

Final Report
Full investigation - *Ombudsman Act 1972*

Complainant	Lakes Dairies Pty Ltd
Department	Department of Environment, Water and Natural Resources
Ombudsman reference	2014/07915
Date complaint received	3 October 2014
Issues	Whether the department properly advised Lakes Dairies of the grounds for seeking a waiver of the penalty Whether the department provided wrong advice to the Minister

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the department
- seeking more particulars from the complainant
- considering the department's Debt Recovery and Write Off Policy¹
- considering the department's Debt Recovery and Write Off Procedure²
- considering Treasurer's Instruction 5³ (TI 5)
- considering the department's advice to the Minister for Sustainability, Environment and Conservation / Minister for Water and the River Murray (**the Minister**), dated 26 May 2014
- considering the *Natural Resources Management Act 2004*
- providing the department and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

¹ Dated 13 December 2013.

² Ibid.

³ South Australia, Department of Treasury and Finance, Treasurer's Instruction 5, Debt Recovery and Write Offs, 29 May 2014.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.⁴ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved
...⁵

Response to my provisional report

The department responded to my provisional report by letter dated 11 June 2015. The response included, in summary, the following:

- pursuant to section 115 of the Act, the Minister may declare that a penalty is payable by 'a person who is the holder of a water allocation who takes water in excess of the amount available under the allocation'
- penalties are key deterrents to prevent the unauthorised taking of water by licensees
- the department understands that the purpose of my investigation is to consider the department's process in addressing Lakes Dairies request to have the penalty waived, not the basis upon which the penalty arose, and requests confirmation of this
- whilst the *Natural Resources Management Act 2004* does not expressly recognise that the Minister has the right to waive a section 115 penalty, it is accepted that the Minister has a discretion to determine whether or not to pursue payment of a penalty that has arisen under section 115
- 'the penalty may be considered a 'debt' for the purposes of T15'
- the department accepts that T15 is a relevant instruction that sets out the various grounds for relief of a debt, and that T15 was not brought to the attention of Lakes Dairies
- 'the Minister must comply with T15 in the exercise of his power unless to do so would be inconsistent with any requirements relating to the exercise of power under the Act'
- Lakes Dairies sought relief from the penalty on the basis of financial hardship
- T15 states that the threshold for waiving a debt is 'exceptional circumstances', which is a different test to financial hardship
- the department has no objection to the proposed recommendation that it invite Lakes Dairies to make a further submission to the Minister, and that it is appropriate in the circumstances that Lakes Dairies be given the opportunity to address the threshold of 'exceptional circumstances'
- the department accepts that its advice to the Minister reflected that financial hardship was the basis that Lakes Dairies sought relief from the penalty
- the department accepts that the Minister was not specifically advised of the 'full relevance' of T15, and was not advised that exceptional circumstances was the test for approval of a waiver
- the department has no objection to the recommendation that it put the matter to the Minister again, setting out (a) the factors that are relevant, and (b) the extent to which the relevant factors meet, or fail to meet, the T15 exceptional circumstances test
- the department requests that paragraph 42 of my provisional report be redrafted for greater clarity. It is concerned that this paragraph of my provisional report may be taken

⁴ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

⁵ *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- to imply that exceptional circumstances do exist, which is a matter that the department intends to give 'due consideration' and to 'provide considered advice to the Minister on'
- the department does not accept that all of the arguments submitted by Mr Levinson on behalf of his clients in relation to relevant and irrelevant consideration are correct, and that 'certain references to Mr Levinson's submission ... relate to substantive matters'. As such, the department queries the necessity of referring to such aspects of Mr Levinson's submission in my final report
 - the department does not object to the recommendation that it develop a policy and/or other guidance as to the process and relevant factors to consider in determining whether exceptional circumstances exist upon which to advise that waiver of a debt under TI5 should or should not be approved.

I have considered the department's response and have amended my report as I consider appropriate in response.

The complainant responded to my provisional the department by letter dated 9 June 2015. The response included, in summary, the following:

- it is concerned about 'the potential for bias or prejudgement in any advice that was or may be given again to the Minister by the department'
- it considers that it would be fair if Lakes Dairies could be 'provided an opportunity to consolidate its submissions and material for the department to review afresh,' given that the material it previously provided to the department was prepared on the basis of the wrong advice by the department
- the material previously provided to the Minister by the department, which Lakes Dairies considers is irrelevant and prejudicial, should not be provided again
- Lakes Dairies remains of the view that it provided relevant information to the department and that the department failed to provide that information to the Minister
- Lakes Dairies request that my recommendations expressly provide that Lakes Dairies (a) be entitled within a reasonable period to lodge with the department a consolidated set of information and submissions; and (b) the department should not include in its advice material which is irrelevant or prejudicial
- Lakes Dairies submit that the penalty is 'manifestly excessive' with 'no oversight by a Court or other independent body' and request that I consider whether it is appropriate to recommend legislative reform 'to enable that the quantum and imposition of such fines be reviewed, and that there be established a process for water users to appeal such decisions without the requirement to seek the exercise of Ministerial discretion'.

I have considered the complainant's response and have amended my report as I consider appropriate in response.

Background

1. Lakes Dairies operates a large dairy on the Narrung Peninsula. It irrigates pasture for dairy cows using water taken from the River Murray prescribed Water Resource under a water licence under the Natural Resources Management Act.
2. Lakes Dairies water licence has an allocation of 75,500 'shares' of Class 1 water for stock and domestic purposes. Lakes Dairies licence also has a number of class 3a shares for irrigation purposes.
3. The volume of water that those shares equates to, and hence may be irrigated in accordance with those shares, "varies depending on the allocation announcements made by the Minister during the water season and on any allocations that are

transferred onto the licence as part of Lakes Dairies' trades in the temporary water allocation market."⁶

4. Mr James Levinson, of Botten Levinson lawyers, made a complaint on behalf of his client, Lakes Dairies, to my Office by letter dated 1 October 2014, including the following:

To ensure that it has sufficient water each season, Lakes Dairies purchases water allocation on the temporary water market throughout the season. The dairy water use is regularly monitored and assessed against the water balance on the "water account" for the licence. If water use is high then temporary water allocations are purchased to keep the water account in balance. A reconciliation is done in early June each year to ensure that the account is balanced by the 30 June close of the Department's water use year. Lakes Dairies has done this successfully for well over a decade without using more water than it is authorised to do under its licence.

On 11 June 2013, a few weeks before the close of the water season, Lakes Dairies undertook its usual calculation of the water use and remaining balance of water on its water account on the licence. This was to check whether more temporary water needed to be purchased to top up the account. Lakes Dairies calculated that:

- (a) it had used a total of 2,233ML⁷
- (b) it had stock and domestic allocation of 75.5ML
- (c) it had an allocation of 836.61 on the licence
- (d) it had purchased an extra 1,328 ML
- (e) therefore it had a total allocation on the licence of $75.5 + 836.61 + 1,328 = 2,240.11$
- (f) with 2,240.11 in the licence and 2,233 used it had a surplus of 7.11 ML.

In fact the figure at (c) was wrong. It wrongly includes the actual allocation of 761.11ML plus the stock and domestic allocation of 75.5ML to reach 836.61ML. The stock and domestic figure was included in the allocation at (c) and then again in the calculation at (e). Therefore the true allocation total on the licence at the end of June was $75.5 + 761.11 + 1328 = 2,164.61$ ML. Compared to the use of 2,233ML this left a deficit of 68.39ML.

The calculations double counted the stock and domestic allocation (of 75,500KL) so that Lakes Dairies believed that it would have a surplus at the 30 June season close of 7110KL. In fact, it had a deficit of 68,173KL by 30 June 2013. But for that arithmetic error, there would have been no breach whatsoever,

5. Lakes Dairies was issued with a notice dated 8 November 2013 of a penalty of \$85,897.98 (**the penalty notice**) charged under section 115 of the Natural Resources Management Act based on the 68,173KL deficit.
6. Lakes Dairies submits that, due to its calculation error, it overused its water allocation by 3.15% of the Licence, which is "less than the tolerance given for meter readings."⁸
7. The department's cover letter accompanying the penalty notice includes the following:

The water allocation endorsed on your water licence was exceeded for the licence year ending 30 June 2012 and consequently you have incurred an excess water penalty charge pursuant to section 115 of the Natural Resources Management Act 2004 ('the Act'). The total volume of water taken for the 2012-2013 licence year was 2232783 kL.

You will shortly be receiving a notice detailing the amount of penalty charge for the water taken in excess of allocation. A copy of the penalty rates gazetted for the 2012 - 2013 licence year is enclosed for your reference.

⁶ Letter from Mr James Levinson, Botten Levinson Lawyers, on behalf of the complainant, to the Ombudsman , 1 October 2014, p2.

⁷ Note that 1ML equals 1000KL. ML are used in this section for convenience.

⁸ Letter from Lakes Dairies to the department, 26 November 2013, p3.

If you wish to dispute the amount recorded on the meter you may have the meter/s tested, at your cost, at a NATA certified laboratory. If the meter is shown to be more than 5% in error, the amount of water recorded as taken may be adjusted accordingly. If you have other information in relation to the penalty charge which you would like considered, you may make a written submission within 15 business days from the date of this letter. Please include any supporting information with your submission.

...
This Department will consider payments in instalments, The appropriate form can be obtained by contacting the Department on 8463 6898. Section 110 of the Act imposes interest on an unpaid penalty charge or unpaid penalty instalments. The current interest rate prescribed by the regulations is 9.48%.⁹

8. By letter dated 26 November 2013 Lakes Dairies wrote to the department asking for the penalty to be reviewed.
9. On 6 February 2014 Lakes Dairies met with an officer of the department, Ms Christine Fiebeg, 'to raise the severity and unfairness of the penalty in the circumstances and to ask about the process to review the penalty.' Mr Levinson states:

Lakes Dairies had no particular knowledge of the legislation or administrative processes surrounding waiver of debts at that time and sought and intended to rely on the advice given by DEWNR. Ms Fiebeg did not refer to any policy or criteria of the Minister or DEWNR relating to such penalties or the review or waiver. She simply suggested that Lakes Dairies write to the Minister asking the Minister to waive the penalty. She acknowledged that the overuse was a result of a bona fide administrative error but would not take this in to consideration.¹⁰

10. The department's file note of the meeting includes:

I contacted Nick Anderson from Lakes Dairies in relation to the submission received dated 26 November 2013 in relation to the overuse of water during 2012-2103. We discussed that unless the overuse was a result of a faulty meter or departmental administrative error the penalty charge would apply. He explained it was an administrative error by Lakes Dairies. A meeting was scheduled for 31 January 2014 at the DEWNR Adelaide office which was subsequently rescheduled to 6 February 2014 (due to leave) to discuss the submission in further detail.

I met with Nick Anderson and Chris Williams to discuss the overuse. They explained to me that the business was not going that well and that payment of the penalty will place their business under further financial strain. Nick and Chris also acknowledged the overuse was a result of accounting for the stock and domestic allocation twice. They stated they were willing to pay for the amount of excess water at market rates not penalty rates, Nick and Chris also explained they now have processes in place to prevent this occurring in the future.

I suggested that a payment plan could be negotiated with the Department to repay the debt and I could assist them with this. However, they asked what other options they had in relation to having the penalty waived or reduced or other alternate offers as previously suggested? I advised that any waiver or reduction could only be approved by the Minister and the Treasurer.

I then went and discussed the situation with Mike Fuller (Program Manager - Water Licensing) and Holly Hershman (Operations Manager) as a result I then advised Nick and Chris that they could write to the Minister and seek a waiver/reduction in the penalty due to the financial hardship that would impact their business as a result of the penalty charge.

⁹ Letter from the department to Lakes Dairies, 11 November 2013.

¹⁰ Letter from Mr Levinson, Botten Levinson Lawyers, on behalf of the complainant, to the Ombudsman , 1 October 2014, p3.

Nick stated they would write to the Minister. I also advised that a response would take some time due to a pending State Election and that in the interim the invoice would be placed on hold.

11. Lakes Dairies made a written submission dated 26 February 2014 to the Minister requesting a waiver of the penalty. The submission proposed a payment of \$3,272.30, being the value of the water on the temporary market at the time, and requested that the remainder of the penalty be waived.
12. Lakes Dairies “also decided as a gesture of good faith to purchase extra temporary water in the 2013/2014 water use year but not to actually use that water, essentially to put back into the system that which had inadvertently been taken in error the previous season.”¹¹ Accordingly, on 30 May 2014 Lakes Dairies purchased 90,000KL of water at a cost of \$4,500. “This meant that by the end of the 2013/2014 water use season, approximately 69,000KL of temporary water allocation was purchased but left unused in the river system by Lakes Dairies.”¹² Lakes Dairies advised the Minister of this by letter dated 13 June 2014.
13. The department provided advice to the Minister dated 26 May 2014. The section headed ‘Discussion’ is as follows:

...The Department advised Lakes Dairies that it is authorised to negotiate a repayment instalment plan for the full penalty charge, but that a waiver or write-off would require approval from you and the Treasurer.

...

The Department reviewed the information submitted by Lakes Dairies Pty Ltd in support of their request to partially waive the penalty charge and determined that further information was required to substantiate the claim of financial hardship. On 21 April 2014 the Department requested Lakes Dairies to submit last year’s audited financial statements. Lakes Dairies advised that this would not be possible but indicated their willingness to assist with the investigation.

Following a detailed review of the information provided, the Department ascertained that the financial statement provided in Appendix E to the letter sent to you related to a joint venture, trading as Lakes Dairies Joint Venture, not Lakes Dairies Pty Ltd. Further investigation revealed a complex structure of Proprietary Limited Companies and trusts sitting behind this joint venture.

Lakes Dairies Pty Ltd, the company that holds the water licence, currently has two directors Mr Kenneth Williams (the Managing Director who has written to you) and Mr William Bayliss (who resides in Victoria). Former directors of Lakes Dairies Pty Ltd include Mr Bruce Carter and Mr Robert De Crespigny. A copy of the historical Australian Securities and Investments Commission Search is attached for your information (Attachment 3). There is also a unit trust associated with this company (attachment 4).

The other company in the joint venture, Lake Alex Dairy Pty Ltd, has two directors Mr Christopher Williams and Ms Dianne Williams. A copy of the historical Australian Securities and Investments Commission Search is attached for your information (Attachment 5). There is also a trust arrangement that is associated with this company (Attachment 6). This trust has some of the bills issued to it directly, such as the energy account in Appendix F to the letter sent to you by Mr Williams. It is important to note that this entity is not the entity that holds the water licence and is liable for payment of the penalty.

In this context, the Department has also recently received several applications in relations to Lakes Dairies Pty Ltd’s water account. These applications have involved three water purchases, trading in additional volumes on their licence. The

¹¹ Ibid.

¹² Ibid.

consideration paid for two of the transactions was \$8,100 and \$27,500 respectively. The consideration paid for the third transaction is unknown.

In light of this complex structure and the ability of Lakes Dairies Pty Ltd to find funds to trade in more water for this financial year, it is not recommended that the penalty charge is waived or written off. However, the option of entering into a payment plan could be offered to Lakes Dairies Pty Ltd.

14. By letter dated 12 June 2014, the Minister advised Lakes Dairies that there were no grounds for him to waive the penalty. The letter includes:

...
I understand that historically Lakes Dairies Pty Ltd has managed its water use appropriately and this excess usage was due to administrative error. I note that you have taken steps to amend your administrative practices to prevent this occurring in the future.

However, I am advised that the Department has undertaken a review of this matter and has determined that there are no grounds for me to waive or vary the penalty.

...

15. On 6 August 2014 Lakes Dairies met with the then Chief Executive of the Department, Mr Allan Holmes (**the CE**).

16. By email dated 21 August 2014, the CE wrote to Lakes Dairies as follows:

I apologise for the delay in getting back to you following our meeting. I am afraid I am unable to provide any relief. The Minister's advice is correct that there are no obvious grounds for him waiving the penalty.¹³

17. My Office sought further information and a response to the allegations from the department by letter dated 17 October 2014.

18. The department's Acting Chief Executive, Mr Tim Goodes (**the Acting CE**) provided a response to the allegations by letter dated 12 November 2014, including the following:

- Lakes Dairies was one of a number of penalties under review at the time and the application of Departmental policies and Treasurer's Instruction 5 was consciously part of all the considerations;
- While it is unclear as to whether Treasurer's Instruction 5 (TI 5) was explicitly stated during the meeting in February 2014, the practical application of TI5 was explained to Lakes Dairies representatives, namely that the approval of the Minister and Treasurer would be required to grant a waiver of a debt;
- Any case for waiver under exceptional circumstances needs to be considered against the fact that excess water had been used and could not be replaced at that time. In addition, an entity's financial situation is not usually considered as grounds, on its own, for automatic leniency for or waiver of an offence, rather each case needs to be considered on its merits;
- The Department was conscious of, had sympathetic concerns for and gave active consideration as to whether exceptional circumstances (in the context of TI 5) existed around both the alleged administrative error and financial viability of Lakes Dairies. However, a subsequent review of the financial situation of the complex structure surrounding the dairying operation did not support the alleged seriousness of the financial hardship of Lakes Dairies Pty Ltd, the licence holder. In addition, the administrative error was not considered grounds for exceptional circumstances.
- Consequently, in consideration of all information available to the Department at the time, it was the Department's view that a case of exceptional circumstances could not be justified for recommending that the Minister take this case to the Treasurer under TI 5.

¹³ Email from the CE, Mr Allan Holmes, to Mr Nick Anderson, Lakes Dairies, 21 August 2014.

- The Government has repeatedly advised of an alternative option to assist the company, namely entering into a payment plan.¹⁴
19. By letter dated 27 November 2014, I advised Mr Levinson that I did not consider that further investigation of his complaint on behalf of Lakes Dairies was necessary or justifiable. I advised that I am not able to investigate decisions of the Minister.
 20. Following my decision not to investigate the complaint further, Lakes Dairies lodged an application with the department under the *Freedom of Information Act 1991* seeking documents from the department relating to the matter.
 21. Following receipt of the documents from the department, Mr Levinson, on behalf of Lakes Dairies, made further submissions to my Office, by letter dated 11 March 2015, submitting errors in my initial assessment and providing further grounds for complaint. Mr Levinson submitted, in summary:

Wrong advice about the test for waiver

- The file note dated 7 February 2014 and the letter from the department to my Office dated 12 November 2014 refer to 'financial hardship'.
- At the 6 February 2014 meeting the test of 'exceptional circumstances' was never raised.
- TI 5 refers to 'exceptional circumstances'. Whilst this may include 'financial hardship' it is not limited to this factor and the proper test in TI5 is much broader than financial hardship.

No evidence that TI5 taken into account at all

- There is no reference to TI5 or the department's Debt Recovery and Write Off Policy and Procedure in any of the materials that predate the complaint to this Office.
- There is no evidence that TI5 was considered by the department aside from the then CE's 12 November 2014 letter to my Office in which he said that the department 'gave active consideration as to whether exceptional circumstances (in the context of TI5) existed around both the alleged administrative error and financial viability of Lakes Dairies.'
- The department's response to my Office says that 'it is unclear as to whether Treasurer's Instruction 5 was explicitly stated during the meeting in February 2014' is misleading because there was no reference to TI5 either directly or indirectly.
- The incomplete and misleading advice to Lakes Dairies was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Not proper to 'presume' what the department took into account

- I advised the complainant that I was of the view that 'had the department considered that exceptional grounds applied I presume it would have sought the approval of the Treasurer.' It is submitted that it is inappropriate and irrelevant to 'presume' anything. The complaint is that Lakes Dairies were not advised of the proper test.

Wrong and irrelevant to suggest that water can't be replaced

- The position that water was taken and cannot be replaced appeared to inform the department's views, and is not relevant. Over the years Lakes Dairies had taken less water than they were allocated in their license. As such, there was no detriment to the environment as a result of the over usage. Further, Lakes Dairies purchased additional water that they did not use.

¹⁴ Letter from the Acting CE, Mr Goodes, to the Acting SA Ombudsman, Ms Megan Philpot, 12 November 2014.

Failings of the advice by DEWNR to the Minister

- The department's advice to the Minister was wrong in that it included irrelevant factors and failed to consider relevant factors.
 - the corporate structure
- The suggestion that there were 'no grounds' to waive the penalty is wrong.

Procedural fairness

- The department failed to afford procedural fairness. The department should have advised Lakes Dairy that it was not recommending the waiver to the Minister and given them the reasons why, and invited a response.

22. My Office assessed the submission by Mr Levinson on behalf of Lakes Dairies and reassessed the complaint.
23. I determined to investigate whether the department properly advised Lakes Dairies of the grounds for seeking a waiver of the penalty, and whether the department's advice to the Minister was wrong, in that it did not advise of TI5 and the 'exceptional circumstances' test.
24. I have not considered the substance of the department's advice to the Minister and Mr Levinson's allegations that the advice included irrelevant factors, and failed to consider relevant factors.

Relevant law / policies

25. Section 115 of the Natural Resources Management Act provides:

115 - Declaration of penalty in relation to unauthorised or unlawful taking of water

- (1) The Minister may, by notice in the Gazette, declare a penalty payable by—
 - (a) a person who is the holder of a water allocation who takes water in excess of the amount available under the allocation; or

...

- (2) The Minister may declare different penalties—

26. Schedule 1 of the South Australian Government Gazette dated 20 December 2012 provides the penalty for overuse for first 10 per cent for the River Murray Prescribed Watercourse as \$1.26/kL.
27. Clause 5.7 of TI5 provides:

The Chief Executive of each public authority must ensure that the authority establishes and implements policies for the management of debt recovery that aim to recover all amounts owing to the authority.
28. Clause 5.22 of TI5 provides:

Waiver of debts must only occur under exceptional circumstances. For example, a waiver of a debt is generally not appropriate where the debtor cannot be located; these situations may lead to the write off of debts but not necessarily the waiver of debts.

29. Clause 5.23 of TI5 provides:

For public authorities that are administrative units, a debt may only be waived if approved by the Treasurer.

30. Clause 5.24 of TI5 provides:

Subject to clause 5.24.1, for public authorities that are not administrative units, a debt may only be waived if approved by the Board, governing authority or Treasurer.

5.24.1 Debts payable pursuant to any Act of Parliament that is administered by the Commissioner of State Taxation may only be waived if approved by the Treasurer.

31. The department's Debt Recovery and Write Off Policy includes:

The Treasurer's approval is required to write off debts, other than State taxation debts, where the amount owing is equal to or greater than \$50 000 (GST inclusive).

32. The department's Debt Recovery and Write Off Procedure includes:

Waiver of debts must only occur under exceptional circumstances. A debt may only be waived if approved by the Treasurer, or where the debt relates to a public authority that is not an administrative unit the debt may be waived by the Board, governing authority or the Treasurer.

Whether the department properly advised Lakes Dairies of the grounds for seeking a waiver of the penalty

33. The complainant submits that it was never properly advised by the department of the relevant grounds for seeking a waiver of the penalty.

34. It appears from the file note of the meeting between the department and Lakes Dairies on 6 February 2014 that Lakes Dairies were not advised at that meeting of the existence or relevance of TI5, or of the requirement for there to be 'exceptional circumstances' in order for the debt to be waived. Lakes Dairies advises that the test for 'exceptional circumstances' was never mentioned to them either 'directly or indirectly'.

35. Lakes Dairies submit that the criterion explained to them was 'financial hardship', and they were told to make a submission for waiver of the penalty based on these grounds. This is supported by the file note of the meeting.

36. The Acting CE advised my Office that:

...while it is unclear whether Treasurer's Instruction 5 (TI 5) was explicitly stated during the meeting in February 2014, the practical application of TI 5 was explained to Lakes Dairies representatives, namely that the approval of the Minister and Treasurer would be required to grant a waiver of a debt.¹⁵

37. Whilst Lakes Dairies may have been advised that the approval of the Treasurer and the Minister was required for the waiver of the penalty, Lakes Dairies was not advised of what the proper grounds of consideration for such a waiver would be.

38. After being advised by the department that 'financial hardship' was the relevant test for waiver of the penalty, it is on these grounds that Lakes Dairies made their submission to the Minister. However, whilst financial hardship may be included in a consideration of

¹⁵ Ibid.

‘exceptional circumstances’, it is certainly not the only factor and the test is in fact much broader. I note the Acting CE’s comment that:

... an entity’s financial situation is not usually considered as grounds, on its own, for automatic leniency for or waiver of an offence, rather each case needs to be considered on its merits.¹⁶

39. I consider that the department failed to adequately communicate to Lakes Dairies the grounds upon which it would consider advising the Minister to recommend, or not, a waiver of the penalty.
40. My final view is that the department was wrong in:
- advising Lakes Dairies that ‘financial hardship’ was the grounds on which they needed to make their submission to the Minister for waiver of the penalty
 - failing to advise Lakes Dairies of the existence, terms and effects of TI 5
 - failing to advise Lakes Dairies that the relevant test for waiver of the penalty is in ‘exceptional circumstances’ as provided by TI 5.
41. I consider that it is appropriate that Lakes Dairies has the opportunity to submit to the department all of the factors that it considers are relevant given that it is now aware of the appropriate test to be met.

Conclusion

In light of the above, I consider that, in failing to advise Lakes Dairies of the grounds for seeking a waiver of the penalty, the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the department invite Lakes Dairies to make further submissions to:

- the Department, and
- the Minister.

Whether the department provided wrong advice to the Minister

42. It is submitted that the department’s advice to the Minister was wrong because it considered irrelevant factors, failed to consider relevant factors, and was wrong to suggest that there were no grounds to waive the penalty. I have not investigated the substance of the advice to the Minister. My investigation has addressed whether or not the Department properly advised the Minister of the ‘exceptional circumstances’ test in TI5. It is not my role to determine whether or not there are exceptional circumstances in this case.

¹⁶ Ibid.

43. In response to the allegation, the Acting CE wrote that the 'departmental policies and Treasurer's Instruction 5 was consciously part of all the considerations.'¹⁷ However, there is no evidence to suggest that TI 5 or the 'exceptional circumstances' test were in fact considered by the department at any stage. The department's advice to the Minister does not include any reference to 'exceptional circumstances' or TI 5, nor does it include the essence of TI 5. Rather, it appears that the advice focuses on the ability for Lakes Dairies to find the funds to pay the penalty, ie whether the penalty would cause financial hardship.
44. I note that it is the Treasurer's decision as to whether there are grounds that amount to 'exceptional circumstances' or not and, accordingly, whether the penalty should be waived. I do not have jurisdiction over decisions of the Treasurer. I understand that the Minister considers the advice provided by the department and, in the event that he/she considers that exceptional circumstances apply to warrant waiver of the debt, advises the Treasurer of this.
45. In my view, the department failed to properly advise the Minister about TI5 and the relevant test of 'exceptional circumstances'.
46. In these circumstances I do not consider that the Minister could have properly formed a view as to whether or not the Treasurer should have been advised that there are 'exceptional circumstances' and he should consider waiving the penalty.

Conclusion

In light of the above, I consider that, in providing the wrong advice to the Minister, the department acted in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

Recommendation

To remedy this error, I recommend under section 25(2) of the Ombudsman Act that the department put the matter to the Minister again, after considering the matter afresh following receipt of the new submission from Lakes Dairies. The department should advise the Minister of:

- the scope for discretion to waive the penalty in 'exceptional circumstances' in accordance with TI5
- relevant factors
- the extent to which the relevant factors meet, or fail to meet, the TI5 'exceptional circumstances' test.

I also recommend under section 25(2) of the Ombudsman Act that the department develop a policy as to the process and relevant factors to consider in determining how and whether a matter should go to the Treasurer as per TI5.

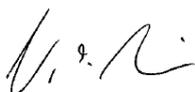
¹⁷ Ibid.

Final comment

In accordance with section 25(4) of the Ombudsman Act the department should report to the Ombudsman by 30 October 2015 on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

6 July 2015