prior to the claim being submitted to the Parliamentary Secretary.

** The total number of claims for 2000–01 does not match the Finance annual report information for that year (as shown in Table 3.1), mainly because the ANAO counted 103 cases of waiver as one claim/decision (refer paragraph 3.32).

Source: ANAO analysis of information extracted from the Finance Claims Details Report for the period July 2000 to February 2003.

3.41 The ANAO considers that there would be some processing efficiencies to be gained if agencies and/or Finance were permitted to process some of the lower value claims in lieu of the Minister-to-Minister arrangements that are now in place. For example, as shown in Table 3.2, if agency officers had had the authority to approve claims for \$2500 and under, the percentage of claims that had to be submitted to the Portfolio Ministers and the Parliamentary Secretary and/or to Finance, depending on the approval arrangements in place at the time of each claim, would have been reduced by nearly 50 per cent.⁵⁹ Delegation of authority to agency and/or Finance officers would also be likely to result in reduced processing times both within agencies and Finance.

3.42 The Commonwealth Ombudsman, in commenting on matters in this report relating to his role in examining compensation claims, advised that his

⁵⁹ Calculated as 264 claims, that is, by adding 192 (total claims under \$1000) and 72 (total claims from \$1001 to \$2500) out of total claims of 566, that is, after deducting the 70 'Administrative action only' claims from the total of 636.

1999 recommendation for Finance to devolve the act of grace and waiver powers to agency heads (refer earlier paragraph 2.46) remained sound. The Ombudsman further advised:

The act of grace and waiver powers could reasonably be delegated to the agencies responsible for the circumstances (whether it be defective action or poor policy/legislation development) that led to claimed losses. There is a difference between an agency recognising, for example, that a particular class should have been included in a group to benefit from legislation and any suggestion of administrative repeal or override of legislation.

Recommendation No.4

3.43 The ANAO recommends that, in the interests of efficiency, the Department of Finance and Administration evaluate the advantages and disadvantages of the current system of actioning act of grace payments and waivers of debt compared with other potential systems. The latter could include limited delegations within the Department and/or devolution of authority to agencies.

Finance response

3.44 Agreed. However, Finance noted that the authority and prerogative to determine whether the act of grace and waiver powers should be delegated/devolved rests entirely with the Minister for Finance and Administration and Parliamentary Secretary to the Minister, who are the decision-makers in whom the act of grace and waiver powers are vested, pursuant to sections 33 and 34 of the FMA Act respectively.

Conclusion

3.45 The ANAO concluded that, while Finance has adequate processes in place for the recording and determining of individual claims for act of grace payments and waivers of debt, there is an opportunity to improve processing efficiencies through the implementation of direct agency to Finance communications and delegation of the Minister's authority for lower level claims to officers in agencies and/or Finance. At the very least, this would reduce the levels of review of such claims and the processing times within both the agencies and Finance.

3.46 The ANAO also concluded that, despite the general adequacy of the guidelines promulgated by Finance, there was an opportunity for the Department to improve processes within agencies through the conduct of awareness forums. The ANAO considers that the better informed the agencies are, the better will be their efficiency in processing, which should also improve Finance's efficiency through the receipt of improved briefs and recommendations.

4. Agencies' Preparedness for Compensation and Debt Relief Claims

Agencies need to implement a control framework to deal with compensation and debt relief claims and to comply with the relevant legislative and administrative requirements applying to such claims. The first steps to achieve this are to conduct a risk assessment and to establish a suitable control environment. This chapter covers these two elements of an agency's overall control framework for dealing with compensation and debt relief claims.

Risk assessment

Background

4.1 Risk assessment is the starting point for evaluating the internal control framework of an organisation because it provides, through a formal systematic process, the necessary information to properly design controls that are appropriate and cost-effective. Risk assessment involves the identification, analysis, assessment and prioritisation of risks that need to be treated by specific control measures (control activities).

4.2 Risk assessment is normally conducted at two levels, namely:

- *organisational level*—that is, the assessment of risks, in terms of their relative impact on the agency's ability to achieve its outcomes and outputs efficiently and effectively; and
- *process level*⁶⁰—that is, the assessment of risks related to the day-to-day operational activities of the agency.

Fraud control plan

4.3 A fraud control plan is one of a number of planning tools associated with treating risk assessment. All FMA Act agencies are required, under section 45 of the Act, to have an operational fraud control plan.

⁶⁰ ANAO Audit Report No.52 2000–01, *Payment of Accounts*, June 2001, provides a 'Payment of Accounts Risk Model, Appendix 3. Examples of GST administration risks were provided in ANAO Audit Report No.53 2001–02, *Goods and Services Tax Administration by Commonwealth Organisations*, May 2002.

Audit evaluation criteria

4.4 The ANAO assessed whether agencies used risk assessments to identify, assess and manage risks within the organisation, and, in particular, whether the risks associated with claims for discretionary compensation payments and waivers of debt had been identified and adequately mitigated.

Formal risk assessments

4.5 None of the agencies audited had formally assessed the risks associated with claims for compensation payments and waivers of debt at the organisational or process level or in the fraud control plan. Accordingly, the ANAO undertook an assessment of the risks and evaluated whether the agencies had addressed those risks covered by the scope of the audit.

4.6 In general, the ANAO found that all of the agencies had addressed the relevant risks, to varying degrees, through the implementation of appropriate management and accounting controls.

ANAO assessment of the risks

Business and financial risks

4.7 Claims for compensation of any form, that is, whether discretionary or not, represent one of the risks of performing an agency's functions, and, as a result, are an element of an agency's business risks.

4.8 The business risks in relation to CDDA claims are generally within the control of agencies, as they relate to breakdowns in agency administration and can be addressed through changes to operational policies and procedures and/or staff training and awareness programs.

4.9 On the other hand, the risks associated with claims for the other discretionary forms of compensation, and debt relief, tend to be largely outside the control of agencies, as they relate to legislation (act of grace) and/or client circumstances (act of grace and waiver of debt) or Government programs (ex gratia). However, the risks in relation to all forms of compensation claims need to be monitored, in the event of a change in the legislative or operating environment. For example, one agency not covered in the audit paid an act of grace claim of several million dollars in 2001 following the impact upon the claimant's business arising from new legislation introduced in 1996.

4.10 All claim cases, whether successful or not, are a cost to the agency's business, as they need to be investigated, decided upon and responded to. In addition, successful claims represent a direct financial cost in terms of a payout or a reduction in revenue.

4.11 As the number and cost of successful claims in a year were relatively low for each of the selected agencies, in terms of the agencies' total budgets over the two and a half year period covered by the audit, there was generally a low level of business and financial risk in each of the agencies.

Reputation and accountability risks

4.12 Apart from business and financial risks, there are administrative risks associated with the processing of claims for discretionary payments and waivers of debt. These include:

- *reputation risk*—relating to the time taken in handling claims and the nature of communications with the claimant, for example, lengthy processing times have the potential to harm the reputation of the agency. These factors also have the potential to cause harm to the claimants, which may, in turn, result in larger financial claims against the Commonwealth; and
- *accountability risk*—relating to the reporting of payments and waivers in the financial statements, for example, inaccurate and/or incomplete reporting would not satisfy accountability requirements. The purpose of the note in the financial statements is to provide proper accountability for the use of the discretionary powers.

4.13 The ANAO considered that, for the purposes of the audit, reputation and accountability risks were the main risks facing agencies.

Fraud risk

4.14 The ANAO considers that the risk of fraud in relation to claims for discretionary compensation payments and waivers of debt would be relatively low, as each claimant is required to prove his/her case. As well, any fraudulent claims would most likely be detected in the evaluation process.

Agency assessments and actions

4.15 All of the agencies had some form of organisational risk assessment and a fraud control plan relating to their main operational activities. The organisational risk assessments, as high-level management documents, did not, and would not normally be expected to, deal specifically with discretionary compensation payments and waivers of debt. Some of the fraud control plans contained detailed fraud risk assessments but, not surprisingly, did not deal specifically with discretionary compensation payments and waivers of debt.

4.16 While all the agencies recognised the importance of financial management and reporting through their corporate governance arrangements, there was no indication of any formal assessment of the risks associated with

claims for discretionary compensation payments and waivers of debt, at the process level or as part of the fraud control plan. Furthermore, none of the agencies had completed any formal assessment of the number of CDDA claims (that is, those claims over which they can exercise some control) to assess what could be done to minimise these in the future.

4.17 However, each agency had established various controls for the management of claims, and therefore, had mitigated some of the relevant risks associated with the claims. For example, in an effort to achieve consistency in CDDA and waiver decisions across the entire agency, one agency altered its procedures so that all decisions had to be determined (CDDA), or reviewed for merit (waivers), at a very senior level. Furthermore, the same agency had established performance indicators for processing, which partly addressed any reputation risk that might arise from lengthy processing times.

Areas for improvement

4.18 The ANAO found that most of the agencies had not properly addressed either reputation or accountability risk, in that the processing of claims was generally slow and the reporting in the financial statements was not always reliable. In particular, these agencies did not have appropriate management controls to ensure prompt processing, nor proper reconciliation processes for reporting the information in the financial statements. For example, some claims took well over one year to resolve. In addition, three of the five agencies did not report accurately and/or completely. Further details of these matters are discussed in chapters 5 and 6 of the report.

4.19 The ANAO considers that there is a need for agencies to consider all the risks of dealing with claims for compensation payments and debt relief more formally in a process-level risk assessment. Such an assessment would cover any relevant business risks, as well as the administrative risks relating to the processing of all claims for compensation. This would include legal liability, and the financial reporting responsibilities, in particular, the note in the financial statements on act of grace and CDDA payments, and waivers of debt. Each agency should also consider the impact of any of these risks in the fraud control plan.

Recommendation No.5

4.20 The ANAO recommends that, where applicable, agencies formally assess and address the specific risks associated with claims for compensation payments and debt relief, in conjunction with any broader review of financial management, to ensure that the risks are being mitigated effectively.

Agencies' responses

Finance

4.21 Finance agreed that such assessments should help agencies to monitor which, if any, administrative procedures should be modified or changed to obviate CDDA claims. In terms of act of grace and waiver claims, such assessments may also be an indicator of the number and quantum of claims agencies are likely to receive in any one period, and assist agencies to identify which provisions of the legislation they administer are associated with recurring claims. Nevertheless, Finance notes that many requests for both act of grace payments and waiver of debts arise from persons' own circumstances, rather than any general application of Commonwealth laws, or the actions or omissions of the agencies to which those claims relate. Therefore, the number and quantum of such requests is likely to remain most difficult to predict with any degree of certainty.

Other audited agencies

4.22 All of the other audited agencies also agreed with the recommendation. Specific comments provided by each of the agencies were as follows:

- Centrelink plans to conduct a formal risk assessment regarding compensation claims during 1994. However, many of the risks identified in the audit have been previously informally identified and there are measures in place or planned to address those risks. For example, decisions regarding all major claims are determined by one delegate in Centrelink, which significantly reduces the risk of inconsistent decision making, and all minor claims are determined by a limited number of officers at a very senior level. Centrelink's full response on this recommendation is at Appendix 5.
- FaCS will be including a risk assessment of the processing of waivers and act of grace payments as part of its review of procedures.
- CSA's management review process seeks to identify systemic problems from an analysis of compensation and other quality review mechanisms to ensure an ongoing process of improvement.
- DIMIA currently undertakes risk assessment on a case-by-case basis and, where necessary, advice is obtained from the business area and/or a legal opinion is sought. A formal risk assessment of the claims process is being undertaken in line with DIMIA's risk assessment guidelines.
- DVA will undertake a formal risk assessment.

Control environment

Background

4.23 The control environment reflects management's commitment and attitude to the implementation and maintenance of an effective internal control structure to align policies, procedures and day-to-day work practices with the overall corporate strategy and objectives.

4.24 An agency should establish a control environment that clearly sets out management responsibilities and promotes sound principles of active management, including continuous improvement. Appropriate, up-to-date, agency policies and procedures and ongoing training programs are fundamental to achieving such an environment.

Audit evaluation criteria

4.25 The ANAO assessed whether agencies had implemented an appropriate control environment for relevant compensation and debt relief mechanisms. In particular, each agency was expected to have:

- determined responsibilities for managing claims for compensation payments and debt relief;
- developed policies and procedures consistent with the Finance guidelines; and
- where possible, appointed suitably qualified staff to determine claims within the agency's powers, for example, CDDA claims on a case-by-case basis.

Responsibilities

4.26 All the agencies audited had a separate section to deal with CDDA claims and for liaison with Finance for act of grace and waiver of debt claims. These sections generally comprised only a few staff who also had other duties, but varied in size according to the number and complexity of claims received. Legal services sections in two of the agencies had sole responsibility for managing CDDA claims. In all cases, the financial reporting staff were responsible for reporting of the approved claims in the financial statements. In addition, the relevant Ministers for each agency had authorised at least one officer in each agency to decide CDDA claims.

4.27 The agencies forwarded all act of grace and waiver claims to Finance for determination by the Parliamentary Secretary for the Minister for Finance, and where approved, arranged the necessary payments or debt relief.

4.28 Although most agencies operated regional/state/overseas offices, and received claims at those locations, only one of these agencies determined claims away from central office (local officers were authorised to determine claims up to \$10 000). CDDA claims against all the other agencies (and above \$10 000 for the one agency) were determined by officers in their central offices or their Minister according to the levels of authorisation. In one agency, the responsible Minister is notified of any CDDA payment of greater than \$5000 and determines all claims above \$50 000.

4.29 Centrelink had established a specialist section in one of its offices for the processing of ex gratia payments for persons affected by the Bali bombing.

Policies and procedures

4.30 All the agencies had prepared Chief Executive's Instructions (CEIs) for the handling of act of grace, CDDA and waiver of debt claims. These generally referred to, or were based on, Finance Circular 2001/01; that is, the Finance guidelines for the handling of claims.

4.31 While some agencies' CEIs included, or were supplemented by, procedures on how to deal with particular types of claims, the ANAO considered that there was scope for all the agencies to either review or develop formal procedures. This was particularly important for decentralised agencies that were represented in multiple locations and for centrally organised agencies that had few claims, as generally there were few staff with appropriate knowledge of the procedures required.

4.32 The ANAO considers that agencies should have formal procedures to guide staff in the processing of claims according to policy. Such procedures should also assist staff to process claims in an efficient, consistent and timely manner. Matters to be covered by such procedures would include:

- registering and recording of claims, including documentation requirements;
- conducting and reporting of investigations, including when to seek legal advice and the preparation of recommendations;
- developing processes for referring act of grace and waiver of debt claims to Finance for a decision;
- actioning and recording of the decision on each claim;
- obtaining the claimant's agreement on the amount of compensation offered;

- reconciling general ledger amounts with supporting records; and
- reporting in accordance with the FMOs.

Staff awareness

4.33 For all the agencies audited, staff knowledge was mainly acquired from on-the-job experience and knowledge of the requirements in the CEIs. Very little specific staff training was provided by any of the selected agencies. While this was consistent with the relatively low levels of activity experienced by most of the agencies, the ANAO considered that it would be worthwhile for agency staff, particularly those that are new to the subject, to spend a short time (for example, a half-day) with the specialist staff at the Special Financial Claims Section at Finance. This would enable agency staff to more fully comprehend the investigation and recordkeeping processes that Finance undertakes for decisions to be made on act of grace and waiver claims, and would also assist staff's understanding of the requirements for the purposes of processing CDDA claims. In turn, this increased understanding and knowledge should assist agencies to develop more efficient and consistent recordkeeping systems and practices.

4.34 One agency with regional offices uses phone link-ups between offices, providing the opportunity for case-study learning. Phone link-ups involve different types of claims (and ways of dealing with them) being discussed by the various staff processing compensation and waiver claims. The same agency also provides an on-line learning tool to staff, where various types of claim scenarios have been provided to assist staff identify different situations and how to deal with them efficiently. Such learning opportunities have provided on-going support to the officers handling CDDA/waiver claims within the regional offices of this agency.

4.35 Another agency introduced a comprehensive centralised database for recording all claims in early 2003 and, at the conclusion of the audit, was in the process of finalising training on the optimal use of the features of the database.

4.36 The same agency provided a 'hotline' for advice on CDDA, act of grace and legal liability type claims so that staff could obtain up-to-date advice. However, the ANAO found that not all regional area staff were aware of this hotline.

Recommendation No.6

4.37 The ANAO recommends that, where applicable, agencies:

- develop and document procedures for the processing of claims for discretionary compensation payments and waivers of debt; and
- implement appropriate training arrangements for staff involved in the processing of claims.

Implementing the recommendation

4.38 Agency procedures need to cover all aspects relating to the processing of the various types of claims from the time of receipt to the reporting in the annual report (refer earlier paragraph 4.32).

4.39 Agencies should arrange training on a needs basis. This might involve:

- newly appointed staff attending a training or information session with the Special Financial Claims Section at Finance; and
- the use of computer-based or face-to-face training, particularly where agencies conduct processing in regional offices.

Agencies' responses

Finance

4.40 Finance notes that where agencies have a structured approach to processing claims, this is of great assistance in ensuring that all the salient factors have been identified. This also minimises the number of occasions on which clarification of facts needs to be sought before matters can be progressed.

4.41 Finance anticipates that the general awareness training it plans to undertake should also assist agencies to identify procedures, which can be implemented to ensure claims requiring Advisory Committee consideration, can be expedited.

Other audited agencies

4.42 Three of the other agencies also agreed with the recommendation, while DIMIA agreed, in principle.

4.43 Specific comments on the recommendation were as follows:

- Centrelink already has procedures, which will be enhanced in 2004. In addition, appropriate training will be delivered during 2004. Centrelink's full response is at Appendix 5.

- FaCS will revise its procedures and will implement appropriate training for staff.
- CSA has a framework in place that it is currently reviewing to include comprehensive procedural instructions, and will ensure they incorporate suggestions from the ANAO audit. Revised procedures will be in place by the end of May 2004.
- DIMIA will refine its existing procedures. The Department also notes, however, that the nature of claims and waiver requests which DIMIA receives varies greatly and no single set of procedures can be uniformly applied to all cases. Requests for claims and waivers are processed centrally to ensure Finance and DIMIA guidelines are applied consistently.
- DVA has a review of the appropriate CEI in progress. In addition, new starters will attend suitable training courses.

Conclusion

4.44 While all agencies had undertaken risk management at an organisational level, none had formally assessed the specific risks associated with claims for compensation payments and debt relief. Nevertheless, each agency had addressed risks to varying degrees through the allocation of responsibility, and implementation of policies and procedures, for the processing and reporting of claims. In addition, Ministers had provided officers within each agency with authorisations to decide CDDA claims. As a result, most agencies were prepared for the receipt of compensation payment and waiver of debt claims.

4.45 The ANAO concluded, however, that, in general, further work was necessary for agencies to properly address the reputation and accountability risks that they face in relation to compensation payment and waiver of debt claims. The ANAO also concluded that most agencies could provide more detailed written procedures for the processing of claims and supplement on-the-job training with appropriate formal training so that there was more consistency in how claims are handled within, and between, agencies.

5. Agencies' Management of Claims

As part of their internal control framework, agencies need to implement specific controls (control activities) for managing the processing of claims, and monitoring and review processes for measuring performance against objectives. This chapter covers these two elements of an agency's overall control framework for dealing with compensation and debt relief claims.

Processing of claims

Background

5.1 Agencies require a set of specific controls (control activities) for the processing of compensation and debt relief claims to minimise the impact of risks and contribute to the efficient and effective delivery of quality outputs and outcomes. Furthermore, successful implementation and operation of such controls promotes compliance with the policies and procedures of the agency and assists in ensuring the integrity, accuracy and completeness of administrative processes.

Audit evaluation criteria

5.2 The ANAO assessed agencies' control activities for processing of claims for compensation and debt relief.

5.3 Agencies were expected to have systems and practices for capturing, managing and reporting information on claims for compensation and debt relief. In particular, each agency was expected to have:

- a system of registration and recording for all claims;
- documents to support the processing of claims in accordance with the legislative and administrative requirements; and
- a system for reconciling the number and amount of act of grace and CDDA payments and waivers of debt to the general ledger.

Receiving claims

Determining the relevant mechanism for dealing with compensation claims

5.4 Most claims for financial compensation are received by agencies directly from a claimant, or a claimant's representative, but may at times be received via the Ombudsman's Office, or directly by Finance (act of grace or waiver of debt claims). Claims (particularly those requesting a compensation payment) are often made without the claimant knowing about the various

schemes and/or without specifying the financial amount of compensation sought.

5.5 The ANAO was advised that, on occasions, elements of claims could be dealt with under different compensation mechanisms, so that all mechanisms had to be considered to determine what, if any, compensation should be paid and on what basis. Therefore, if an agency determined that a legal liability existed, the claim should be settled in accordance with the Legal Services Directions, rather than at the delegate's discretion, as is provided for under the permissive nature of the other compensatory mechanisms. The fact that the Commonwealth has to pay compensation because of a legal obligation, provides the agency with a publicly defensible reason to do so. This contrasts with a payment under, for example, the CDDA scheme, where payment is not obligatory, but may be made where there is good reason to do so.

5.6 Agencies received claims at various locations with most sending them to their central office for further processing. One agency processed claims fully in the regions (CDDA claims under \$10 000 in accord with the authorisation as mentioned in Chapter 4). Most other agencies preferred to determine the appropriate category of each claim, that is, whether it was legal liability, act of grace, CDDA, waiver of debt, or some other compensation type, before proceeding further with the claim. Accordingly, these agencies often sent claims to their legal units in the first instance for advice.

Claim registers

5.7 Most agencies recorded all claims in a register (or database) or separate registers for each type of claim. The registers contained particular information for referencing each claim and managing its progress (for example, name, amount, date received, date sent to Finance). However, most of the agencies' registers could have usefully contained more information for management purposes. Furthermore, at the time of commencing the audit, one agency's act of grace/CDDA register was not well structured and maintained. In addition, two agencies did not maintain a register for their CDDA claims so that it was not possible to determine the full extent of claims received.

5.8 One agency had established a database to record and maintain all claims for act of grace, CDDA and waiver of debt. Certain regional staff were authorised to access this database, with the local manager being able to approve claims up to \$10 000 directly through the database. All the other registers were only available to designated central office staff.

5.9 Centrelink had established a comprehensive database to record case information and assist with the prompt processing of claims relating to the ex gratia program arising from the Bali bombing.

Claim processing

Examination of claims

5.10 Claims were investigated, as necessary, by appropriate staff for passing to Finance (act of grace and waiver claims) or processing internally (CDDA claims). The claims section of the agency normally prepared a detailed brief of the facts of the CDDA case and a recommendation for the delegate or relevant authorised officer to consider. The ANAO's review of a selection of cases at each agency indicated that investigations were properly carried out in relation to all types of claims and that the relevant Minister or authorised officer had decided each CDDA claim.

Approved claims

5.11 Approved claims were processed by agencies in accordance with the authorisations given from Finance (act of grace and waiver claims) or by authorised officers (CDDA). However, in some payment instances, there was no evidence that a signed 'Deed of Release', as required by the Finance guidelines, had been obtained, prior to the compensation payment being processed. Under these arrangements, claimants are requested to accept an offer of payment by signing a deed of release to ensure that no future claims can be made against the Commonwealth in relation to the particular claim.

5.12 Each agency had budgeted for payment claims (through the Budget or Additional Estimates processes) and was able to absorb any additional costs from its appropriation funding. The approved payments and waivers were actioned through the agencies' general ledgers. However, prior to March 2002, one agency had actioned waivers in the business system in which the debts were recorded without the waivers being reflected in the general ledger at an individual or aggregate level. This agency implemented a new business system in 2002 enabling waivers to be recorded appropriately from that time.

Documentation

5.13 The maintenance of proper and complete documentation in relation to each claim is essential to the efficient management and reporting of overall claims processing, and is complementary to the maintenance of the register of all claims received and processed. Documentation should include: the original claim; the request for legal advice; the legal advice; internal briefs; a copy of the Deed of Release; correspondence with the claimant, Finance and Ministers; and any other relevant evidence.

5.14 Agencies generally placed the claims on existing client case files or created separate files for dealing with the claims. Agencies with regional offices normally kept client files at the regional office where the client was located. Generally, in these cases, copies of relevant evidence were sent to the

respective central offices and maintained on the separate files created by the compensation section. However, some of the agencies did not keep a comprehensive file for each claim showing all the relevant correspondence from/to the claimant and Finance, and the Ombudsman's office, where applicable.

Reconciliation of claim registers and general ledger

5.15 Agencies did not generally reconcile their claim registers with the general ledger figures at any time. The ANAO considered that reconciliations, undertaken at least quarterly, would assist agencies in maintaining the accuracy and completeness of both sets of information. This in turn, would assist in preparation of the required information for reporting in the annual financial statements (see further comment in Chapter 6).

Recommendation No.7

5.16 The ANAO recommends that agencies implement appropriate controls for the recording and management of all claims received for discretionary compensation payments and debt relief.

Implementing the recommendation

5.17 Agencies should maintain:

- a register(s) or database for recording the progress, status and history of claims; and
- a separate file on each claim for recording the relevant documentation that was received and issued in relation to the claim.

5.18 A suggested form of register is at Appendix 3.

5.19 Documentation should include, among other things, a 'Deed of Release', which has been signed by the claimant in accordance with the guidelines in Finance Circular 2001/01 prior to any act of grace or CDDA payment being made.

5.20 Agencies should also notify Finance when an act of grace payment has been made, or a waiver of debt has been processed, as this will assist Finance's reconciliation procedures in relation to these mechanisms.

Agencies' responses

Finance

5.21 Finance agreed that such controls are particularly valuable to agencies and to claimants, in the complex environment where many agencies face demands to consider a large range of claims for discretionary payments or debt relief under different mechanisms, some of which can be settled in-house, some of which need to be referred to regional offices, and many of which need

ultimately, to be forwarded to Finance for act of grace and waiver consideration.

Other audited agencies

5.22 All the other agencies also agreed with the recommendation.

5.23 Specific comments on the recommendation were as follows:

- Centrelink uses the legal services database to manage all customer compensation and act of grace claims, as well as debt waiver under the FMA Act. This database contains sufficient information for the monitoring of compensation claim processing, and the extraction of meaningful management information.
- FaCS will implement a register to monitor its claims.
- CSA has a comprehensive register of all claims in place. CSA maintains separate, comprehensive files on all claims received.
- DIMIA already maintains a comprehensive file of all documentation for each case and has a claims register that contains information on the progress and outcome of each claim. The Department will, however, consider further refinement of its claims register.
- DVA will develop one register to reflect all claims for compensation payments.

Policy advice issues arising out of the review of claim processing

Legal advice

5.24 The ANAO found that two agencies commonly sought legal advice on claims made against them, no matter under what mechanism the claim was likely to be dealt with. The majority of these cases related to claims that were eventually settled under legal liability, or under the CDDA scheme. In many instances, the claims took a considerable time to finalise.

5.25 The ANAO recognises that agencies need to consider the potential for legal liability before a claim is considered for processing under the CDDA scheme, and that, therefore, legal advice will be necessary in particular instances. However, the ANAO considers that there is sufficient scope within both the Legal Services Directions and the CDDA scheme guidelines to action claims up to amounts of \$10 000 in a proper and efficient manner, without obtaining legal advice in all instances, and therefore without always incurring the time and costs associated with such advice. Rather, agencies may make a judgement on the likelihood of legal liability and decide the case under either the Legal Services Directions or the CDDA scheme, whichever is applicable, having only sought legal advice, following consultation with Comcover, or

where advice was necessary in order to determine the appropriate course of action.

Legal liability claims and insurance through Comcover

5.26 Where an agency chooses to settle a claim under the Legal Services Directions, the amount of the claim may be recovered through an agency's insurance with Comcover, thereby reducing the financial impact of the claim to any excess applying under the policy (and potential increases in premiums arising from claims against the policy).⁶¹

5.27 Comcover policy on general liability and professional indemnity requires fund members to report claims of loss caused by the execution or a breach of duty within 30 days of the agency becoming aware of the claim. Where a valid claim exists, Comcover will then indemnify the agency for the damages or judgements up to the maximum amount specified in the insurance cover, as well as any legal costs awarded against the agency.⁶²

5.28 Comcover advised that, if in the initial stages of investigating a claim that may be covered by insurance, it would be reasonable to conclude that the Commonwealth would be liable if litigated, agencies should consult fully with Comcover so that the proper procedures are followed. This allows Comcover to investigate the claim and, if necessary, seek legal advice on whether there is a likelihood of legal liability and whether the agency has an entitlement to be indemnified against the claim. To avoid a conflict of interest with the agency, Comcover may seek its own legal advice to determine whether there is a likelihood of legal liability or, where it is unsure, whether the agency is indemnified for the loss. In these circumstances, there would be no need for the agency to seek legal advice, as Comcover would only duplicate the advice. Where the legal advice obtained by Comcover indicates that there is a likelihood of legal liability and the agency is indemnified against the claim, Comcover then pays the claim and for the legal advice.

5.29 Although agencies are responsible for determining whether there is a likelihood of legal liability, Comcover advised that agencies are under no obligation to seek legal advice before referring a claim to Comcover. However, they are encouraged through the Comcover policy to report potential losses to Comcover early, that is, within 30 days. Once Comcover accepts the claim, it is responsible for managing the claim. Comcover quite often settles claims that are less than \$10 000 and, in cases of property damage, has authority to settle claims that are less than \$50 000, without legal advice.

⁶¹ It is understood that most FMA Act agencies have no excess for legal liability claims.

⁶² Comcover Policy Manual, 2002/03, p. 15.

CDDA claims

5.30 Where the agency chooses to make payment under the CDDA scheme (which is only available where there is considered to be no meaningful prospect of legal liability), a properly executed deed of release for payment under the CDDA scheme would safeguard the Commonwealth against potential claims in the future. Accordingly, having ruled out legal liability either through contact with Comcover or through internal processes, the agency may choose the CDDA scheme with or without obtaining legal advice. While a Minister (or an authorised officer) could make a decision in such circumstances for any amount (within the limits of an authorised officer's authorisation) without legal advice, it would be prudent to obtain legal advice for larger value and/or complex claims.

Suggested approach for compensation claims

5.31 Finance agreed that agencies should not seek legal advice on claims made against them as a matter of course. The Department advised that it would be including a statement to this effect in revised guidelines for the CDDA scheme. Finance also stated that the Commonwealth is, of course, obliged to first consider whether it is liable at law in relation to any claim for 'compensation'. However, Finance agreed that, in cases where there is no prima facie liability, and it is accepted that an administrative error has occurred, the matter should be settled without delay and recourse to legal opinions; although, in some cases, it would be prudent to seek advice relating to the quantum of the proposed payment.

5.32 The ANAO developed a suggested approach, which was agreed, in principle, by Finance, to assist agencies in processing compensation claims efficiently. Details of the approach are outlined at Appendix 4.

Equity in relation to other clients

5.33 The ANAO observed two cases in one agency, where the claimants had been paid a standard rate of a particular allowance when in fact they were entitled to a special (higher) rate.⁶³ In both cases, there was no mention of the special rate on the relevant allowance application forms. Accordingly, the claimants were not aware of the higher rate at the time of completing their applications. The claimants subsequently became aware of their additional entitlements, but as neither of the particular allowances could be backdated under the relevant legislation, CDDA payments were made in both instances.

5.34 Following on from the settlement of these cases, system enhancements were to be made to enable automatic payment of the special rate for new

⁶³ Each of these cases was for a different (but similar) type of allowance.

applicants and current beneficiaries from when there had been a change in circumstances. However, there was no indication that the agency had conducted a review of beneficiaries receiving the allowance prior to this change to ascertain whether other beneficiaries (who had not had a change in circumstances) should have had their entitlements compensated. The ANAO considered that, as a matter of equity, the agency should have established the full extent of the anomaly and corrected the amounts paid and payable to all affected beneficiaries. Conversely, the same approach would have been expected, where it was ascertained that particular beneficiaries had received overpayments.

Recommendation No.8

5.35 The ANAO recommends that, where a compensation payment or waiver of debt is granted to one claimant and the circumstances of the claim are likely to apply to other individuals or entities, agencies should conduct a review to establish whether any payments/waivers should be made in relation to other affected individuals or entities.

Agencies' responses

5.36 Agencies generally supported the recommendation, but indicated that any potentially affected individuals or entities may need to be considered on a case-by-case basis.

5.37 Specific comments on the recommendation were as follows:

- Finance acknowledged that such reviews could lead to more equitable outcomes and be desirable in some circumstances, but noted that the CDDA scheme is essentially permissive (in that a decision-maker is not bound to approve a payment in any particular circumstance) and that approval of act of grace payments or debt waivers (under sections 33 and 34 of the FMA Act respectively) operates on a case-by-case basis. Discretionary decisions made under these provisions do not create legal precedents per se. Therefore, while it is open to any agency to seek a compensatory payment or relief from debt on behalf of any claimant, the fact that his or her claim is similar to another, would not automatically lead to approval, as each case needs to be examined on its individual merits.
- Centrelink advised that where a service issue is identified through the consideration of a compensation claim, the appropriate area is notified to ensure that the issue is more permanently resolved as quickly as possible. Centrelink agreed that it may be appropriate to attempt to identify other potential claimants in some cases, and this may produce a more equitable outcome. However, decisions regarding the

investigation into 'classes' of potential claimants need to be considered on a case-by-case basis.

- FaCS agreed that a review may be appropriate where a systemic flaw has been identified and a risk assessment indicates that treatment as a 'class' is warranted. However, there are other circumstances that do not warrant a 'class' action as facts in individual cases vary.
- DIMIA noted that, with the exception of the refugee reintegration packages, the circumstances of each claim tend to vary significantly.
- DVA agreed with the recommendation in relation to FMA waivers. In respect of *Veterans' Entitlements Act 1986* matters, the complexity of cases can mean that decisions will need to vary on a case-by-case basis. However the principle of review can sensibly apply where group circumstances can be identified.

Measuring performance against objectives

Background

5.38 Agencies should measure the performance of their processing activities on a regular basis and review the performance of overall programs against objectives from time to time (monitoring and review processes). These processes include the establishment of performance indicators together with regular management review of performance reporting, as well as the use of periodic reviews, such as those undertaken by internal audit and external consultants. Such processes provide assurance and feedback on whether objectives are being achieved efficiently and effectively, and provide a check on the effectiveness of the internal control structure.

Audit evaluation criteria

5.39 Agencies were expected to have regular monitoring and review processes to ensure that policies and procedures were being adhered to and properly applied. Such processes would include:

- reporting against performance indicators; and
- internal auditing and other reviews.

Performance monitoring

Management reporting

5.40 Only one of the agencies audited had a formal process for monitoring, or oversighting, management reports on any of the claims. This and another agency had also ascertained the reasons for CDDA claims arising, and

reviewed practices and procedures through liaison with the relevant management, in order to reduce the likelihood of future claims. Otherwise, there was a general lack of analysis and monitoring of the activity by senior management, other than through the processing of individual cases and annual reporting in the financial statements.

5.41 The agency monitoring compensation claims did so through the use of quarterly management reports. These reports provided detail on the number of compensation claims received during the quarter; how many were finalised; the total amount paid in compensation for that quarter; the total amount waived by Finance for that quarter; and the number and amount of legal liability/privacy claims paid; as well as the number of claims processed within/outside the benchmark processing time. The reports also highlighted emerging trends being experienced across the agency's offices allowing management to implement remedial action.

5.42 One of the other agencies was in a good position to implement regular monitoring, following the implementation of a legal services database in early 2003. Consequently, the agency should be able to extract a range of management information from the database, such as: the number and value of claims lodged, rejected and granted; specific data for each type of claim; and the business lines or benefits affected by each claim. Analysis of this information should enable more robust monitoring and control of claims processing and provide opportunities for alleviating, or reducing, the number of claims in future.

5.43 The ANAO considers that agencies should implement an appropriate means of monitoring, on a periodic basis, to provide senior management with a view on performance in processing claims, and to enable any systemic weaknesses in the agency's administration to be identified. Monitoring by a specific manager, or through the monthly financial reports, may be suitable for this type of activity. The need for monitoring is particularly demonstrated in the following paragraphs on processing times, but is also relevant for public reporting and accountability purposes (see Chapter 6).

Claim processing

Time taken to process claims

5.44 The time taken to process a claim varied considerably for individual claims, but on average took significant periods for all of the agencies examined. In particular, a large proportion of CDDA claims took a long time to resolve with some claims for certain agencies taking well over a year to process. Act of grace and waiver of debt claims also took long periods to resolve in certain instances with several taking six months or more. Some of the delays were due to claimants and other parties not responding in a timely manner to queries from agencies and/or Finance.

5.45 Summary times taken for processing each type of claim, from the ANAO review of a selection of claims in each agency, are shown at Table 5.1. The average time taken for CDDA claims (293 days) was particularly long, and even after excluding the worst three cases (827, 910 and 1135 days, respectively), it was 232 days.

Table 5.1

Time taken to process the selection of act of grace and CDDA payment and waiver of debt claims that were examined by the ANAO

| Type of claim | Number of claims examined | Time taken to process a claim (number of days) | | |
|-----------------|---------------------------|--|--------|---------|
| | | Average | Lowest | Highest |
| Act of grace | 27 | 113 | 26 | 380 |
| CDDA | 78 | 293 | 23 | 1135 |
| Waivers of debt | 16 | 131 | 31 | 360 |

Source: ANAO analysis of information extracted from audited agencies' records. The selection of all claims was made on a random basis.

5.46 The ANAO considers that agencies need to make a greater effort to reduce the time taken in processing compensation payment and waiver of debt claims. A reduction in processing time should also help to reduce the cost of processing claims. Although agencies would need to examine the whole management of compensation and debt relief claims in attempting to reduce the time taken to process claims, the pro-active use of performance measures and targets is one means by which agencies may achieve shorter processing times.

Performance indicators

5.47 Two agencies had set performance indicators in relation to the time expected to process act of grace, CDDA and waiver claims. The agency using the quarterly reports had set a performance indicator of 42 days from the quarter ended 31 December 2001, having previously operated with a performance indicator of 90 days. At the time of the audit, the agency had found the new performance indicator difficult to achieve in a significant proportion of cases, but still considered it as a realistic target in most instances. The other agency's central office was considering introducing a performance indicator of 13 weeks, although some of its regional offices had a current performance indicator of six weeks.

5.48 Two agencies did not consider that performance indicators were appropriate in their particular circumstances. These circumstances included the varied nature of the individual claims and legislative requirements, the

regular need for legal advice, and the relatively low frequency of claims received.

5.49 All the agencies experienced a number of complex cases, including some involving extensive research and/or legal advice. The ANAO considered that, in these circumstances, an option for an agency would be to set a tiered system of performance indicators, with one for standard cases, and another for more complex cases, thereby maintaining realistic measures for each circumstance.

5.50 The ANAO considers that each agency should introduce a common performance indicator suitable to its level of activity. Further, the date of completion for each stage of the process could be monitored and, where there are regional offices, variations in performance across offices could be identified. Appropriate rules would need to be set in measuring performance against the performance indicator, for example, time expired while awaiting information from the claimant could be excluded, as long as there was prompt and regular follow-up by the agency.

Recommendation No.9

5.51 The ANAO recommends that, where applicable, agencies determine appropriate performance time indicators for processing discretionary compensation and debt relief claims, and monitor actual performance against those indicators.

Implementing the recommendation

5.52 Agencies should monitor performance at least quarterly. They should also consider establishing any other performance indicators and performance monitoring that may be relevant to their compensation and debt relief claim processing activities.

Agencies' responses

Finance

5.53 Finance agreed and advised that it was in the process of considering the operation of its own performance indicators with regard to act of grace and waiver claims. Finance noted that because the timeframe in which requests can be processed is often, to a large extent, dependent on claimants or their representatives providing further information, performance indicators need to be linked to the amount of time dedicated to actively working on any one case, and need to exclude periods when a claim may remain current, but be essentially inactive.

Other audited agencies

5.54 FaCS and Centrelink also agreed with the recommendation, while DVA agreed in principle and DIMIA noted it.

5.55 Specific comments on the recommendation were as follows:

- Centrelink is considering the imposition of a 13-week timeliness indicator for the completion of most customer compensation claims. This standard should be achieved by the centralisation of the work for minor claims, as it has been for major claims, where the consistency and timeliness standards are generally higher. In addition, recently, staff at the central office have examined outstanding customer compensation claims under consideration in the network, and have contacted the appropriate officer to offer their assistance to complete the matter. In most cases, this offer of assistance has led to the resolution of the matter. It is intended that this review will be conducted every two months.
- FaCS will set timeframes in the processing of claims as part of its procedures.
- CSA already uses timeliness performance indicators.
- DIMIA noted that an important aspect of processing the claims was that additional information is normally sought from the claimants. However, the Department has no control over the time taken to receive the additional information. This makes it difficult to set realistic time-related performance indicators for the processing of claims.
- DVA agreed with the recommendation in principle, but considered that the complexity of cases may require considerable processing time.

Internal audit and other independent reviews

5.56 While all agencies operated an Audit Committee and an internal audit function, none had undertaken an audit of the particular compensation and debt relief mechanisms examined by the ANAO.⁶⁴ Furthermore, no other management committees or organisational reviews had shown a direct interest in compensation and debt relief mechanisms covered by the ANAO audit.

5.57 The ANAO recognises that discretionary compensation and debt relief mechanisms represent only a small part, if any, of most FMA agencies' operations. However, in view of the overall findings detailed in this report and

⁶⁴ This comment does not apply to waivers of debt under legislation other than the FMA Act, as such waivers were not examined by the ANAO.

the discretionary nature of the compensatory mechanisms, the ANAO considers that there is scope for undertaking internal audit reviews from time to time, within any of the agencies dealing with claims under these mechanisms.

Conclusion

5.58 Although most of the audited agencies maintained a register of act of grace, CDDA and waiver claims, there was a general need for agencies to improve their recordkeeping systems and practices for both management and accountability purposes. Despite these shortcomings, the ANAO concluded that, overall, agency processes for handling act of grace and CDDA payments and waivers of debt were generally in accordance with the guidelines in Attachments B, C and D to Finance Circular 2001/01. Further, the ANAO concluded that Finance should consider providing general guidance in the guidelines on the stage of the process that agencies should seek legal advice on act of grace and CDDA claims.

5.59 In addition, the ANAO concluded that there was insufficient monitoring of act of grace, CDDA and waiver claims by management. This was particularly evidenced by the slow processing times across all agencies, as well as limited analysis of results. Accordingly, the ANAO considered that there was a need to set performance indicators and to report against those indicators on a periodic basis. In particular, a performance time indicator should be established and reported against, for the processing of claims. The ANAO also concluded that there was scope for periodic internal audit coverage of compensation and debt relief activity.

6. Public Reporting and Accountability

This chapter examines the reporting of compensatory payments and waivers of debt in financial statements by individual agencies and globally by Finance, and other public reporting and accountability aspects.

Introduction

Background

Financial reporting

6.1 FMA Act agencies are required to prepare financial statements in accordance with the FMA Act and the FMOs for the relevant year. The audited financial statements are required to be reported in the agency's annual report, which is required to be tabled in Parliament. Both the financial statements and annual report are principal means by which the chief executive of an agency discharges his/her accountability to the Parliament and the public.

6.2 The FMO policy for the reporting of act of grace and CDDA payments and waivers of debt in the financial statements is based on the principle that 'the required disclosures are material by nature.' This principle featured as the first clause of the relevant FMO policy for each of the reporting years covered by the audit.⁶⁵

6.3 Australian Accounting Standard, AAS 5 *Materiality* (and its Australian Accounting Standards Board equivalent, AASB 1031 *Materiality*), provides a definition of 'material' for the purposes of financial reporting. It states that:

Information is material if its omission, misstatement or non-disclosure has the potential to adversely affect: (a) decisions about the allocation of scarce resources made by users of the financial report; or (b) the discharge of accountability by the management or governing body of the entity.⁶⁶

6.4 While the concept of materiality is often determined by quantitative means, it can also be determined by the nature of the items, that is, irrespective of value.

Reporting by Finance

6.5 In addition to the reporting in agency financial statements, Finance reports its performance in processing act of grace and waiver of debt claims

⁶⁵ The 2002–03 FMO reference was clause 7A.1.

⁶⁶ Institute of Chartered Accountants in Australia and CPA Australia, AAS 5 *Materiality*, and Australian Accounting Standards Board, AASB 1031 *Materiality*, paragraph 4.1, September 1995.

under the FMA Act, as part of its annual reporting on the relevant outcome in the Finance annual report. The combined reporting by Finance and individual agencies represents the principal means of accountability for act of grace and waiver decisions under the Act by the Parliamentary Secretary to the Minister for Finance and Administration, as well as the accountability for the accuracy and completeness of the required information by the respective chief executives.

Administrative review

6.6 Certain claims for compensation, for example, common law claims in negligence and claims based in contract, may involve FMA Act considerations. However, their determination by an agency is not a decision made under an enactment, and such decisions are therefore not subject to review under the *Administrative Decisions (Judicial Review) Act 1997*. Similarly, a decision by a Court to not find for a claimant seeking damages is not a decision subject to review under that Act. By contrast, act of grace and waiver of debt claims arise specifically under the FMA and PS Acts and do involve decisions made under those Acts which are the subject of review under the *Administrative Decisions (Judicial Review) Act 1997*. On the other hand, CDDA decisions are not subject to such review, as they are not made under an enactment. The avenue for reviews of CDDA decisions, given the discretionary nature of the decision and that no entitlements are involved, is through representation to the responsible Minister and/or the Commonwealth Ombudsman.

Audit evaluation criteria

6.7 The ANAO assessed whether the selected agencies had reported accurately and completely in accordance with the financial statement reporting requirements.⁶⁷ The ANAO used the Finance data to assess the accuracy and completeness of the reporting by all FMA Act agencies.

6.8 In addition, the ANAO assessed the clarity of the requirements of the relevant FMO policy for 2002–03⁶⁸ and whether they provided sufficient accountability for all of the relevant mechanisms of compensation and debt relief. Finally, the ANAO assessed whether there were any other avenues for public reporting.

⁶⁷ Although the review of accuracy and completeness was only undertaken for the years 2000–01 and 2001–02, presentation issues were checked for 2002–03.

⁶⁸ FMOs 2002–03, Policy 7A.

Reporting in agency financial statements

Reporting of act of grace and CDDA payments, and waiver of debts

2000–01 and 2001–02 reporting

6.9 The policy requirements of the 2000–01 and 2001–02 FMOs simply required reporting of the number and aggregate amount of act of grace and CDDA payments and waivers of debt. Waivers were required to be separated into those under the FMA Act, and those under other legislation, which was to be specified.

6.10 The ANAO found incomplete and inaccurate information, and issues of non-compliance, in the reporting of act of grace and CDDA payments and waivers of debt by the selected agencies. Two of the audited agencies failed to report all act of grace and waiver of debt information for at least one year, while one agency had at least two act of grace payments reported as CDDA payments. In two other agencies, the ANAO could not fully verify the completeness of the reporting due to incomplete records for one year or for both years. Further, one agency did not disclose the numbers of payments and waivers for 2001–02.

6.11 The ANAO considered that, in general, the reporting breakdowns had occurred because most of the audited agencies had reported information from their general ledger without reconciling it with supporting records, such as a claims register.⁶⁹ Further, there were no reconciliations between agency data and Finance records.

Recommendation No.10

6.12 The ANAO recommends that agencies:

- undertake reconciliations between the supporting documentation on claims for compensation payments and debt relief (best summarised in a claims register) and the general ledger on a periodic basis, including at 30 June each year for annual reporting purposes; and
- reconcile their records with any related annual information provided by the Department of Finance and Administration.

Agencies' responses

Finance

6.13 Finance has already implemented this recommendation on the basis that such reconciliations are the best means of ensuring implementation of all

⁶⁹ The use of a claims register was suggested in Chapter 5.

decisions has been effected, and that payments and waivers are reported in agencies' annual financial statements. To this end, Finance initiated procedures at the end of the 2002–03 financial year, whereby each relevant agency was provided with a list of all act of grace and waiver claims that had been approved with respect to that agency during the financial year. Subsequently, agencies were able to reconcile this information with their own records, and reported any discrepancies to Finance. Agencies were provided with a further bi-annual report for the period from July—December 2003 in January 2004.

Other audited agencies

6.14 Three of the other agencies also agreed with the recommendation, while Centrelink agreed in principle.

6.15 Specific comments on the recommendation were as follows:

- Centrelink currently reconciles the act of grace payments made on behalf of FaCS annually as part of the end of financial year processes. Consideration will be given to undertaking a quarterly reconciliation. In addition, all CDDA payments made by Centrelink are now reconciled in the Legal Services Database, enabling more regular reconciliations to be undertaken from this financial year.
- FaCS will reconcile its claims register and general ledger to the information provided by Finance. Discussions need to be held with Finance to ensure all claims relating to the portfolio are included in its information.
- DIMIA will carry out reconciliations on a quarterly basis instead of the current practice of annual reconciliations.
- DVA will develop procedures to reconcile the register to the general ledger, in conjunction with developing and implementing a claims register.

2002–03 disclosure of periodical payments

6.16 The act of grace power provides for the authorisation of periodical payments over a period specified in the authorisation (paragraph 33(1)(b) of the FMA Act refers). In line with this provision, the FMO policy for 2002–03 introduced a new requirement for agencies to disclose the amount of periodic payments outstanding at the end of the year, as well as the amounts paid during the year.⁷⁰ Finance advised that, under this requirement, agencies now needed to report the outstanding commitment at year-end.

⁷⁰ FMOs 2002–03, sub-clause 7A.2(a) refers.

6.17 Three of the audited agencies made periodical act of grace payments during 2002–03. However, none of the three agencies reported the amount outstanding at the end of the year in accordance with the new FMO requirement for that year. Further, only one of the agencies indicated that it had made periodic payments.

6.18 While the relevant agencies had not adopted the new requirement at all, the ANAO considers that the FMO requirement to report the ‘number of payments’ could be misinterpreted. For example, where a periodical payment is paid fortnightly, it could be interpreted as 26 payments, instead of as one case involving periodical payments.

6.19 In addition, the ANAO considers that there would be some merit in distinguishing between periodic act of grace payments (i.e. pensions) and one-off payments or between ongoing periodic payments approved in previous years and new payments (periodic or one-off) approved in the current year. Either presentation would be of particular benefit to readers of the financial statements of FaCS and Finance (Comsuper payments), which together account for almost all of the act-of-grace payments made on a periodic basis.

6.20 Finance agreed to consider enhancing the explanatory notes in the relevant FMO policy for 2003–04 to provide additional guidance on the appropriate presentation of periodical payments made under the act of grace provisions. The ANAO can also provide assistance to agencies by providing appropriate examples in its future AMODEL better practice guides, which illustrate the required FMO presentations and disclosures for the nominal reporting entity.⁷¹

Issues common to all three years

Administered or departmental items

6.21 The ANAO also found that most of the audited agencies, and most other agencies reporting compensation payments and waivers of debt, did not indicate whether the payments or waivers were administered or departmental transactions, in accordance with the general requirements of the FMOs to separately disclose and distinguish between them.⁷² While Finance revised the

⁷¹ The ANAO produces an annual better practice guide for use by FMA Act agencies, titled AMODEL Agency—Illustrative Financial Statements for the Year Ended 30 June 200X. A similar guide is also issued for non-commercial reporting entities. *AMODEL Agency Illustrative Financial Statements for the Year Ended 30 June 2003* did not illustrate the disclosure of periodical act of grace payments.

⁷² Under the FMOs, assets and liabilities, and revenues and expenses, that are ‘controlled’ by an agency, are classified as ‘departmental’ or ‘agency’ items, while those that are ‘oversighted or managed on behalf of the Government’, are classified as ‘administered’ items. This requirement is based on Australian Accounting Standard, AAS 29 *Financial Reporting by Government Departments*, paragraphs 6.3.11 and 6.3.12 and Statement of Accounting Concepts, SAC 4, *Definition and Recognition of the Elements of Financial Statements*, paragraphs 24 to 28. The 2002–03 reference was FMO policy 2B.

FMO policy for 2002–03 to include a clause that the act of grace and CDDA payments and waiver of debt disclosures applied to both administered and departmental items, most agencies continued to report without indicating whether the payments or waivers were administered or departmental. Subsequently, Finance has included further clarification of this requirement in the relevant draft FMO policy for 2003–04.

Accrual or cash reporting

6.22 A further issue arising out of the audit was whether the information was to be reported on an accrual or cash basis. This principally arose from the use of the word ‘payments’, rather than ‘expenses’ for the reporting of authorisations under the act of grace and CDDA scheme provisions. Finance advised that this should not be an issue because the Commonwealth reports under an accrual accounting framework, unless otherwise specified. However, the ANAO considers that there would be some benefit in clarifying the requirements in the relevant FMO for 2003–04.

Ex gratia payments and APS employment payments in special circumstances

6.23 While ex gratia payments and APS employment payments in special circumstances are not currently required by the FMOs to be reported in the notes of agency financial statements, the ANAO examined whether any payments had actually been specifically reported.

Ex gratia payments

6.24 Only Centrelink, among the audited agencies, made ex gratia payments during the period covered by the audit. These payments, which were mostly on behalf of FaCS, related mainly to volunteer fire-fighters for lost income while fighting bushfires in New South Wales between 24 December 2001 and 16 January 2002 (\$1.627 million in 2001–02), and to persons affected by the Bali bombing in October 2002 (\$1.62m during 2002–03). The payments were not separately disclosed in the FaCS financial statements but comprised part of the item ‘Personal Benefits Direct, Other’, which was reported in the administered expenses note as \$279.698 million (2001–02) and \$305.796 million (2002–03).⁷³ However, details of the amounts paid were reported elsewhere in the respective annual reports. Centrelink advised that further payments in connection with the Bali bombing would continue during 2003–04.

6.25 The ANAO also observed that one agency not included in the audit, the Australian Federal Police (AFP), had reported ex gratia payments alongside act

⁷³ FaCS 2001–02 financial statements, Note 2 and 2002–03 financial statements, Note 20, respectively.

of grace payments in its note to the financial statements in 2000–01. This involved 76 payments to AFP East Timor Peacekeepers totalling \$1.102m.⁷⁴

6.26 The AFP advised that, for completeness purposes, ex gratia payments relating to East Timor Peacekeepers were also made in relation to other financial years, as reflected in the following figures: \$113 818 (1999–2000); \$493 250 (2001–02); and \$6736 (2002–03).⁷⁵ The AFP further advised that, although the FMOs for the relevant years did not require disclosure of these payments in agency financial statements, they were disclosed in 2000–01 on the basis of their overall materiality in that year.

APS employment payments in special circumstances

6.27 Only two of the audited agencies made any APS employment payments in special circumstances during the period under review. One agency made one payment of approximately \$900 for legal expenses relating to an employment matter during 2002–03, while the other agency made payments to three persons totalling approximately \$59 000 for the settlement of employment-related legal matters, with one payment being made in each of the three years. These payments were included in the financial statements of each agency as part of ‘operating expenses’ without being separately identified.

6.28 Furthermore, ANAO review of the notes to the financial statements of all FMA Act agencies for the years 2000–01 to 2002–03 did not reveal any separately identified disclosures of such payments. In addition, the APS Commission was only aware of enquiries from agencies regarding the making of APS employment payments since the introduction of the new PS Act in December 1999. As a result, the Commission was unable to provide any estimate of the quantum of such payments.

Improving accountability

6.29 In view of the similarities between ex gratia payments and APS employment payments in special circumstances, and act of grace payments, the ANAO considers that it would be appropriate to report these, and any other similar types of discretionary transactions, in the financial statements, in addition to the discretionary compensation payments already reported. Finance should consider this matter in conjunction with the other relevant policy agencies, namely PM&C (ex gratia) and the APS Commission (special circumstances relating to APS employment). The additional items could be

⁷⁴ The AFP advised that the full amount of ex gratia payments for 2000–01 should have been \$1 205 608. The extra \$103 816 is attributed to payments made post the reporting date, but relevant to the financial year 2000–01.

⁷⁵ Total payments under the program over the four financial years were \$1 819 412.

included in the same note, along with those items already required by the FMOs, or in separate notes, whichever is appropriate.

Recommendation No.11

6.30 The ANAO recommends that the Department of Finance and Administration assess whether ex gratia payments and APS employment payments in special circumstances should also be reported in the notes to agencies' financial statements for greater transparency.

Agencies' responses

Finance

6.31 Agreed. Finance initially advised that, as part of assessing whether the FMOs for 2004 and onwards should include mandatory reporting requirements for ex gratia and any other compensatory payments, the Department would liaise with PM&C and other relevant entities. Finance subsequently advised that the FMOs for 2004 and onwards included new sub-clauses requiring ex gratia payments and APS employment payments in special circumstances to be reported in the same note to the financial statements as act of grace payments.⁷⁶

PM&C

6.32 PM&C supported the recommendation as its implementation would improve the public transparency of ex gratia payments and APS employment payments.

APS Commission

6.33 The APS Commission believed it would be appropriate for APS employment payments in special circumstances made under section 73 of the PS Act to be reported in the notes to agencies' financial statements.

Other

6.34 The AFP agreed, in principle, with the recommendation.

Debts written-off and total write-down of financial assets

6.35 Although, as indicated in Chapter 1, debt write-off was not covered during the audit, the ANAO noted that the amount of debt written-off annually by agencies was far more significant than the amount waived by the Parliamentary Secretary to the Minister for Finance and Administration and

⁷⁶ FMOs for reporting periods ending on or after 30 June 2004, sub-clause 7A.2(d) – ex gratia payments, and sub-clause 7A.2(e) – payments under section 73 of the *Public Service Act 1999*. The FMOs for 2004 and onwards were approved by the Minister for Finance and Administration on 9 March 2004, and gazetted on 17 March 2004.

other authorised persons. Together, therefore, these amounts result in a significant diminution of the Commonwealth's net asset position.

6.36 Under present arrangements, write-offs and waivers are shown in agencies' financial statements as a combined amount under the expense item 'Write Down of Financial Assets'. The annual Consolidated Financial Statements for the Australian Government provide the aggregated information, at a whole-of-government level, on the write-down of financial assets. For the last three financial years, the amounts written-down as a result of write-offs and waivers were \$2.1 billion (2000–01), \$2.5 billion (2001–02) and \$2.9 billion (2002–03).⁷⁷ Waivers included in these amounts represented approximately five per cent of the three-year total.

6.37 The majority of the write-down for each year relates to the write-off of taxes due and debts incurred from student loans and the Higher Education Contribution Scheme (\$2.1 billion in 2002–03). The ANAO considers that, in the interests of greater transparency, there would be value in increasing the level of note disclosure in all agencies' financial statements to detail the other types of debts being written down.

Reporting of act of grace payments and waivers of debt by Finance

6.38 Finance has reported on act of grace payments and waivers of debt in its annual report up to, and including, the year ended 30 June 2003. Up until the year ended 30 June 2000, the annual report disclosed the total number and total value of claims for cases considered as well as for cases approved. From 2000–01, only the total number and total value of cases considered has been disclosed. While this provides a degree of accountability in relation to the total claims made, it omits the more important accountability aspects relating to successful claims, especially the financial impact of those claims. However, as individual agencies are required to report the approved cases, there is a degree of transparency through those annual reports, but no consolidated report of approved cases.⁷⁸

6.39 Finance advised that the data represented in its annual report is only intended to give a representation of its workload.

⁷⁷ Australian Government Consolidated Financial Statements for the financial years ended 30 June 2001, 2002 and 2003, Notes to the Financial Statements, 'Net write-down and impairment of assets', Line item, 'Total receivables – bad and doubtful debts', Note 16, p. 92 (2000–01), Note 15, p. 107 (2001–02) and Note 15, p. 116 (2002–03).

⁷⁸ This aggregated information is not reported in summary form in the notes to the Australian Government's Consolidated Financial Statements, as the consolidated financial statements are not prepared in accordance with the FMOs. However, as indicated earlier, the total amount waived represents part of the total write-down of financial assets in the Consolidated Financial Statements, although the amount waived is not separately identified.

Reconciliation of Finance and agency data

6.40 At the time of commencing the audit, there had been no reconciliation of the Finance data of approved cases with that reported in the financial statements of the agencies administering the payments and waivers. Finance advised that its claims database was being redeveloped to assist with this reconciliation process.

6.41 Tables 6.1 and 6.2 show the numbers and amounts of claims approved by Finance against those reported in separate agency annual reports for act of grace payments and waivers of debts respectively for the years 2000–01 and 2001–02⁷⁹. The Finance figures do not take into account on-going pension payments for act of grace approvals that would have been provided in past years. Also, there would be claims that were approved by Finance in one financial year but not processed by agencies until after 30 June of that year.

Table 6.1

Act of grace payments—comparison of numbers and amounts approved by Finance versus that reported by agencies for 2000–01 and 2001–02

| | 2000–01 | | | 2001–02 | | |
|---------------|---------------------|--------------------------|-------------|---------------------|--------------------------|-----------|
| | Approved by Finance | Reported by FMA agencies | Variation | Approved by Finance | Reported by FMA agencies | Variation |
| Number | 66 | 121 | 55 | 42 | 131 | 89 |
| Amount | \$8,566,323 | \$8,217,373 | (\$348,950) | \$986,284 | \$1,100,049 | \$113,765 |

Source: Extracted from the Finance Claims Details Report for July 2000-June 2002 and from agency annual reports.

Table 6.2

Waiver of debts#—comparison of numbers and amounts approved by Finance versus that reported by agencies for 2000–01 and 2001–02

| | 2000–01 | | | 2001–02 | | |
|---------------|---------------------|--------------------------|---------------|---------------------|--------------------------|-------------|
| | Approved by Finance | Reported by FMA agencies | Variation | Approved by Finance | Reported by FMA agencies | Variation |
| Number | 32 | 20 | (12) | 142* | 43** | (99) |
| Amount | \$53,528,073 | \$50,139,661 | (\$3,388,412) | \$56,992,173 | \$63,911,890 | \$6,919,717 |

Waiver of debts under the FMA Act only.

* This figure includes 103 applications for waiver of certain fees of one agency, which were decided as one claim but not reported by the relevant agency.

** This figure excludes the 103 applications for waiver of the fees referred to in the previous note.

Source: Extracted from the Finance Claims Details Report for July 2000-June 2002 and from agency annual reports.

⁷⁹ As indicated earlier, the audit did not cover the whole 2002–03 year.

6.42 There are some large individual discrepancies between the two sets of data, for example:

- \$3.07 million of interest waived by the Minister for Finance and Administration during 2000–01 relating to a debt of \$53.07 million owing by ComLand Limited (a Commonwealth company) was not reported by Finance in its financial statements for 2000–01;⁸⁰
- \$56.6 million in loans waived by the Parliamentary Secretary to the Minister for Finance and Administration during June 2002 in relation to the corporatisation of the Snowy Mountains Hydro-electric Authority (SMHEA) was reported by the Department of Industry, Tourism and Resources (DITR) in its financial statements for 2001–02 as \$63.682 million. The main reason for this discrepancy was subsequently explained by DITR as being the use of differing accounting treatments by SMHEA (approval documentation) and DITR (reporting documentation) for the classification of certain interest amounts on the Commonwealth loans provided to SMHEA to finance the construction of the Snowy Mountains Hydro-electric Scheme between 1948 and 1974. These interest amounts were accumulated for the periods between the actual commencement of construction of each stage of the Scheme and when that stage entered production. In accordance with the relevant provisions in its enabling legislation, SMHEA classified the repayments of the interest amounts accumulated during construction as ‘repayments of capital’, on the same basis as the principal advanced to fund construction. DITR, however, upon taking Commonwealth responsibility for administering the loans in 1998–99, classified the repayment of such amounts from that time as ‘repayments of interest’. As a result, in relation to the amount to be waived, DITR was reporting a higher capital amount than SMHEA. While the DITR accounting treatment was not in accordance with SMHEA’s enabling legislation, the amount of debt actually waived by the Commonwealth, when taking into consideration the variance in accounting treatment, was in line with the waiver approved by the Parliamentary Secretary to the Minister for Finance and Administration.

6.43 While the ANAO recognised that individual agencies are responsible for ensuring that they correctly and completely report act of grace and CDDA payments and waivers of debt in their annual financial statements, the large

⁸⁰ \$50 million of the debt, representing the principal of the amount outstanding, was reported by Finance as the amount waived (refer 2000–01 financial statements, Note 28). This portion of the debt was waived by the Commonwealth in exchange for \$50 million in shares in ComLand (refer 2000–01 financial statements, Notes 20c and 28).

differences between the number of claims and the total amount of claims indicate that there is a need for agency reporting to be improved. In addition, there was a risk that act of grace and waiver claims may have been approved by Finance, in say June of any year, but not processed in the agencies' books of account and therefore not recorded in their general ledgers as at 30 June of that year.

6.44 The ANAO suggested that one means of providing greater assurance was for Finance to reconcile its records with individual agencies prior to the release of agency financial statements or on a more frequent basis, eg quarterly or half-yearly.

6.45 During the audit, Finance sent a summary report for the 2002–03 year to each relevant agency and the ANAO, showing each agency's approved act of grace and waiver claims. This should have assisted the relevant agencies in correctly reporting approved payments and waivers in 2002–03. Finance also indicated that it planned to provide these reports on a bi-annual basis.

6.46 Details of act of grace and CDDA payments and waiver of debts for all agencies for the financial years 2000–01 to 2002–03 are shown at Appendix 2.

Other public reporting and accountability

6.47 There are two other avenues for public reporting and accountability of information on compensation payments and waivers of debt, namely in the Budget Papers and the Commonwealth Ombudsman's annual reports.

Budget papers

6.48 Reporting in the Budget papers is generally confined to the estimates relating to any of the compensation payments as shown in the Portfolio Budget Statements for the relevant agencies. However, the ANAO noted that, for the 2003–04 Budget, a significant potential CDDA claim was reported as a 'Quantifiable Contingent Liability' in Budget Paper No.1. The commentary in relation to this claim was as follows:⁸¹

The Department of Agriculture, Fisheries and Forestry Australia is considering a claim made under 'The Scheme for Compensation for Detriment Caused by Defective Administration' (CDDA). CDDA is an administrative scheme established in 1995 to enable Commonwealth agencies to compensate persons who have been adversely affected by the defective action or inaction of agencies but who have no other avenues to seek redress. The claim, for an

⁸¹ Budget 2003–04, Budget Paper No.1, Statement 11: Statement of Risks, Contingent Liabilities—Quantifiable, Agriculture, Fisheries and Forestry, p. 11–7. The same comment was made in the 2002–03 Budget Paper No.1, Statement 9, p. 9–6.

amount of \$68.1 million, relates to a decision in 1985–86 by the then Export Inspection Service to ban the export of sultana table grapes.

6.49 At the date of preparation of this report, the claim was unquantifiable as the Department of Agriculture, Fisheries and Forestry was still in negotiation with the claimant for settlement.

Commonwealth Ombudsman’s annual reports

6.50 The Commonwealth Ombudsman, among other things, investigates complaints against agencies in relation to compensation payments and waivers of debt and reports matters concerning these complaints in his annual report each year. Although the Ombudsman’s reports do not provide any detailed statistics in relation to the number of compensation and debt relief cases referred to his office relating to each agency, they do provide general commentary regarding the performance of individual agencies and cite case studies to illustrate the findings.⁸²

6.51 As noted earlier, the Ombudsman is the most accessible recourse for a claimant that is dissatisfied with a CDDA decision. Furthermore, although the Ombudsman cannot investigate a decision made under an enactment, such as an act of grace or waiver decision, he may investigate the advice given to the decision-maker.

6.52 Two of the agencies audited [Centrelink and the CSA] were reported on, in respect to claims for compensation, in each of the Ombudsman’s reports for 2000–01 to 2002–03. In relation to such reporting, the Commonwealth Ombudsman advised that, given the number and nature of interactions between these agencies and members of the public, it was not surprising that they should produce discussions of compensation issues in the Ombudsman’s annual reports.

Conclusion

6.53 The ANAO concluded that the reporting of act of grace and CDDA payments and waivers of debt in agency financial statements was not always complete and accurate. This mainly resulted from agencies reporting from general ledger information without reconciling the information with supporting records. Some misinterpretation of the FMO requirements by agencies, together with the approval of all act of grace payments and most agencies’ waivers of debt under the FMA Act being conducted in the Finance Portfolio, also had some impact on the quality of the reporting.

⁸² The Ombudsman’s annual reports do provide statistics by agency relating to all complaints received, but not by the category of complaint.

6.54 The ANAO considered that improvements in agency reporting could be achieved by:

- agencies reconciling general ledger records with supporting documentation;
- Finance reporting the total approved numbers and amounts of act of grace and waiver of debt claims in its annual report and reconciling its data with agency data at least at year end; and
- minor enhancement of the explanatory notes of the FMO reporting requirements, together with examples of presentation in the ANAO's AMODEL better practice guides.

6.55 In addition, the ANAO concluded that there was scope for increasing the level of note disclosure in agencies' financial statements to detail the types of debts being written down, as a matter of greater transparency and, therefore, accountability.

Canberra ACT
24 March 2004



Oliver Winder
Acting Auditor General

Appendices

Appendix 1: Examples of act of grace and CDDA payments, and waiver of debt

Disclaimer: Due to the sensitive and private nature of these cases, the exact details of the case have been omitted to ensure the privacy of the claimants' details.

Act of grace

Mr X and his family took up residence in Australia after migrating from overseas and they shipped all their belongings, including their car to Australia. They had to pay customs duty and goods and services tax (GST) of just over \$1000 each on the importation of the vehicle. Mr X was unable to claim input tax credits on the GST component as he was not carrying on a business in Australia and he was not registered for GST.

When the company he worked for collapsed soon after arriving in Australia and he was made redundant, he and his family returned to their home country. Before leaving, Mr X did not get the opportunity to register his car and thus use it in Australia. The customs duty was refunded by the Australian Customs Service under the *Customs Regulations 1926* as he had not used the vehicle. The Australian Taxation Office advised Mr X that there was no provision under the GST legislation for a refund of the GST paid on his vehicle.

The Department of Finance and Administration received a request from Mr X for an act of grace payment in respect of the GST paid. The Department concluded that, as Mr X had been the victim of circumstances beyond his control and as customs duty had been refunded by Customs, the Commonwealth had a moral responsibility to make an act of grace payment to Mr X to compensate him for the GST paid on the importation of the vehicle. The delegate approved the payment on this basis.

CDDA

Ms Y had her family allowance reduced and rent assistance cancelled by Centrelink when she advised that she was going overseas for a short period of time. Centrelink incorrectly coded the overseas absence that resulted in the variation of these payments.

Centrelink did not restore Ms Y's entitlements when she returned to Australia. Ms Y did have the right to appeal against this decision. However, she did not do so before the 13 weeks allowed for such appeals. She then sought compensation for defective administration for lost family allowance and rent assistance to which she would have been otherwise entitled for the four weeks

that she was overseas. The CDDA claim succeeded, as Centrelink had not complied with existing administrative procedures. Ms Y received the compensation requested of just over \$3000.

Waiver of debt

An overseas national came to Australia on an overseas student (temporary) visa in 2001. One of the conditions of his visa was that he should not engage in work in Australia. He was later found to be working in a friend's restaurant by an immigration official and taken into detention at an Immigration Detention Centre and charged detention fees of approximately \$400. He later stated that he was just 'helping out' the owner who was a friend of his. He appealed to the Migration Review Tribunal and stated that he had never received any money while working for a few days at his friend's restaurant. Based on other evidence provided to the Tribunal, a request for waiver of just over \$400 of detention debts was made and later approved by the Department of Finance and Administration.

Appendix 2: Agency-by-agency reporting of act of grace and CDDA payments and waivers of debt in financial statements

The numbers and aggregate amounts of act of grace payments, CDDA payments and waivers of debt, as reported in agency financial statements over the financial years 2000–01 to 2002–03, are shown in Tables A2.1 to A2.4 that follow. All amounts are reported in absolute values, as required by the relevant Finance Minister's Orders for each of the years; that is, there is no rounding of the amounts.

The tables cover all FMA Act agencies and any reporting entities operating under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) that had made use of the FMA Act provisions for act of grace payments and waivers of debt during the three-year period. The latter comprises the Australian Securities and Investments Commission and the Health Insurance Commission. Accordingly, the tables do not include any waivers made by other CAC Act reporting entities under the provisions of other legislation. Further, FMA Act agencies not included in the tables did not report any compensation payments or waivers of debt in the notes to their financial statements during the three-year period.

Waivers of debt are divided between the FMA Act (Table A2.3) and other legislation (Table A2.4).

All the information in the tables in this Appendix has been sourced from agency financial statements in their annual reports. This has been confirmed with the respective agencies.

Table A2.1

Act of grace payments—All agencies, financial years 2000–01 to 2002–03

| Agency | 2000–01 | | 2001–02 | | 2002–03 | |
|--|------------|------------------|------------|------------------|------------|------------------|
| | Number | \$ | Number | \$ | Number | \$ |
| Attorney-General's Department | 3 | 6,862,000 | 0 | 0 | 0 | 0 |
| Australian Customs Service | * | 29,231 | * | 10,478 | 0 | 0 |
| Australian Federal Police | 1 | 10,000 | 0 | 0 | 0 | 0 |
| Australian Taxation Office | 0 | 0 | 3 | 19,125 | 1 | 1,099 |
| Department of Agriculture, Fisheries and Forestry | 1 | 105,154 | 0 | 0 | 3 | 79,098 |
| Department of Defence | 4 | 169,636 | 0 | 0 | 0 | 0 |
| Department of Education, Science and Training | 1 | 1,911 | 0 | 0 | 0 | 0 |
| Department of Employment and Workplace Relations** | 0 | 0 | 0 | 0 | 1 | 5,750 |
| Department of Family and Community Services | 25 | 137,161 | 25 | 160,955 | 25 | 144,420 |
| Department of Finance and Administration | 77 | 760,078 | 67 | 640,009 | 81 | 856,741 |
| Department of Health and Ageing | 1 | 3,099 | 18 | 134,507 | 4 | 56,899 |
| Department of Immigration and Multicultural and Indigenous Affairs | 0 | 0 | 1 | 720 | 0 | 0 |
| Department of the House of Representatives | 0 | 0 | 3 | 1,354 | 0 | 0 |
| Department of the Treasury | 0 | 0 | 1 | 7,000 | 0 | 0 |
| Department of Transport and Regional Services | 1 | 100,000 | 1 | 30,774 | 1 | 10,000 |
| Department of Veterans' Affairs | 7 | 39,103 | 7 | 77,678 | 4 | 56,085 |
| Health Insurance Commission** | 0 | 0 | 5 | 17,449 | 1 | 112,429 |
| Total (for 17 agencies) | 121 | 8,217,373 | 131 | 1,100,049 | 121 | 1,322,521 |

* Number not disclosed.

** Numbers not disclosed in financial statements, but confirmed with agency.

Source: Agency financial statements.

Table A2.2

CDDA payments—All agencies, financial years 2000–01 to 2002–03

| Agency | 2000-01 | | 2001-02 | | 2002-03 | |
|---|--------------|------------------|------------|------------------|------------|------------------|
| | Number | \$ | Number | \$ | Number | \$ |
| Attorney-General's Department | 1 | 29,695 | 0 | 0 | 0 | 0 |
| Australian Customs Service | 1 | 5,914 | 0 | 0 | 0 | 0 |
| Australian Federal Police | 0 | 0 | 1 | 4,500 | 0 | 0 |
| Australian Taxation Office | 1,395 | 429,404 | 180 | 90,904 | 277 | 319,466 |
| Centrelink | 223 | 251,500 | 255 | 626,064 | 277 | 659,052 |
| Department of Defence | 22 | 237,282 | 44 | 343,234 | 36 | 287,983 |
| Department of Family and Community Services | 8 | 31,516 | 39 | 48,415 | 28 | 58,624 |
| Department of Foreign Affairs and Trade | 5 | 4,781 | 5 | 2,578 | 0 | 0 |
| Department of Health and Ageing | 0 | 0 | 0 | 0 | 1 | 40,000 |
| Department of Immigration and Multicultural and Indigenous Affairs* | 8 | 3,804 | 5 | 5,281 | 3 | 7,146 |
| Department of the Environment and Heritage | 0 | 0 | 0 | 0 | 1 | 577 |
| Department of Veterans' Affairs | 4 | 13,473 | 9 | 50,344 | 7 | 119,160 |
| Family Court of Australia | 0 | 0 | 1 | 77 | 2 | 1,410 |
| IP Australia | 0 | 0 | 1 | 80,168 | 0 | 0 |
| Total (for 14 agencies) | 1,667 | 1,007,369 | 540 | 1,251,565 | 632 | 1,493,418 |

* Numbers not disclosed for 2001–02 and 2002–03, but confirmed with agency.

Source: Agency financial statements.

Table A2.3
Waivers of debt under the FMA Act—All agencies, financial years 2000–01 to 2002–03

| Agency | 2000-01 | | 2001-02 | | 2002-03 | | Notes |
|--|---------|------------|---------|------------|---------|-----------|--|
| | Number | \$ | Number | \$ | Number | \$ | |
| Australian Customs Service | 0 | 0 | 0 | 0 | 1 | 7,871 | |
| Australian Office of Financial Management | 2 | 12 | 2 | 12 | 3 | 96 | |
| Australian Taxation Office | 4 | 17,459 | 8 | 152,183 | 1 | 3,615 | See also Table A2.4 |
| Centrelink | 0 | 0 | 0 | 0 | 4 | 15,113 | |
| Department of Defence | 6 | 19,293 | 3 | 9,562 | 0 | 0 | FMA and non-FMA waivers not separated. All assumed to be FMA waivers |
| Department of Education, Science and Training | 0 | 0 | 3 | 8,525 | 11 | 62,778 | See also Table A2.4 |
| Department of Employment and Workplace Relations* | 0 | 0 | 0 | 0 | 1 | 1,012 | |
| Department of Family and Community Services | 0 | 0 | 1 | 1,508 | 9 | 19,341 | See also Table A2.4 |
| Department of Finance and Administration# | 1 | 50,000,000 | 0 | 0 | 1 | 9,937 | |
| Department of Immigration and Multicultural and Indigenous Affairs** | 1 | 32,261 | 3 | 37,244 | 98 | 1,437,557 | |
| Department of Industry, Tourism and Resources | 0 | 0 | 1 | 63,682,355 | 0 | 0 | |
| Department of the Parliamentary Library* | 2 | 257 | 0 | 0 | 0 | 0 | |
| Health Insurance Commission* | 4 | 70,379 | 2 | 501 | 2 | 2,216 | See also Table A2.4 |

| Agency | 2000-01 | | 2001-02 | | 2002-03 | | Notes |
|--|---------------|-------------------|---------------|-------------------|---------------|------------------|---------------------------|
| | Number | \$ | Number | \$ | Number | \$ | |
| Human Rights and Equal Opportunity Commission | 0 | 0 | 0 | 0 | 1 | 59,958 | |
| Refugee Review Tribunal | 0 | 0 | 20 | 20,000 | 35 | 35,000 | |
| Sub-total (for 15 agencies) | 20 | 50,139,661 | 43 | 63,911,890 | 167 | 1,654,494 | Reconciles with Table 1.3 |
| Australian Securities and Investments Commission | 17,277 | 2,967,946 | 20,328 | 3,481,346 | 22,491 | 4,671,004 | Reconciles with Table 1.4 |
| Total (for 16 agencies) | 17,297 | 53,107,607 | 20,371 | 67,393,236 | 22,658 | 6,325,498 | |

* Numbers not disclosed in financial statements, but confirmed with agency.

** Number for 2002-03 adjusted upward after consultation with agency, as reported number was unclear.

2000-01 should have been \$53.070 million (refer paragraph 6.42).

Source: Agency financial statements.

Table A2.4

Waivers of debt under legislation other than the FMA Act—All agencies, financial years 2000–01 to 2002–03

| Agency | 2000-01 | | 2001-02 | | 2002-03 | | Legislative authority |
|---|---------|------------|-----------|-------------|---------|------------|--|
| | Number | \$ | Number | \$ | Number | \$ | |
| Australian Taxation Office | 874 | 7,932,032 | 965 | 10,162,565 | 828 | 7,874,126 | Section 265 of the <i>Income Tax Assessment Act 1936</i> |
| Department of Education, Science and Training | 5,749 | 2,073,048 | 6,057 | 2,235,198 | 8,509 | 3,491,563 | <i>Student and Youth Assistance Act 1973</i> and <i>Higher Education Funding Act 1988</i> |
| Department of Family and Community Services | 597,117 | 25,778,640 | 1,681,654 | 526,415,830 | 905,574 | 89,721,564 | Section 1237 of the <i>Social Security Act 1991</i> |
| Department of Health and Ageing | 0 | 0 | 3,706 | 856,462 | 55 | 210,148 | Subsection 95(6) of the <i>Aged Care Act 1997</i> |
| Department of Veterans' Affairs | 9,451 | 710,079 | 1,921 | 526,504 | 2,553 | 1,022,655 | Section 206 of <i>Veterans' Entitlements Act 1986</i> |
| Family Court of Australia | 36,302 | 12,723,616 | 33,052 | 11,690,113 | 30,777 | 11,716,064 | Sub-regulation 11(7) of the Family Court Regulations of the <i>Family Law Act 1975</i> . Figures include exemptions, as well as waivers. |
| Federal Court of Australia | 3,207 | 2,150,662 | 3,887 | 2,649,557 | 3,446 | 2,492,348 | Sub-regulations 2(4), 2A(2) and 2AA(2) of the <i>Federal Court of Australia Regulations 1978</i> . Figures include exemptions, as well as waivers. |
| Federal Magistrates Service | | | 245 | 58,050 | 14,761 | 2,737,272 | Regulations 8 and 9 of <i>Federal Magistrates Regulations 2000</i> . Figures include exemptions, as well as waivers. |
| Health Insurance Commission | 0 | 0 | 75,200 | 15,673,885 | 0 | 0 | Paragraph 18-15(1)(b) of the <i>Private Health Insurance Incentives Act 1998</i> |

| Agency | 2000-01 | | 2001-02 | | 2002-03 | | Legislative authority |
|--|----------------|-------------------|------------------|--------------------|----------------|--------------------|--|
| | Number | \$ | Number | \$ | Number | \$ | |
| Migration Review Tribunal | 0 | 0 | 131 | 183,400 | 192 | 268,800 | Sub-regulation 4.13(4) of the Migration Regulations 1994 |
| Office of Film and Literature Classification | 134 | 102,220 | 91 | 69,773 | 26 | 21,220 | Subsection 91(1) of the Classification (Publications, Films and Computer Games) Act 1995 |
| Total (for 11 agencies) | 652,834 | 51,470,297 | 1,806,909 | 570,521,337 | 966,721 | 119,555,760 | Reconciles with Table 1.5 |

* Numbers not disclosed in financial statements, but confirmed with agency.

Source: Agency financial statements.

Appendix 3: Example of a register for all types of discretionary compensation and waiver of debt claims

XYZ Agency—Financial Year 2000–01

| Claimant | Claim Type* | Date Received | File Number | Date sent to/received from Legal Section | Date sent to DOFA | Date sent to Minister or authorised officer | Amount Sought \$ | Amount Recommended \$ | Amount Approved \$ | Payment Date | Client Advised of Decision | Turnaround |
|------------|--------------|---------------|-------------|--|-------------------|---|------------------|-----------------------|--------------------|--------------|----------------------------|---------------------|
| John Smith | Waiver | 5 April 99 | 123 | 14/7/99 2/6/00 | 11/8/00 | 11/8/00 | 200 | 0 | 200 | 24/1/00 | 26/1/00 | 1 year and 4 months |
| Bob White | Waiver | 9 May 00 | 124 | 28/5/00 28/8/00 | 17/9/00 | 17/9/00 | 462 | 462 | 462 | 25/10/00 | 27/10/00 | 5 months |
| Judy Brown | Act of Grace | 4 Jan 01 | 125 | 10/1/01 20/1/01 | 29/1/01 | 29/1/01 | 8000 | 0 | 0 | | 10/2/01 | 30 days |
| Fred Jones | CDDA | 16 Dec 99 | 126 | 13/1/00 20/5/00 | 14/7/00 | 14/7/00 | 250 | 250 | 250 | 24/7/00 | 26/7/00 | 8 months |

*A separate worksheet on the one spreadsheet for each claim type (CDDA, Act of Grace etc.) would be preferred.

Source: Constructed by the ANAO from agency registers.

Appendix 4: ANAO proposal for processing claims for compensation

The ANAO considers that agencies could adopt the approach described below to process compensation claims efficiently.

Preliminary assessment of the claim

1. On receipt of a claim for compensation, a responsible officer should undertake a critical and objective assessment of the claim. In conducting the assessment, relevant considerations may include:

- credibility of facts alleged;
- reasonableness of claim;
- whether supporting evidence has been, or could be, provided; and
- whether further investigation is required.

2. When assessed against these criteria, some claims will be revealed to be of no or little merit. In these circumstances, the decision-maker should advise the claimant in writing that their claim has been rejected, briefly setting out the reasons for this. In the ANAO's view, neither the Legal Service Directions nor the CDDA scheme requires that an agency obtain legal advice before rejecting a claim if, taking a common-sense approach, a responsible officer forms the view that the claim has little or no merit.

Investigation of the claim

3. An investigation should be conducted in relation to those claims, which, on a preliminary assessment, have some merit.

4. Once an investigation has been commenced, claimants should be advised, in writing, that their claim is being evaluated. Where appropriate, the letter should indicate that, although the claim has not been accepted at this stage, it may be necessary for the claimant to provide additional information to enable a proper assessment of it.

5. The investigation should:

- gather all relevant factual information, including any additional information obtainable from the claimant;
- consider all applicable policies, both Commonwealth-wide and agency- or portfolio-specific;
- examine pertinent administrative practices;
- identify any facts or information that cannot be obtained (because, for example, records have been destroyed or misplaced, or a relevant officer cannot be contacted) and assess the relevance of these facts or information; and then
- assess the findings.

6. The investigation should be performed by an objective and independent officer who has had no previous involvement in the subject matter of the complaint. In order to perform a reliable and sufficiently comprehensive investigation, the investigating officer may need to: interview relevant officers; seek further information or supporting evidence from the claimant; refer to electronic and other records; and consult experts. The investigating officer needs to have sound judgment of the credibility of evidence as well as a sound appreciation of good administrative practice in the agency.

Conclusion about investigation

7. Following investigation, the investigating officer should form a view about the factual merit of the claim. If the officer finds the claim unsubstantiated, the claimant should be advised of this, in writing. Where appropriate, the letter should indicate that an investigation has been carried out, and include the findings of that investigation. The letter should also provide the claimant with an opportunity to provide further information.

8. Where the officer considers that the claim is factually substantiated, he or she must then consider whether or not there is legal liability to pay compensation, or whether compensation should be paid under the CDDA scheme. The ANAO notes that compensation for defective administration cannot be paid 'where it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated.'⁸³

Legal liability claims

9. If the claimant has a reasonable prospect of establishing legal liability, the claim must be handled (including possible settlement) in accordance with the

⁸³ Finance Circular 2001/01, Attachment B, paragraph 10.

Legal Services Directions issued by the Attorney-General, particularly Appendix C, 'Directions on Handling Monetary Claims'. Under these arrangements, if the claim is for:

- (a) less than \$10 000, and the officer considers, as a matter of common sense, that legal liability is likely to be established,⁸⁴ the matter should be settled in accordance with legal principle and practice, including the execution of an appropriately worded Deed of Release; or
- (b) more than \$10 000, the officer should seek external legal advice about the prospects of legal liability being established. If the external legal advice concludes that there is a meaningful prospect of legal liability being established the claim must be handled and settled in accordance with legal principle and practice, including, where appropriate, the execution of an appropriately worded Deed of Release.

CDDA claims

10. If the claim is for:

- (a) less than \$10 000, and the officer forms the common sense view that legal liability is not likely to be established against the Commonwealth, or,
- (b) more than \$10 000 and external legal advice is obtained that legal liability is not likely to be established against the Commonwealth,

then a CDDA payment may be made to the claimant provided the claim and the payment satisfy the requirements of the CDDA Guidelines (and the officer is authorised to make the payment, or the appropriate authorisation for the payment is given).

11. The ANAO notes that there is no legal obligation to make a CDDA payment; the test for payment is 'public defensibility'.

Dealing with the claim efficiently

12. As noted above, it is not necessary to obtain legal advice in relation to all claims. Having said that, there will be many circumstances where, because of the amount of the claim or the complexity of the issues involved, legal advice will be required.

13. The ANAO considers that agencies can assist lawyers' consideration of a claim and, therefore, minimise legal costs by:

⁸⁴ Legal Services Directions, Appendix C, paragraph 3.

- providing an accurate and comprehensive summary of matters relevant to the claim (this should be relatively easy if the investigation has been carried out properly);
- only providing information which is relevant to the claim, rather than all records held in relation to the claimant and the investigation (in some circumstances, an officer may consider all records to be relevant);
- obtaining all information necessary to evaluate the claim prior to referring it to a legal service provider;
- setting out the responsible officer's preliminary findings in relation to the claim; and
- where possible, identifying the potential sources of legal liability and restricting the request for advice accordingly.

Keeping claimants informed

14. As a matter of good practice, claimants should be advised of the progress of their claim on a regular basis. Where claims are not approved, applicants should be advised of their right of review with the Commonwealth Ombudsman.

Appendix 5: Agencies' responses to the proposed audit report

This Appendix provides any general comments received from each of the agencies, together with any detailed responses to recommendations (or other aspects of the report) that are not shown in the body of the report.

Each of the agencies selected for audit, together with relevant policy agencies and other agencies specifically referred to in the report, was provided with the opportunity to comment on the proposed audit report (or extracts of the proposed report, where applicable) in accordance with the provisions of section 19 of the *Auditor-General Act 1997*.

Most of the comments received from agencies were specific responses to the recommendations of the audit. In most instances, these have been fully placed in the main body of the report under the subheading "Agencies' responses" directly following each recommendation, and are not reproduced here. In a few instances, however, agencies provided general responses, or detailed responses to the recommendations (or other aspects of the report), which have been abbreviated in the main body of the report. These general and detailed responses are fully reproduced below.

General responses

Finance's comments were:

Finance supports the thrust of the report, which notes that management and guidance for processing requests for discretionary payments and debt relief in special circumstances is generally in accordance with relevant legislative requirements and administrative guidelines. Finance also agrees with all the recommendations of the report that are addressed to this agency. These recommendations focus primarily on strengthening the framework underpinning the processes whereby requests for payments or waivers are examined, approved and reported; enhancing the guidance and training provided by Finance to agencies on these matters; and reviewing the operation of the CDDA scheme in all agencies.

Finance also agrees with the majority of the other recommendations of the report addressed to all agencies. However, Finance does not agree with the proposal that would result in more agencies pursuing their own waiver powers, as this would not necessarily have any beneficial outcomes for claimants who, under current arrangements, are afforded a fully independent investigation of their claims under the FMA Act.

FaCS' comment was:

FaCS welcomes the audit and its recommendations and will work to deliver improvements in processes.

DIMIA's comments were:

DIMIA welcomes the report and the opportunity to improve the management of compensation payments and debt relief processes. The Department agrees with the recommendations made in this report, but notes that there are differing circumstances that give rise to claims for debt relief and CDDA claims and that no single set of procedures or performance time indicators can be developed and applied in all cases.

DVA's comments were:

DVA agrees with the findings and recommendations in the report and will implement these recommendations as business improvements over the course of the next few months. It should be noted that DVA has not used the FMA Act provisions for the waiver of debt during the 3-year period covered by this review. Also our Act of Grace and Compensation for Detriment caused by Defective Administration (CDDA) payments are a relatively small component of the total agencies figures quoted in this report with DVA's total less than \$0.355M over the three-year period of the review.

Centrelink did not provide a general response.

Specific responses

Two agencies, ASIC and Centrelink provided detailed responses to particular aspects of the report. These are outlined below.

ASIC—Waiver powers under Acts other than the FMA Act (paragraphs 2.59 to 2.72 refer)

Overall, the Australian Securities and Investments Commission (ASIC) supports the measured approach outlined by the ANAO.

ASIC's power to impose fees

ASIC's power to impose fees for chargeable matters is by virtue of the provisions of the *Corporations (Fees) Act 2001* ("Fees Act"). Chargeable matters are defined in section 5 in the Fees Act as, amongst other things, the lodgement of a document, registration of a document or the performance of other functions under the *Corporations Act 2001*. The *Corporations (Fees) Regulations 2001* sets out the amount of the prescribed fees to be allocated for these chargeable matters.

ASIC's waiver powers

The Finance Minister, under section 62 of the *Financial Management and Accountability Act 1997* (the FMA Act) and regulation 24 of the *Financial Management and Accountability Regulations 1997*, delegated to the Chief Executive of ASIC the power to waive the Commonwealth's right to payment

of an amount owing to the Commonwealth. Under the terms of the delegation, entitled the *Financial Management and Accountability (Finance Minister to Chief Executives) Delegation 2002* and the FMA Act, the Chief Executive of ASIC must comply with any directions made by the Finance Minister.

Under section 53 of the FMA Act, the Chief Executive of ASIC has delegated the power to waive the right of the Commonwealth to fees payable under the *Corporations Act 2001 (Cth)* to various ASIC officers. Under section 53(2) of the FMA Act, ASIC delegates must comply with the directions of the Chief Executive of ASIC.

ASIC's evaluation of its waiver powers

ASIC's power to waive fees for chargeable matters is a critical part of its commercial operations and core functions. The power to waive fees enables ASIC to continue to provide services and systems to cover the full life cycle an Australia's 1.3 million companies with efficiency and effectiveness.

ASIC maintains that the exercise of the delegation to its Chief Executive and ASIC delegates under the FMA Act, distinct from the *Corporations Act 2001 (Cth)*, provides ASIC with an expedient and efficient process for granting fee waivers. Such a statement is confirmed by the aggregated data for three consecutive financial years, commencing in 2000–01 and concluding in 2002–03, which indicates that ASIC processed a total of 60,096 fee waivers under the FMA Act. As the figures indicate, ASIC's waiver power by virtue of the delegation does not create any inefficiencies, impediments nor detriment to ASIC's financial accountability or operational effectiveness.

As the evidence suggests, ASIC continues to consistently and efficiently process fee waivers under the regime in effect under the FMA Act, by virtue of the delegation to ASIC's Chief Executive and ASIC delegates. ASIC maintains that the current regime is convenient and has been effectively implemented into its current business and commercial practices. It provides ASIC with autonomy and the scope for its staff with specified knowledge and skills of ASIC's practices and procedures to execute waiver powers in accordance with the FMA delegation.

Centrelink—Recommendation 5 (paragraphs 4.20 to 4.22 refer)

Centrelink plans to conduct a formal risk assessment regarding compensation claims during 1994. However, many of the risks identified in the audit have been previously informally identified and there are measures in place or planned to address those risks. For example, decisions regarding all major claims are determined by one delegate in Centrelink, which significantly reduces the risk of inconsistent decision making, and all minor claims are determined by a limited number of officers at a very senior level.

The recommendations regarding major claims are made by a specialist, centralised group in National Support Office, who also provide training and assistance to those making recommendations regarding minor claims in the network. Centrelink is considering similarly centralising the processing of

minor claims, in order to address both business and accountability risks. This would facilitate the use of timeliness standards for the processing of these claims. As discussed in the audit, Centrelink considers that a 13-week period is appropriate for most claims, although simple claims would be processed more quickly. Centrelink believes that this will go some way to addressing the reputation risk outlined in the audit report.

Centrelink has a database that is currently used to track workflow, timeliness and provide comprehensive management information about compensation and act of grace claims that has proved an invaluable tool for the reduction of risk. Centrelink is now in a position to analyse trends in compensation claims across payment types or Areas, check the accuracy of compensation recommendations made by the network and ensure compliance with the appropriate policies.

Centrelink—Recommendation 6 (paragraphs 4.37 to 4.43 refer)

There are comprehensive, compulsory procedures for processing customer compensation claims available to all staff on the Centrelink intranet. These procedures will shortly be enhanced through the addition of a workflow diagram outlining each stage of the process and the expected timeframe for completion of a claim.

The Service Recovery Team operate a helpdesk for officers in the network who are inexperienced or need assistance when preparing a customer compensation submission. There is also a legal services database helpdesk that offers assistance with the coding and maintenance of the compensation record on the database.

In addition to the over the phone coaching offered by these helpdesks, staff from the central customer compensation unit offer face-to-face training to Area office staff. Since June 2003, Area-based officers have been trained in Area North Central Victoria, Area South East Victoria, Area West Victoria and Area South West, as well as officers from the Call Centre in Melbourne and Centrelink Call Centre in Canberra. In February 2004, face-to-face training will be provided to officers from Area Brisbane and Area Pacific Central. The National Induction Training Package is being updated to increase the information available to new staff regarding customer compensation.

Officers from the centralised compensation unit attend relevant training courses offered by Centrelink's panel of legal services providers. Centrelink occasionally requests that these providers prepare and deliver training to these staff on specific compensation issues. Training of this nature will be delivered in March 2004.

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