



Australian Government
Department of Agriculture, Fisheries and Forestry

SECRETARY

8 December 2006

Senator the Hon. Bill Heffernan
Chairman
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Heffernan

I refer to the Committee's Supplementary Budget Hearings of 31 October 2006 and a question from Senator Kerry O'Brien relating to legal advice prepared by MinterEllison Lawyers regarding the difference between Finance Circular 2006/05 and Finance Circular 2001/01 on administering the Commonwealth's discretionary compensation mechanisms including the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme.

At the hearing, I agreed to further consider a request to provide the legal advice to the Committee. Having done so, a copy of the advice is enclosed.

Yours sincerely

Joanna Hewitt

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DEPARTMENT OF FINANCE AND ADMINISTRATION – NEW GUIDELINES FOR CLAIMS UNDER THE SCHEME FOR COMPENSATION FOR DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION (CDDA)

The Department of Finance and Administration issued a new Finance Circular 2006/05 on 11 August 2006. The new circular sets out guidelines for claims under the CDDA scheme and replaces the previous guidelines under Finance Circular 2001/01.

Set out below is a brief discussion of changes to the CDDA scheme under the new finance circular guidelines. The discussion focuses on substantive changes that would be relevant to a decision-maker in the context of a CDDA claim.

1. Paragraph 6 of the new guidelines provides that each case must be determined on its own merits, and that the principles of natural justice will apply to CDDA claims. Although the old guidelines did not expressly state this obligation, it is likely that these fundamental principles were implied.
2. Paragraph 7 of the new guidelines provides that investigations should be treated as confidential. Again, although this was not an express requirement under the old guidelines, it is likely that it was implied.
3. Paragraphs 12 and 13 of the new guidelines provide that while there is no time limit for submitting a claim, claims that are subject to unreasonable delay are unlikely to be compensated. Again, while not expressly stated in the old guidelines, this requirement was probably implied.
4. Paragraph 17 of the new guidelines provides that in complex cases where some of the issues involved can be verified more easily than others, it may be practical (if a claimant agrees) to split the claim into components that can be determined separately.

Types of detriment

5. Paragraphs 35-36 of the new guidelines provide a new definition of detriment. Whereas the old guidelines provided that detriment was either quantifiable financial loss or non-financial loss (stress, pain and suffering, etc.), the new guidelines provide that detriment means 'quantifiable financial loss'. It provides that there are three types of detriment:
 - (a) personal injury including mental injury (personal injury loss);
 - (b) economic detriment that is not related to personal injury (pure economic loss); and
 - (c) detriment relating to damage to property (property loss).

Thus, under the old guidelines compensation for all financial loss including property damage, business costs and medical expenses would be payable as a quantifiable financial loss, whereas compensation for psychological injury would be compensated as a non-financial loss. Under the new guidelines, both financial and non-financial losses related

to personal injury are compensated together as a type of personal injury detriment. Any other financial losses that are unrelated to physical injury or property damage fall will be compensated as a type of pure economic loss detriment. While structurally different, the categorisation of types of detriment under the new guidelines is more logical.

6. In relation to personal injury loss, the new guidelines appear to be substantially similar to the old guidelines despite significant rewording. Both guidelines provide that a claimant may seek compensation for financial detriment (eg hospital expenses) that is related to a recognised psychiatric injury suffered as a result of defective administration. Compensation is also available for non-financial loss (eg pain and suffering, embarrassment, disappointment, etc.) provided that it is related to financial detriment flowing from the physical injury. However, compensation is not payable for grief, anxiety or embarrassment that is not related to a personal injury. The new guidelines provide greater insight into how a claimant can demonstrate that they have suffered a psychiatric illness.
7. Whereas the old guidelines suggested that expert medical evidence would be required to support the existence of a psychiatric illness, paragraph 40 of the new guidelines provides that compensation will be payable provided that it was reasonably foreseeable that a person of 'normal fortitude' might suffer psychiatric illness as a result of the defective administration. Once that test is satisfied, compensation is payable for the whole of the claimant's financial detriment, even if the psychiatric injury suffered was more severe than would have been expected. The new guidelines, although more detailed, are probably just a restatement of the law as it applies to personal injury and do not appear to change the substance of the old guidelines.
8. In relation to pure economic loss, the new guidelines are more prescriptive. Whereas the old guidelines provide that quantifiable financial loss may be associated with costs incurred such as legal costs, out-of-pocket expenses, travel costs and loss of wages for time off work, the new guidelines specifically refer to lost opportunity (such as an opportunity to earn a capital gain or earn income) as a type of pure economic loss. Although the old guidelines did not specifically refer to loss of opportunity as a type of economic loss, this ground was probably implied.

Reasonable foreseeability

9. The old guidelines provide that where a claimant has relied on incorrect information to alter their circumstances to their detriment, it will be necessary 'to consider whether it was, on balance, reasonable for the claimant to have accepted in good faith, and to have acted upon, the incorrect information provided'. The new guidelines build upon this by providing that compensation will only be payable if it was reasonable in all the circumstances for the claimant to seek and rely upon the advice *and if the agency should have appreciated the implications for the claimant by giving incorrect or ambiguous advice*. This additional requirement appears to be a reference to the reasonable foreseeability test.
10. There was no reference to the requirement of reasonable foreseeability under the old guidelines, and because decisions under the CDDA scheme are not published, it is unclear whether decision-makers took this consideration into account when determining CDDA claims. A test of 'reasonable foreseeability' was probably implied under the old guidelines. The express reference to the test in the new guidelines seems to do little more

than to confirm its applicability to the assessment of compensation under the CDDA scheme.

11. In relation to loss of opportunity, the new guidelines specifically provide that compensation will only be payable if the agency could reasonably have foreseen the *type* of opportunity that, as a result of the agency's defective administration, the claimant lost. However, paragraph 54 of the new guidelines also provides that 'the *type* of detriment suffered by the claimant must have been reasonably foreseeable by the agency'. Therefore, this requirement to foresee the specific type of loss suffered appears to be a general requirement imposed under the new guidelines to all forms of detriment for which compensation is claimed. In accordance with paragraph 10, this is an explicit statement of what would have been implied in the old guidelines.

Causation

12. Both the old guidelines and the new guidelines provide that compensation for loss is only available where it arises 'as a direct consequence of the defective administration'. Paragraphs 52 and 53 of the new guidelines further provide that 'the claimant's detriment must have been caused, in a common sense view, by the agency's actions or omissions', and that situations will arise where 'the decision-maker will need to carefully consider whether there is a causal link with the agency's acts or omissions'. Essentially, however, the requirements for causation are the same under the old and new guidelines.

Mitigation

13. Both the old and new guidelines provide that the claimant's own actions are important in considering whether he or she contributed to the detriment suffered, and the appropriate level of compensation. The new and old guidelines are very similar. However, the new guidelines provide two further examples of where the claimant's own actions will indicate a failure to mitigate loss:
- whether the advice provided to the claimant was informal and no reasonable person would have relied on it; and
 - whether the correct information was available to the claimant from another source to which there was access, or if it would have been reasonable for the claimant to inquire further.

Quantifying detriment

14. Both the new guidelines ([63]-[65]) and the old guidelines ([37]-[38]) require similar considerations to be taken into account when quantifying detriment. However, the new guidelines emphasise the need for appropriate documentation to substantiate claims for lost opportunity. This underscores the commentary at paragraph 49 of the new guidelines, which provides that lost opportunity claims can be particularly difficult to determine, both in establishing whether the opportunity was lost at all, and if so, the amount lost. The onus is on the claimant to provide very clear evidence of the lost opportunity (including quantum).

Interest

15. The old guidelines provide that interest may be payable where it forms part of the damages suffered. However, interest will not generally be available because of a delay in paying compensation unless the agency's actions were unreasonably protracted. The new guidelines provide that interest will only be payable where an agency has been unduly slow in settling claims.
16. There was no express statement under the old guidelines regarding the availability of review mechanisms for aggrieved applicants. The new guidelines provide that because CDDA decisions are not made pursuant to an enactment or law, they are not amenable to judicial review under the ADJR Act. However, they are potentially subject to judicial review by the Federal Court under the *Judiciary act 1901* (Cth) s 39B(1). The new guidelines also state that internal review may be pursued where the agency has established this mechanism.

Ombudsman's role

17. The new guidelines clarify the Commonwealth Ombudsman's role in making suggestions or proposals in relation to CDDA requests. The new guidelines expressly oblige agencies to consider recommendations made by the Ombudsman. Compare paragraphs 81 – 88 of the new guidelines with paragraph 21 of the old guidelines.

Form of application

18. In addition, paragraph 14 of the new guidelines provides that while there is no form in which to make a claim, the claimant should ideally address the criteria for determining defective administration, explain how the conduct was defective and identify how the defective administration directly caused the loss.

Minter Ellison