

15 November 2010

Senator Guy Barnett
Chair
References Committee
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Senator

Thank you for inviting the Commonwealth Ombudsman and officers to appear before the hearing on your Committee's Inquiry into Government Compensation Schemes. We very much appreciated the opportunity to share our experiences and knowledge with the Committee.

We took a number of questions on notice, and also undertook to provide any additional information which we thought may aide the Committee's deliberations. With that in mind, please find attached, the following documents:

- A table outlining the responses from and actions taken by both Centrelink and the Child Support Agency in relation to our report on the Compensation for Detriment caused by Defective Administration (CDDA) scheme. Unfortunately other priorities have precluded us from, so far, following up on the responses and actions by the Australian Taxation Office in relation to the report.
- A CDDA Complaint Summary, which outlines the number and nature of complaints our Office has received about the CDDA and associated schemes during 2009-10.
- The Department of Finance and Deregulation charts outlining which Australian Government agencies fall under the *Financial Management and Accountability Act 1997* and which fall under the *Commonwealth Authorities and Companies Act 1997*
- A copy of our 2009 report on the case of Mrs X, whose compensation claim was caught between two agencies, and therefore took a significant amount of time to be resolved.
- A copy of our 2010 on Australia Post's level of compensation for loss or damage to postal items, in which it did not agree with our recommendations in relation to the adequacy or level of standard compensation.

With regard to our report on Comcare and Department of Finance and Deregulation *Discretionary Payments of Compensation*, we can advise that Comcare's response to Recommendation 1 was the following:

Together with the Department of Education, Employment and Workplace Relations (DEEWR), the Australian Government Solicitor's Office and the Department of Finance and Deregulation, Comcare has investigated these, and developed other options for establishing discretionary compensation scheme for Comcare. Comcare notes that most of the viable options would require legislative amendment of the SRC Act to authorise Comcare to make any payments.

Comcare advise that following a thorough investigation, an Act of Grace-like mechanism appears to be the most feasible. With appropriate changes to the law, such a scheme would give Comcare the capability to make decisions under the scheme, have the potential for retrospectivity, and be funded under Comcare's current financial arrangements. The scope of the discretion under this scheme would be at least as broad as the CDDA scheme, and individuals such as those whose cases were considered by the Ombudsman would be eligible to apply for consideration.

DEEWR is currently seeking appropriate policy and legislative bid approvals. Although no guarantee about timelines when legislative change is required. Comcare, however, is working to progress the changes by no later than 1 July 2011.

Should you require any additional information, please feel free to have your officers contact me on the numbers above.

Yours sincerely

Adam Stankevicius
Acting Deputy Ombudsman

Recommendation 1	
<p>The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:</p>	
Details of Recommendation	Status of Recommendation
<p>a) review their publicly available information to ensure that information about the CDDA Scheme, including the Ombudsman's role in review of decisions, is accessible on agency internet sites, and referred to in service charters, correspondence relating to decisions, and on fact sheets and similar material relating to complaints, review of decisions and appeals</p>	<p><i>Centrelink</i></p> <p>Centrelink has an internet page about customer compensation, including CDDA at http://www.centrelink.gov.au/internet/internet.nsf/legal/compensation.htm. Following the Ombudsman's report the content has been reviewed and expanded.</p> <p>A fact sheet has been developed and published with content similar to the internet page to be printed and provided to customers at all Centrelink sites. It is also available to customers online at http://www.centrelink.gov.au/internet/internet.nsf/publications/co755.htm</p> <p>A Freecall 1800 number for customer compensation is now in operation and has been added to the fact sheet and the internet page.</p> <p>All letters advising the outcome of compensation claims refer to the option to contact the Commonwealth Ombudsman if unhappy with the outcome. The fact sheet and the internet page also give information about the Ombudsman's role in review of decisions.</p> <p>Centrelink's customer charter (long form) has been amended to include information on claiming compensation from Centrelink see: http://www.centrelink.gov.au/internet/internet.nsf/about_us/customer_charter.htm#performance</p>
	<p><i>Child Support Agency</i></p> <p>Information about how to lodge compensation claims, the schemes under which claims may be lodged and the requirements attached to each scheme are available on the CSA's website http://www.csa.gov.au/ParentsAndCarers/ClaimingCompensationFromTheCSA.aspx</p> <p>This includes a compensation fact sheet and publication of the dedicated compensation 'hotline' number.</p>

Recommendation 1	
The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:	
Details of Recommendation	Status of Recommendation
b) review their claim forms to ensure that claimants are assisted to provide all required information	<p><i>Centrelink</i></p> <p>Centrelink accepts claims made by phone or in person.</p> <p>Except where the whole claim can be paid without doing so, customers are given the opportunity to provide further information at a later stage when case managers contact the customer to give them the opportunity to comment.</p> <p>A compensation claim form has been developed for customers preferring to make a claim in writing. This claim form is available from the web page at: http://www.centrelink.gov.au/internet/internet.nsf/forms/ss465.htm</p> <p>Centrelink Customer Service Advisers (CSAs) and Authorised Review Officers (AROs) are encouraged to refer matters where payment of customer compensation may be appropriate to the CDDA team. Also references to where to get assistance –eg contact numbers for Legal Aid and Welfare Rights are provided in the fact sheet.</p>
	<p><i>Child Support Agency</i></p> <p>From 1 September 2010 a compensation claim form has been available for download by CSA customers directly from the internet. The form asks claimants to clearly articulate the grounds for the claim. Customers are encouraged to lodge claims for compensation using the claim form, however, the form is not compulsory.</p>
c) review their timeliness standards, increase monitoring of compliance with those standards, and consider whether the resources currently available to CDDA processing are adequate to meet appropriate timeliness standards; reporting against CDDA	<p><i>Centrelink</i></p> <p>Centrelink advise that they review and monitor timeliness standards on a monthly basis. In 2009–10, 48 per cent of claims were completed within 90 days. Centrelink advise that resourcing for the CDDA team remains under consideration.</p>

RECOMMENDATIONS - Ombudsman's Report - Compensation for defective administration: decision-making under the scheme for CDDA

Recommendation 1	
The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:	
Details of Recommendation	Status of Recommendation
timeliness standards should be incorporated in agency annual reports	<p>CSA</p> <p>The CSA introduced a new compensation process on 1 September 2010. Under the new process, the CSA aims to finalise claims within 90 days of lodgement. This is in keeping with timeframes for other complex decision making processes.</p> <p>The CSP undertakes monthly reporting on the compensation caseload, and weekly reporting on the progress of aged compensation claims.</p> <p>The CSP has also increased staff numbers within the team managing CDDA claims.</p>
d) adopt a rigorous approach to records management, including by encouraging staff to maintain accurate records, providing staff with guidance on records management processes, supporting an agency culture of compliance and applying effective quality assurance mechanisms	<p><i>Centrelink</i></p> <p>Centrelink have advised that continuing to improve records management will require engagement with most of Centrelink's 27,000 employees and appropriate communication mechanisms and messages for the network are under consideration.</p>
	<p>CSA</p> <p>As referred to in the report since 2007 CSA have been recording their telephone calls where advice is provided.</p>
e) implement and ensure compliance with procedures acknowledging the receipt of a CDDA claim within a set timeframe and that claimants are regularly advised of the progress of their claim, particularly if a matter is likely to exceed timeliness standards	<p><i>Centrelink</i></p> <p>Centrelink's practice is that a letter of acknowledgement is sent to all claimants within 3 working days of the receipt of claim.</p> <p>If the claim is not responded to within 90 days, it is Centrelink's practice to contact customers regarding their claim.</p>

Recommendation 1	
The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:	
Details of Recommendation	Status of Recommendation
	<p>CSA</p> <p>Compensation Advisor will contact a customer within 48 hours of a written claim being received. An acknowledgement letter outlining the customer's claim, detailing any relevant alternative remedies (if applicable), confirming the issues already discussed, outlining any additional evidence required and providing guidance on timeframes will be sent to the customer within one week of the initial customer contact.</p>
f) consolidate all documentary instructional material on handling CDDA claims into a single coherent document, and consider formal training with a focus on administrative decision-making and report writing	<p><i>Centrelink</i></p> <p>Centrelink advise that consolidation of instructional material has commenced but will take some time to complete. They also advise that all CDDA case managers have come from the Centrelink network where they received training in administrative decision-making. New case managers undergo induction training followed by mentored on-the-job training for several months. Centrelink is looking to the interagency forum to develop and/or provide formal administrative training decision-making and report writing for this relatively small team.</p> <p>CSA</p> <p>The CSA has conducted a review of its internal staff Procedural Instructions (PI) governing its administration of CDDA claims. An updated PI – Compensation was launched on 13 September 2010.</p> <p>The updated PI – Compensation details a more structured and centralised process for the management of CDDA claims, which will enable the Compensation and Waiver Team, reporting to the Strategic Stakeholder Unit (SSU), to oversee:</p> <ul style="list-style-type: none"> • Consistency in decision making • Management of customer expectations • Identification and escalation of service delivery and systemic issues <p>A dedicated 'hotline' phone number for incoming compensation enquiries was introduced on 1</p>

RECOMMENDATIONS - Ombudsman's Report - Compensation for defective administration: decision-making under the scheme for CDDA

Recommendation 1

The Ombudsman recommends that all agencies subject to the *Financial Management Accountability Act 1997* take note of this report, and in particular that agencies:

Details of Recommendation

g) use decision-making templates to encourage consistent consideration of claims

Status of Recommendation

September 2010. This enables questions about compensation from both customers and internal staff to be managed by appropriately trained staff from Customer Review and Quality Improvement (CR&QI) and the SSU's Compensation and Waiver Team. Staff are able to proactively manage prospective claims by setting realistic expectations about the process prior to claims being lodged.

The workflow set out in the new PI – Compensation will ensure that all claims will be lodged in writing through the Compensation and Waiver Team, with potential claimants being encouraged to initially utilise the dedicated 'hotline' to discuss their potential claims.

CSA advised that it is in the process of providing all staff working on compensation matters with formal writing training. The CSA is in the final stages of testing an ebook to develop compensation staff's understanding of the compensation process and administrative decision making under the scheme. The CSA is organising to send all staff in the Compensation and Waiver team to the new AGS CDDA training.

Centrelink

Centrelink has re-engineered its process for customer compensation claims. The submission submitted to the authorised officer is now in the form of a statement of reasons which, if the claim is rejected or varied, is sent to the claimant with a covering letter to explain why the decision was made. Both the letter and the submission/statement are written from templates.

CSA

In September 2010, the CSA implemented new templates for compensation submissions and for acknowledgement, procedural fairness and decision letters.

The CSA claim that it's new centralised compensation process will also help to ensure that decisions made in accordance with the CDDA Scheme are consistent. Compensation Advisors working in the Compensation and Waiver Team manage compensation claims by:

- working with CR&QI staff to address questions from potential applicants on the

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Details of Recommendation

Status of Recommendation

compensation 'hotline';

- receiving all compensation claims in the Compensation and Waiver team;
- undertaking a review of customers' claims both prior to and upon receipt of a written application;
- working with CR&QI staff in regard to issues to be addressed in the investigation brief;
- preparing a recommendation in accordance with Finance Circular 2009/09 and seeking customer input; and
- preparing the compensation recommendation for signature by the appropriate delegate.

h) ensure that reasons for decisions are properly recorded and the reasons for rejected claims are clearly explained to claimants

Centrelink

See response to 1 (g) above

CSA

In addition to response regarding template letters above in 1 (g) CSA advise that the decision letters clearly outline to claimants the reasons for the decisions regarding their claims, and advise the claimant of the role and contact details of the Commonwealth Ombudsman.

i) agencies ensure that claimants have a full opportunity to comment on the agency's assessment of a claim prior to a decision being made

Centrelink

Centrelink claim that standard Centrelink practices require case managers to contact the customer to discuss the claim prior to a decision being made. Centrelink advise that with approximately 2500 claims per annum, Centrelink does not provide draft decision statements to customers due to the resourcing that would be required for that additional process.

CSA

The opportunity for a customer to comment on the proposed outcome of their claim has been

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Details of Recommendation

Status of Recommendation

incorporated into the new PI – Compensation. In accordance with the new PI, CSA have advised that customers will have the opportunity to:

Discuss a potential claim with a staff member with compensation training.

- Customers may utilise the compensation ‘hotline’ to discuss their circumstances to determine if lodging a compensation claim is their best option. The staff member will provide the customer with information about the CDDA Scheme in general, and will undertake a preliminary review of the customer’s circumstances prior to the lodgement of a written claim.

Discuss their specific circumstances following the lodgement of a written compensation claim.

- As noted above, a Compensation Advisor will contact a customer within 48 hours of a written claim being received. An acknowledgement letter outlining the customer’s claim, detailing any relevant alternative remedies (if applicable), confirming the issues already discussed, outlining any additional evidence required and providing guidance on timeframes will be sent to the customer within one week of the initial customer contact.

Comment on the preliminary compensation recommendation.

- Following receipt and acknowledgement of a written compensation request, the Compensation Advisor will request an investigation brief from Customer Review and Quality Improvement (CR&QI). Upon receipt of the investigation brief, the Compensation Advisor will review the brief and prepare a preliminary recommendation to the delegate regarding whether the CSP was defective, whether the customer suffered a loss as a direct result of the defective administration and whether an amount of compensation should be offered. The customer will be contacted when the preliminary recommendation has been prepared and, if required, a letter will be sent inviting further comment.

RECOMMENDATIONS - Ombudsman's Report - Compensation for defective administration: decision-making under the scheme for CDDA

Recommendation 1	
The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:	
Details of Recommendation	Status of Recommendation
j) implement formal processes by which CDDA claim processing areas are able to draw problems to the attention of relevant business lines or service areas within the agencies for systemic remedial action	<p><i>Centrelink</i></p> <p>Centrelink claim that feedback processes have been in place for many years. Feedback is given individually to customer service advisors and feedback on systemic issues identified is given to the appropriate business line.</p> <p>In addition to this the number and amount of CDDA payments made are reported to the business lines by benefit types. The business lines for the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) are sent the individual CDDA decisions for payments made during the quarter. These individual decisions are used in the quarterly business discussions with FaHCSIA.</p> <p>Improvements to the recording of these feedback activities have been made. A database was introduced in 2009 for case managers to record the feedback that they give and track any resulting changes. Feedback has been included as a business outcome in case manager's performance agreements.</p>
	<p><i>CSA</i></p> <p>The new submission template includes a section 'Recommendation for agency improvement'. Compensation Advisors identify any systemic issues, provide recommendations for resolution and escalate these to the Quality Analysis team and owning business area.</p>
k) review instructional and other decision-making support material and ensure that they place more emphasis on the merits of administrative decision making consistent with the CDDA Scheme, and less reliance on legal	<p><i>Centrelink</i></p> <p>Centrelink advise that CDDA team staff have been involved in discussions about the report of the Ombudsman's report, and these issues are being addressed as relevant matters arise.</p>

RECOMMENDATIONS - Ombudsman's Report - Compensation for defective administration: decision-making under the scheme for CDDA

Recommendation 1	
The Ombudsman recommends that all agencies subject to the <i>Financial Management Accountability Act 1997</i> take note of this report, and in particular that agencies:	
Details of Recommendation	Status of Recommendation
precedent, doctrine and concepts	<p>CSA</p> <p>The new PI clearly emphasises the need to consider compensation claims under Legal Liability or the CDDA Scheme, noting that most compensation claims lodged with the CSA come under CDDA.</p> <p>The CSA advise that they take a flexible approach when considering financial losses. Some applicants seek compensation for costs which they are unable to provide conclusive evidence for, or they are unable to clearly demonstrate that the costs solely arose following defective administration on the CSA's part. In these circumstances the CSA takes into consideration their request, the individual circumstances of the cases, and may make an offer of compensation based upon the likely costs incurred.</p>
<p>l) provide clear training and ongoing guidance to staff on:</p> <ul style="list-style-type: none"> - the purpose of the CDDA Scheme - deciding claims on their merits - the standard of evidence required to make a decision - who should provide the evidence. 	<p><i>Centrelink</i></p> <p>Centrelink is looking to the interagency forum to develop and/or provide further training and support.</p>
	<p>CSA</p> <p>As noted above, the CSA is in the process of providing all staff working on compensation matters with formal writing training. The CSA is also in the final stages of testing an ebook to develop compensation staff's understanding of the compensation process and administrative decision making under the scheme. The CSA is also organising to send all staff in the Compensation and Waiver team to the new AGS CDDA training.</p>

Recommendation 2	
The Ombudsman recommends that:	
Details of Recommendation	Status of Recommendation
a) the Australian government consider the merits of establishing an interdepartmental	<i>Department of Finance and Deregulation</i>

RECOMMENDATIONS - Ombudsman's Report - Compensation for defective administration: decision-making under the scheme for CDDA

Recommendation 2	
The Ombudsman recommends that:	
Details of Recommendation	Status of Recommendation
advisory or review panel to deal with disputed or exceptional CDDA claims.	Finance not yet agreed to this recommendation although they claim that there could be merit in establishing an Advisory Committee for defective administration claims of \$250,000 or more, to provide broader oversight of such decisions, similar to that in section 65(2)(1a) of the FMA Act. Finance have advised that this recommendation will be a topic on the agenda of the next inter-agency forum.
b) Finance and relevant agencies consider strategies for greater sharing of information on best practice and whether there is merit in the creation of an inter-agency body to encourage a consistent, whole-of-government approach to CDDA claims.	The Department of Finance and Deregulation (Finance) has convened an inter-agency forum to meet approximately quarterly where, amongst other things, best practice ideas are shared. The Ombudsman's office has attended these forums. Both Centrelink and CSA are active participants in that forum, and Centrelink advise that they report back to the CDDA team following those meetings.
c) Finance review the requirements in relation to deeds of release contained in the Finance circular in order to address the issues raised in this report.	<i>Department of Finance and Deregulation</i> Following consultations with agencies Finance have amended the Finance circular to make it clear that a deed of release is discretionary.

2009-10 CDDA Complaints Summary

Number and nature of CDDA related complaints

During the past 2009/2010 year the Ombudsman's office received 281 complaints about CDDA:

- 75 were inquiries where the person had not yet sought CDDA from the agency
- 22 were complaints about how to access CDDA
- 65 were about how the agency was handling the CDDA claim, including timeliness
- 21 were where a CDDA offer was made but the complainant was dissatisfied as to quantum
- 98 were complaints about the agency declining the request for CDDA

This is a little more than we mentioned at the hearing because we drilled down a little further in examining issue strings set out in our case management system.

In addition to these complaints, in 36 cases the Ombudsman's office recommended that agencies invite complainants to lodge a CDDA claim as a result of administrative deficiency. We do not have clear figures on the outcome of these cases as we often leave it to the agency to process the claim at that point. We also advise the complainant that they can complain further to our office if dissatisfied with the agency's assessment.

Number and nature of Act of Grace complaints

In respect of act of grace, 24 of 25 complaints we received concerned Department of Finance and Deregulation (Finance) declining a request and one concerned administrative matters. We sought reconsideration in five of these cases. There are two additional matters underway at present without result.

Chart of 87 bodies under the *Commonwealth Authorities and Companies Act 1997 (CAC Act)*

Agriculture, Fisheries and Forestry: 7

Australian Wine and Brandy Corporation
(*Wine Australia*)
Cotton Research and Development Corporation
Fisheries Research and Development Corporation
Grains Research and Development Corporation [M] P
Grape and Wine Research and Development Corporation
Rural Industries Research and Development Corporation
Sugar Research and Development Corporation

Attorney-General's: 4

Australian Government Solicitor [M] @
Australian Institute of Criminology P [I]
Australian Law Reform Commission P
Criminology Research Council [I]

Broadband, Communications and the Digital Economy: 3

Australian Broadcasting Corporation [M]
Australian Postal Corporation [M]
Special Broadcasting Service Corporation [M]

Defence: 7

Army and Air Force Canteen Service
(*Frontline Defence Services*)
Australian Military Forces Relief Trust
Fund (*Army Relief Trust Fund*)
Defence Housing Australia [M]
Royal Australian Air Force Veterans' Residences Trust Fund
Royal Australian Air Force Welfare Trust Fund
Royal Australian Navy Central Canteens Board
Royal Australian Navy Relief Trust Fund

Education, Employment and Workplace Relations: 4

Australian Curriculum, Assessment and Reporting Authority [I]
Australian National University
Coal Mining Industry (Long Service Leave Funding) Corporation [M]
Comcare [M] P @ *

Families, Housing, Community Services and Indigenous Affairs: 8

Anindilyakwa Land Council
Central Land Council
Indigenous Business Australia [M]
Indigenous Land Corporation
Northern Land Council
Tiwi Land Council
Torres Strait Regional Authority
Wreck Bay Aboriginal Community Council

Finance and Deregulation: 2

Albury-Wodonga Development Corporation
(*Albury-Wodonga Corporation*) [M] [I]
Australian Industry Development Corporation [M]

Foreign Affairs and Trade

Export Finance and Insurance Corporation [M] P ^

Health and Ageing: 4

Australian Institute of Health and Welfare P *
Food Standards Australia New Zealand [I]
Health Workforce Australia [I]
Private Health Insurance Administration Council

Human Services

Australian Hearing Services
(*Australian Hearing*) [M]

Infrastructure and Transport: 3

Airservices Australia [M]
Australian Maritime Safety Authority P
Civil Aviation Safety Authority [M]

Innovation, Industry, Science and Research: 4

Australian Institute of Aboriginal and Torres Strait Islander Studies
Australian Institute of Marine Science P [I]
Australian Nuclear Science and Technology Organisation [M] P
Commonwealth Scientific and Industrial Research Organisation [M] P

13 bodies encompass a Statutory Agency under the *Public Service Act 1999* (PS Act). These comprise a Commonwealth company and 12 Commonwealth authorities, of which 3 are marked * as they can engage personnel under their enabling Act along with the PS Act # There are also 2 statutory corporations, subject only to certain CAC Act provisions, that are Statutory Agencies under the PS Act and can also employ their own staff (*)

7 Commonwealth authorities are established by regulations: comprising 5 of the 6 research and development corporations, plus both the Army and Air Force Canteen Service and the Royal Australian Navy Central Canteens Board

3 Commonwealth authorities and 4 Commonwealth companies are also government business enterprises (GBEs) under section 5 of the CAC Act
2 Commonwealth authorities are exempt from being notified of general policies of the Australian Government, under sections 28 and 48A of the CAC Act
2 Commonwealth authorities are partially exempt from ss 28 and 48A of the CAC Act
1 Commonwealth authority is a statutory marketing authority (SMA): Australian Wine and Brandy Corporation

Prime Minister and Cabinet: 9

Australia Council
Australian Film, Television and Radio School
Australian National Maritime Museum P
Australian Sports Commission
(*Australian Institute of Sport*) [M]
National Film and Sound Archive
National Gallery of Australia [M] P
National Library of Australia [M]
National Museum of Australia [M] P
Screen Australia *

Resources, Energy and Tourism

Tourism Australia [M] P

Sustainability, Environment, Water, Population and Communities: 2

Director of National Parks P @
Sydney Harbour Federation Trust P [I]

Treasury: 2

Australian Reinsurance Pool Corporation [M]
Reserve Bank of Australia [M] P

Veterans' Affairs

Australian War Memorial [M] P

Infrastructure and Transport

National Transport Commission * [I]

Sections 9, 18, 20 and Schedule 1
Sustainability, Environment, Water, Population and Communities

NEPC Service Corporation * [I]
Sections 9, 18, 20 and Schedule 1

70 General Government Sector (GGS) bodies. The National Interest Account is also classified as GGS, but is administered by the Export Finance and Insurance Corporation (EFIC) ^ which is a Public Financial Corporation
9 Public Non-financial Corporations (PNFC)
6 Public Financial Corporations (PFC) - ^ EFIC also administers the National Interest Account, which is classified as GGS

2 Unclassified bodies (plus there are 2 statutory corporations # which are unclassified and subject only to certain CAC Act provisions)

[M] 29 CAC Act bodies are material entities (comprising 99% of revenues, expenses, assets and liabilities) 25 are Commonwealth authorities and 4 are Commonwealth companies, limited by shares

P 18 Commonwealth authorities and 1 company are also subject to section 47A of the CAC Act, which allows for directions on procurement matters

[I] 8 Commonwealth authorities, 1 Commonwealth company and 2 statutory corporations are inter-jurisdictional in nature, e.g. involving the States or Territories or New Zealand in their governance structure or establishment

Σ 3 Commonwealth companies are mentioned in statute.

@ 3 Commonwealth authorities have a single person at their apex, rather than a multi-member board

2 statutory corporations are only subject to the provisions of the CAC Act mentioned beneath each entry

15 limited by guarantee *Corporations Act 2001*

Climate Change and Energy Efficiency
Australian Carbon Trust Limited

Defence: 3

AAF Company
Australian Strategic Policy Institute Limited
RAAF Welfare Recreational Company

Education, Employment and Workplace Relations: 2

Australian Institute for Teaching and School Leadership Limited [I]
Australian Learning and Teaching Council Limited

Families, Housing, Community Services and Indigenous Affairs

Aboriginal Hostels Limited Σ

Health and Ageing: 3

Aged Care Standards and Accreditation Agency Ltd P
General Practice Education and Training Limited
National Breast and Ovarian Cancer Centre

Prime Minister and Cabinet: 4

Australia Business Arts Foundation Ltd
Australian Sports Foundation Limited Σ
Bundanon Trust
National Australia Day Council Limited

Resources, Energy and Tourism

Australian Solar Institute Limited

9 limited by shares *Corporations Act 2001*

Broadband, Communications and the Digital Economy

NBN Co Limited [M]

Families, Housing, Community Services and Indigenous Affairs

Outback Stores Pty Ltd

Finance and Deregulation: 3

Australian River Co. Limited

ASC Pty Ltd [M]

Medibank Private Limited [M] Σ

Infrastructure and Transport

Australian Rail Track Corporation Limited [M]

Innovation, Industry, Science and Research: 2

IIF Foundation Pty Limited

IIF Investments Pty Limited

Treasury

IIH Claims Support Limited

Chart of 104 Agencies under the *Financial Management and Accountability Act 1997 (FMA Act)*

[M]

1. Department of Agriculture, Fisheries and Forestry
2. Attorney-General's Department
3. Department of Broadband, Communications and the Digital Economy
4. Department of Climate Change and Energy Efficiency
5. Department of Defence *
6. Department of Education, Employment and Workplace Relations
7. Department of Families, Housing, Community Services and Indigenous Affairs
8. Department of Finance and Deregulation
9. Department of Foreign Affairs and Trade
10. Department of Health and Ageing
11. Department of Human Services
12. Department of Immigration and Citizenship
13. Department of Infrastructure and Transport
14. Department of Innovation, Industry, Science and Research
15. Department of the Prime Minister and Cabinet
16. Department of Regional Australia, Regional Development and Local Government (part of the Prime Minister and Cabinet portfolio)
17. Department of Resources, Energy and Tourism
18. Department of Sustainability, Environment, Water, Population and Communities
19. Department of the Treasury
20. Department of Veterans' Affairs † (part of the Defence portfolio)

Note there are 20 Departments of State and 20 Cabinet Ministers across 18 portfolios

Defence: 1/1

Defence Materiel Organisation [M]

Innovation, Industry, Science and Research: 1/2

IP Australia ^

Resources, Energy and Tourism: 1/2

Geoscience Australia

Treasury: 2/14

Australian Office of Financial Management (AOFM) [M]

Royal Australian Mint

Education, Employment and Workplace Relations: 1/5

Seafarers Safety, Rehabilitation and Compensation Authority (Seacare Authority)

Treasury: 1/14

Commonwealth Grants Commission

Agriculture, Fisheries and Forestry: 3/3

Australian Fisheries Management Authority †
Australian Pesticides and Veterinary Medicines Authority (APVMA) † [I]

Wheat Exports Australia †

Attorney-General's: 12/16

Administrative Appeals Tribunal
Australian Commission for Law Enforcement Integrity (ACLEI)

Australian Crime Commission [I]

Australian Customs and Border Protection Service [M]

Australian Human Rights Commission †

Australian Transaction Reports and Analysis Centre (AUSTRAC)

Family Court of Australia [M]

Federal Court of Australia

Federal Magistrates Court of Australia

National Native Title Tribunal

Office of Parliamentary Counsel

Office of the Director of Public Prosecutions *

Broadband, Communications and the Digital Economy: 1/1

Australian Communications and Media Authority (ACMA) † [M]

Climate Change and Energy Efficiency: 1/1

Office of the Renewable Energy Regulator

Education, Employment and Workplace Relations: 4/5

Fair Work Australia (FWA)

Office of the Australian Building and Construction Commissioner

Office of the Fair Work Ombudsman

Safe Work Australia [I]

Families, Housing, Community Services and Indigenous Affairs: 1/1

Equal Opportunity for Women in the Workplace Agency

Finance and Deregulation: 3/4

Australian Electoral Commission * [M]

ComSuper

Future Fund Management Agency † [M]

Foreign Affairs and Trade: 2/4

Australian Centre for International Agricultural Research (ACIAR)

Australian Trade Commission (Austrade) [M]

Attorney-General's: 2/16

CrimTrac Agency [I]

Insolvency and Trustee Service Australia (ITSA) † ^ Σ

Foreign Affairs and Trade: 1/4

AusAID (Australian Agency for International Development) [M]

Health and Ageing: 7/7

Australian Organ and Tissue Donation and Transplantation Authority
Australian Radiation Protection and Nuclear Safety Agency (ARPANSA)
Cancer Australia

National Blood Authority [M] [I]

National Health and Medical Research Council (NHMRC) [M]

Private Health Insurance Ombudsman

Professional Services Review Scheme

Human Services: 2/2

Centrelink (Commonwealth Services Delivery Agency) [M]

Medicare Australia [M]

Immigration and Citizenship: 1/1

Migration Review Tribunal and Refugee Review Tribunal (MRT-RRT)

Infrastructure and Transport: 1/1

Australian Transport Safety Bureau (ATSB)

Innovation, Industry, Science and Research: 1/2

Australian Research Council [M]

Prime Minister and Cabinet: 8/11

Australian Institute of Family Studies (AIFS) *

Australian National Audit Office

Australian Public Service Commission (APS Commission)

Australian Sports Anti-Doping Authority (ASADA)

Office of National Assessments *

Office of the Australian Information Commissioner

Office of the Commonwealth Ombudsman

Office of the Inspector-General of Intelligence and Security

Regional Australia, Regional Development and Local Government: 1/1

National Capital Authority [M]

Resources, Energy and Tourism: 1/2

National Offshore Petroleum Safety Authority (NOPSA) † [I]

Sustainability, Environment, Water, Population and Communities: 3/4

Great Barrier Reef Marine Park Authority † [I]

Murray-Darling Basin Authority † [I]

National Water Commission [I]

Treasury: 10/14

Australian Bureau of Statistics * [M]

Australian Competition and Consumer Commission † [I]

Australian Securities and Investments Commission (ASIC) † * [M] [I]

Australian Taxation Office [M]

Corporations and Markets Advisory Committee (CAMAC) † *

Inspector-General of Taxation

National Competition Council

Office of the Auditing and Assurance Standards Board (AUASB) *

Office of the Australian Accounting Standards Board (AASB) *

Productivity Commission

Prime Minister and Cabinet: 2/11

National Archives of Australia [M] Σ

Old Parliament House

Sustainability, Environment, Water, Population and Communities: 1/4

Bureau of Meteorology [M] Σ

Department of the Senate

Department of the House of Representatives

Department of Parliamentary Services [M]

Attorney-General's: 2/16

Australian Federal Police [M] [I]

Australian Security Intelligence Organisation [M]

Finance and Deregulation: 1/4

Australian Reward Investment Alliance (ARIA) † ^ Δ

Foreign Affairs and Trade: 1/4

Australian Secret Intelligence Service

Prime Minister and Cabinet: 1/11

Office of the Official Secretary to the Governor-General

Treasury: 1/14

Australian Prudential Regulation Authority (APRA) †

FMA Act agencies comprise all Departments of State, Departments of the Parliament and "prescribed agencies" named in the FMA Regulations. These agencies are all able to receive appropriations in their own right.

Also, note that all FMA Act agencies are in the "General Government Sector".

[M] 43 agencies are material entities. Material entities comprise 99% of revenues, expenses, assets and liabilities. Note too, that all of the 20 Departments of State are "material in nature".

† 16 agencies also encompass bodies corporate formed under statute.

[I] 12 agencies are interjurisdictional in nature, e.g. involving the States or Territories in their governance structure or establishment.

* 10 agencies can engage personnel under their enabling legislation as well as under the *Public Service Act 1999*. These include Defence, under the *Defence Act 1903*, *Naval Defence Act 1910* and the *Air Force Act 1923*.

12/16 – Indicates number of prescribed agencies of that type (e.g. statutory agencies) out of the number of prescribed agencies in the portfolio generally.

Δ 2 agencies handle money other than public money.

Σ 3 Executive Agencies have statutory functions.

^ IP Australia encompasses some office holders, ie. for registering patents, trademarks and designs.

The Attorney-General's portfolio includes the High Court of Australia, which is part of the Commonwealth, is an "agency" named in the annual Appropriation Acts and is in the "General Government Sector". However, it is not an agency under the FMA Act, due to its status under its enabling legislation, which also sets its employment framework.

Commonwealth authorities are statutory corporations. They are established in legislation as bodies corporate. A Commonwealth authority must satisfy the three criteria set out in section 7 of the CAC Act, namely:

- (a) that it be established by legislation for a public purpose;
- (b) that it be a body corporate; and
- (c) that it hold money on its own account.

Commonwealth authorities are governed both by their separate enabling legislation and by the CAC Act. The CAC Act imposes a single set of core reporting and auditing requirements on directors of these entities and sets out standards of conduct for officers of Commonwealth authorities that are equivalent to those applied to officers of companies by the *Corporations Act 2001*.

Subsection 7(2) of the CAC Act provides that none of the following are Commonwealth authorities: Corporations Act companies; corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; and associations that are organisations within the meaning of the *Fair Work (Registered Organisations) Act 2009*.

Bodies in this box are statutory corporations established by an Act of Parliament that are not Commonwealth authorities but subject to selected CAC Act provisions.

Denotes bodies that are identified in their enabling legislation as Statutory Agencies for the purposes of the *Public Service Act 1999*. The enabling legislation also sets out the arrangements for the appointment and termination of the Agency Head and their specific powers, responsibilities and accountability requirements. The *Public Service Act 1999* confers general employment powers on the Agency Heads of Statutory Agencies.

Denotes Commonwealth authorities that are established by regulation (ie, secondary legislation).

Denotes Commonwealth authorities and companies that are also CAC Act government business enterprises (GBEs). GBEs are prescribed under regulation 4 of the CAC Regulations. They have a commercial focus, prepare corporate plans and generally have wider investment powers, compared to other Commonwealth authorities and companies. The Finance Minister has a role in the oversight of these bodies.

Denotes Commonwealth authorities that are exempt from sections 28 and 48A of the CAC Act. Sections 28 and 48A of the CAC Act allow the responsible Minister to notify the directors of a Commonwealth authority of general policies of the Australian Government that are to apply to the authority.

Denotes Commonwealth authorities that are partially exempt from sections 28 and 48A of the CAC Act. Sections 28 and 48A of the CAC Act allow the responsible Minister to notify the directors of a Commonwealth authority of general policies of the Australian Government that are to apply to the authority.

Denotes Commonwealth authorities that are prescribed as statutory marketing authorities (SMAs) under regulation 5 of the CAC Regulations. SMAs generally also have wider investment powers compared to other Commonwealth authorities.

Denotes Commonwealth companies that are in the process of winding down their affairs, involving voluntary deregistration or the appointment of a liquidator to manage the process of realising the company's assets, ceasing or sale of their operations, payment of its debts (if any) and distribution of surplus assets (if any) among members or shareholders.

limited by guarantee under the *Corporations Act 2001*

A **Commonwealth company** is a company registered under the *Corporations Act 2001* and which the Commonwealth "controls". Section 34 of the CAC Act defines the Commonwealth as controlling a company if, and only if, it:

- a) controls the composition of the company's board (including through a veto power); or
- b) has the ability to cast a majority of votes (more than one-half of the maximum number of votes) at a general meeting of the company's members; or
- c) holds more than one-half of the issued share capital of the company.

A **Commonwealth company** may come into existence in one of two ways:

- a) where a company is registered under the *Corporations Act 2001* and which the Commonwealth controls; or
- b) where the Commonwealth acquires control of an existing company.

"Company limited by guarantee" means a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up (*Corporations Act 2001*, section 9). These companies typically have the letters "Ltd" after their name.

"Company limited by shares" means a company formed on the principle of having the liability of its members limited to the amount (if any) unpaid on the shares respectively held by them (*Corporations Act 2001*, section 9). Where it is a public company, the company has the suffix "Ltd" after its name, or when it is a proprietary company, the suffix "Pty Ltd".

Bodies with a white coloured background are classified in Government Finance Statistics as General Government Sector (GGS) bodies. The primary function of this type of entity is to provide public services that are mainly non-market in nature, and for the collective consumption of the community, or that involve the transfer or redistribution of income. These services are largely government-funded, although user charging and external funding have increased in recent years.

Bodies with a blue coloured background are classified in Government Finance Statistics as Public non-Financial Corporations (PNFC). The primary function of entities in this sector is to provide goods and services which are mainly market, non-regulatory and non-financial in nature, financed predominately through sales to the consumers of the goods and services.

Bodies with a green coloured background are classified in Government Finance Statistics as Public Financial Corporations (PFC). These entities are defined similarly to PNFCs except they trade in financial assets and liabilities. They are entities which perform central banking functions; accept demand, time or savings deposits; or have the authority to incur liabilities and acquire financial assets in the market on their own account.

Bodies with a grey colour background are unclassified. This means the body is not classified into the GGS, PNFC or PFC sectors because the body is not consolidated in the Commonwealth's consolidated financial statements. This is because the relationship it has with the Commonwealth does not meet the definition of control for accounting purposes. Universities are an example of unclassified bodies. Some unclassified bodies are, however, included in the Commonwealth's consolidated financial statements as "other investments".

The key also includes a number of symbols that are used on the chart to denote those agencies that are material in nature, those bodies that are interjurisdictional in nature, bodies that may be directed under section 47A of the CAC Act on procurement matters, Commonwealth companies that are mentioned in statute, Commonwealth authorities that have a single person at their apex, those that encompass a "body corporate" under statute, and statutory corporations only subject to provisions of the CAC Act mentioned beneath their entry.



Departments of State are the arms of the Executive Government responsible for advising, administering and overseeing particular Australian Government policies.

Departments of State are established in accordance with the Australian Constitution. Section 64 provides that the Governor-General may appoint Ministers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish. By convention the Governor-General acts on the advice of the Prime Minister.

The Governor-General formally establishes the matters to be dealt with by each Department of State and the legislation to be administered by each Minister through the Administrative Arrangements Order (AAO).

Each Department of State is in a portfolio. A portfolio consists of a Department of State (often called the portfolio department) and a number of Agencies with similar general objectives and outcomes. However, a portfolio may encompass more than one Department of State. The Defence portfolio consists of the Department of Defence and the Department of Veterans' Affairs. Accordingly there are currently 19 Departments of State in 18 portfolios.

These Agencies are financially autonomous, but are otherwise part of the relevant **Department of State**.

They are not PS Act Agencies and therefore do not employ staff under the PS Act in their own right. Instead, employment responsibilities are typically delegated to the Agency's Chief Executive from the Secretary of the relevant Department of State.

An example is the Royal Australian Mint, which is not established in primary legislation. It is financially autonomous from the Department of the Treasury because it is a prescribed Agency.

These agencies are established by legislation which specifies their functions and structure. They are not PS Act Agencies and therefore do not employ staff under the PS Act in their own right. Instead they are staffed through a Department or other PS Act Agency.

An example of this type of prescribed Agency is the Seafarer's Safety, Rehabilitation and Compensation Authority (Seacare Authority) which is staffed through Comcare, under section 125 of the *Seafarers Safety, Rehabilitation and Compensation Act 1992*.

These Agencies are established by an Act which declares them to be a Statutory Agency for the purposes of the PS Act. They are also prescribed Agencies. Accordingly, they have both financial and staffing autonomy.

An example of this type of prescribed Agency is the Office of Parliamentary Counsel (OPC). OPC is declared to be a Statutory Agency for the purposes of the PS Act in its enabling legislation (*Parliamentary Counsel Act 1970*, section 16). OPC is also separately prescribed as an FMA Act Agency in Schedule 1 to the *Financial Management and Accountability Regulations 1997* (FMA Regs).

These Agencies are not established by an Act. They are established as an Executive Agency under the PS Act by order of the Governor-General and are also a prescribed Agency. Accordingly, they have both financial and staffing autonomy.

Departments of the Parliament provide a range of services and support for the working of Parliament. They are staffed under the *Parliamentary Service Act 1999* and are FMA Act Agencies. Accordingly, they have both financial and staffing autonomy.

Section 54 of the *Parliamentary Service Act 1999* establishes the Departments of the Senate and the House of Representatives. Subsection 54(2) provides that such other Departments of the Parliament as are required may be established by resolutions passed by each House of the Parliament. An example of a Department established through this process is the Department of Parliamentary Services.

These agencies are staffed under their enabling Act and are prescribed Agencies. Accordingly, they have both financial and staffing autonomy.

An example of this type of prescribed Agency is the Australian Federal Police (AFP). Section 23 of the *Australian Federal Police Act 1979* provides that the Commissioner of the Australian Federal Police has all rights, duties and powers of an employer in respect of AFP employees.

The key describes a number of symbols that are used on the chart to denote those agencies that are material in nature, those that are interjurisdictional in nature, those that do not involve employment under the PS Act and those that encompass a "body corporate" under statute.

**Australian Federal Police
and the
Child Support Agency,
Department of Human Services**

CAUGHT BETWEEN TWO AGENCIES:
THE CASE OF MRS X

August 2009

*This is an abridged version of report 14/2009.
The full report has not been made publicly available
due to privacy considerations*

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **14|2009**

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version.

Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

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INTRODUCTION

Few individual complaints that the Ombudsman investigates culminate in a formal report. Publication of a report can involve an unreasonable disclosure of personal information about the person who complained to us, or related third parties. However, the case of Mrs X holds lessons for all Commonwealth agencies that administer programs or deliver services in cooperation with other organisations. That explains the decision to publish this abridged report.

BACKGROUND

Mrs X's complaint about the Child Support Agency (CSA) and the Australian Federal Police (AFP) arises from the arrangements for making and enforcing CSA Departure Prohibition Orders (DPOs). The CSA uses DPOs as a tool to encourage a parent who has persistently and unreasonably failed to pay their child support debt to make a satisfactory payment arrangement.¹ It is an offence for a person to leave Australia while a DPO is in force.

DPOs are administered through the joint efforts of the CSA, the AFP and the Australian Customs and Border Protection Service (Customs). Essentially, the CSA is responsible for issuing the DPO, and the AFP and Customs are responsible for enforcing it at international departure points by stopping people who attempt to leave Australia while subject to a DPO.

Mrs X's complaint

Mrs X's complaint concerns the AFP's failure to prevent her former husband, Mr X, from leaving Australia while there was a DPO in force for him. She believes that both the CSA and the AFP are responsible for that failure.

Since 2005, Mrs X has been passed between the CSA and the AFP in her attempts to have the Commonwealth acknowledge and remedy her situation. She first approached the Ombudsman's office in 2007 about her complaint. She applied to the CSA and the AFP for compensation in early 2008. The CSA received her claim, but did not arrange to meet with the AFP to discuss it until August 2008. A further 12 months passed before either agency had made a decision on her claim. We consider that the CSA and the AFP's delays in finalising her compensation claim are unjustified.

Making and administering the DPO for Mr X

The CSA had been unsuccessful in its efforts to collect child support from Mr X over a number of years. By 2004, Mr X's child support debt exceeded \$50,000. This was money that Mrs X was entitled to receive from Mr X, but that she would not receive unless and until the CSA was able to collect it from him. The CSA decided to make a DPO for Mr X.

¹ Report no. 08/2009: *Child Support Agency: Administration of Departure Order Powers* contains a discussion of the circumstances in which the CSA issues DPOs. It is available on the Commonwealth Ombudsman's website at: [http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/report_2009_08/\\$FILE/onlineCSA_DepartureProhibOrders_20090603.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/report_2009_08/$FILE/onlineCSA_DepartureProhibOrders_20090603.pdf).

Commonwealth Ombudsman—Australian Federal Police and the Child Support Agency - Caught between two agencies: The case of Mrs X

The CSA notifies the AFP when it issues a DPO. When the AFP receives that notification, it records an alert for the person on the database that Customs checks before it allows a person to leave Australia. If Customs finds an alert for a person who is attempting to leave Australia, the person is stopped and referred to the AFP.

The CSA notified the AFP of Mr X's DPO. The AFP recorded an alert for Mr X for a limited period. This was the usual arrangement at the time, even though a DPO remains in force until the CSA revokes it. The AFP's practice was to contact the CSA when the alert expiry date arrived to establish whether the DPO was still in force. If so, the AFP would renew the alert for a further period. However, in Mr X's case, the alert expired and was not renewed, because of a communication breakdown between the CSA and the AFP.

Mrs X was aware that the CSA had made a DPO for Mr X. In 2005 she learned that Mr X had made plans to go overseas. Mrs X contacted the AFP on the day of Mr X's proposed departure, to make sure that he would be stopped at the airport. The AFP told her that Mr X had already been allowed to board his flight to leave Australia. The AFP said that Customs had not stopped Mr X at the Customs barrier at the international airport, because the alert for him had expired.

Mrs X saw the DPO as her best chance to receive any child support from Mr X. She thought the DPO meant that the AFP would stop Mr X at the airport and seize any cash or cheques that he was taking with him. Mrs X believed that when Mr X went overseas, he would have been carrying enough money to pay his child support debt. She says that she has suffered a financial loss as a result of the AFP's failure to stop Mr X leaving Australia.

The CSA and the AFP conducted separate internal investigations of Mrs X's complaint. Each agency blamed the other for the expired computer alert. The CSA claimed that it had sent a fax to the AFP telling the AFP to renew the alert for Mr X, but the AFP denied receiving it (the 'disputed fax').

In 2007, Mrs X complained to us about the incident and the way the CSA and the AFP had treated her since it happened.

CONCLUSIONS

The expired alert – what went wrong?

Our investigation of Mrs X's complaint revealed that the CSA and the AFP did not have adequate procedures for administering DPOs. There was no formal protocol between the two agencies, and this had led to an arrangement of ad hoc communication, with handwritten and amended documents being transmitted by fax.

The CSA appears to have attached no significance to the fact that the AFP did not acknowledge receipt of its fax instructing the AFP to renew the alert for Mr X. The CSA simply assumed that the AFP had received and acted upon it.

We did not make a finding about which agency was at fault in relation to the disputed fax, although we consider that the AFP's evidence about the faxes that had been sent and received by each agency on the relevant day was preferable to the CSA's evidence. Nevertheless, we concluded that both agencies had a responsibility to ensure that they had in place robust procedures for administering DPOs. Their failure

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to do so had led to the situation where Mr X had been able to leave Australia, despite the DPO.

The CSA and the AFP have since advised us that they have developed and implemented Guidelines for administering DPOs.

Mrs X's claim for compensation—poor handling by both agencies

Mrs X says that in February 2008, she faxed a letter to both the CSA and the AFP, claiming compensation for the child support that she believed she missed out on as a result of their deficient procedures. The AFP says it has no record of receiving that fax. Mrs X faxed a copy of her claim to the AFP in August 2008. In August 2008, the CSA advised us that it intended to consider Ms X's compensation claim in conjunction with the AFP. We stopped our investigation while the two agencies considered her compensation claim. In April 2009, Mrs X contacted us again, complaining that neither agency had made a decision on her claim.

In July 2009, we provided the CSA and the AFP with a draft report of our investigation of Mrs X's complaints. At that time, Mrs X had still not been told whether she would receive compensation. We consider that delay unreasonable. We also believe that there have been serious deficiencies in the way that both agencies have responded to Mrs X's complaint since she first brought it to their attention in 2005. The most serious flaw, in our view, is that the CSA and the AFP have failed to coordinate their efforts, unnecessarily prolonging the process and increasing the stress and inconvenience for Mrs X.

The following criticisms can be made of the way the AFP and the CSA have handled this matter:

- The initial investigation of Mrs X's complaint by both agencies was inadequate. Both agencies claimed to have exhaustively investigated her complaint, but clearly this was not so.
- There has been inordinate delay in the resolution of Mrs X's complaint and compensation claim. The delay is not justified by any inherent complexity in Mrs X's claim, but is instead attributable to administrative weaknesses in both agencies and to the lack of a joint investigation and resolution of her complaint and compensation claim.
- The AFP's handling of Mrs X's compensation claim was inadequate in the following ways:
 - the AFP failed to identify Mrs X's claim as one under the Commonwealth's scheme for Compensation for Detriment caused by Defective Administration (the CDDA scheme)
 - on several occasions the AFP cancelled or postponed meetings with the CSA to discuss Mrs X's claim
 - the AFP was unwilling to speak directly with Mrs X about her claim and told her to deal with its solicitors.
- Communication by both agencies with Mrs X was inadequate. Her inquiries were not always answered, her complaint was not properly acknowledged, and she was left at times in a situation of uncertainty and confusion.

RECOMMENDATIONS

Arising out of this investigation, I made the following recommendations. After each recommendation we include a discussion of the agency response and any developments.

Recommendation 1

The CSA and the AFP should give priority to finalising their consideration of Mrs X's compensation claim and calculate interest on any sum offered, in view of the delays involved.

The CSA notified Mrs X on 11 August 2009 that it had decided to refuse her claim for compensation. This was six days after the six-week period that the CSA and the AFP said they would require to finalise a joint response on Mrs X's claim, following their meeting on 24 June 2009. The CSA apologised to Mrs X for the delay in making a decision.

The AFP had not finalised its consideration of Mrs X's compensation claim by 13 August 2009 when it responded to our draft report. The AFP said that it had provided a report to the Minister for Home Affairs, and told us that it expected a decision shortly.

Recommendation 2

The CSA and the AFP should provide Mrs X with a detailed explanation of the basis for their compensation decision, when made, including a report of their separate investigations of the circumstances in which the computer alert for Mr X was allowed to expire.

The CSA and the AFP both accepted this recommendation in part. The CSA has provided, and the AFP intends to provide, Mrs X with an explanation of the reasons for their separate decisions on her compensation claim. However, the two agencies still do not agree on the reasons Mr X's alert was not renewed and consider that a report of their separate investigations is unlikely to assist in resolving Mrs X's complaint.

Recommendation 3

The CSA and the AFP should review their DPO alert guidelines to include a complaints handling protocol and develop arrangements to cooperatively investigate and consider complaints and compensation claims which relate to the actions of both agencies.

The CSA advised us that it intends to implement this recommendation as soon as is practical.

The AFP advised us that it considered a complaints handling protocol would be of limited utility and that it expected a joint CSA/AFP complaints mechanism would be very seldom used.

Recommendation 4

The CSA and the AFP should provide a suitable apology to Mrs X for their involvement in the events that allowed Mr X to depart Australia and their failure to appropriately respond to her complaints.

The CSA provided a written apology to Mrs X for the administrative failure that did not prevent Mr X leaving Australia and for the delay in resolving her complaint and compensation claim. It also offered her the opportunity to meet with a senior CSA officer.

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The AFP said that it would acknowledge to Mrs X our finding of inadequacy in the communication arrangements between the AFP and the CSA. It also said that it would express regret for the delay in resolving her compensation claim. However, the AFP told us that it did not consider that its actions warranted an apology.

Recommendation 5

The AFP should review how it handles claims under the CDDA scheme having regard to the recommendations in the Ombudsman's report *Putting things right: compensating for defective administration. Administration of decision making under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA) Scheme*, Report No 11/09.

No response required or received from the CSA.

The AFP advised us that it would review its arrangements for managing CDDA claims in the light of our report 'to ensure that it maintains best practice in this area'. The AFP said that it would do this 'irrespective' of our recommendation.

AGENCY RESPONSES

The CSA and the AFP each provided separate responses to our report.

The CSA's response

The CSA told us that it 'fully appreciated the significance' of our decision to prepare a report of our investigation and responded positively to our recommendations. The CSA had finalised its consideration of Mrs X's compensation claim and advised her of its decision by the time that it responded to the draft report. It acknowledged our concerns about the delays involved in that process, saying:

'It is accepted, however, that this process has taken far too long and has involved too much time spent in trying to resolve the agencies' conflicting views about the circumstances which form the basis of Mrs X's complaint and compensation claim.'

The CSA accepted that it and the AFP were jointly responsible for the administration of DPOs and that Mr X had been able to depart Australia because of defects in the processes that the two agencies had in place at the time. However, the CSA concluded that even if Mr X had been stopped at the airport, this was unlikely to have resulted in him paying his child support debt. Accordingly the CSA concluded that Mrs X had not suffered a financial loss as a result of its defective administration and refused to pay any compensation.

The CSA acknowledged that Mrs X was likely to be disappointed with its decision and offered to make a senior officer available to discuss it with her. The CSA also apologised to Mrs X for the delay and the way it handled her complaint and claim.

The CSA told us that it intended to work with the AFP to develop a complaints handling protocol for matters concerning the actions of both agencies.

The AFP's response

The AFP had not finalised its consideration of Mrs X's compensation claim by the time that it responded to our draft report. The AFP disputed that there had been unreasonable delay in dealing with the claim, saying that it only received it in August 2008 and that although 12 months had passed since then, 'reasonable steps have

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been taken to progress it throughout this period'. The AFP argued that it should not be criticised for the approach that it had taken to Mrs X's compensation claim. The AFP said that it could have dealt with the claim on a single agency basis, but that it had adopted a joint approach with the CSA for Mrs X's benefit.

The AFP asserted that it had acted promptly and appropriately at all times in its handling of Mrs X's complaints and compensation claim. It acknowledged our conclusion that there was inadequacy in the communication arrangements between the CSA and the AFP, but was not prepared to agree with it.

The AFP argued that our draft report did not convey a complete picture of its role and actions in Mrs X's case. It asked that we amend the report to make clear its view that 'the AFP had a limited and reactive enforcement role in respect of the DPO system administered by the CSA' and that 'the AFP's role was only to properly implement the CSA's instructions. To the extent that it carried out any additional functions, it did so as a courtesy, not as an obligation, and the CSA nevertheless remained responsible for controlling initiation, maintenance and removal of alerts.'

The AFP also told us that it believed a joint CSA/AFP complaints mechanism for DPOs was unnecessary.

Lessons for other agencies

When agencies share the responsibility for administering a particular service or program, each is likely to be responsible for discrete parts of the whole. A failure in one agency can undermine the effectiveness of the entire service or program. Furthermore, while each agency may be confident that it has in place good internal processes, it is essential for effective joint service delivery that they develop a common understanding of their separate responsibilities and that they have in place arrangements to discuss and remedy any problems that may develop at the points where those responsibilities intersect.

When things go wrong, members of the public may well be adversely affected. Navigating between two or more Commonwealth agencies to fix a problem can be difficult. My office found dealing separately with both the CSA and the AFP to resolve Mrs X's complaint challenging. Mrs X found the task impossible. In our view, Mrs X's complaint clearly illustrates the need for agencies who work together to deliver programs and services to also work together to fix any problems arising from their activities.

The Commonwealth Ombudsman's office has a range of products that will assist agencies to develop effective and responsive complaint handling mechanisms and to improve the way they deal with compensation claims. The following publications are available from our website www.ombudsman.gov.au.

- *Better Practice Guide to Complaint Handling*
- *Fact Sheet 7 Complaint handling: multiple agencies*
- *Report 11|2009 Putting things right: compensating for defective administration*

The CSA's response to our investigation suggests that it has used Mrs X's experience to improve the way that it deals with DPOs and that it will attempt to engage the AFP in any future complaints about matters involving both agencies. We hope that other agencies, including the AFP, can learn from Mrs X's experience of being 'caught between two agencies'.

Australia Post

DETERMINING LEVELS OF COMPENSATION FOR LOSS OR DAMAGE OF POSTAL ITEMS

February 2010

Report by the Commonwealth and Postal Industry Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **01**|2010

Reports by the Ombudsman

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EXECUTIVE SUMMARY

Compensation may be payable by Australia Post if postal items are lost or damaged. For items other than those sent by registered post or cash on delivery, the maximum compensation payable under Australia Post's terms and conditions is \$50.

If an item is sent registered post or cash on delivery, a maximum basic compensation level of \$100 is applicable. 'Extra Cover' (formerly called insurance) up to \$5,000 can also be purchased for these items.

In our view, some form of compensation is a necessary feature of the postal service. People have a right to expect some level of recompense if their property is lost or damaged while in Australia Post's hands. The liability to compensate for service failure also acts as an incentive to optimise service delivery.

It is reasonable for Australia Post to limit its liability for loss and damage in the post. Australia Post has no way of knowing the value of items that people may be sending. Loss and damage may not be Australia Post's fault. Limitation of liability is common in the postal and courier industry.

However, Ombudsman office records show that there was a maximum compensation level of \$50 payable as long ago as 1987. Changes in the value of money brought about by inflation since 1987 mean that \$50 now is worth only half what it was worth then. Without expressing a particular view about the level of compensation, we note that if the amount had been increased in line with the consumer price index, the 2009 figure would be \$100.60.

As the level of standard compensation is a regular issue of complaint to our office, we decided to investigate why the compensation level has remained unchanged for so long. We do not claim to have the expertise to indicate an appropriate level of compensation. We do, however, consider it appropriate to investigate the process used by Australia Post to determine compensation levels given the substantial erosion in the value of the maximum payable.

In response to our enquiries, Australia Post advised us that there had been changes to compensation levels since 1987. In 1989, an enhanced maximum compensation level of \$75 was made available for items sent by certified mail. In 1996, when the certified and security mail services were replaced by the new registered post service, a basic compensation level for that service of \$100 was introduced, and the rate for ordinary postal items was confirmed at \$50.

Australia Post considers that \$100 was and remains an attractive basic compensation level for registered post, taking pricing and marketing considerations into account. It considers that the compensation level for ordinary items should be differentiated from registered post, effectively by being kept at half the level applicable to registered items.

In our view, this forges an unwarranted and misleading link between the terms and conditions on which Australia Post offers its registered service, in relation to which it competes with other couriers and postal operators, and the terms and conditions on which Australia Post's monopoly letters service is provided.

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In addition, there was presumably a rationale for the figure of \$50 being in place in 1987. This may have been based on considerations such as the type and value of items deemed by Australia Post as suitable for the ordinary (as opposed to registered) post, community standards regarding items deemed suitable for the ordinary post, and the cost to Australia Post of providing compensation at that rate.

Given that the real value of compensation for ordinary items today is only half what it was in 1987, the rationale applicable in 1987 no longer seems to be relevant or applied by Australia Post. We do not know whether Australia Post has carried out any analysis to justify the declining real value of compensation for ordinary items. The information it provided to us suggests that the compensation level for ordinary items is set solely by reference to the level for registered items.

We note the tendency for the diminishing level of compensation for ordinary post to dissuade people from using the ordinary letters and parcels services in favour of registering items, in order to secure adequate cover should their postal items be damaged or lost.

We consider that the compensation level payable for service failure in relation to the monopoly letters service is closely bound up with issues around the pricing of that service. The Australian Competition and Consumer Commission (ACCC) has statutory powers to enquire into, and report upon, proposed price increases for the letters service. In our view, the question of compensation payable for service failures is a relevant consideration in the exercise of those powers.

In relation to Australia Post's other services to which the basic compensation level applies—most notably parcels—we consider that the steadily declining real compensation rate is worthy of note and will tend to steer customers towards the more expensive registered service.

This has implications particularly for residents of regional and rural Australia, who have only limited access to competitors' services. If this is deliberate Australia Post policy, then it may be a matter worthy of public debate.

On the basis of this investigation, the Ombudsman recommends that Australia Post should as soon as practicable conduct a formal review of the amount of compensation it pays for loss of, and damage to, ordinary items. We also propose that compensation rates should be part of the ACCC's consideration of proposals to increase the basic postage rate, and that Australia Post should incorporate information about its compensation arrangements and how they have changed over the relevant period in any future price notification to the ACCC.

We will follow up with Australia Post in six months in relation to its implementation of these recommendations. We will also provide a copy of this report to the ACCC.

PART 1—BACKGROUND

Payment of compensation by Australia Post

1.1 Of the millions of postal items handled by Australia Post every day, the vast majority reach their destination safely. However, inevitably some items are lost and damaged while in transit.

1.2 This is not necessarily the result of any fault on the part of Australia Post or its employees. Through our investigation of complaints we have encountered many different causes of loss and damage, ranging from arson of street posting boxes, to transport accidents. Equally, however, loss or damage may be caused by lack of care and skill in handling, or even outright dishonesty and theft, by mail handlers.

1.3 There are limitations on Australia Post's legal liability for items lost and damaged in the mail. Chief of these is the provision in the *Australian Postal Corporation Act 1989* (the APC Act) that Australia Post is not liable for loss or damage caused by any act or omission in relation to the carriage of a letter or article, unless Australia Post has given the claimant a receipt for the article.

1.4 The APC Act also provides that unless a customer enters into a different agreement with Australia Post, the terms and conditions under which articles are carried are those made by the Board of Australia Post.

1.5 The Board has made terms and conditions that seek to exclude any liability for loss of, and damage to, postal items, or for misinformation by Australia Post employees. The terms and conditions nevertheless provide for compensation to be paid in some circumstances.

1.6 Where an item is sent by registered post or cash on delivery (COD), compensation for loss or damage may be payable in accordance with the Extra Cover terms and conditions. This is up to a basic maximum of \$100 for registered items or up to \$5,000 if the customer purchases additional Extra Cover.

1.7 In addition, the terms and conditions provide that Australia Post can pay up to \$50 compensation at its discretion for loss of, and damage to, ordinary postal items.¹ There are limitations and exclusions on when compensation may be paid.

1.8 The net effect of the terms and conditions is that, generally speaking, unless a customer uses registered post or COD, a maximum of \$50 compensation for loss and damage is payable.

1.9 This report does not consider the legal validity of the terms and conditions, or their consistency with other legislation. For present purposes it is assumed that the limitations and exclusions of liability contained in the terms and conditions are legally effective and would be upheld if tested in a court of law.

Our investigation

1.10 In the financial year ended June 2009, 470 out of 2,219 complaints made to the Postal Industry Ombudsman about Australia Post concerned loss of a postal

¹ An 'ordinary' item is one that has not been sent by the registered post or COD service.

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item. This represents 21.2% of the Australia Post complaints we received. Many of these complaints raised issues about the payment or amount of compensation.

1.11 We are aware that complaints about loss are a significant issue for Australia Post. In written replies to the Senate Standing Committee on the Environment, Communications and the Arts Budget Estimates hearings in May 2008, Australia Post advised that in 2007 its centralised enquiry number received 224,000 complaints that involved searching for a missing item.

1.12 Complainants often say to us that they have been offered the maximum compensation of \$50 for ordinary articles, but that this amount would not fully compensate them for their loss.

1.13 Our usual response to complaints of this nature is that customers may register their items or purchase Extra Cover for them. While this option is not available for Express Post items, customers do have a choice between Express and Registered Post. By selecting Express Post, customers choose not to obtain the benefit of Extra Cover.

1.14 For this reason, we do not generally investigate complaints about claims that the compensation for ordinary items is inadequate to cover the customer's loss. We do so only where a serious and identifiable service failure by Australia Post caused the loss—one which went beyond the general risk of loss and damage it must be assumed customers accept when they consign items by post.

1.15 We are aware, however, that the maximum rate of compensation for lost ordinary items has not changed for many years. This was highlighted when a review of old files held by the Ombudsman showed references to a compensation rate of \$50 as long ago as 1987.

1.16 Since 1987, the cost of postage has increased materially. For example, the basic letter service—that is, the letter service that Australia Post is required by law to provide across Australia at a flat rate of postage—has increased in price from 37¢ to 55¢ since 1987.

1.17 We decided to contact Australia Post to seek information about the history of compensation rates since 1987, and the basis on which the rates were set.

Australia Post's response

1.18 We provided a draft version of this report to Australia Post for comment. Its response is reproduced in full at appendix 1 of this report.

1.19 Australia Post has rejected the thrust of this report and the recommendations in it. Australia Post maintains the view that the level of compensation for ordinary mail should be tied to the basic level of compensation for registered post, which for commercial reasons it considers should be \$100.

1.20 Australia Post has also indicated that its view is that compensation levels are not relevant to the pricing of the basic letter service, having in mind the low level of compensation payments made for failures of that service.

1.21 The Ombudsman believes it is time to thoroughly review compensation levels. Australia Post's reasons for disagreeing with the Ombudsman do not address the

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major issue, which is that the same compensation level has been in place for 22 years, and should be revisited.

1.22 As to the pricing of the basic letter service, Australia Post's view that there is no connection between compensation levels and the price of the reserved postal service requires further analysis and justification. Accordingly, this report recommends that information about compensation arrangements, including when they were last changed and what proposals exist to review them, be provided in any future price notification by Australia Post to the ACCC.

PART 2—ISSUES

Why pay compensation?

2.1 For most businesses, liability to compensate dissatisfied customers will be fixed by contract. In many jurisdictions, the law implies some basic contractual terms about providing services with reasonable care and skill, which could lead to compensation being payable if breached. Businesses may also be liable to pay compensation for negligence if that negligence causes loss of, or damage to, other people's property.

2.2 As well as legal liability of this sort, businesses may choose to pay compensation despite not being legally liable to do so, in order to retain customer loyalty. In such circumstances, businesses are likely to be concerned with making the level of compensation attractive to customers.

2.3 Australia Post is in a somewhat different position in that its terms and conditions are not governed by the law of contract. Instead, they have effect because the APC Act says that they do. Accordingly, the Australia Post Board has a measure of flexibility in making terms and conditions independent of market forces and the general law of contract.

2.4 In structuring its pricing arrangements to be both competitive and profitable, a business will need to consider the frequency with which it is likely to have to compensate customers and the amount it is likely to have to pay. In a competitive environment, a business must provide a level of compensation that compares favourably with its rivals, or risk losing business to them.

2.5 Another consideration for business is, of course, minimising the number of occasions on which it has to compensate dissatisfied clients. Strong quality assurance mechanisms will necessarily reduce a business's exposure to compensation payments.

2.6 In our view, these principles apply equally to Australia Post, with one notable difference. In respect of the basic letter service, Australia Post is not subject to competition because it has a statutory monopoly on the collection and delivery of letters under 250 grams and 5 mm thick² (known as the 'reserved services').

2.7 Australia Post therefore lacks the same incentive to provide compensation for failures in the reserved services as would exist in a competitive environment, because customers do not have the choice to take their business elsewhere if they are dissatisfied with the compensation payable.

Compensation as 'sound commercial practice'

2.8 Australia Post is under a legal obligation to act in accordance with sound commercial practice. This may imply that Australia Post should always seek to maximise its profits and take advantage of its monopoly position in relation to reserved services.

2.9 An alternative interpretation, at least in respect of the reserved services, is that Australia Post should act as though it is subject to market forces—even though it

² Subject to certain exceptions spelt out in the APC Act, Australia Post effectively has both an obligation to provide, and a monopoly over, the basic letter service in Australia.

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is not. In relation to compensation, this would involve setting compensation at a level that is equitable for Australia Post's customers, having in mind the cost of the service provided and the reasonable expectation of customers that appropriate care will be taken in the handling of their mail.

2.10 There is another way in which liability to pay compensation promotes sound commercial practice, and that is by providing an incentive to improve service and product quality. If compensation has to be paid for service failure, whether because of legal liability imposed from outside or commercial imperatives to keep customers happy, there is a cost incentive to minimise compensation payouts by optimising service delivery.

2.11 It may therefore be a further aspect of operating in accordance with sound commercial practice that Australia Post recognises an obligation to compensate for service failure and sets the amount of compensation at a realistic level. By allocating compensation payments to the responsible cost centres, an incentive is provided for service improvement and higher visibility of problems is achieved.

2.12 It is not in our view unreasonable for Australia Post to limit the extent of its legal liability to customers through its terms and conditions. We often have to remind complainants that Australia Post may have no way of knowing what has been posted in a parcel or its value.

2.13 Private businesses often limit their liability by use of contractual terms, subject to rules of law governing when terms of this nature can be said to have been effectively incorporated in a contract and subject also to laws about unfair contract terms and trade practices.

2.14 It would not be fair in those circumstances to expect Australia Post to pay unlimited compensation for loss, even where the loss is caused through its fault, noting that the loss may not be Australia Post's fault at all.

2.15 However, we do consider that it is appropriate for Australia Post to have some form of compensation scheme. In our view, the provision of basic compensation is an aspect both of Australia Post's obligation to provide a letter service to all Australians, and its obligation to act in accordance with sound commercial practice. It is questionable whether provision of a service that did not provide some sort of compensation, albeit subject to conditions, for service failure would meet those obligations.

How much compensation?

2.16 It is not the Ombudsman's function to set the amount of compensation that should be payable by Australia Post for service failure. The Ombudsman's office does not have the mandate or expertise to conduct the analysis that would be required to strike the balance between profit, equity to customers, and the quality control incentive referred to previously.

2.17 This report examines why the level of compensation for loss of, or damage to, ordinary items that is payable by Australia Post in 2009 is the same as the level prevailing in 1987.

The changing value of money

2.18 When comparing historical levels of compensation with the present day, it can be useful to consider how the value of money has changed over time. Ombudsman files indicate that a maximum of \$50 compensation for loss and damage was paid by Australia Post as long ago as 1987. In real terms, \$50 in 1987 was worth more than it is today.

2.19 People are, generally, familiar with the concept of the changing value of money. In brief, the result of inflation is that a dollar will not buy as much today as it did 20 years ago. One way of measuring this is the Consumer Price Index (CPI), which tracks how much a set selection of goods costs over time, and uses changes in the cost of the goods to measure changes in the value of money.

2.20 Measured by the CPI, the value of money has halved in the past 20 years.³ That is, in 2009 the same selection of goods would cost double what it did in 1987. On that basis, \$100 at 30 June 2009 is equivalent to \$49.70 in 1987.

2.21 Not all goods change in value at the same rate. Appliances such as televisions and other electrical goods may decrease in price over time, whereas other goods have increased in price more than the CPI would suggest. This is because the CPI averages out price increases across a range of goods.

2.22 Of particular relevance to the question of compensation for postal services is the change in the price of those services over time. A good benchmark is the basic postage rate, or the price of a standard postage stamp.

2.23 In 1987, the basic postage rate was 37¢, compared to 55¢ today. Last year, Australia Post notified the ACCC of its proposal to increase the amount to 60¢, although the proposal did not find favour with the ACCC.

2.24 The cost of postage has not risen as fast as the CPI; since 1987 the CPI has doubled but the price of a stamp has not. The 55¢ cost of a basic postage stamp today is 27¢ in 1987 terms, compared with the actual cost of a stamp in 1987 of 37¢. Nevertheless, the price of postage has risen, just not as fast as other goods and services.

2.25 In our view, this raises two considerations:

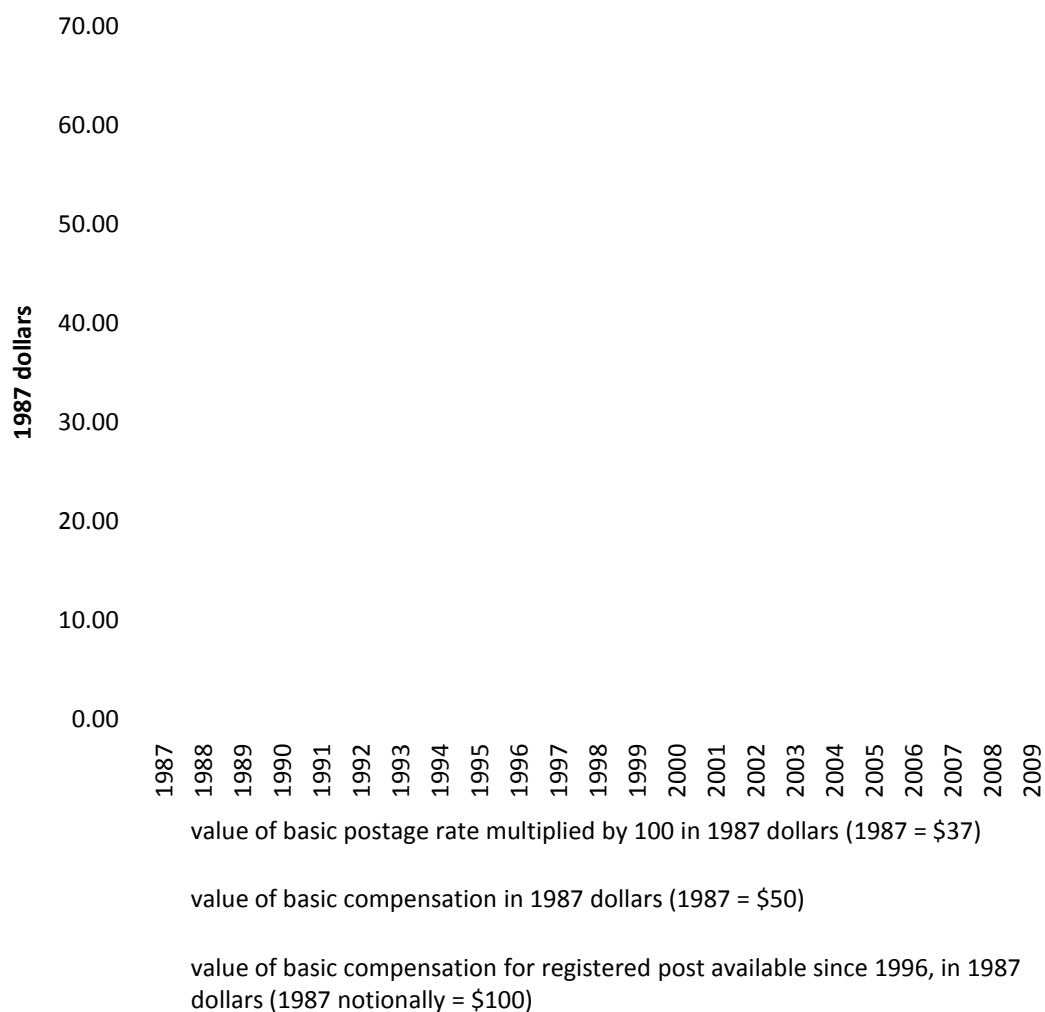
- Why did Australia Post consider \$50 an appropriate amount of compensation in 1987 (or at the date that this figure was set, if earlier)? Was this amount related to the value of articles that Australia Post expected people to send through the post without purchasing additional insurance? Was there any other rationale for the figure?
- Has Australia Post considered reviewing the \$50 compensation maximum? In 1987 dollars, \$50 today is only worth \$24.85. If there was a rationale for the figure of \$50 in 1987, does it still apply?

As part of our investigation, we asked for Australia Post's comment on these questions.

³ Figures from the Australian Bureau of Statistics website www.abs.gov.au.

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Table 1: Comparisons of changes over time in the value of the basic postage rate, the basic compensation level, and the registered post compensation level, expressed in 1987 dollars



Australia Post’s position

2.26 In response to our initial investigation, Australia Post provided us with information about the levels of compensation it had set and how these had changed over time.

2.27 Australia Post agreed that the maximum level of compensation for ordinary items had been \$50 in 1987, but said that in 1989 this was increased to \$75. The level was reconsidered when Australia Post reviewed its certified and security mail services in the mid-1990s and replaced these with the new registered post service in 1996.

2.28 When the new registered post service was introduced, Australia Post decided to offer a base level of \$100 compensation for loss of, and damage to, registered post items. Additional cover could be purchased up to the current maximum of \$5,000. Australia Post advised that the base level of \$100 was considered to be:

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... the most appropriate and effective compensation point, from both a market positioning and service cost perspective.⁴

2.29 No doubt \$100 was seen in 1996 to be marketable as an improvement on the \$75 cover for certified and security mail. It is perhaps worth noting that in 1989–90, when the \$75 limit was introduced, \$75 was worth \$60.75 in 1987 dollars. When the figure of \$100 for the new registered post was introduced in 1996, it was worth \$68 in 1987 dollars and the value of \$75 had fallen to \$51 in 1987 dollars.

2.30 Australia Post advised us that the return to a \$50 maximum for ordinary items in 1996 intended to provide a clear product/service differentiation between ordinary and registered post. We understand that Australia Post considered it appropriate to provide maximum compensation for ordinary items at half the base rate available for registered items.

2.31 Australia Post has told us that while it had increased the price of registered post over time, it still considered the base level of \$100 compensation cost effective and beneficial, from a marketing perspective. It has no plans to increase the \$100 figure and, because the rate of compensation for ordinary items is linked to the rate for registered post, there are no plans to increase the figure for ordinary items either.

Distinctions between registered post and ordinary post

2.32 Australia Post is required by law to provide the reserved services. Other operators are barred from offering them, unless they charge at least four times what Australia Post charges. In contrast, Australia Post is under no obligation to provide a registered post service and other operators may provide a similar service in competition with Australia Post if they wish.

2.33 Australia Post offers the registered post service (and, it should be noted at this point, its parcels service) as part of its principal function under the APC Act to provide postal services. It does so in competition with other companies that collect and deliver courier items and parcels.

2.34 The price of the non-reserved services is a matter for Australia Post to decide, based on normal considerations of market pricing. In contrast:

In order to increase the prices of its reserved letter services in accordance with the *Trade Practices Act 1974* (the TPA), Australia Post must provide the ACCC with a locality notice specifying the proposed price increases, and receive a response from the ACCC stating that it has no objection to the proposed price increases, or price increases that are less than those proposed by Australia Post.⁵

The Minister has the right of veto over any proposed price increase for the reserved services.

2.35 If customers find the \$100 basic level of maximum compensation for registered post unacceptable, they have two options—they can use the services of a competitor or they can choose to purchase Extra Cover for the item.

2.36 Customers do not necessarily have these options for ordinary items if they are dissatisfied with the \$50 maximum compensation. For the reserved services, Australia Post has no competitors because competition is outlawed. For ordinary

⁴ Australia Post response to our investigation, 18 June 2009.

⁵ ACCC issues paper on Australia Post's draft price notification, August 2009.

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parcels, customers can take their business elsewhere. However, in many rural and regional areas this is not a practical solution because there is no accessible competitor. Extra Cover is not available unless an item is registered.

2.37 Australia Post's argument that \$100 is a good basic compensation level from a marketing and cost point of view is not in itself unreasonable. That said, it should be observed that the real value of \$100 has diminished over time. Between June 1996 and June 2009, the CPI has increased by 39%. In other words, \$100 in 1996 is worth only \$71.75 today.

2.38 By not increasing the basic level of compensation, Australia Post is shifting customers not satisfied with this level of cover towards purchasing Extra Cover as an 'add-on'.

2.39 In contrast, customers requiring more than the \$50 maximum compensation on ordinary items can only increase their cover by registering the item. A customer intending to use the reserved letter service to send an item cannot do so if they want more than \$50 cover—instead, they must use the non-reserved registered service.

2.40 In our view, Australia Post's suggestion that the compensation provided for the reserved services should be set as a proportion of the cover provided for the non-reserved registered service makes an unwarranted link between the terms and conditions on which the reserved services are supplied, and the terms and conditions of a non-reserved service (registered post).

2.41 Although the argument does not apply in the same terms to the ordinary parcels service (as it is not a reserved service), we consider that there is nonetheless a debate to be had about the way in which risk is shared between Australia Post and its customers in the event of loss of, or damage to, postal items.

2.42 Particularly for Australians living in rural and regional areas, Australia Post may be the only realistic choice when sending parcels. The diminution in the real value of compensation for loss of, or damage to, ordinary parcels raises questions about the reasons for shifting risk of service failure from Australia Post to the consumer, and whether this is a deliberate policy or an unintended consequence of long-standing inaction.

The rationale for \$50

2.43 Australia Post advised us that the figure of \$50 for compensation for ordinary mail was set in 1996, having regard to the \$100 figure for registered mail. The \$100 figure was arrived at by a process of deciding what was cost-effective and 'saleable' and, we infer, as an increment from the existing \$75 for security and certified mail.

2.44 This does not explain how the figure of \$50 current in 1987 was determined. Nor does it reveal the process by which earlier figures were reviewed and increased if necessary.

2.45 We assume that, periodically, Australia Post must have reviewed the 'basic' compensation to be paid for loss of, and damage to, items sent using the reserved services. As previously stated, we consider that a compensation scheme is a necessary part of the provision of the reserved services. As long ago as 1987, Australia Post considered \$50 an appropriate sum of compensation.

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2.46 In our view, Australia Post has not satisfactorily explained why the maximum compensation payable for ordinary and reserved services items has halved in real terms since 1987.

2.47 Even if it is accepted that the introduction of the registered service in 1996 provided a basis for ‘resetting’ the basic figure to \$50, that sum today is worth \$35.90 in 1996 dollars.

2.48 The devaluing over time of the compensation payable for ordinary mail, including the reserved services, might have influenced customers who would previously have been content to use the reserved letter service to instead use the non-reserved registered service.

The need for review

2.49 In our view, the provision of some level of compensation for service failure is an integral part of the reserved letter service. There is no doubt an expectation on the part of customers of other ordinary mail services that they will be compensated in the event of loss of, or damage to, their mail.

2.50 It seems to us that the maximum amount of compensation payable, particularly for the reserved services, should not be a random choice. Rather, it should be based on some level of analysis of:

- the type and value of items people send and for which they seek compensation
- community standards in relation to ‘valuable’ items that should be sent by a more secure service, such as registered post
- the cost to Australia Post of providing compensation at a given rate for ordinary items, and its effect on the pricing of the ordinary services, including the reserved letter service.

2.51 If an analysis of this sort was carried out in 1996 when the figure of \$50 was set, then by reason of the changing value of money and price of postage, it may no longer be valid and should be updated.

The level of compensation and the cost of postage

2.52 At a broader level, we consider that there would be an expectation among mail users that the level of compensation for service failure should keep pace in some way with the changing value of money, and should at least be reviewed whenever the cost of basic postage is reviewed.

2.53 Australia Post must provide notification to the ACCC of any proposed price increase for its reserved services. The ACCC has a role in considering and reporting on such proposals.

2.54 In considering these notifications, the ACCC gives regard to various factors, including:

... the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices⁶

⁶ *Trade Practices Act 1974 s 95G(7)(b)*.

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and

the functions and obligations of Australia Post as set out in sections 14–16 and 25–28 of the *Australian Postal Corporation Act 1989*.⁷

2.55 One of the obligations is to provide the reserved services. One of the functions—indeed, the principal function—is to supply postal services within Australia.

2.56 We argue that the availability of appropriate compensation for service failure is an integral part of the provision of the reserved services and of postal services generally. In our view, the adequacy of the compensation provided—which should encompass a consideration of whether the level of compensation has been reviewed appropriately having regard to the changing value of money—is a factor to which the ACCC could have regard in considering any notification of a proposal to increase the basic postage rate given to it by Australia Post.

2.57 This is the more so because, as we discussed earlier in this report, the setting of compensation levels is closely bound with the pricing of a product. The optimum compensation level will depend on a number of factors, including the price of the service involved; and conversely that the price of the product may be affected if the level of compensation for service failure changes.

⁷ Direction made by the Minister under his statutory powers on 19 September 1990.

PART 3—CONCLUSIONS

- 3.1 We consider there are two broad areas Australia Post should address.
- 3.2 First, we do not accept that there should be a link between the level of compensation paid in respect of service failure in the reserved services and the level payable for service failure for the non-reserved services. Different considerations apply to the two. While Australia Post can argue that the pricing and compensation provisions for non-reserved services are matters of commercial judgement, the same does not apply to the reserved services. One should not depend upon the other.
- 3.3 By setting the compensation level at a specific figure for reserved services and then letting that level be eroded by inflation over time, customers are likely to be influenced away from using the reserved services because the maximum level of compensation is inadequate.
- 3.4 The rationale for the basic level of compensation for the reserved and ordinary parcels services should depend on more than Australia Post's judgement about the commercially attractive level for registered post and its decision to maintain differential pricing between the two.
- 3.5 Australia Post should appreciate that because it has failed to change the basic level of compensation over time, people can no longer send by ordinary mail items that they could have sent 10 or 20 years ago and expect to be fully compensated if the items are lost or damaged.
- 3.6 The implications of the erosion in the value of the basic compensation for users of ordinary mail services are clear. Any influence on people to substitute use of the non-reserved registered service where they would previously have used the reserved letter service may raise questions about Australia Post's commitment to maintaining the standards of the basic letter service.
- 3.7 In relation to the non-reserved parcels service, if Australia Post hopes to persuade people to purchase registered post and Extra Cover for their mail items in order to receive adequate compensation in case of service failure, we consider that Australia Post should be transparent about this approach. It should be prepared to debate the merits of the effect this will have on users, particularly users in rural and regional areas who have limited access to competitors' services.
- 3.8 Second, we have noted the apparent lack of any review of compensation levels when the basic price of postage has been increased.
- 3.9 We have already clarified that we do not consider that our role, or the scope of this report, extends to any discussion of what would constitute an appropriate compensation level. However, we are of the view that the ACCC has the appropriate expertise and the legal authority to express a view on the subject in relation to price notifications by Australia Post.
- 3.10 Accordingly, we consider that the compensation provisions applicable to the reserved services are relevant to any price notification submitted by Australia Post to the ACCC. We take the view that Australia Post should include some discussion of those provisions in any price notification, and, whether or not it does so, the ACCC could usefully inform itself of such provisions and take them into account when considering a price notification by Australia Post.

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3.11 Australia Post could also address the issues discussed in this report by creating a link between the cost of postage and the compensation available for service failure. In other jurisdictions the link is specific. For example, in the UK the compensation available for loss of, or damage to, ordinary mail is capped at 100 times the cost of a first class stamp.⁸

3.12 Whether Australia Post chooses a strategy of that kind, or a different way of reviewing and keeping current the basic level of compensation it pays, it needs to establish a strategy for handling this issue in the future. We do not consider that inaction over a period of 13 years is acceptable.

⁸ Royal Mail's retail compensation policy for loss, <http://www.royalmail.com/portal/rm/content2?catId=70700722&mediaId=79800735> and Royal Mail's compensation policy for damage, <http://www.royalmail.com/portal/rm/content2?catId=77300736&mediaId=80000739>, last accessed on 19 January 2010.

PART 4—RECOMMENDATIONS

4.1 I make the following recommendations:

Recommendation 1

Australia Post should as soon as practicable conduct a formal review of the amount of compensation it pays for loss of, and damage to, ordinary post items. The review should address, at least, the following:

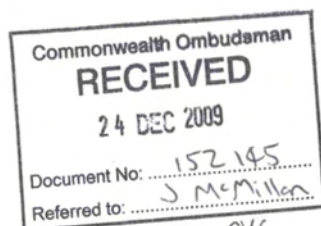
- identification of the rationale for the figure being set at \$50 in 1987
- whether that rationale is still valid independent of the compensation levels payable for other services, and if not, why not
- identification, if that rationale is still valid, of the compensation level that would be required to fulfil the same purpose at 2010 values.

Recommendation 2

Australia Post should incorporate information about its compensation arrangements and how they have changed over the relevant period in any future price notification to the ACCC relating to a proposed increase in the basic postage rate.

4.2 We will follow up with Australia Post in six months in relation to its implementation of these recommendations. We will also send a copy of this report to the ACCC.

APPENDIX 1—AUSTRALIA POST'S RESPONSE



CORPORATE SECRETARY

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9-
McMillan

22 December 2009

Professor John McMillan
Postal Industry Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Professor McMillan

Thank you for the opportunity to provide our comments on the contents of your draft report titled "Determining Levels of Compensation for Loss or Damage of Postal Items".

As a general observation the content of this report focuses on the amount of compensation available for those items carried via the letter service which encompasses small (standard) and large letters and therefore is a mix of reserved and non-reserved services.

Although Section 27 of the Australia Post Corporation Act (the Act) requires the Corporation to offer a letter service, it is not restricted to just reserved letters and it does not include any obligation to provide compensation for either reserved or non-reserved items. Furthermore Section 34 of the Act provides immunity from liability for lost or damaged items where the item has been sent using the letter service except where a receipt has been issued.

In this context it should be noted that the current compensation limit for ordinary mail items have been designed primarily for articles of value which are overwhelmingly sent by the parcel service, which is not a reserved service.

This view is supported by the 2008/09 statistics which show that out of a total volume of 43.8 million ordinary parcels mailed, 9,124 or 0.02% made compensation claims; with an average payout value of \$38.03. These claims represent just under 72% of the total number of compensation claims for ordinary mail items received during 2008/09.

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In contrast, out of the 4,259.1 million items posted in the domestic letters service, 666 compensation claims were received. This figure of 666 represents less than one in six million letters and is only 5.2% of the total compensation claims for mail items with the average amount paid being \$28.83.

As advised previously, we do not consider that there is a relationship between compensation limits and the basic postage rate. Any refund on postage is treated as a separate amount to any compensation claim. Furthermore, the cost of providing the letter service is a factor that is taken into consideration in setting letter prices. However, as noted above the amount of compensation paid is a minimal cost in Australia Post providing the letter service.

However, given the nexus between the ordinary mail and basic Registered Post compensation levels, any change to the former will ultimately be dependent on an adjustment to the latter. In this regard the base Registered Post level of cover is still considered the most appropriate and effective compensation point from both a commercial and service cost perspective. Although there are no immediate plans to adjust this level, it will be kept under review as part of our ongoing product/service monitoring.

In regard to our latest draft notification to the ACCC, we made no claim that these price increases are necessary to cover an increase in costs which can be attributed to an increase in the amount of compensation payments. As such we believe the existing compensation limit of \$50 is not a relevant component of the current price notification. Furthermore, given that Section 34 of our Act provides statutory protection in the event of loss or damage to items sent via the letter service, should Australia Post attempt to increase the compensation limits the ACCC may question whether the proposed prices are recovering the efficient costs of providing the reserved service (given the statutory immunity) and whether such a change would have a negative impact upon other competitive offers (eg. would it result in customers moving towards the reserved services).

You have suggested that Australia Post should consider adopting the Royal Mail model whereby the compensation amount is based on a multiple of the basic postage rate. Under our current compensation framework, compensation of up to \$50 in addition to a refund for any postage paid is available to customers sending ordinary items. Australia Post also has the discretion to pay compensation in excess of this amount where this is warranted by the circumstances of the particular claim. Given that the compensation provided by Royal Mail is in the form of 6 first class letter stamps for eligible letters, which equates to a much lower value than the amount offered by Australia Post, we see no merit in adopting this alternative compensation scheme.

In addition to our comments on your draft report I would also take this opportunity to provide some feedback on Mr Brent's letter of 26 October 2009 (ref: 2009-300007).

In this letter it is stated that "...compensation is a cost of providing the reserved services". As advised in our previous correspondence regarding this issue, there is no provision in our Act which stipulates that the Corporation is obliged to offer compensation for ordinary mail items. Australia Post offers a

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basic level of compensation for ordinary letters and parcels for the benefit of our customers and to differentiate our services from those of our competitors. The setting of these compensation limits is entirely at Australia Post's discretion.

Like many commercial organisations we offer a variety of products/services designed to meet a range of market needs, including the ability for our customers to purchase a level of cover that aligns with the value of the items being sent. In this way the cost is met by those who wish to purchase the service and therefore not subsidised by postal users in general.

In summary it is important to note that the bulk of compensation claims for mail items relate to parcels which are provided by Australia Post in a fully competitive environment. This would support our view that the value of items sent via the letter service is generally much less than those being sent as parcels. Nevertheless Australia Post offers the same amount of compensation for both letters (which includes reserved letters) and parcels.

In addition, given that the average compensation payout in the 2008/09 period was considerably less than \$50 we believe that there is no justification for changing the current limit at this time.

In regard to your specific recommendations, we have provided our responses in the attached. I trust that the information provided will be of assistance in this investigation. Should you wish to discuss further please contact me on (03) 9106 7115.

Yours sincerely



Paul Burke
Acting Corporate Secretary

Attachment

Recommendation 1

Australia Post should conduct a formal review of the amount of compensation it pays for loss and damage in the post to ordinary items as soon as practicable. The review should at least address the following:

- Identify the rationale for the figure being set at \$50 in 1987
- Review whether that rationale still holds good independently of the compensation levels payable for other services, and if not why not
- If that rationale still holds good, identify the compensation level that would be required to fulfil the same purpose at 2009 values

Response

It would not be appropriate for any review of Australia Post's compensation framework to take 1987 as a reference point.

Australia Post's structure and obligations were fundamentally changed in 1989 when the organisation became incorporated with a commercial charter. Prior to that Australia Post was a break-even Commission. To review from 1987 would suggest an analysis /critique of change that was driven by government policy which would be inappropriate for Australia Post.

Notwithstanding this and based on the information provided above we do not currently believe that a formal review of our compensation framework is justified.

Recommendation 2

Australia Post should, as part of its current notification to the ACCC of a proposed increase in the basic postage rate, draw this report to the ACCC's attention and should provide the ACCC with sufficient information to enable the ACCC to consider the implications of the existing or any proposed compensation arrangements for the proposed increase.

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Response

The level of compensation offered is not a relevant component of the Australia Post's letter price notification. The amount of compensation payments for domestic reserved letters is immaterial in the context of the total cost base for domestic reserved letters (the assessment of which the ACCC uses to determine the merits of a price notification).

Recommendation 3

Australia Post should incorporate information about its compensation arrangements and how they have changed over the relevant period in any future price notification to the ACCC.

Response

Similar to Recommendation 2 above the level of compensation offered by Australia Post is not a relevant component of any current or future price notification. Put simply, the amount of compensation payable for domestic reserved letters is immaterial in the context of the total cost base for domestic reserved letters.

Such action would only be applicable if one of the justifications for the increase in price was to offset an increase in the level of compensation payments and that such compensation payments were part of an efficient cost base. i.e. Australia Post was not passing on higher compensation payments as price increases to other postal users. This is not the case.

ABBREVIATIONS AND ACRONYMS

ACCC	Australian Competition and Consumer Commission
APC Act	<i>Australian Postal Corporation Act 1989</i>
Basic letter service	Collection and delivery of letters that conform to the following criteria: <ul style="list-style-type: none">(a) does not weigh more than 250 grams(b) not more than 5mm thick(c) other 2 dimensions form a rectangle:<ul style="list-style-type: none">(i) 2 of whose sides are shorter than the other sides; and(ii) the shorter sides of which are not more than 122 mm long; and(iii) the longer sides of which are not more than 237 mm long; and(iv) the adjacent sides of which are in the ratio of 1 to at least 1.414.
COD	Cash on delivery
CPI	Consumer price index, which measures the changing value of money over time by comparing how the dollar cost of a fixed selection of goods changes over the years
Extra Cover	Formerly known as insurance, a service by which customers can, for a fee, increase the maximum level of compensation payable for COD or registered post items
mm	Millimetre
Ordinary articles	Postal articles that have not been sent by the registered or COD services
Reserved services	Postal services that, under the provisions of the APC Act, only Australia Post may provide—broadly speaking, the basic letter service within Australia, except where a charge of at least four times the charge for Australia Post’s basic letter service is levied.