

Scottish Public Services Ombudsman Act 2002

Report by the Scottish Public Services Ombudsman of an investigation into a complaint against:

The Scottish Executive Environment and Rural Affairs Department

Complaint as put to the Ombudsman

1. A farmer (Mr U) complained of failures to administer the Agricultural Business Improvement Scheme (ABIS) fairly and equitably.

2. On 1 July 1999 responsibility for agricultural affairs in Scotland, including the administration of ABIS, transferred from the Scottish Office Agriculture, Environment and Fisheries Department to the Scottish Executive Rural Affairs Department, which subsequently became the Scottish Executive Environment and Rural Affairs Department (SEERAD). For convenience I generally use the term 'the Department' throughout this report to refer to the body responsible at any given time for the administration of ABIS. This investigation began in October 2000 once comments had been obtained from the Head of the Department and was still in progress when the office of the Scottish Parliamentary Commissioner for Administration ceased to exist on 22 October 2002. I therefore assumed responsibility for the investigation under the terms of Paragraph 4 of Schedule 7 to the Scottish Public Services Ombudsman Act 2002. Relevant documents, including the Department's files, were obtained and a number of interviews were carried out. I have not put into this report every detail investigated, but I am satisfied that no matter of significance has been overlooked. Paragraphs 4-14 provide general information about the ABIS scheme. Paragraphs 15-55 set out evidence relating to Mr U's complaint. My findings are at paragraphs 56-69.

Jurisdiction

3. I am empowered to investigate administrative actions taken by or on behalf of the Scottish Executive, and other public bodies listed in Schedule 2 to the Scottish Public Services Ombudsman Act 2002. These include SEERAD, and, in the case of devolved functions, departments of the former Scottish

Office. Section 7(1) of the 2002 Act provides that I may not question the merits of discretionary decisions of departments and public bodies taken without maladministration.

General background

4. ABIS was an agricultural grant scheme, funded partly by the European Union. It operated between 1994 and 1999 and provided farmers and others in the Highlands and Islands with support for agricultural business expansion projects. Paragraphs 5 and 6 below explain the basis on which the scheme was established and paragraphs 7-10 outline the regulations governing it and the procedures applicants had to follow to obtain funding. The scheme was revised in March 1999 (see paragraph 8) after which the rate of recorded applications started to increase. Significantly more applications were rejected under the revised ABIS scheme than under the original scheme. The main cause of the increase in the proportion of cases rejected was that the overall value of grant applications exceeded the funds available in late 1999. This level of rejected grant applications led to concerns in the farming community and as a result investigations were undertaken and reports produced by the Rural Affairs Committee of the Scottish Parliament (see paragraph 11) and the Auditor General for Scotland (see paragraphs 12-14).

Basis of the scheme

5. In July 1993, the European Commission designated the Highlands and Islands as an area which would attract European Union Objective 1 status from 1 January 1994 to 31 December 1999. Regions generally qualify for Objective 1 status when their per capita gross domestic product is less than 75% of the European Community average over a three-year period. Objective 1 enables the member state to apply to the European Commission for part funding to support economic development in that region. Under Objective 1 status the European Community and the UK Government jointly funded some £570 million of investment across a range of programmes in the Highlands and Islands. Programmes were identified and monitored by the Objective 1 Monitoring Committee comprising representatives from a range of bodies with an interest in the region including the Scottish Executive, local authorities, enterprise companies, the Department of Trade and Industry and the European Commission.

6. ABIS was the largest element of the three-part Highlands and Islands Agricultural Programme (the programme) covering the period 1994-1999 inclusive. The programme was jointly funded (50/50) by the Scottish Executive and the European Union. Financial assistance was available to eligible persons operating an eligible agricultural business within the Objective 1 area to help improve their income-generating potential; to maintain rural employment; and to enhance the environment.

7. Prospective applicants had to have a resource audit and business assessment carried out to establish the assets and financial health of the business; the opportunities for development; the skills of the farming family; and any training needs. The resource audit and business assessment formed the basis of any subsequent application for financial assistance towards the cost of future investment. All the eligible investment identified in the resource audit could be included in an application for financial assistance. The costs of the resource audit were eligible for grant assistance in all cases, i.e. whether or not a subsequent application to carry out works was made.

Regulations governing ABIS

8. The Highlands and Islands Agricultural Programme Regulations 1994 provided the statutory basis on which ABIS was administered. On 31 March 1999 these regulations were amended by the Highlands and Islands Agricultural Programme Amendment Regulations. The changes made included:

- (i) applications for financial assistance received after 31 October 1999 would not be approved (given that all offers of a grant had to be made by 31 December 1999) and claims for payment received after 31 October 2001 would not be accepted (to enable the Department to make all payments by 31 December 2001 - an EU deadline);
- (ii) the provision of funding for new measures, including information technology equipment; and
- (iii) an increase in the rate of grant payable for certain business improvement measures.

Planning and other statutory consents

9. An explanatory leaflet on ABIS gave applicants general guidance on the statutory requirements necessary to support an application for grant. This included the following:

‘It is your responsibility to comply with any statutory requirements which apply to any works you may carry out, including local bylaws, and the appropriate standards. You are also responsible for obtaining any necessary wayleaves, servitudes, consents or agreements. Failure to do so may mean that financial assistance will not be paid.

‘You must notify the local planning authority in all cases where you intend to erect a new building, or substantially alter an existing building, or changed the use of a building, e.g. from an agricultural to a non-agricultural use such as a tea room or craft shop. Full planning permission is required in respect of these works and you would be required to submit the relevant consents with your application for financial assistance.’

The requirement to submit the relevant consents with an ABIS application applied from the inception of the scheme. In the case of a grant application approved by the Department and where the work was carried out and paid for, the applicant could include with his/her claim the costs of obtaining any necessary statutory consents and professional fees. These were eligible for financial assistance on the basis of the grant rate applicable to the relevant items of expenditure. However, if the works were not approved and carried out, there was no provision under ABIS to assist with costs relating to consents. Neither was there any commitment by the Department to grant aid on any non-resource audit expenditure incurred by the applicant. All applicants received in writing at the resource audit stage the following statement:

‘Submission of the resource audit does not commit you to implementing any of the recommended measures. Equally, I must emphasise that acceptance of the resource audit does not commit the Department to

approving any subsequent application for financial assistance on any of the measures identified in the audit.'

ABIS grant application and claims procedure

10. The procedure was divided into three main stages:

1. Resource audit - the potential applicant made an application to the local area office of the Department for approval to carry out a resource audit. Area office staff considered the request and, if both the applicant and their business were eligible, issued approval. The applicant then commissioned preparation of the resource audit and submitted it to the area office for assessment by the Department. If the resource audit was acceptable, approval was issued by the area office within 42 days. Expenditure on fees associated with the preparation of the resource audit was eligible for assistance under ABIS, at a rate of 50% subject to a maximum grant of £250. A claim for resource audit expenditure was submitted to the area office at this stage. The claim was certified if it was in order and passed to the Department's headquarters (HQ) for payment within 28 days.

2. Application to carry out individual items in the resource audit - the applicant submitted to the area office an application to carry out one or more items identified in the approved resource audit. At this stage the applicant would have paid for any associated statutory consents and/or professional fees. The application was then considered by area office staff to ensure that the proposals were eligible. Checks were carried out to ensure that all necessary details had been submitted along with the application, including statutory consents for planning etc. Up to 31 August 1999, approvals were issued by area offices and copied to HQ. The target for processing applications was 28 days. The applicant then formally accepted the offer of a grant. After this, the applicant had two years from the date of the approval letter to carry out the approved works and submit a claim for a grant.

3. Submission of claim for completed work and reimbursement - once applicants completed and paid for the work in question they could submit a claim for grant. Claims for grant received in the area office

were examined to ensure that the work was in accordance with the approval and that all necessary support and documentation were correct. Checks included a site inspection in 5% of cases. If the claim was acceptable, it was certified and passed to HQ for payment. The target time for this was 56 days.

Report by the Scottish Parliament Rural Affairs Committee

11. In December 1999 the Committee produced an interim report on ABIS. This noted that since 1994 the scheme had:

'... encouraged farmers to invest capital to enhance the potential of their businesses. Now, within weeks of the close of the scheme, the Committee has been informed that Departmental forecasts of uptake failed to identify a significant surge in applications in the two months before the closing date for applications, of 31 October 1999 ... Some applicants for this scheme have been encouraged to spend substantial sums on the preparatory work for applications which now stand little chance of being approved.

'The Committee has examined the history of the scheme and the peaks and troughs of demand. We have encountered a trail of decisions which have alternated between delaying applications and then encouraging farmers to apply.

'...

'The Committee notes that an undertaking was given by [the then Minister for Agriculture, the Environment and Fisheries at the Scottish Office] in his letter of 18 February 1999 to [a member of the Westminster Parliament]:

"I can assure you and your constituents, however, that sufficient resources will remain applied to the ABIS to ensure that all outstanding commitments can be met, as well as accommodating any upsurge in applications which may emerge as a consequence of the improvements to the Scheme to which I refer below".'

The report expressed concerns about, among other things, the administration and management of the scheme and noted that the Committee had already asked the Audit Committee to consider the circumstances of ABIS with a view to a possible investigation by the Comptroller and Auditor General.

The report of the Auditor General for Scotland

12. As a result of the Rural Affairs Committee's request (paragraph 11), the Audit Committee invited the Comptroller and Auditor General to undertake an investigation. On 1 April 2000 audit responsibility passed to the Auditor General for Scotland. In June 2000 he laid the report of his examination of ABIS before the Scottish Parliament. The report noted that expenditure on ABIS in the early years fell short of expectations. Discussions on revision to ABIS began in 1996 and the Department sought the views of farmers and their representatives on potential changes to the terms of the scheme which would make it more attractive. Although the Department and farmers' representatives agreed on the changes necessary to make the scheme more attractive, the Department could not submit these to the EC for approval until an interim assessment of the Highlands and Islands Objective 1 Programme was complete. In May 1997, as part of the Objective 1 interim assessment, consultants produced a report which identified a number of reasons why the take-up of ABIS was half of that expected. The consultants recommended that ABIS should be retained with a lower budget and that the scheme should be revised to promote uptake. The Department submitted proposals for revised terms for ABIS to the EC in September 1997 and these were approved in December 1997. The EC gave final approval in September 1998. In March 1999 the Minister approved proposals to re-allocate £2.7 of the programme's budget. Also in March 1999, legislation implementing the revisions to ABIS came into operation (paragraph 8). The Auditor General for Scotland's report noted that the Department had identified a number of factors that inhibited progress towards implementing the revisions to ABIS: the Government's Comprehensive Spending Review which ran from June 1997 to July 1998; other negotiations with the EC; and conflicting priorities. The Department considered that their on-going dialogue with farmers' representatives on a range of issues provided a suitable mechanism to answer any questions that arose on the progress towards a revised ABIS scheme. However, Audit Scotland's interviews with the Department's own area offices and with farmers' representatives suggested that the mechanism

used by the Department did not meet stakeholders' expectations for being kept informed of developments, particularly on the likely timing of a revised scheme.

13. The Auditor General for Scotland's report gives the following account of how the Department reacted to an upsurge in ABIS applications:

'In July 1999 the Department first became aware of an increase in ABIS activity. At that stage, managers in each of the Area Offices noted a general increase in farmers' requests to commission Resource Audits which suggested an increase in the number of project applications might follow. The Department therefore imposed a moratorium on processing ABIS applications in order to take stock of the scale of the increase in resource audits and the likely impact. The moratorium lasted from 31 August to 9 September 1999 and led to the Department identifying a significant increase in project applications, which they considered required careful monitoring. The Department consequently changed their procedures by transferring responsibility for approving applications from Area Offices to Headquarters.

'The upsurge in applications in September and October 1999 forced the Department to prioritise applications. Headquarters' draft list of priorities [which included resource audits and information technology] was drawn up initially in the light of policy priorities, which they identified at that time. The proposals were subsequently discussed with Area Offices and with farmers' representatives. The Area Offices visited by Audit Scotland said that there was broad agreement among their managers that the priorities identified provided the greatest potential benefit. In particular, they supported the high priority awarded to IT projects. The managers who were interviewed considered that improvements in IT would provide farmers with better information on how their businesses were developing and, in the longer term, would allow more efficient processing of claims for all grant schemes operated by the Department.

'The Department informed farmers of their proposals on prioritisation through a press release on 1 October 1999. They also held a public

meeting to discuss the proposals on 23 October. Farmers' representatives told Audit Scotland that farmers generally voiced significant opposition to the principle of limiting demand through prioritisation.

'The Department began applying priorities to applications in November 1999. Because their computer records did not initially contain sufficient detail on the type of projects to be assisted, prioritising meant sifting through application files looking for projects to satisfy priority 1, then sifting for priority 2 and then priority 3. A cumulative total of commitments arising from prioritisation were maintained and by the time priority 3 applications had been approved only £200,000 of the ABIS budget remained. The remaining budget was allocated to a small number of specific cases where the Department knew the farmer had incurred significant preparatory costs.'

14. The Auditor General for Scotland concluded that the action taken by the Department in revising the scheme was in line with their understanding of prevailing circumstances and in accordance with the priority they attached to it. Nonetheless, the introduction of revised terms led to a higher level of grant applications, to which the Department was unable to respond because it had not been anticipated. This dissatisfied many clients. The experience of ABIS reinforced the need for the Department to have in place sound procedures to monitor and manage publicly funded schemes. As regards management information, the Auditor General for Scotland wrote:

'... The Department did not have available accurate information on the scale of problems associated with ABIS, particularly the potential value of grant applications received in September and October 1999. This information would have helped the Department to identify priority projects for ABIS assistance when prioritisation was belatedly introduced.

'The lack of information led to confusion at Area Offices and disrupted the processing of grant applications in the closing weeks of ABIS ...

'I therefore recommend that all essential information in support of a grant scheme should be recorded and maintained on readily accessible computer records ...'

The Auditor General for Scotland also made recommendations in respect of monitoring scheme activity, setting clear plans for introducing changes to grant schemes and managing risk when grant schemes are changed.

Mr U's complaint

15. A chronology of events relevant to Mr U's complaint is set out at Annex A to this report. At the start of this investigation the Head of SEERAD provided a detailed account of the Department's dealings with Mr U. The substance of that account is set out in paragraph 16. Mr U's evidence is set out at paragraphs 17-23. Evidence obtained from Departmental staff is set out at paragraphs 24-55.

Comments from the Head of SEERAD

16. In his formal response at the start of the investigation the Head of the Department explained the background to the decision to make the terms of ABIS more attractive to farmers (see paragraph 12). He said that while it was estimated that these changes, together with the fact that the whole Objective 1 Programme was coming to an end, would result in increased applications, the Department were also told by farming organisations and other bodies in the Highlands and Islands that demand would be depressed by the on-going economic downturn facing the industry. In the event, demand far outstripped the money available and many applicants were disappointed. Mr U was one of them. The Head of the Department said that as an illustration of the unprecedented upsurge which took place, the number of applications received in the period September to November 1999 was over 3,700, compared with some 5,800 in the whole of the first five years of ABIS. The Head of the Department wrote:

' While the Department had always made clear that the Scheme was cash-limited ... and other schemes in the Objective 1 Programme had already closed as their funding had come to an end, rationing of ABIS had not been needed in the past and, it was possible, that some farmers had come to view the Scheme as open ended. When the huge upsurge in demand took

place and the Scheme was curtailed, a large number of farmers were very surprised and angry. The timescale of events was as follows.

'It became evident in late August 1999 that the volume of grant applications was increasing more than expected. As a precaution, approvals were stopped temporarily on 31 August 1999 to enable the Department to assess the situation. Approvals had, until that point, been issued by Area Offices, but all subsequent approvals were issued from headquarters in order to allow close monitoring of the situation. An initial batch was approved covering all eligible and fully documented applications received up until the end of August. However, as the rate of applications in September continued to increase, it was evident by around 20 September that the existing criteria for approvals of 'first come, first served' would have to change. No further approvals were made and the Department considered the options available for allocating the remaining funds.

'It would have been possible to continue with a first come first served system but this was considered unfair on those people who had already spent money on preparing applications and were just about to submit them. At the same time, it was thought to be important that potential applicants should be warned of the shortage of funds so that they could choose to avoid new nugatory expenditure. Consequently, the Executive announced on 1 October that it would have to prioritise applications, offering an indication of the order in which it was likely to give priority to applications so that those about to make applications for low priority projects would be able to judge the likelihood of success and whether it was worth spending the necessary time and money on an application. These priorities were to be the subject of consultation but, in the event, the farming representative organisations refused to have substantive discussions about prioritising because they wanted the Executive and HM Treasury to fund all applications. On 16 November, the then Minister announced that a further £1 million had been allocated to the Scheme but, even so, only certain grant applications would be considered for approval, subject to the normal rules of the Scheme. These were for:

resource audits, which were considered to be useful in their own right as they offered farmers an external assessment of their business;

information technology, alternative agricultural production, and conversion of redundant farm buildings for residential letting, all of which had only become eligible for grants after the March 1999 announcement and so were considered to have priority over other measures which had been eligible since 1994;

mobile tanks and dippers; and

self-standing systems for the storage and disposal of farm waste which were in keeping with the Executive's policy of promoting good environmental standards.

'A number of individuals had suggested that priority should have been given to recompensing those who had spent money on gaining planning permission, etc. This was considered but the terms of the EC Regulation governing expenditure under ABIS did not permit expenditure to be used to recompense applications unless this was linked to a grant towards a capital expenditure project.

'...

'Turning to the details of [Mr U's] complaint, ... [Mr U] submitted a resource audit on 19 September 1995 and this was approved on 30 November 1995. Included in the list of measures was the erection of a general purpose (GP) shed 40 metres x 12 metres.

'On 30 May 1996, [Mr U] submitted grant applications for cattle handling facilities, feeding areas and a GP shed 40 metres x 12 metres but full supporting documentation as detailed in the explanatory leaflet ABIS 1 was not submitted for the shed. Grant approvals were issued for the cattle handling facilities and feeding areas. In the course of discussions with the Department's surveyor, when the missing documentation was discussed,

[Mr U] advised him that he intended to concentrate on the approved measures and would proceed with the shed at a later date.

'The Department's area office staff were in contact with [Mr U] over the time following his submission of the initial grant application for the shed and became aware that he was changing the focus of his business from a sheep and cattle enterprise to one concentrating on cattle. The business which existed in 1999 was therefore not the same as the one which had been the subject of the approved resource audit carried out in 1995. Paragraph 12 of ABIS 1, the explanatory leaflet for ABIS, states that the purpose of a resource audit is to have an independent examination of the agricultural business in order to identify the assets, the opportunities for development, the financial health of the business, the skills of the farming family and the need for any training. It is designed to help ensure that any investment is directed in such a way as to optimise the benefits to the business and is the Department's main means of ensuring that investments are part of a structured business plan. Given the changes that had taken place in his business between 1995 and 1999, [Mr U] was advised that, in accordance with normal practice, a new resource audit would be needed to look at the changed business and to identify any possible investments. The revised resource audit, prepared by the college in July, was submitted on 11 August 1999 and approved as payable under ABIS on 19 August 1999.

'The next stage was for [Mr U] to decide which, if any, of the investments highlighted in the audit he wanted to make the subject of a grant application. The explanatory leaflet and the letter sent to [Mr U] made clear that approval of the resource audit and payment of its associated cost did not "commit the Department to approving any subsequent application for financial assistance on any of the measures identified in the audit". The Department had no indication at this stage that there was about to be such a huge increase in applications and that this would affect [Mr U's] chances of receiving further grants. The list of proposed investments in [Mr U's] new resource audit included a GP shed 42 metres x 24 metres and a grant application for the shed was submitted on 7 September 1999, but the supporting planning consent and building warrant were not submitted until 9 and 10 September 1999.

'While, as [the Principal Agricultural Officer for Mr U's local area office - Officer A's] letter of 10 September to [Mr U] indicates, some grant approvals under ABIS were issued in September, these approvals were for fully documented eligible applications received by 31 August. When it became known that a new set of approval criteria would have to be introduced, [Mr U] telephoned and wrote to the Department and his MSP to ask that his application be considered as a special case and approval issued. During telephone conversations and in letters from the Department, [Mr U] was advised that some form of priority list for considering applications was being considered and that the Department intended to consult the industry on the best way to proceed.

'Unfortunately, like many other farmers, [Mr U] found that his proposal did not feature in the list of items which the Minister subsequently announced would be considered for approval in the final rounds. Grant assistance towards the costs of obtaining planning consents and building warrants was only available under ABIS if the associated works were approved and carried out so, as with many other unsuccessful applicants under the Scheme, [Mr U] could not recoup his outlays incurred before submitting his application. It was put to the Department that it had been wrong to continue to require planning consents and building warrants before considering applications. Consideration was given to dropping this requirement towards the end of ABIS but, as it was suspected that there were already speculative applications being made by farmers where preparatory costs were minimal, dropping the requirement to have the proper planning and building consents was likely to have increased the proportion of successful applicants not using their approvals, either because they subsequently failed to seek the necessary approvals or because these were refused. This, in turn, would have disadvantaged serious applicants. To comply with scheme rules all approvals had to be issued and the conditions accepted by those offered grant assistance by 31 December 1999. No new approvals could be issued after that date if some projects failed to materialise. It was decided, on balance, to retain the existing rules while, at the same time, publishing the likely priority list so as to steer farmers away from incurring costs on applications which were likely to be a low priority.

'[Mr U] indicated that there was considerable delay in notifying him that his application had been unsuccessful. The Minister had been unwilling to implement the decision announced on 16 November until the Rural Affairs Committee had been given the opportunity to comment on it. The Committee's report was published on 16 December and a news release announcing the Minister's response was issued on the same day. This was widely reported in the agriculture press and would have been seen by most applicants. It was accepted, of course, that all applicants should nevertheless receive a letter from the Department. Given the need for successful applicants to have accepted an offer by 31 December, priority was given to contacting them. This was done successfully and letters were subsequently issued as quickly as possible to the unsuccessful applicants. [Mr U] was advised that he had been unsuccessful by letter on 22 February 2000 ...

'In summary, the circumstances of [Mr U's] case were extremely unfortunate, but it was considered properly in accordance with the Department's procedures. There were no special circumstances which justified making an exception. The fact that his enterprise had materially changed since 1995, thus necessitating a new resource audit, together with the timing of his subsequent application which fell just outside the end of August cut-off, meant he was affected by the need to prioritise the thousands of applications received between 1 September 1999 and 31 October 1999. The particular problem he faced – the need to incur costs in gaining planning consents, etc. for what turned out to be an unsuccessful application – was one which was known to the Department and it was one of the issues taken into account before a final decision on priorities was announced in December 1999. For the reasons given above, the Minister's final decision meant that [Mr U] was one of the many whose application was unsuccessful.'

Mr U's evidence

17. **Mr U** told my investigators that he had waited until the revised scheme was in force before applying for a grant because the Scottish Agricultural College (the college) had advised him that there would be more money available under the revised scheme. His business was growing and he thought he would need a general-purpose shed bigger than that

recommended by the resource audit he had previously obtained so he decided to wait before applying for a grant. As ABIS was a six-year scheme, he was confident that he had enough time to assess his business needs before making an application.

18. Mr U said that his experience of the Department, and his participation in other schemes, was positive and he did not expect anything different under the revised scheme. It was presented to farmers in the same way that other schemes had been. However, he had checked with the Department that there were sufficient funds available. This was because he was embarking on an expensive project; he had to make financial commitments before applying (he had to pay £2,000 in late July for planning permission); the revised scheme had a short time to run; and he was aware that there were many applications in the pipeline. He had no indication from the Department that funding would dry up. Given that, and his previous experience of the Department, he was confident that he would receive a grant. Mr U said that he could not definitely say who he spoke to about funding but he thought it may have been an official in the local area office (Officer B - see paragraph 24) and that the Department's surveyor had also mentioned it. Mr U said that he was sure that he was told that to the best of their knowledge, the budget for the revised scheme would not run out. Mr U told the Ombudsman's staff that the college's building design engineer had also checked with the Department and was told that there would be sufficient funding.

19. Mr U said that he was aware from conversations with other farmers, and from press articles, that others were also waiting for the revised scheme to be introduced before making applications. It was common knowledge that ABIS was being revised to make it more favourable to applicants, the only surprise was that it took so long. The farming industry had expected the revised scheme some 18 months before it came into being.

20. Turning to the events that led to his application, Mr U said that he did not find out about the revised ABIS scheme until three weeks after it had been introduced in March 1999. His father then took the plans of the shed to the Department and was told that they needed a second resource audit because the size of the shed had increased by more than 10% of the size

recommended in the first audit. Mr U then applied to the college for a new audit, design plans and a survey – this was around May. The college started preparing the audit and survey four weeks later (previously the wait had been one week but they were now inundated with requests). Mr U applied for planning consent as soon as the college produced the design plans for the shed. It was late July before the application was made to the Department. Mr U had attempted to make the application before then without planning permission because he was increasingly concerned about sufficient funds being available but the Department told him that the application was unacceptable without planning permission. [Note - the Department says the complete application was received on 7 September 1999 with supporting documentation submitted on 9 and 10 September.]

21. In subsequent correspondence with the Department Mr U informed them that he had been given every encouragement that his application would be successful. He explained that was on the basis that he had been told that there were sufficient funds available; had applied in plenty of time and his application was fine. It was his opinion that the local area office did not really know what was going on. Mr U said that he had become aware during the summer of 1999 of the former Minister's statement (paragraph 11) about sufficient funding being available for any upsurge in applications. That gave him confidence that there would be sufficient funds.

22. Mr U said that it was not until his father arrived at the Department's offices to submit the application with planning permission on 7 September that they officially found out that the Department had placed a moratorium on approving all applications on 31 August. They had heard about it from other farmers a few days earlier. When the moratorium was lifted and applications were being approved on a first come first served basis, Mr U's father telephoned the Department enquiring where his application was in the queue. Mr U's father thought that the Department had told him that it was quite high up in the queue but Mr U said that this information might have come from the college.

23. Mr U said that he and other farmers had attended a meeting with departmental officials on 29 October. Officials said at the meeting that they were thinking about prioritising but Mr U got the impression that they had

made up their mind that that was what they were going to do. Mr U did not contact the Department again once they had announced the priority scheme. He was sure that he had not received the Department's letter of 22 February 2000 telling him that his application was unsuccessful. He knew by then through a telephone conversation but did not hear officially in writing until 3 May.

Evidence from Departmental staff

24. My staff interviewed the following departmental officials who were involved with Mr U's application and/or the administration of ABIS:

the Principal Agricultural Officer for Mr U's local area office (Officer A);

a Senior Agricultural Officer in Mr U's local area office (Officer B);

the head of the HQ branch responsible for the policy and financial oversight of ABIS who was in post until February 1999 (Officer C);

an official at HQ who until July 1998 had policy responsibilities for ABIS, particularly in relation to the revision of the scheme (Officer D);

an official at HQ whose responsibilities from around April 1999 included payments, monitoring approvals and recording of monitoring returns in respect of ABIS (Officer E);

the official at HQ who from January 1999 was grant manager for a number of schemes, including ABIS, replacing Officer C in that role (Officer F);

the Chief Agriculture Officer at HQ (Officer G); and

the Head of Finance at HQ (Officer H).

25. **Officer A** said that area offices had anticipated, through their contact with producers and industry-related organisations, a significant increase in the number of applicants wishing to join the revised scheme. Indeed, the number of applicants expected did not exceed the actual number. However, it was the number of applications made by the applicants that had not been

anticipated by area office staff. Many producers had produced 'wish lists' covering everything they could apply for in the hope that they would get something out of it. However, Mr U's application did not seem to be speculative.

26. Officer A said that he had received no instructions from HQ about monitoring uptake or the level of interest from the launch of the revised scheme. Nor was there any system in place locally to monitor how money was being spent. The college had telephoned his office in June 1999 to say that they were inundated with requests for planning permission and building warrants. They said that they had about 200 applications for resource audit, plans and designs with more expected and would not be able to clear them quickly. Officer A told HQ that there were huge numbers of actual applications and that these were likely to cause workload problems. He knew from conversations with staff in other area offices that they were passing on the same message. When the temporary moratorium was put in place at the end of August, he informed HQ that there were many applications in the pipeline, many for large agricultural buildings, and that there were likely to be budget problems.

27. In October, the Department announced that a prioritisation system for applications had been put in place. Officer A had been consulted about what categories should be prioritised. He thought that the college and other farming bodies had also been consulted - sometimes producers seemed to know things that area offices did not. It was the area offices' responsibility to tell producers about the prioritisation. However, they did not approach producers directly due to pressures of work but gave information about the revised procedures when producers themselves made enquiries, so it was possible that some producers would not have been aware of the situation.

28. Officer A said that the ABIS budget was generally well known. Once ABIS began and applications started coming in, they told producers that they should apply quickly as there was a great deal of interest in the revised scheme. If producers asked whether there would be enough funds, they would have been told that there was a financial monitoring system in place but there was no guarantee that they would receive a grant because the funding was finite. While Officer A's staff would not have told producers that

the applications would not be approved, they did tell them once the moratorium was in place that they might not be approved.

29. Officer A said that policy branch in HQ did not seem to be fully aware of the financial problems that area offices were experiencing. In July (see Annex A, 27 July 1999) one of his staff told policy branch that at that stage if applications were submitted for all proposals included in resource audits received in their office a minimum of £2.2 million would be needed to approve them. That would have exhausted the remaining budget for the whole Objective 1 Area. [Note - the Department says applications would not be submitted for all the works. This was because many applicants would reach their financial ceiling long before they could reach the end of the list of possible improvements or they would decide that the business could not afford to carry out the work or that in the limited time available they could not undertake all works identified.]

30. **Officer B** said that he was responsible for considering and approving Mr U's resource audit. He had contact with both Mr U and his father. He recalled that he had a number of telephone conversations with Mr U and believed that he would have told him that ABIS was cash limited and that as far as he was aware, applications would be handled on a first come first served basis and so should be made as soon as possible. Officer B said that he would not have given any guarantee that a grant would be approved, but might reasonably have said that as far as he knew there was no difficulty with funding. The problem for Mr U and others was that they had to get their revised resource audits from consultants such as the college who were inundated with requests at that time. The level of interest between March and May 1999 was huge. Mr U had said that his college adviser told him two years earlier that there were proposals afoot to revise ABIS. Officer B said that if the college told Mr U this, then they had probably told other producers the same thing so there was a huge potential interest in the revised scheme and enhanced rate of grant even though full details were not available until the end of March 1999.

31. Officer B said that his office was aware that there was a lot of interest in the revised scheme, but he did not know if this would transfer into actual applications. There was a delay between the start of the revised scheme and

getting the revised resource audits in because the college was inundated with requests for resource audits and associated documents. The Department had advised producers to hurry along their revised resource audits if they could.

32. Officer B said that in his view Mr U's application would undoubtedly have been successful had there been no shortage of funding. Unlike many others, the application was not speculative but absolutely genuine and Mr U had already spent £5,000 on the project. He was a very proactive farmer trying to resolve some real problems with his livestock accommodation. In Mr U's revised resource audit the only item proposed was the cattle building.

33. **Officer C** said that as well as ABIS he had had a number of other responsibilities and his branch had been under pressure. The view of senior management had been that the scope and rate of assistance under the original ABIS scheme were generous enough and that changes to it were not a priority. Officer C said that despite attractive rates of assistance, ABIS had been a very slow starter: there was a disappointingly low uptake in the early years. This was at a period of financial downturn in agriculture, especially in the Highlands and Islands. In late 1996 the Department had informal discussions with the National Farmers Union of Scotland (NFUS), the Crofters' Union and others about possible changes to ABIS. There was a legal obligation to carry out an interim evaluation of the whole Objective 1 Programme, including structural programmes and ABIS, and this was fulfilled by a consultants' report (paragraph 12). That proposed cutting ABIS's budget substantially but at a meeting with the European Commission in December 1997 the Department successfully argued against that. Cutting the scheme's funding had also been supported by many members of the Highlands and Islands Partnership, but again, this had been resisted by the Department. Instead, they came up with a package of changes intended to widen the scope of ABIS and make it more attractive. This was viewed as helpful by the NFUS and other industry representatives but the industry did not think it would have a major impact on the uptake of grants because there was not the money available for matching funding. The same message came from the Department's own economists.

34. The statement in the then Minister's letter of 15 February 1999 (paragraph 11) that sufficient resources would remain applied to ABIS to

ensure that all outstanding commitments could be met, as well as accommodating any upsurge in applications, was made against a background of extreme pessimism about the state of Scottish agriculture. The pound had been strong against the ECU and farm income figures showed a downward spiral. Therefore, the Department and the industry predicted only a very modest increase in uptake. He did not think any study could have predicted what actually happened. There had been a number of newspaper articles saying that farmers were holding back from submitting applications until the revised scheme was introduced. However, in Officer C's view the NFUS, with its area network, was a better source of information about likely uptake than individual farmers talking to the Press. In addition to conversations with NFUS officials, the Department also communicated with the Crofters' Union and the Scottish Landowners' Federation.

35. As regards communication with area offices, Officer C said that he thought they had also been aware of what was proposed. The normal route for information to reach the area offices was via the HQ agricultural staff and the Assistant Chief Agricultural Officer had been involved in the discussions about revising ABIS. The launch date for the revision was put back a few times but Officer C thought that briefing information went out to area offices when the changes were introduced. As the Auditor General for Scotland's report had noted (paragraph 12), a number of factors led to the delayed launch of the revised scheme. However, Officer C did not consider that an earlier launch of the new measures would have made any difference to the aggregate number of farmers and crofters who could access ABIS. The budget was finite - if the upsurge had occurred earlier, ABIS would probably have been closed due to lack of resources.

36. As regards monitoring of uptake once the changes were introduced, Officer C said that there were systems in place but it had emerged that they were not particularly effective. Computer systems at HQ and in area offices were not able to speak to each other, although Officer C's branch introduced very detailed reports for the Highlands & Islands Monitoring Committee.

37. **Officer D** said she had worked to Officer C and had been responsible for policy issues relating to the revision of ABIS. There was a problem in relation to the time it took to put the changes to ABIS into place. There had

been only Officer C and herself working on ABIS policy and they had been told by senior management that it did not have a high priority. At some points Officer C had been taken away to work on other matters, including BSE.

38. The decision in March 1999 to transfer £2.7 million out of ABIS (paragraph 12) was made on the basis that uptake was unlikely to increase and the scheme had only nine months to run. There were other, oversubscribed, schemes and there was pressure to transfer funds to them. There had been no formal market research on the likely uptake on ABIS. Officer D said that she could not recall what consultation there had been with area offices about the proposed changes. She thought that any consultation would have been through the then Assistant Chief Agricultural Officer.

39. **Officer E** said that she had worked to Officer F and had been involved in internal discussions about transferring money from ABIS. She had argued for a smaller transfer than advocated by some colleagues. She had done so on the basis of the pattern of expenditure until then and the fact that there was usually an increase in applications towards the end of a scheme. However, they did not anticipate a major upsurge because the NFUS and other industry representatives were saying that given the poor financial state of agriculture, producers would not be able to make the matching commitment required to attract funds under ABIS. When the revised scheme was introduced the application rates continued to be low, it was only in the final months that there was an upsurge.

40. It was possible that at the meeting on 17 May 1999 (see Annex A) between HQ and area office staff from the Highlands and Islands, the latter might have reported concerns about a potential upsurge in applications. However, there was no concrete evidence for that and Officer E's recollection was that staff thought that funds would be sufficient to cover expected applications. Similarly, if, as had been reported, the college was swamped with requests for revised resource audits from late April or May 1999, one would have expected a steady flow of completed resource audits but in fact the volume being submitted was very low.

41. Officer E said that she thought consideration had been given to doing market research on the likely level of uptake before the revised scheme was launched but that this had not been pursued because of lack of time and resources. It would have taken several months to get the results from any market research, by which time it would have been too late for the information to be of benefit. The Department had been monitoring the level of approvals which gave information of expenditure to which the Department was committed and allowed that to be compared with the amount available.

42. Officer E accepted that communications between area offices and policy branch had not been effective to the extent that there had been some lack of co-ordination in information passing to and from area offices, from policy branch and HQ agricultural staff and within area offices. That was essentially due to a lack of resources and the speed at which action had to be taken. There had been particular problems with area office computer systems which had been recognised and addressed when a new scheme had been introduced.

43. **Officer F** said that he was grants manager for a number of schemes but that responsibilities for ABIS were somewhat blurred when he first arrived in the division in January 1999. Therefore, in the early days he had concentrated on the other schemes for which he was responsible. He had experience from previous jobs of monitoring the progress of schemes and had regular discussions with Officer E about ABIS but found that the sort of information which he had hoped would be readily available for the scheme was not. He received better information, for example about uptake, for other schemes. The computer system being used to monitor schemes was old. The kind of information which area offices were getting from one-to-one discussions with producers about ABIS was not necessarily reaching his branch. The branch also seemed to have more local contacts on other schemes than it did on ABIS. The historical background to that was that ABIS was an agricultural scheme and therefore the route for information to pass between area offices and HQ was through professional agricultural HQ staff.

44. It was his view that communication routes in relation to ABIS might be characterised as clumsy. The problem was one of resources and time. As ABIS was very near its end it would not have been practical to bring in

significantly different arrangements, even if that had been considered at the time. Also, the background was that the industry was experiencing difficulties and some approved grants under ABIS had not been taken up after two years. There had been considerable funds still available under ABIS and no intelligence from any quarter that the likely level of interest in the scheme would be such as to cause problems. For that reason it had not been considered necessary to carry out research about the likely level of uptake.

45. Officer F said he thought he had been aware from around May 1999 that the college reported it was inundated with requests for resource audits. However, as there were a number of stages between commissioning resource audits and submitting an application that was not necessarily an indication that ABIS risked being oversubscribed. Also, completed resource audits were not a reliable indicator of likely demand on ABIS as they tended to be 'wish lists' rather than necessarily setting out proposals which there was a realistic prospect of taking forward.

46. Officer F said that the Department became concerned that ABIS might be oversubscribed around July 1999. Although at that stage the level of applications was still low there were comments from various quarters that there could be a potential rush. To some extent, once the potential shortfall of funds was identified the problem became self-perpetuating. Also, he considered that the industry had expected that once ABIS ran out it would soon be followed by something similar. Once it was realised that was not going to happen there was a rush of applications.

47. Officer F said that there had been discussions about warning farmers of the potential shortfall in funds and the need for prioritisation but events overtook them. There was a perception that farmers knew already so there seemed little point in sending letters to individual farmers giving them information that they already had. Also, there was a fundamental principle that area offices should be the route by which information reached farmers. If area offices felt there was a problem with the information reaching them they could contact HQ.

48. **Officer G** said there had been a perception by local area office staff that they were not being listened to by HQ. Area office staff believed that they

had a very good feel for ABIS and that there was going to be huge upsurge of applications (a view that was shared by the college's advisers). This was voiced at the meeting in May 1999 but from policy branch's point of view there was no evidence at this point. Turning to communication before the implementation of the revised scheme, Officer G said that, while there was some communication, policy branch tended to use their existing contacts with the agricultural industry as their source of intelligence, rather than consulting area offices. Agricultural staff implemented whatever policy was decided but also advised on these policies at the development stage. In doing so they drew on the experiences of those in area offices although at that time there was no formal procedure for doing so. More formal arrangements were now in place.

49. Officer G said that the money that was left for ABIS after March 1999 (paragraph 12) allowed for some increase in take-up and the feeling in HQ was that the industry was not in a position to fund a huge amount of investment. Area offices were not asked what the potential uptake might be under the new scheme. Neither were they consulted on the decision to take money out of ABIS and put it into other parts of the programme. Had Officer G been asked, he would have suggested that the reallocation of funds was delayed until the revised ABIS scheme was up and running. Although HQ had consulted industry representatives on the monitoring committee, Officer G considered that it would also have been useful to consult area office staff who implemented ABIS on a day-to-day basis and had a good idea of what was happening on the ground.

50. Turning to the prioritisation, Officer G said that it was clear by September that the Department had a problem. He felt that allocating funds on a first come first served basis would have penalised those farmers in the more remote areas of the Highlands and Islands for whom it was more difficult to access essential resources such as the college. When the moratorium was lifted, all fairly complete, outstanding applications were approved and prioritisation came into effect thereafter. Priority was given to applications which were consistent with the Executive's policy objectives for agriculture. The items that had been introduced for the first time when ABIS was revised earlier were also included as priority items, as producers had only a limited opportunity to take advantage of them. IT was one such item, but it

was also included because it would help businesses generally to become more efficient.

51. Officer G said that there had been discussion of whether it would be possible to identify those applications that were genuine rather than speculative but he believed that attempting to do so would be very subjective. Also, it could have penalised applicants from remote areas in the same way as the first come first served approach, as they would also have been at a disadvantage in substantiating applications, for example by obtaining planning permission. As regards monitoring, Officer G said that he did not feel that, if it had been kept up-to-date, it would have provided information that would have helped in deciding on the priority items. Experience of previous schemes would give just as much information about the benefits that were going to be achieved and monitoring of the success of individual projects would not have informed the selection of priorities at what was a fairly general level.

52. Officer G said that the decision to allocate £200,000 to those who had incurred significant preparatory costs was necessarily somewhat subjective, particularly given the pressure of time as they were nearing the end of ABIS. However, area offices were asked to identify projects where significant preparatory work had been undertaken and where significant expenditure was involved.

53. **Officer H** said that he reported directly to the Principal Finance Officer at the Scottish Executive and was not part of the Department. His role was to advise ministers on making the best use of their resources and to monitor, on behalf of the Accounting Officer of the Executive, the regularity and propriety with which the Department conducted its business. This involved continually questioning decisions to ensure that ministers understood all of the financial consequences. Against this background, he expressed concerns (in his minute of 20 February 1998 - see Annex A) about the initial proposals to revise ABIS. At that stage it was stated that the proposals would not incur costs. However, it was later accepted that there would be additional costs but it was thought that they would be contained within the agreed baseline of £5 million as ABIS had been underspending. The Department

believed that if they did not make changes, they would spend £2 or £3 million and this would probably increase to £3 or £4 million under a revised scheme.

54. Officer H said that the first draft of the submission to the Minister seeking agreement to the changes had contained no real assessment of the risks in revising the scheme. However, the final version of the submission contained as good an assessment as could be given of the likely financial consequences of revising ABIS. He believed the statement was reasonable because of the overall economic climate at that time of the industry; his experience of spending in previous schemes for 15 years; the history of underspending on ABIS; and the fact that policy branch would have taken advice from the monitoring committee and agricultural staff about any evidence they might have had of latent demand. Nevertheless, the assessment did contain an element of risk, as with any assessment, and it was difficult to predict the uptake under the revised scheme. However, he believed that the intelligence from the Department's staff was reasonable and that there was no evidence at the time to suggest that the assessment was wrong.

55. Towards the end of the investigation the Department's Head of Farm Business Restructuring Division - **Officer I** - (who took up that post subsequent to the events complained of) provided written comments on a number of issues raised by Mr U's complaint. As regards whether Mr U might have a legitimate expectation that his application for grant would be approved, Officer I wrote:

'The scheme literature was absolutely clear that ABIS was a cash-limited scheme and that there was no automatic right to approval and subsequent payment for grant. It was up to applicants to decide whether to take the risk of incurring any costs involved in preparing and submitting an application, against the background that they had no guarantee of success. The Department did not believe that the Minister's letter of 17 February 1999 ... gave rise to a clear legitimate expectation that [Mr U] would be offered funding. While it appeared reasonable, in light of the low levels of demand over most of the duration of the scheme, to take a view in February 1999 that there would be sufficient resources to meet an upsurge in demand, the Minister's opinion was specific to that time and

circumstances and could not reasonably be relied on as a guarantee that, in the very different circumstances prevailing in the late Summer and Autumn of 1999, there would necessarily be enough money to meet a level of demand which was far in excess of what could have been anticipated in February.'

As regards whether the Department has taken reasonable steps to assess the likely level of demand for ABIS grants, Officer I wrote:

'... the officers administering ABIS had to take account of diverse and contradictory intelligence. On the one hand common experience with capital grants schemes was that there was a modest surge of demand towards the end of the scheme's period (although nothing like the surge which was in fact experienced with ABIS). There was also some intelligence, largely anecdotal, that potential applicants were holding back their applications until the end of the scheme, in the expectation that grant rates might be enhanced and that the sort of projects which the scheme supported might be changed to their advantage. Conversely, against a backdrop of the very severe economic problems facing the industry, there was strong evidence that demand was likely to remain depressed. The consultants who considered likely demand for ABIS assistance as part of the mid-term evaluation of the Objective 1 programme felt that, even if the scheme was changed, demand was likely to remain below the levels projected when the budget for the scheme was originally set. The Programme Monitoring Committee (PMC) of interested stakeholders, and the National Farmers' Union of Scotland, also believed that demand would continue to remain depressed, even after the scheme had been changed, and the PMC sought a deeper cut in the scheme's funding than the Scottish Office was prepared to agree to. In the light of the diverse intelligence available to them, I believe it was reasonable for Departmental officials to take the view that only a modest upsurge in demand was likely after the scheme changes were introduced.'

As regards the time it took to introduce changes to ABIS, Officer I wrote:

'It is true that preliminary and informal discussions with the NFUS started in 1997 but changes were not implemented until March 1999 ... this was

partly because of other management priorities for the time and effort of the officers involved. However, ... it typically took a fair while to get from initial acknowledgement of the case for changes to a scheme to the introduction of actual changes, especially where agreement with external parties was required (in ABIS's case agreement by the Programme Monitoring Committee, the Treasury and the European Commission was required) ...'.

He gave as an example of a typical process for the introduction of changes to a scheme the case where modest improvements had recently been introduced to the Rural Stewardship Scheme after proposals for change were first conceived and discussed with key stakeholders in October-December 2001. He said that this sort of critical path was not untypical, and in other work to develop and introduce a grant-scheme for farm business advice they had seen a similarly long timescale, from the initial research to scope and make a case for change, in the first half of 2001, through detailed work with stakeholders to develop a new scheme through late 2002 and early 2003, to submission now of a case to the European Commission for this scheme, which they should not expect the Commission to approve for six months or so.

As regards whether reasonable management decisions had been made about the relative prioritisation of changes to ABIS in relation to other business, Officer I wrote that, within the finite resources available to Scottish Office and Scottish Executive management, he thought reasonable decisions had been made. It was quite difficult at this distance of time to reconstruct what the specific priorities for the officers concerned were at particular times, and one of them (Officer E) had subsequently retired. Officer I was, however, aware of the various priorities which Officer C had to take forward in addition to the development and management of ABIS. Particular priorities during 1998 and 1999 included taking the lead in ensuring that Scottish interests were taken into account in the negotiation of a new EC regime for funding rural development; during 1998 negotiating emergency State Aids with the European Commission to support particular farming sectors in crisis; management of four diversification schemes in Objective 5b areas in Lowland Scotland; time spent in 1998 on the task force dealing with the implementation of control and eradication measures for BSE which involved Officer C being seconded from the branch for around six months; and during

1999-2000 developing (with intensive stakeholder involvement) the rural development measures in the new Highlands and Islands Special Transitional Programme (including the successor to ABIS) and the Scottish Rural Development Plan setting out proposals for spending €1.1 billion of domestic and European money between 2000 and 2006. In the Department's view, the revision of ABIS received reasonable management priority in relation to other projects which had to be carried forward within a necessarily limited resource. Officer C was advised by the then Head of Group that the rates of assistance in the original ABIS compared very well with similar schemes, so the implementation of changes should not be given high priority against the other tasks to which he referred.

Findings

56. As I have noted in paragraph 3, I am not empowered to question the merits of discretionary decisions of public bodies taken without maladministration. Decisions which the Department made in administering ABIS, for example, about the allocation of funds and the assessment of priorities, were of a discretionary nature. The question I have to consider is whether there was any maladministration in the Department's decision making and if so, whether it has resulted in any unremedied injustice to Mr U.

57. Concerns about the ABIS scheme were highlighted in the interim report produced by the Scottish Parliament Rural Affairs Committee and in the report of the Auditor General of Scotland. The Rural Affairs Committee raised issues about the administration and management of the scheme and commented particularly on the failure of the Department to identify the significant increase in applications; changes in their decision-making over the history of the scheme; and the assurance given by the then Minister that there would be sufficient resources (paragraph 11). In his report, the Auditor General noted shortcomings and drew attention to the need for the Department to monitor and manage publicly funded schemes (paragraph 14). In its own 'Lessons Learned' paper (see Annex A, 17 December 1999) the Department acknowledged the need for closer monitoring and better communication. The evidence gathered in the course of this investigation confirms the shortcomings identified by others and points to the fact that many of the difficulties experienced in the final months of ABIS stemmed from those problems. They were exacerbated by the fact that there was a very long

delay between the time when the need to revise the scheme was identified and the actual implementation of revisions. There was, therefore, a cumulative effect of poor and conflicting information, inadequate monitoring of demand, and limited time for implementation of the revised scheme.

58. Although the Department wrote to the EC about revising ABIS because of the low uptake as far back as 29 September 1997, it was not until 31 March 1999 that the revised scheme was in place. The Audit General's report (paragraph 12) outlined a number of factors that the Department identified as accounting for this delay. Evidence obtained in the course of this investigation indicates that the delay in implementing the revised scheme was due in part to competing priorities for the staff concerned. For example, Officer C said that his manager's view was that changes to ABIS were not a priority. Officer D also stressed the impact the lack of resources had on the delay. The delay in introducing the revisions meant that there was a period of only seven months in which eligible applications could be submitted. All eligible applications required resource audits (conducted in the main by the college) and many also required building warrants and other statutory planning consents. While many applications included resource audits that had already been approved under ABIS, a significant number required new or revised resource audits. The short period in which the revised scheme was implemented made it difficult to administer and to manage the upsurge in applications when it materialised.

59. It is also notable that the decisions to transfer £2.7m out of ABIS and to revise the scheme to make it more attractive were undertaken without any formal market research and in the absence of effective consultation outside the policy branch at HQ. These are very significant shortcomings which also contributed significantly to the difficulties that were encountered.

60. I turn now to whether it should have been possible to forecast and plan for the upsurge in demand that followed. Most of the departmental officials the Ombudsman's staff interviewed commented that it was difficult to predict the projected uptake under the revised scheme. That is understandable given that ABIS was demand-led. However, it seems to me that the Department could and should have done more than it did to assess the likely increase in uptake under the revised scheme and to monitor the

rate of applications after the revisions were introduced. Several departmental witnesses have commented on the poor communication between area offices and HQ and Officer F has characterised communication routes generally as 'clumsy' (paragraph 44). There can be no absolute certainty that better communication would have enabled the Department to take earlier and more effective action than it did. However, it would, at the very least, have increased the possibility of doing so. The poor communications systems merit criticism and I am pleased to note from Officer G's evidence (paragraph 48) that more formal arrangements for communications between area offices and HQ are now in place.

61. Making all due allowances for the difficulties of managing finite resources and competing pressures within the Department, and of predicting expenditure on a demand-led scheme, it seems to me that many of the problems the Department faced in the last months of ABIS stemmed from their own inadequate management information, forecasting and monitoring; poor planning and communication; and under-resourcing. These factors contributed to the delay in implementing the revised scheme which in turn resulted in a short timescale for applicants. I have no doubt that these shortcomings amounted to maladministration. This finding of maladministration in the Department's general handling of the scheme does not in itself imply that individual applicants suffered an injustice. I now turn to the question of whether or not this caused an unremedied injustice to Mr U.

62. The particular circumstances relating to Mr U's case are that he proceeded with his application after he became aware that the new scheme had been introduced. He did not anticipate that he would require another resource audit and this unfortunately contributed to the delay in processing his application. Mr U has explained how he made decisions about the timing of his revised application based on his previous positive experience of dealing with the Department, the feedback he had obtained about the strength of his application and its chances of success, the information he was able to obtain about the likely availability of funds under the revised ABIS scheme, and the fact that the Department had revised the scheme in order to induce applications. He was also aware of, and reassured by, the statement made by the former Minister (paragraph 11) regarding the availability of funding.

63. It was reasonable for Mr U to have high expectations that his application would be funded. Indeed, Officer B, the official responsible for considering and approving Mr U's resource audit, has said that in his view Mr U's application would undoubtedly have been successful but for the shortage of funds (paragraph 32). He and Officer A (paragraph 25) were satisfied that Mr U's application was not speculative, unlike many others, some of which had been categorised as 'wish lists'.

64. On the other hand, the Head of the Department has quite rightly pointed out (paragraph 16) that the explanatory leaflet and letter sent to Mr U made clear that approval of the resource audit and payment of its associated cost did not 'commit the Department to approving any subsequent application for financial assistance on any of the measures identified in the audit'. I accept that the availability of funding is not the same as an entitlement to or a guarantee of funding.

65. Faced with pressures of timescale and high demand, the Department was forced to introduce new criteria to prioritise funding. As I have indicated above, this was in part due to the shortcomings I have identified. Nevertheless, I accept that it was necessary and reasonable for the Department to review the criteria in the light of these changed circumstances.

66. In making his application and incurring costs, Mr U assessed his chances of success. For the reasons stated, it was reasonable for him at that time to anticipate that he would have received funding. In the interim period, circumstances changed and worked to his disadvantage. He could not have predicted the imposition of a cut-off point for applications at the end of August 1999; the subsequent transfer of responsibility for approving applications from area offices to HQ; and the change in the criteria for prioritising funding announced on 1 October. It was by then too late for him to adjust his application in line with the new criteria.

67. In his response to my enquiries, the Head of Department stated that when the Department became aware of the high demand and pressure on funding in September 1999 'it was thought to be important that potential applicants should be warned of the shortage of funds so that they could

choose to avoid new nugatory expenditure'. The announcement of prioritisation of funding followed on 1 October. This would allow those about to make applications the opportunity 'to judge the likelihood of success and whether it was worth spending the necessary time and money on an application' (see paragraph 16). As Mr U had already spent the time and money in making his application he could not have benefited from this advice. On the contrary he had been advised by staff in the area office and the college that he had a strong chance of success and acted accordingly.

68. I accept that in applying for funding under the ABIS scheme there was no guarantee that Mr U or any other applicant would receive a grant. In these circumstances, I do not recommend that he be compensated for the amount of funding involved. Nevertheless, in the light of the Minister's statement the fact that the revised scheme was designed to induce applications, and the particular circumstances of his case including the positive feedback given to Mr U at the area office level, I consider it was reasonable for him to expect his application to be successful. Had his application been submitted a few days earlier then it is highly likely it would have succeeded. It was delayed because of circumstances beyond his control, for example, the time taken to process resource audits at the college and the need to obtain planning permission. In addition, I am of the view that the maladministration I have identified contributed to the failure of Mr U's application. Taking into account all the factors in this case, I have determined that Mr U has suffered an unremedied injustice.

69. In recognition of the preparatory costs incurred by Mr U, the time and trouble to which he was put and the delay in advising him that his application had been unsuccessful, I recommend that the Department make a consolatory payment of £5,000 to Mr U.

Conclusion

70. I have conveyed my findings to the Head of the Department who has informed me that his Department will consider my recommendation.

Professor Alice Brown
Scottish Public Services Ombudsman

16 January 2004

Summary of Events relevant to Mr U's complaint

1995

30 November The Department told Mr U that a resource audit and business assessment carried out on his business was acceptable for the purposes of ABIS. One of the measures identified in the audit was the provision of a general purpose shed to house livestock. Mr U decided to monitor his business before undertaking all the measures in the audit.

1997

29 September The Department wrote to the EC outlining their proposals to revise ABIS.

1998

20 February Officer H minuted Officer C about proposals to revise the scheme. He expressed concerns that it would be imprudent to do anything which would encourage more applications the costs of which could not be met from within planned provision.

17 April An official in an area office minuted the Assistant Chief Agricultural Officer saying that they had advised a prospective applicant under ABIS to delay an application as the scheme rules were due to be changed shortly.

25 April A newspaper article reported that the NFUS believed that that the low take-up rate was due to the low grant rates rather than a lack of interest by the farming community.

6 June Another article reported the NFUS's concerns about the delay in revising the scheme.

22 June The Department made a submission to the then Minister seeking agreement to the proposed changes to the scheme. The submission stated that the proposed changes were a result of an interim evaluation of the programme by external consultants and the Department's own assessment of ABIS in the light of the Government's priorities for the agricultural industry.

The proposed changes sought to transform the scheme from one delivering agricultural capital grants (with some 'bolt-on' environmental measures) to one with a greater emphasis on measures aimed at diversification and rural development activities which went beyond traditional agriculture. These changes would not require any additional funding and would lead to some increase in uptake in the scheme but probably not such as to remove the possibility of savings overall on the programme. The minute warned that with only 18 months left in the programme any further delay in approving the changes would compromise what utility they would have. The Department was keen to move quickly once the outcome of the Government's Comprehensive Spending Review was known on 9 July both to maximise the time for the revised programme to take effect and to counter the growing impatience of the industry and other rural interests.

25 June The Minister agreed the proposed changes.

14 December Officer C minuted his manager and Officer H about taking money out of the programme and reallocating it to other parts of the Objective 1 Programme. Officer C said that he was confident that the Department would be able to meet all of the programme's commitments, including those created by the introduction of the new scheme measures.

16 December Officer C wrote to the members of the Highlands and Islands Objective 1 Programme Monitoring Committee enclosing a paper about reallocating money from the programme. He said that there were a number of factors which had limited and would continue to limit farmers' ability to match funds under the scheme but that the Department had budgeted for some acceleration in uptake of grants to reflect the improvements made to the scheme as well as the prospect of a rush of applications prior to the scheme closure at the end of 1999. He said that it was difficult to predict accurately the uptake of grants but that the Department had assumed that over £300,000 of the scheme's commitments would not materialise as applicants decided against going ahead with projects.

1999

9 January A newspaper article reported farmers' concerns about delay in launching the revised scheme. It said that the diversification measures were

even more essential given the state of agriculture and the need to secure money from outwith farming. Under the revised scheme, more grant rates would be available.

25 January A Member of Parliament (MP) wrote to the Minister about the delay in launching the revised scheme.

18 February The Minister responded to that MP explaining the reasons for the delay and saying that there would be sufficient resources to accommodate any up-surge in applications under a proposed revised scheme (see main report, paragraph 11).

25 March Officer C sought the Minister's agreement to redeploy resources from the programme, stating that uptake under the scheme had been badly affected by the general downturn in farm incomes which curtailed the ability of farmers and crofters to put their own resources into new capital projects. The scheme was demand-led; there might be a surge of applications because there was no new scheme yet in place for 2000, or, conversely, farmers and crofters might simply try to survive without increasing financial outlay. However, the best estimate that could be made was that £2.7 million from the programme would be uncommitted by the end of December.

29 March The Minister agreed the recommendations.

31 March The revised scheme was launched.

May Mr U began preparatory work for the construction of his general purpose shed and made an application for approval to the Department. The Department advised him that a revised audit was required because the emphasis of his business had changed.

17 May The Department's HQ branch responsible for policy on ABIS held a meeting with local area offices to discuss the revised scheme.

27 July An official from Mr U's local area office sent Officer E details of the value of works identified in resource audits which could be the subject of applications. He said that they believed that the volume of claims had

increased and that the college had 110 audits in the pipeline, which included measures that, if approved, could require a total of £2.2 million grant.

11 August Mr U submitted his second resource audit and business assessment to the Department.

19 August The Department told Mr U that his second audit was acceptable.

31 August The Department put in place a moratorium on approving applications.

7 September Mr U met a department official to submit his application form with the appropriate documentation and was told that there was a moratorium on approving proposed works under the scheme.

9 September The moratorium was lifted.

10 September Mr U wrote to the Department seeking urgent approval for his application. He said this had been delayed because he required a larger shed than originally envisaged and so had to obtain a second audit despite the original audit indicating a minimum size. He added that at no time did the Department indicate that there would be a problem in obtaining authority to proceed with his shed. On the same day, the Department replied to Mr U saying that the second audit was a requirement of the scheme and his application for a shed would therefore have a 7 September date for receipt. The Department said that HQ was now issuing approvals on a date of receipt of application basis and they did not know whether Mr U's application would be successful.

14 September Officer F updated the Minister on the latest position on the scheme. He said that officials had met the NFUS who expressed concerns that applications were now being considered on a first come first served basis. They argued that future applications might produce better returns for the businesses but that these applications might not receive approval because of the finite grant available. Applicants were running up against time constraints and in some cases were incurring several thousand pounds of expenditure obtaining planning consent, building warrants etc.

21 September Mr U wrote to Officer E explaining why his application for funds had been delayed and asked her to consider his case closely. A hand written note by Officer E records that she spoke to Mr U.

23 September Mr U wrote to a Member of the Scottish Parliament (the MSP) asking for help in securing funds under ABIS for his shed. He said that it was unfair that funds were being allocated on a first come first served basis as he had had to obtain planning permission which had created a three-month delay. He had also restructured the business and invested approximately £5,000 in planning and preparing for the project. Mr U wrote to the Department on the same day outlining the difficulties he would face if he did not receive funds.

27 September Mr U wrote to Officer G outlining again his position. He also said that he and his building adviser spoke to his local area office on several occasions during the summer to make sure that there would still be funds available. Mr U then heard that his case would be one of the first to be considered.

The MSP wrote to Officer B about Mr U's application. He asked him to confirm whether there were still available funds under the scheme, when the funds would be allocated, and that Mr U's application be dealt with as having been received in May.

30 September Officer F sought the Minister's agreement to adopt a prioritised system for considering grant applications under ABIS. He said that in the month of September the volume of applications to the area offices had increased sharply to over 1000. This came as a surprise given the financial problems being experienced by the industry. However these financial problems might have exacerbated the last-minute rush of applications usually seen as scheme closing dates approach. Many farmers thought that this might be the last agricultural capital grant scheme and did not want to miss the opportunity of assistance for vital works, which they could not fund out of currently low incomes.

9 October Mr U wrote again to Officer G expressing his concern that the Department intended to prioritise categories and that his application would

therefore come last. He said that it was very unfair that his application for a shed, on which his livelihood depended, should be prioritised after applications less crucial and he sought approval.

19 October Mr U wrote to Officer G saying that he had not received a response to his letters.

21 October Officer G replied and apologised for not acknowledging Mr U's letters. He outlined Mr U's case history and said that when Mr U submitted his application with all the necessary consents, it was clear that there were insufficient funds available for the scheme. Once consultations with the industry on the proposed priority system had been completed, applications would be considered.

25 October Officer F received legal advice about the statement by the Minister that there would be sufficient resources to accommodate any up-surge in applications under a proposed revised scheme. It stated that the statement *might* have caused a legitimate expectation but that it would not necessarily be legally binding, that would be a matter for the courts to decide.

27 October The Department held a meeting for potential and actual applicants in Mr U's area to discuss the current difficulties with the administration of ABIS. The main areas of complaint by applicants were about expenditure they had already incurred; the Department's prioritisation proposals; delayed implementation of improvements to the scheme; lack of consultation and foresight by the Department; and the Minister's statement.

Officer C received further legal advice about the Minister's statement. It said that courts might find the Minister's statement sufficiently clear and unambiguous for the farmer to rely on. It would be for the claimant to show that it was clear and unambiguous, that he was part of the group of people to whom the promise referred, that he relied on it and that he did so to his detriment.

16 November Officer E received further legal advice about the statement by the former Minister, and a contribution for the submission to the current Minister. The advice was that although it was likely that the former Minister

did intend to promise that money would be available for all claims it was not possible to say conclusively that this led to a legitimate expectation: that would be for the courts to decide.

10 November A departmental official sought the Minister's agreement to the introduction of a prioritised system for approvals under the scheme. Amongst other things, she pointed out that there was no legal provision under the scheme to assist with costs such as planning when applicants were unsuccessful. Furthermore, at the initial stage of the scheme all applicants were told that acceptance of the resource audit did not commit the Department to approve any subsequent application. Turning to the then Minister's statement, the official said that it was not possible to conclusively say that it gave applicants a legitimate expectation that they would be offered financial assistance and that it would be difficult to predict the outcome of any court action on this basis. The Department's position was that the Executive was not irreversibly bound by the terms of the Minister's letter and that policy must continue to be reviewed by government in light of changing circumstances.

November The Minister wrote to the convener of the Rural Affairs Committee announcing that an additional £1 million would be put into the scheme and he outlined the factors, which had led to the current situation.

17 November Officer G requested information from Principal Agricultural Officers (PAOs) in the Highlands and Islands area about events before the revised scheme was launched and events that had occurred since then.

20 November A PAO's response to Officer G's minute included:

'The agricultural community was aware of [the Department] working up a revised scheme under [the programme]. The information that this was happening seemed to disseminate from the monitoring committee and through the NFUS until it was widely known during 1997. The general belief was [the revised scheme] would be more attractive and would be in place by mid to late 1997.'

'... everybody in the farming world was waiting for [the revised scheme] to start and were purposely delaying applications under the new rates were announced.

'[A local authority] ... were quite scathing about the lack of progress on [the revised scheme] and recognised that the community were delaying all major works until the revised scheme was announced. The local NFU were better informed on the subject than we were.

'While [the downturn in major applications during 1998] could be attributed to the lack of investment cash and also farmers thinking ahead to winter food bills as a result of the wet season a great deal has to be set against farmers waiting for [the revised scheme].

'At the main meeting [in May] all area staff emphasised to headquarters officials that [the college was] swamped by requests for RAs and that we should be ready for the scheme to take off.

'[A newspaper] ran an article that Planning Officials in the Highlands Council were receiving a deluge of agricultural building applications for planning and farmers were experiencing delays in having them approved.

'[An official] contacted policy branch in June and learned then that there was plenty of funds for all the applications we were likely to receive. I am certain that had any farmers asked this is the message that would have been passed on.'

22 November Another official wrote in response to Officer G's minute:

'[In March 1999, I] forecast that there would be considerable interest.

'At the [May] meeting we stated that the response to the new scheme would be huge and more importantly we said that the main rush would come late in the day because farmers were going through a difficult time and would wish to have the maximum amount of time to carry out the work after the December 1999 deadline.'

Another PAO complained that he was never asked to provide information on either the uptake of the scheme or the projected uptake following the revision of the scheme. Nor was he given an opportunity to have an input to proposals to revise the scheme.

An official from another area office said:

'I am advised that contact with Branch on [the scheme before March 1999] was conspicuously sparse.

'It is difficult to remember exactly what was said at the May meeting ... it was however clear that the high value type of proposals being envisaged in many cases was likely to strain the remaining funds and this was discussed.'

Commenting on events before March 1999, one official said that:

'Headquarters were advised verbally that many applicants were holding back from making an application after hearing from the NFU, [the college] etc that consideration was being given to improving the scheme grant rates and inclusion of additional items.'

and on events after March 1999:

'[The college] advised us ... that the delay in advising scheme changes and the need for full documentation at initial application stage, was likely to result in a flood of late applications. Headquarters were informed of this.'

1 December Officer E and another official recorded that their recollection of the May meeting was that it focused on accepting incomplete applications and deadlines set for receipt of missing supporting documentation if all available funds had not been allocated as the closing date for applications drew close. None of the area office staff said that the remaining funds would not cover the expected customary slight rise in the applications at the close of the scheme.

An official recorded his recollection that it was reported that the college were preparing significant numbers of resource audits and that there was likely to be an increase in applications towards the end of the scheme. However, he did not remember the forecasts being near the numbers of applications that the Department eventually received.

2 December An official sought legal advice as to whether the Minister could decide to find money outwith EU funding to pay those who had incurred preparatory costs but would not receive a grant.

17 December The Department conducted a review of the events in the months leading up to the closure of the scheme and prepared a paper 'Lessons Learned'. The conclusions set out in the paper included:

- one computer system should have operated for recording all scheme data which would have more accurately reflected the situation on demand, approvals, payments etc;
- a more formal system should have been available to collect information from the outset of the scheme and better use could have been made of anecdotal evidence from area offices and the college about the potential number of applications;
- a comprehensive report system on schemes should be established from the outset so that current data would be available to staff managing schemes and regular management checks made to monitor applications' progress, agreed commitment and actual expenditure;
- regular meetings should take place with all implementing parties, notes of meetings should be kept and action points agreed;
- scheme funds should be monitored closely;
- applicants should be monitored closely and reminded that there was no guarantee of funding in the pre-projects approval stage.

2000

28 January The Member wrote to Mr U outlining the Minister's statements about the scheme. The Minister said that the Department was inundated with grant applications between August and October 1999 and after consulting on a prioritisation scheme, he decided that grant applications would be accepted for a number of categories. These did not include livestock accommodation.

22 February The Department informed Mr U that his application had not been approved. [Note - Mr U told the Investigating Officer that he did not receive this letter.]

3 May The Department informed Mr U that his application was unsuccessful as it was not within the categories prioritised by the Minister.