



## Finance Circular No. 2009/09

To agencies subject to the *Financial Management and Accountability Act 1997*

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### Discretionary Compensation and Waiver of Debt Mechanisms

#### Purpose

The purpose of this circular is twofold:

- to provide an overview of mechanisms that are available to provide discretionary payments in special circumstances, or financial relief from amounts owing to the Commonwealth; and
- to provide guidance to agencies on how each of these mechanisms operate.

The mechanisms described in this circular are:

- payments made under the *Scheme for Compensation for Detriment caused by Defective Administration* (the CDDA Scheme) ([Attachment A](#));
- act of grace payments made under section 33 of the *Financial Management and Accountability Act 1997* (the FMA Act) ([Attachment B](#));
- waiver of amounts owing to the Commonwealth under section 34(1)(a) of the FMA Act ([Attachment C](#)); and
- ex gratia payments ([Attachment D](#)).

This circular replaces and updates *Finance Circular 2006/05: Discretionary Compensation Mechanisms* issued in August 2006. This circular provides updated guidance on the operation of the CDDA Scheme, the act of grace and waiver mechanisms and information on ex gratia payments.

#### Target audience

This circular is relevant for all officials who deal with the CDDA Scheme, requests for act of grace payments or waiver of debts, or ex gratia proposals.

#### Discretionary mechanisms

1. A key feature of the mechanisms covered by this circular is that they are discretionary. There is no automatic entitlement to a payment under the compensation mechanisms or financial relief under the waiver of debt mechanism. A decision under any of these mechanisms is therefore at the discretion of the decision maker.
2. This feature distinguishes payments and relief provided under other mechanisms, for example:

- compensation paid by agencies in settling claims for which the Commonwealth has at least a meaningful prospect of liability, under the Attorney-General's *Legal Services Directions 2005* (the Directions); or
- compensation paid in providing applicants with their statutory entitlements, for example, compensating losses arising from workplace injuries under the provisions of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

## Policy considerations

3. The mechanisms are:
  - permissive, that is they enable decision makers to approve payments, but do not oblige them to do so; and
  - designed to take into consideration circumstances which are specific to individual persons or bodies (in relation to CDDA applications, act of grace and waiver requests) or which arise on a case-by-case basis or in relation to particular groups of persons (in relation to most ex gratia payments).
4. Therefore, general principles, rather than prescriptive rules, underlie the mechanisms. These principles aim to achieve consistency and impartiality in evaluating the merits of cases in different circumstances.

## Summary description of the mechanisms

### CDDA payments

5. The authority to make CDDA payments comes from the executive power of the Commonwealth under section 61 of the Constitution. The CDDA Scheme operates on the basis of authority provided to individual portfolio Ministers.
6. The CDDA Scheme enables Government portfolio Ministers and authorised officials in FMA Act agencies to compensate individuals or other bodies who have experienced losses caused by agency's defective administration. Guidance on the CDDA Scheme is provided at [Attachment A](#).
7. The role of officials is generally twofold: some officials are involved in processing applications and advising decision makers on the merits of cases, while authorised decision makers are involved with approving or declining claims.

### Act of grace payments

8. The act of grace power under section 33 of the FMA Act allows the Finance Minister or delegate to authorise one-off and periodic payments to individuals or other bodies (such as companies), if he or she considers it appropriate because of [special circumstances](#). Guidance on the act of grace mechanism is provided at [Attachment B](#).
9. The act of grace mechanism:
  - may be appropriate in relation to special circumstances that have occurred as a direct result of:
    - a. the involvement of an agency of the Australian Government, where that involvement had an unintended outcome in the applicant's circumstance; or
    - b. the application of Commonwealth legislation or policy, which has resulted in an unintended, inequitable or anomalous effect on the applicant's particular

circumstances (including in cases where the agency has acted correctly in administering the legislation involved).

- is used where the paramount obligation to the applicant is moral, rather than legal; and
- is generally confined to applications related to FMA Act agencies and the legislation they administer.

10. The Finance Minister has delegated this power with directions to the Chief Executive of the Department of Finance and Deregulation (Finance). The Finance Chief Executive has further delegated this power with directions to officials within Finance. As this power has not been delegated to other agencies, they cannot make act of grace decisions themselves. Ultimately, responsibility for determining an act of grace request rests with the Finance Minister, or delegate, who exercises the discretion in his or her own right.

11. Agencies should provide advice when forwarding requests to Finance or when generating requests on behalf of applicants. The Finance Minister, or delegate, rely on the expertise of agencies in providing advice on the merits of an act of grace request, including those that come directly to Finance.

### **Waiver of amounts owing to the Commonwealth**

12. The waiver power under section 34(1)(a) of the FMA Act allows the Finance Minister or delegate to waive the Commonwealth's right to payment of amounts owing to the Commonwealth. Guidance on the waiver of debt mechanism is at [Attachment C](#).

13. Waiver of an amount owing under the FMA Act:

- may be appropriate in relation to debts arising as a direct result of:
  - a. the involvement of an agency of the Australian Government (in cases where the debt should not have arisen); or
  - b. the application of Commonwealth legislation in cases where repayment would be inequitable in the circumstances, or cause severe ongoing [financial hardship](#).
- can apply to amounts owed to the Commonwealth which are not yet due for payment; and
- is generally confined to applications related to FMA Act agencies and the legislation they administer.

14. The Finance Minister has delegated this power with directions to the Chief Executive of Finance. The Chief Executive of Finance has delegated this power with directions to officials in Finance. The Finance Minister has also delegated section 34(1)(a) to the Chief Executives of the Australian Securities and Investments Commission and ComSuper in relation to debts arising from specific parts of the legislation they administer.

15. Ultimately, the responsibility for determining a request for waiver of debt rests with the Finance Minister, or delegate, who exercises the decision in his or her own right.

16. Agencies should provide advice when forwarding requests for waiver of debt to Finance or when generating requests on behalf of applicants. The Finance Minister, or delegate, rely on the expertise of agencies in providing advice on the merits of a waiver of debt request, including those that come directly to Finance.

## Ex gratia payments

17. The authority to make ex gratia payments comes from the executive power of the Commonwealth under section 61 of the Constitution.

18. Ex gratia payments enable the Australian Government to deliver financial relief at short notice. The Prime Minister and/or Cabinet decide, on a case-by-case basis, whether an ex gratia payment will be made. Guidance on the ex gratia mechanism is at [Attachment D](#).

19. The ex gratia mechanism is:

- flexible, to produce workable outcomes, and does not have pre-set criteria in the same way as other discretionary schemes;
- generally appropriate for providing assistance to a group of people, but in some circumstances, may be used in respect of a specific individual; and
- generally only used after full consideration of all the other available schemes.

20. Where appropriate, it is the role of an agency to advise its portfolio Minister of issues that come to the agency's attention, that may give rise to the need for an ex gratia payment. The portfolio Minister can then raise the issue with the Prime Minister and/or Cabinet for consideration. Such requests are subject to the Budget Process Operational Rules. Agencies then administer payment of approved ex gratia payments.

## Relationship with other mechanisms

21. In addition to the mechanisms outlined in this circular, there are a number of other mechanisms which may be applicable for dealing with applications for financial redress. These other mechanisms and their relationship with the mechanisms outlined in this circular are summarised below.

## APS employment payments

22. Section 73 of the *Public Service Act 1999* (Public Service Act) enables the Public Service Minister to authorise the making of payments to a person in special circumstances that relate to, or arise out of, his or her employment by the Commonwealth in the Australian Public Service.

23. Cases related to, or arising out of, employment by the Commonwealth should be considered under the Public Service Act, rather than under the act of grace provisions of the FMA Act.

24. The Prime Minister, as Public Service Minister, has delegated this power to all agency Chief Executives, but the power must be exercised by those Chief Executives personally, and cannot be sub-delegated. Specific guidance is contained in the Australian Public Service Commission [Circular No. 2004/04: Payments in Special Circumstances under Section 73 of the Public Service Act 1999](#).

## Payments in settlement of legal claims

25. The *Legal Services Directions 2005*, issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, apply where a legal claim for monetary compensation is made against the Commonwealth or an agency, other than claims that need to be determined under a legislative mechanism.

26. If a legal obligation to which the Directions apply is established, the claim must be settled in accordance with legal principle and practice, which require at least a meaningful

prospect of liability being established. Specific guidance is provided at [Appendix B](#) of the Directions: *The Commonwealth's obligation to act as a model litigant* and [Appendix C](#): *Handling monetary claims*.

27. Payments provided in settlement of legal claims may be recoverable from Comcover, which operates within Finance as the Commonwealth's self managed fund for insurable risks. All claims, or potential claims, should be notified to Comcover as soon as possible, and should not be settled without Comcover's consent. This is in contrast to payments provided as a result of decisions made under the CDDA, act of grace, waiver, or ex gratia mechanisms, which are not recoverable from insurance.

### **Write off of debts**

28. Under section 47 of the FMA Act, the Chief Executive of an agency must pursue recovery of each debt for which the Chief Executive is responsible unless the debt can be written off as authorised by an Act<sup>1</sup>, or it is considered that the debt is not legally recoverable, or recovery is not economical to pursue.

29. Where a Chief Executive, or delegate, makes a decision that there is justification for not pursuing a debt, the debt effectively becomes dormant, but can be raised again at a later date. A decision under section 47 of the FMA Act not to pursue recovery of a debt must be disclosed in an agency's financial statements as a debt write off.

30. Writing off a debt is a mechanism that can be applied particularly where it is not economical to pursue recovery of the debt in instances which will not have any ramifications for the applicant in his or her current circumstances. An example would be a person who owes a debt to the Commonwealth, but has left Australia permanently and has no assets or income. In this instance, an agency could decide not to pursue the debt as it would be not economical to do so.

31. Additionally, debts are sometimes written off where it is considered that a person's circumstances may well change in the future, due to his or her age and potential earning capacity. In these instances, it is often considered prudent to write off rather than waive the debt involved, so that the matter could be raised again at a later time.

### **Payment of a debt by instalment and deferring time for payment**

32. Under section 34(1)(c) of the FMA Act, the Finance Minister may allow payment by instalments of an amount owing to the Commonwealth.

33. Under section 34(1)(d) of the FMA Act, the Finance Minister may defer the time for payment of an amount owing to the Commonwealth.

34. The Finance Minister has delegated section 34(1)(c) and (d) with directions to Chief Executives of FMA Act agencies. It is often considered prudent to arrange payment by instalments or defer the time for payment of an amount owing to the Commonwealth, rather than waive the debt, as this preserves the Commonwealth's entitlement to the amount.

### **Responsibilities for decisions relating to applications that may span more than one mechanism**

35. As the relationship between write off and waiver demonstrates, mechanisms for dealing with financial redress can form a continuum in that they may provide alternative means for resolving similar claims in different circumstances. This applies particularly to the

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<sup>1</sup> There are specific write off provisions under some program related legislation (such as section 1236 of the *Social Security Act 1991* and section 43 of the *Student Assistance Act 1973*).

CDDA and act of grace mechanisms. For instance, an application relating to a loss that usually arises in the CDDA context may, in some circumstances, require act of grace consideration where a moral obligation relating to issues other than purely administrative ones arises from the initial examination of the application.

36. However, it is important to bear in mind that in relation to responsibility for decisions that are made:

- CDDA decisions are always made by a portfolio Minister or an authorised official in the agency concerned;
- act of grace decisions are always made by the Finance Minister or a delegate of the Finance Minister;
- waiver decisions under the FMA Act are always made by the Finance Minister or a delegate of the Finance Minister;
- ex gratia decisions are always made by the Prime Minister and/or Cabinet;
- APS employment payments under the Public Service Act are generally made by individual agency Chief Executives;
- legal claims for amounts up to \$25,000 may be determined by individual Chief Executives or officers authorised by them, while claims above this threshold are settled on advice from lawyers external to the agency concerned in accordance with the Directions; and
- decisions to write off a debt, allow payment by instalment or defer time for payment are always made by individual agency Chief Executives or their delegates.

## Conclusion

37. The Attachments A-D which follow are intended to be used in conjunction with agencies' own internal procedures and Chief Executive Instructions.

## Contacts

38. If you have any queries, please contact the Special Financial Claims Section, Finance on 1800 227 572, at [sfc@finance.gov.au](mailto:sfc@finance.gov.au), or visit the information on financial redress at [www.finance.gov.au](http://www.finance.gov.au).

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25 November 2009



## **The Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme)**

### **Introduction**

1. The CDDA Scheme is an administrative scheme to enable Commonwealth agencies to compensate persons who have suffered detriment as a result of an agency's 'defective' actions or inaction, and who have no other avenues of redress. The Department of Finance and Deregulation (Finance) is responsible for providing policy advice on the CDDA Scheme. However, portfolio Ministers continue to have responsibility for decisions made under the CDDA Scheme.
2. This is a guidance document and is not intended to be exhaustive. However, it sets out the criteria to be applied and factors to be taken into consideration when determining an application for defective administration. It also outlines the limitations of the Scheme.
3. There are two key features of the CDDA Scheme. They are:
  - decisions are made at the discretion of the decision maker; and
  - payments are approved on the basis that there is a moral, rather than a legal, obligation to the person or body concerned.
4. Each case must be determined on its own merits. It is important that the principles of procedural fairness are applied to CDDA matters and that applicants are treated equitably. Decisions should be taken impartially and an applicant must be given the opportunity to state his or her case, preferably in writing.
5. In accordance with the principles of the *Privacy Act 1988*, all aspects of an investigation should be treated as confidential to ensure adequate protection of the applicant's privacy.

### **Who can apply?**

6. Any individual, company or other organisation can submit a CDDA application. The application can be submitted either directly to the relevant agency or through an appropriate third party.

### **Time in which to apply**

7. There is no time limit in which an application must be submitted. However, significant lapses in time between the alleged defective administration and the submission of an application may exacerbate any difficulties in gathering evidence and verifying the facts of a case.

### **Details to be provided**

8. There is no particular form in which an application must be made. However, a template application form is provided at [Appendix 1](#) to this guidance. The template may need to be tailored to reflect the type of applications individual agencies receive.
9. Applicants should address:
  - a. the [criteria](#) for determining defective administration;
  - b. explain how the actions or inactions were [defective](#);

- c. provide details of the [detriment](#) being claimed, including an explanation of how the amount claimed is calculated; and
- d. explain how the defective administration directly [caused the loss](#).

10. Applicants should provide any evidence they have to support his or her claims. Agencies and decision makers should note the guidance below on evidence of defective administration (see [paragraphs 31-34](#)).

## **Determining a CDDA application**

11. There are a number of steps in determining a CDDA application. The process diagram on [page 9](#) outlines the main steps which would normally be considered in determining an application, but it is not intended to be exhaustive.

12. Usually an agency official, who is in a position to undertake steps 1 to 7 in the process diagram, submits a written report and recommendation for the consideration of the appropriate decision maker. A decision maker may authorise a payment if he or she considers that defective administration has taken place. However, there is no obligation to make a payment.

13. In complex cases where some of the issues involved can be verified more easily than others, it may be practical to split an application into components which can then be determined separately.

## **Authority of decision makers**

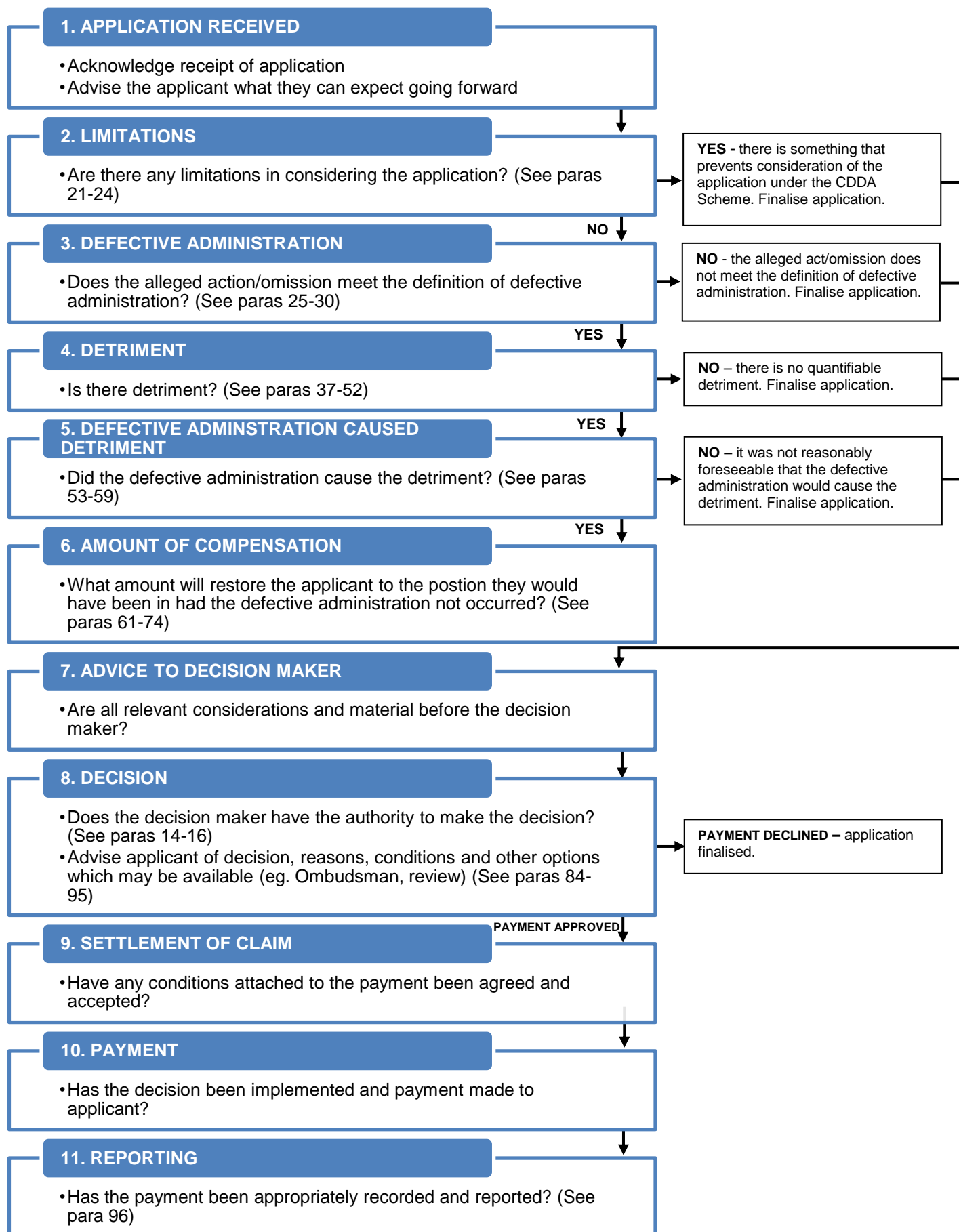
14. The CDDA Scheme operates on the basis of authority provided to individual portfolio Ministers under the executive power of section 61 of the Constitution.

15. Where authority is given by a Minister to an agency official to approve payments under the CDDA Scheme, that authority is to be conferred expressly, that is, authorisations must be given separately from the Minister's general authorisations to incur expenditure. This requirement is in recognition of the special and potentially sensitive nature of decisions made under the CDDA Scheme for which the agency and its Minister may be held accountable.

16. Where a decision maker is a person other than a Minister, the decision maker acts for and on behalf of the relevant Minister. The decision maker is an agent of the Minister and not a delegate. Only an officer who has been authorised by the Minister can decide claims under the CDDA Scheme.



## Process diagram – determining a CDDA application



## When should legal advice be sought?

17. In general, an agency may seek legal advice either from its internal advisors, or if necessary, from external providers, in determining a CDDA claim if a payment is contemplated and if:

- the decision maker requires assistance in the application of these principles particularly when consideration of legal principle and practice is required; or
- the decision maker considers there may be a question whether the relevant legislation provides the applicant with an alternative administrative review mechanism, bearing in mind that not every person affected by a reviewable decision would have a meaningful right of review; or
- the applicant alleges that they have a legal claim and the decision maker is uncertain whether legal liability exists or alternatively where no legal claim is asserted, the decision maker wishes to confirm whether legal liability exists.

18. Legal advice need not be sought if the agency is confident that a claim is completely unfounded. In addition, both the Commonwealth Ombudsman (Ombudsman) and the Australian National Audit Office have at times expressed concern that agencies tend to seek legal advice on claims when this advice is not warranted, thus delaying the claims settlement process.

19. The Attorney-General's *Legal Services Directions 2005* (the Directions) specify a monetary threshold of \$25,000 for the settlement of legal liability claims beyond which external legal advice is required. Whether that threshold constitutes an appropriate threshold for seeking legal advice in relation to the determination of a particular CDDA application will depend on the circumstances of each case, including the complexity of the claim.

20. If a Deed of Release and Indemnity is considered appropriate in the circumstances, agencies may seek legal advice in drafting these documents.

## Limitations of the scheme

21. The CDDA Scheme is not available to Commonwealth authorities and companies, which have a separate legal identity to the Commonwealth and operate under the *Commonwealth Authorities and Companies Act 1997*.

22. The CDDA Scheme is not available to the Departments of the Parliament. However, applications arising from these Departments can be referred to Finance for consideration under the [act of grace mechanism](#).

23. The CDDA Scheme is a mechanism of last resort. Therefore, the Scheme does not generally apply:

- to any claims for monetary compensation where it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated. Such claims should be settled in accordance with the criteria prescribed by the Directions; or
- where it is reasonable to conclude that there is an administrative review mechanism which has the capacity to provide a remedy for the defective administration<sup>2</sup>; or

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<sup>2</sup> This reflects the fact that if appropriate legal or legislative mechanisms (whether in the nature of litigation or administrative appeal) are available to a claimant, they should generally be pursued. However, this does not mean that a claimant should be forced to pursue legal action in circumstances where that legal action is unlikely to succeed, or where that legal action will not provide a remedy for the defective administration.

- to overcome the effects of specific legislative provisions that are found to be flawed. Legislative problems or anomalies should be dealt with through statutory remedies either by seeking amendment of the relevant legislation, with retrospective effect to bestow the benefit on the applicant if appropriate, or by considering the matter under the [act of grace mechanism](#); or
- to compensate for the payment of a recoverable debt owed to the Commonwealth, even if the debt arose because of defective administration. Such applications should either be considered under the relevant, specific legislative provisions or, if none apply, be considered by the agency for write off under section 47 of the FMA Act, or be referred to Finance for waiver consideration under section 34 of the FMA Act; or
- to applications that would more appropriately be considered under section 73 of the *Public Service Act 1999*, which provides that the Public Service Minister, or delegate, may authorise payments up to \$100,000 due to special circumstances which relate to, or arise out of the person's, or another person's, employment with the Commonwealth; or
- to applications that would more appropriately be considered, for example, under the *Safety, Rehabilitation and Compensation Act 1988* or the *Military Rehabilitation and Compensation Act 2004*; or
- where a proposed payment would have the effect of supplementing payments set by other specific legislation, which caps the amount a beneficiary may receive as the only amount he or she may receive from the Australian Government, in circumstances where the legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances.

24. The CDDA Scheme should not be used as a form of alternative dispute resolution in itself to settle claims which should be settled in accordance with the Directions. However, it may be appropriate to use forms of alternative dispute resolution in determining CDDA applications<sup>3</sup>.

## Criteria and definition of defective administration

25. Subject to the 'Limitations' specified above, the CDDA Scheme can be applied if a Minister, or an authorised officer, forms an opinion that an official of the agency acting, or purporting to act, in the course of their duty, has directly caused the applicant to suffer detriment as a result of defective administration.

26. Defective administration is defined as:

- a specific and unreasonable lapse in complying with existing administrative procedures; or
- an unreasonable failure to institute appropriate administrative procedures; or
- an unreasonable failure to give to (or for) an applicant, the proper advice that was within the official's power and knowledge to give (or reasonably capable of being obtained by the official to give); or
- giving advice to (or for) an applicant that was, in all the circumstances, incorrect or ambiguous.

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<sup>3</sup> For example, mediation and conciliation.

## When are actions unreasonable?

27. A lapse in complying with existing procedures, failure to institute procedures or failure to give advice will only amount to defective administration where that lapse or failure is 'unreasonable'.
28. An unreasonable lapse or failure is one where the actions of the officer(s) involved are considered to be contrary to the standards of diligence that the agency expects to be applied by reasonable officers acting in the same circumstances with the same powers and access to resources.
29. Circumstances may arise where instances of administrative omissions or errors may not be regarded as unreasonable when considered in isolation from each other, but may be considered as constituting defective administration when considered in totality and in the context of the combined impact of the omissions or errors on the applicant. Each assessment of whether there has been defective administration is dependent on the facts of a particular claim.
30. Where advice or information given to an applicant was incorrect or ambiguous, it is not necessary for an element of unreasonableness to be present for the action to fall within the definition of defective administration.

## Standards of conduct

31. In assessing whether defective administration has occurred, consideration should be given (where applicable) to compliance with the Australian Public Service Values and Code of Conduct as set out in sections 10 and 13 of the *Public Service Act 1999*<sup>4</sup>. The Australian Public Service Commission can provide further guidance on standards of conduct.

## Evidence of defective administration

32. Determining whether or not defective administration has occurred in individual cases can be difficult because:
- there may be lengthy delays between the date of the alleged defective administration, the date its effect became apparent, and the date the complaint was lodged;
  - reliance on the overall experience and competence of the official who provided advice may need to be qualified by contemporary records. In addition it may need to be balanced against the low likelihood of the official recalling one conversation among thousands some months later and the high likelihood of the applicant remembering what he or she heard (whether or not what was heard was the same as what was said);
  - the applicant may have relied on oral advice, which has not been recorded or documented; and
  - there may be insufficient written evidence available to support or refute the applicant's allegations.
33. Documentary or incontrovertible proof of defective administration is not an essential requirement. However, there must be sufficient evidence to enable the decision maker to be satisfied that defective administration has occurred.
34. Each case must be decided on its own merits. Where insufficient evidence of defective administration exists, an assessment must balance the plausibility of the applicant's account of his or her actions and the plausibility of the allegations against the agency against

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<sup>4</sup> This does not mean that such consideration would require that action be taken under the Code, or that the Code would be applicable to the majority of claims.

other possible explanations in order to determine what is more likely than not to have occurred. In making such an assessment the following guidance is offered:

- the likelihood that wrong advice could have been given in the particular situation, taking into account:
  - a. the experience of the staff involved;
  - b. understanding and knowledge of the relevant statutory provisions, procedures, benefits, or entitlements; and
  - c. availability and familiarity of relevant information.
- whether the applicant's subsequent actions were consistent with the advice he or she alleges was provided by the agency;
- the consistency of the allegations made;
- whether the passage of time could have distorted the officers and/or applicants recollection of events; and
- whether there has been confusion or misinterpretation of advice rather than defective administration, although some applicant misinterpretations will result from poorly constructed advice.

35. If there is evidence available to the applicant, the applicant should provide it to the agency concerned, preferably at the time of submitting his or her application. If the applicant does not provide sufficient evidence, the decision maker may request further particulars from the applicant.

36. Agencies should ensure that it seeks out any relevant information which is readily available to it, but not necessarily known or available to the applicant.

### **Definition of detriment**

37. Detriment means quantifiable financial loss that a applicant has suffered.

38. There are three types of detriment:

- detriment relating to a [personal injury](#) including mental injury (personal injury loss, formerly referred to as non-financial damage);
- [economic detriment](#) that is not related to a personal injury (pure economic loss); and
- detriment relating to [damage to property](#).

### **Personal injury loss**

39. Generally, claims for personal injury under the CDDA Scheme would be limited to the types of personal injury compensable in legal practice and principle.

40. The majority of claims for personal injury will relate to a legal liability claim. However, in some cases where there is no legal liability, an applicant may seek compensation under the CDDA Scheme for claimed personal injury. Such a claim could include hospital and medical expenses related to treatment of the injury and loss of income as a result of being unable to work due to that injury.

41. Compensation is not payable for grief or anxiety, hurt, humiliation, embarrassment, or disappointment that is unrelated to a personal injury, no matter how intense the emotion may be.

42. An applicant may seek compensation for financial detriment related to a *recognised* psychiatric injury suffered as a result of defective administration. In this context,

compensation will generally be payable if it was reasonably foreseeable that a person of 'normal fortitude' might suffer psychiatric injury as a result of the defective administration.

43. 'Normal fortitude' refers to a person who is not suffering from a psychiatric illness and who has no predisposition to psychiatric injury<sup>5</sup>.

44. If a person of 'normal fortitude' might have suffered psychiatric injury, compensation is payable for the whole of the applicant's financial detriment, even if the psychiatric injury (and consequent financial detriment) suffered was more severe than would have been expected.

45. Any payment for personal injury losses is subject to the requirement that there is no 'double dipping' and therefore some allowance will need to be made if the applicant is entitled to payments from insurance such as health or personal injury insurance.

## **Pure economic loss**

46. Pure economic loss refers to financial detriment suffered which is unrelated to any physical injury to the applicant or damage to the applicant's property.

47. Financial detriment should be distinguished from financial disappointment. For example, where a formal assessment results in the amount of an entitlement being less than a 'ballpark' figure given to a person at the time he or she made inquiries. An applicant does not suffer financial detriment merely because he or she was not granted a benefit after being advised he or she was entitled to that benefit.

48. If the pure economic loss claimed is directly caused by alleged incorrect or ambiguous advice, compensation will only be payable if the agency should have appreciated the implications for the applicant by giving incorrect or ambiguous advice *and* it was reasonable in all the circumstances for the applicant to seek and rely upon the advice.

49. Pure economic loss can arise from a lost opportunity. The opportunity lost may be, for example, loss of an opportunity to earn a capital gain (for example by investing in shares, a business or a property); or to earn income (for example, interest on a savings account).

50. In these circumstances, compensation will only be payable when the agency could reasonably have foreseen the type of opportunity that, as a result of the agency's defective administration, the applicant lost.

51. Lost opportunity claims can be particularly difficult to determine, both in establishing whether the opportunity was lost at all, and if so, the amount lost. The onus is on the applicant to provide very clear evidence of the lost opportunity (including the quantum).

## **Loss arising from property damage**

52. Detriment includes financial loss arising from damage to property.

## **Has defective administration caused detriment?**

53. Compensation for detriment suffered by an applicant is only available where it has arisen as a direct cause of the defective administration. Claims for compensation must be considered on their own merits and on a case-by-case basis.

54. The applicant's detriment must have been caused by the agency's actions or omissions.

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<sup>5</sup> Given the different functions and different clientele which agencies deal with, agencies may decide in some cases to use thresholds that are lower than the test of 'normal fortitude'.

55. The *type* of detriment suffered by the applicant must have been reasonably foreseeable by the agency<sup>6</sup>.

### **Applicant's own actions**

56. The actions of an applicant are important in considering:

- whether he or she contributed to, or caused, the detriment suffered; and
- the appropriate level of compensation.

57. The following factors are provided as a guide only in deciding if the amount of compensation should be reduced because of the actions of the applicant:

- the applicant's age, health and knowledge of dealing with the issues concerned, including knowledge of English;
- whether the applicant gave false, misleading or incomplete information which the agency could not have been reasonably expected to challenge or clarify;
- whether there was any unreasonable delay between receiving and acting on the administrative error. Where repeated delays were experienced because of an applicant's inaction, the cumulative effect should be considered;
- whether the advice provided to the applicant was informal and no reasonable person would have relied on it; and
- where it is evident that there has been defective advice, consideration also needs to be given to whether compensation should be paid in full or in part, if the correct information was available to the applicant from another source to which there was access, or if it would have been reasonable for the applicant to inquire further.

58. In considering an applicant's actions, it is important to take into account the applicant's specific circumstances and the factors that influenced his or her actions, rather than adopting an assumed normative model of 'usual' behaviour.

59. If it is considered the applicant contributed to his or her situation, then depending on the extent of the applicant's contribution to the detriment suffered, this may justify a reduction in the level of compensation.

### **Limits on payments**

60. There is no financial ceiling on the quantum of any CDDA payment.

### **Determining the level of compensation**

61. Offers of compensation to applicants should be calculated on the basis of what is fair and reasonable in the circumstances and in consideration of the fact that the Commonwealth should not take advantage of its relative position of strength in an effort to minimise payment.

62. The overarching principle to be used in determining the level of compensation is to restore the applicant to the position he or she would have been in had defective administration not occurred.

63. As mentioned above, the applicant's own actions are a relevant consideration for the decision maker to take into account.

64. Generally, the following amounts will not be included in calculating the level of a CDDA payment:

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<sup>6</sup> The cause need not necessarily be the only cause of the loss, but must not be too remote as there must be a direct relationship between the defective administration and the loss.



- costs incurred as a result of engaging legal, financial or other professional services to assist in the preparation of the application; or
- any other incidental costs incurred in the preparation of an application, which may include, but is not limited to the cost of travel, telephone calls, photocopying or postage/courier services.

## **Quantifying financial detriment**

65. In general, claims of financial detriment must be substantiated with appropriate documents. This is even more important for claims for lost opportunity.

66. Applicants should be encouraged to provide independent supporting documents to support their application. However, in considering the type and amount of evidence required to substantiate the application, agencies should take account of the nature and size of the expenses involved.

67. If, for some reason, it is impractical for an applicant to demonstrate all or part of the detriment suffered, the decision maker should make a reasonable assessment about the level of detriment, taking account of all relevant factors.

## **Interest payments**

68. Generally, CDDA payments should not include components for interest.

69. However, in certain circumstances it may be appropriate to include a component in lieu of interest. Such circumstances would generally be limited to claims for pure economic loss involving lost opportunity.

70. An applicant should substantiate any claim for interest. The decision maker must be satisfied that, but for the defective administration, the applicant would have made a particular financial choice or experienced a specific financial benefit.

71. If a decision maker proposes to make a payment which includes a component for interest, consideration should be given to the following:

- the period to which interest is to be applied: for example, the date of the defective administration or some other relevant date.
- the rate of interest, for example, the bank-accepted bill rate.

## **Taxation implications**

72. The applicant should be advised that tax may be payable on CDDA payments and that it is the applicant's responsibility to declare all taxable income. Applicants should be advised to seek independent financial advice or contact the Australian Taxation Office if they are unsure of their tax obligations.

73. If applicable, compensation should be paid on a pre-tax basis, for example, by compensating for the gross income amount in loss of earnings cases.

## **Exchange rates**

74. If it is likely that a proposed payment may be affected by fluctuations in the official exchange rate, the decision maker may make allowance for such movements.

## **Procedural fairness**

75. Prior to a decision being made it is important to ensure that the applicant has been afforded procedural fairness. This includes:

- providing an opportunity for the applicant to present his or her claims/allegations in writing;
- providing an opportunity for the applicant to comment on all relevant information/material/documents that will be considered by the decision maker; and
- that the determination of the application is free from bias.

## **Settlement of applications**

### **Information provided to applicants**

76. Each applicant should be provided with an adequate explanation of the reasons for a decision to accept, partially accept, or reject his or her application.

77. Advice on the right to seek assistance from the Ombudsman should be provided to all applicants. Agencies should also provide information about what other options may be available to the applicant, including review options.

### **Deeds of Release and Indemnity**

78. An agency may request an individual to release the Commonwealth from possible legal action in relation to the circumstances of the CDDA application. The agreement should be in the form of a Deed of Release.

79. Deeds of Release should be tailored to the circumstances of the application. If an applicant does not accept a particular offer, or sign a Deed of Release, the offer can be withdrawn.

80. Where only part of the application is settled by a payment under the CDDA Scheme, an agency may request that an applicant agree to a Deed of Release for that part of the application.

81. In some circumstances, it may be considered necessary to seek an indemnity from the applicant in relation to any possible legal action which may arise from the circumstances of the application.

82. Agencies may wish to seek legal advice in drafting Deeds of Release and Indemnity.

83. Agencies should advise applicants to seek independent legal advice in cases where a Deed of Release or Indemnity is proposed.

## **Review and reconsideration of applications**

### **Reconsideration**

84. Some agencies have an internal right of review mechanism, which can be requested as a matter of course. Agencies can also choose to reconsider an application if it is determined that reconsideration is warranted. This would generally be confined to circumstances where additional supporting information became available.

85. Where the applicant does not accept the decision, it is open to the decision maker to consider the matter again, but they are under no obligation to do so. If the applicant provides pertinent new evidence/fact/argument to support his or her application, the decision maker should reconsider the matter.

### **Role of the Commonwealth Ombudsman**

86. A person whose application has been refused, or who has rejected an offer as insufficient or subject to unreasonable conditions, may complain to the Ombudsman. The

Ombudsman may investigate and, if the Ombudsman considers it appropriate to do so, propose that a decision be changed.

87. When considering a matter related to an agency decision under the CDDA Scheme, the Ombudsman takes a similar approach to that which is taken in other cases involving an agency's exercise of discretion. The Ombudsman has no separate processes for CDDA matters and the Ombudsman's powers (to make a suggestion or recommendation which the decision maker may decide whether to adopt) are the same as in other cases.

88. The Ombudsman has no power to overturn or vary an agency's decision.

89. In a CDDA case, the Ombudsman would first consider whether the agency action complained of (for example, the refusal of a CDDA payment) should be investigated, having regard to the factors set out in section 6 of the *Ombudsman Act 1976* and the circumstances of the case. If the Ombudsman investigates, typically he or she would consider whether the decision maker gave proper and fair consideration to the matter, in particular:

- the Ombudsman will generally be less inclined to investigate after a CDDA application has been settled by a payment.
- the Ombudsman will be less inclined to consider (and propose changes to) the quantum offered where the agency seemed to have a reasonable basis for its offer (for example, by reference to an entitlement or opportunity lost or legal advice on a fair settlement amount). The Ombudsman and staff consider each case on its merits and structure investigations to enable an informed decision to be made on those merits.
- where a person is dissatisfied with a payment which has been through the CDDA process, the Ombudsman would give considerable weight to any Deed of Release signed by the person and would be likely to decline to investigate.

90. The Ombudsman has a role in making suggestions or proposals in relation to CDDA requests where the Ombudsman, or his or her delegate, has investigated an agency action and considers that a financial remedy would be appropriate.

91. In these cases, the Ombudsman or the delegate explains the suggestion or proposal to the agency concerned by references to apparent instances of defective administration. If an agency acts on such a suggestion, it usually avoids the formality of a report and recommendation pursuant to section 15 of the *Ombudsman Act 1976*.

92. Where the circumstances of a case do not clearly fall within the exact criteria for defective administration, but the agency concerned agrees with the Ombudsman that detriment has occurred as a result of defective administration and the agency is inclined to compensate an applicant, a proposal or recommendation by the Ombudsman supporting compensation is sufficient basis for payment.

93. An agency must consider any proposal or recommendation made by the Ombudsman but is not bound by it. Agencies should be aware that the Ombudsman may exercise powers to bring the matter to the attention of the Chief Executive Officer of the respective agency, the portfolio Minister, the Prime Minister and the Parliament.

## Judicial Review

94. As CDDA decisions are not made under an enactment or law, decisions are not amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. However, they may be subject to judicial review under section 75 of the Constitution or section 39B(1) of the *Judiciary Act 1901*.

95. It is recommended that applicants be advised to seek independent legal advice before commencing any legal action.

## **Funding and reporting**

96. In general, CDDA payments should be funded through Departmental Appropriations and reported under an appropriate agency outcome. The number and quantum of payments should be reported in the agency's financial statements.

## **Contacts**

97. Inquiries on this guidance can be directed to the Special Financial Claims Section, Finance on 1800 227 572 or [SFC@finance.gov.au](mailto:SFC@finance.gov.au).



## APPENDIX 1

### Australian Government

## APPLICATION FORM

### Scheme for Compensation for Detriment Caused by Defective Administration (CDDA Scheme)

*Please complete **all** sections of this form and **enter N/A** in any section that is not applicable to indicate that the question has been considered and completed.*

Please return to:

Branch

Department

Address

Suburb State Postcode

### Section 1: Personal details

1. Your title (please circle one): **Mr / Mrs / Ms / Miss / other** \_\_\_\_\_

2. Your surname (family name)

--

3. Your given name(s)

--

4. Date of birth

--

5. Residential address

State:	Postcode:

6. Postal address (if same as residential address, write 'as above')

State:	Postcode:

7. Contact details

Home phone: ( )	Work phone: ( )	Mobile phone:
Email address:		

## **Section 2: Application details**

1. Which agency's administration do you consider was defective?

2. Please explain how the agency's administration was [defective](#). You should outline the events and circumstances which you consider contributed to the defective administration. *Please attach any available supporting documents. If there is insufficient space, please attach a separate document.*

3. Please explain what [detriment](#) you have suffered. *Please attach any available supporting documents. If there is insufficient space, please attach a separate document.*

4. What is the total amount of compensation you are seeking for this detriment?

5. Please specify how this amount is calculated. *Please attach any available supporting documents (eg. medical bills). If there is insufficient space, please attach a separate document.*

<b>DESCRIPTION OF CLAIMED ITEM</b>	<b>AMOUNT</b>
	\$
	\$
	\$
	\$
	\$

6. Please explain how the defective administration [directly caused](#) the detriment you have suffered. *Please attach any available supporting documents. If there is insufficient space, please attach a separate document.*

7. Please advise what action you have taken to resolve this matter (for example, review by agency, Ombudsman, Courts, Tribunals). What is the status/outcome of these actions?



## **Section 3: Other details and declaration**

### **Other details**

1. Are there any other factors that you believe are important and have not yet been mentioned in this application? If so, please provide details.

### **Additional Information**

Please note that CDDA payments may be taxable. Please contact the Australian Taxation Office or seek independent financial advice to determine your own circumstances.

More information on the CDDA Scheme can be found in Finance Circular 2009/09 available at [www.finance.gov.au](http://www.finance.gov.au).

### **Declaration**

I declare that to the best of my knowledge and belief, the information that I have supplied in or attached to this application is accurate and true, and that all relevant information has been included.

Signature	Date
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### **Privacy disclosure**

This information is necessary for <<insert agency>> to assess your application. All information, including personal information, collected by <insert agency name> is treated as confidential and is protected in accordance with the *Privacy Act 1988*.

## **Act of grace payments**

### **Introduction**

1. The act of grace power under section 33 of the FMA Act allows the Finance Minister or delegates to authorise one-off and periodic payments to individuals or other bodies if it is appropriate in special circumstances.
2. This is a guidance document and is not intended to be exhaustive. However, it describes the principles and processes that underlie decisions to approve or decline applications.
3. In addition, the guidance also discusses funding and reporting arrangements.

### **The nature of the act of grace power**

4. Section 33(1) of the FMA Act provides:
  - (1) If the Finance Minister considers it appropriate to do so because of special circumstances, he or she may authorise the making of any of the following payments to a person (even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability):
    - (a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);
    - (b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).
5. ‘Special circumstances’ are not defined for the purposes of section 33(1) of the FMA Act, and are ultimately a matter for the decision maker to assess. Generally these circumstances are considered to apply where the decision maker is satisfied that:
  - a loss has arisen directly from an alleged act or omission on the part of an agency/agent of the Australian Government:
    - a. that the allegations relate to involvement by the agent/agency that was the direct cause of the loss; and
    - b. that the loss was not caused by the relevant agent/agency initiating processes that were consistent with its responsibilities and in accordance with the Administrative Arrangements Orders; or
  - the application of Commonwealth legislation or policy is alleged to have had an unintended, anomalous, inequitable or otherwise unacceptable result in the applicant’s circumstances, and that those circumstances were:
    - a. specific to the applicant;
    - b. outside the parameters of events for which the applicant was responsible or had the capacity to adequately control; and
    - c. consistent with what could be considered to be the broad intention of the relevant legislation; or
  - the matter is not covered by legislation or specific policy, but the Australian Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant policy prospectively.

6. The key features of the act of grace mechanism are:
- each request is considered on its individual merits;
  - decisions are made at the discretion of the decision maker;
  - that it is appropriate in cases where there is a moral, rather than legal, obligation to the person or body concerned; and
  - decisions do not establish precedents.

## **Applying for an act of grace payment**

### **How to apply**

7. Any individual, company, or other organisation can submit an act of grace request, either for themselves or for a third party when authorised. An application can be submitted through the agency to which the application relates, direct to the Minister for Finance and Deregulation, or to the Department of Finance and Deregulation (Finance).

8. There is no particular form in which an act of grace request is to be made. However, in making an application, applicants should:

- state which FMA Act agency or agencies his or her application relates to;
- outline the special circumstances in his or her case; and
- provide evidence in support of his or her application.

### **Time in which to apply**

9. There is no time limit in which an application must be submitted. However, significant lapses in time between the event giving rise to the act of grace request and submitting the application may exacerbate any difficulties that arise in gathering evidence and verifying the facts of a case.

## **Determining an act of grace request**

10. Once an act of grace request has been received by Finance, it is allocated to a Finance official in the Special Financial Claims Section to be investigated. Where necessary, the official will liaise with the responsible agency and applicant to ascertain the following:

- whether there is an alternative avenue of redress that should be pursued, and whether that avenue is viable in the applicant's circumstances;
- whether the act of grace provisions would normally apply to the matter to which the application relates;
- whether, if the matter is not one usually examined, there are any exceptional reasons to do so in the particular case;
- the quantum of the claim, if it appears that the applicant suffered a loss that can be examined in the act of grace context;
- whether there are any special circumstances in which it would be appropriate to make a payment; and
- whether or not, and under what conditions, a lump sum payment or periodic payment should be authorised.

11. Prior to preparing a written report for consideration by the Finance Minister, or delegate, in accordance with procedural fairness requirements, Finance will ensure that the applicant has been provided with an opportunity to comment on the material that will be

considered by the relevant decision maker (see paragraphs 27-32).

12. Based on all available information, a Finance official will then prepare a written report and recommendation for consideration by the Finance Minister, or delegate. All information provided by the applicant will be attached to the report. Having considered the report and attached documents, the decision maker will determine the matter on its individual merits.

## **Authority of decision makers**

13. Section 33 of the FMA Act allows the Finance Minister to authorise an act of grace payment.

14. Section 18C of the *Acts Interpretation Act 1901* (AI Act) gives the Finance Minister the power to authorise a non-portfolio Minister to act on his or her behalf in the performance of statutory functions and the exercise of statutory powers. Under Section 18C of the AI Act, the Finance Minister has authorised the Assistant Treasurer to act on his behalf in determining certain requests made under section 33 of the FMA Act.

15. Section 62 of the FMA Act gives the Finance Minister the power to delegate his or her powers or functions under the FMA Act. The Finance Minister has delegated his power to authorise act of grace payments to the Chief Executive of Finance.

16. Section 53 of the FMA Act gives a Chief Executive the power to delegate his or her powers or functions under the FMA Act to an agency official. The Chief Executive of Finance has delegated the power to authorise act of grace payments to the following Finance officials:

- General Manager, Asset Management Group;
- Division Manager, Government Business, Special Claims and Land Policy Division; and
- Branch Manager, Special Claims and Land Policy Branch.

17. Section 65 of the FMA Act allows for the making of Regulations, in particular relating to the Finance Minister considering a report from specified persons before authorising under section 33(1) a total amount that is more than a specified amount.

18. Regulation 29 of the FMA Regulations provides that if a proposed authorisation under section 33(1) of the FMA Act would involve, or be likely to involve, a total amount of more than \$250,000, the Finance Minister must request the report of an Advisory Committee and must not authorise the payment without considering the report.

19. In accordance with Regulation 29 of the FMA Act, the members of Advisory Committees are the Chief Executives of Finance, the Australian Customs and Border Protection Service (ACS), and the agency responsible for the matter on which the Committee is reporting. If the responsible agency is Finance or the ACS, the Finance Minister may appoint the Chief Executive of another FMA Act Agency, generally the Chief Executive of the Attorney-General's Department. Advisory Committee members are able to appoint a deputy to act in his or her place.

## **Parameters of the act of grace power**

20. The conditions under which act of grace requests are authorised can broadly be characterised as where the Minister or delegate considers that there are special circumstances under which it is appropriate to provide redress because:

- the direct role of an agent/agency of the Australian Government has caused an unintended and inequitable result for the individual or entity concerned; or

- the application of Commonwealth legislation has produced a result that is unintended, anomalous, inequitable or otherwise unacceptable in a particular case (including in cases where the agency has acted correctly in administering the legislation involved); or
- the matter is not covered by legislation or specific policy, but the Australian Government intends to introduce such legislation or policy, and it is considered desirable in a particular case to apply the benefits of the relevant provisions prospectively.

21. The act of grace power is available to provide a remedy in respect of all FMA Act agencies. However, it is generally a remedy of last resort and used only where there is no other viable remedy available to provide redress in the circumstances giving rise to the application. This means that an applicant would generally need to exhaust all viable alternative avenues of redress prior to requesting an act of grace payment. As a matter of practice, the act of grace mechanism is generally not available:

- where a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent/agency of the Australian Government and the matter is not related to the impact of any Commonwealth legislation;
- in respect of a matter which relates solely to the involvement of Commonwealth authorities and companies which have a separate legal identity to the Commonwealth and operate under the *Commonwealth Authorities and Companies Act 1997*. (Exceptions to this may be where an act of grace request involves a Commonwealth authority and has broader policy implications for the Australian Government.);
- to claims for monetary compensation where it is reasonable to conclude that the Commonwealth would be found liable if the matter were litigated. Such claims should be settled in accordance with the criteria prescribed by the Attorney General's *Legal Services Directions 2005*;
- where it is reasonable to conclude that a legislative mechanism (for example, a right of review under the *Social Security (Administration) Act 1999* or a payment under section 73 of the *Public Service Act 1999*) will provide a remedy to the person;
- to applications under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) (see [Attachment A](#));
- to applications which relate to a privacy complaint. Such complaints should be directed to the Office of the Privacy Commissioner;
- to compensate a person or body for a debt owed to the Commonwealth;
- to compensate a person for a loss arising from a judicial decision not involving the executive arm of the Government; or
- to compensate a person for a benefit that he or she has been historically ineligible to receive for which a person in a similar contemporary situation would now be eligible. In many of these cases the legislative changes involved simply reflect the evolving nature of Australian Government policy interpretation and analysis, including incremental legislative amendment.

22. Despite the generally broad application of the act of grace power, there are some circumstances where act of grace payments would not be authorised by section 33 of the FMA Act. Possible scenarios could include those where:

- the proposed payments would have the effect of supplementing payments set by other

specific legislation, which cap the amount a beneficiary may receive as the only amount he or she may receive from the Australian Government, in circumstances where the legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances<sup>7</sup>; or

- there is legislation that sets conditions for particular benefits and the proposed act of grace payment would be applied to all or most beneficiaries on an ongoing basis, or for a significant period of time<sup>8</sup>; or
- the proposed payments would have the effect of establishing a payment scheme to apply to a group of applicants, without considering the merits of their requests on an individual basis.

23. If agencies receive any applications which may fall into these categories, they can contact the Special Financial Claims Section in Finance and arrange to meet to discuss the issues involved.

### **When should legal advice be sought?**

24. Legal advice may be required to ascertain whether section 33 of the FMA Act can be applied in a particular set of circumstances. It is recommended that agencies consult with the Special Financial Claims Section, Finance, prior to obtaining legal advice in such cases.

### **Agency submissions to Finance**

25. The Special Financial Claims Section, Finance, is responsible for coordinating all act of grace requests to ensure the decision maker has sufficient information and evidence to make an informed decision. This will generally include a submission from the agency responsible for the matter subject to the act of grace request.

26. Agencies are requested to provide sufficient information to enable an informed and independent assessment of the case, including as appropriate:

- a copy of the applicant's original request, if the agency is referring the request to Finance;
- details of the relevant section(s) of legislation to which the claimed disadvantage may relate and details of the applicant's circumstances in relation to that legislation;
- specific details of the Australian Government's role, if any, that may have directly contributed to the applicant's situation;
- any history/background to the case, including any consideration of the case under the CDDA Scheme, decisions of any tribunals or other review bodies, or settlement of a legal claim;
- if there is a perceived anomaly in the law or policy, an estimation of the likely number of people affected and quantum of likely applications;
- whether or not the responsible agency supports the act of grace request and supporting reasons;
- information that will assist in determining the amount of any payment; and

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<sup>7</sup> Many act of grace payments are for amounts equivalent to payments a person would be entitled to receive under other legislation, were his or her circumstances different. In these cases, the legislation does not explicitly cap the payment levels outlined in the relevant legislation as the only payments recipients could be paid.

<sup>8</sup> This is not to say that act of grace payments could not be made to remedy an unintended or anomalous result arising from such legislation for a relatively small class of persons, each of whose claims had merits, on an ongoing basis or for a significant period of time.

- any other information that may be relevant to the decision maker in determining whether special circumstances exist.

## **Procedural fairness**

27. Prior to a decision being made, it is important to ensure that the applicant has been afforded procedural fairness. This includes:

- providing an opportunity for the applicant to present his or her claims/allegations in writing;
- providing an opportunity for the applicant to comment on all relevant information/material/documents and/or adverse comments that will be considered by the decision maker; and
- that the determination of the application is free from bias.

28. In accordance with procedural fairness requirements, and in the absence of any reason why the information contained in an agency's submission should remain confidential (for reasons which include, but may not be limited to, legal professional privilege, national security, privacy, etc.), an agency should provide a copy of its submission to the applicant for comment.

29. Agencies should advise applicants to provide any further information to Finance within a reasonable period of time. A date for the applicant to respond by, usually 14 days, should be specified in the submission or covering letter provided to the applicant.

30. The applicant should be advised that the decision on their request will be based on all information that Finance holds which includes, but is not limited to, the agency submission and any comments which the applicant may make in relation to the submission.

31. When providing its submission to Finance, agencies should advise if the applicant has been provided with a copy of its submission, and by what date the applicant is to respond.

32. Finance may sometimes need to seek additional information from the relevant agency or elsewhere, including directly from the applicant as appropriate, in order to ensure the decision maker has all the necessary facts before determining a case. Any additional information obtained would be subject to procedural fairness requirements and also be provided to the applicant. While this can appear overly time consuming in some cases, it serves to ensure the integrity of the process underlying the examination of act of grace requests.

## **Determining the level of an act of grace payment**

33. The Finance Minister or delegate will determine act of grace payments having regard to the circumstances of the request, and the general principle in determining the actual level of payment will be based on restoring as far as possible the applicant to the position he or she would have been in had the special circumstances not arisen.

34. Issues that may be taken into account in determining the level of payment include, but may not be limited to:

- any benefit the applicant may have been entitled to had the special circumstances not arisen;
- any claimed financial loss;
- the extent, if any, to which the applicant contributed to the loss, and what steps they took to minimise or contain that loss; and
- any interest and taxation implications.



35. Generally, the following amounts will not be included in calculating the level of an act of grace payment:
- costs incurred as a result of engaging legal, financial or other professional services to assist in the preparation of an act of grace request; or
  - any other incidental costs incurred in the preparation of an act of grace request, which may include, but are not limited to, the cost of travel, telephone calls, photocopying or postage/courier services.

### **Interest payments**

36. In some cases interest may be payable where it forms part of the damages suffered (interest as part of the loss), but generally not when there is a delay in paying for the loss (interest on damages). However, the inclusion of any interest in an act of grace payment is at the discretion of the decision maker having regard to the specific circumstances of each application.

### **Taxation implications**

37. Taxation may be payable on some act of grace payments. It is the applicant's responsibility to declare all taxable income. It is recommended that applicants seek independent financial advice or contact the Australian Taxation Office regarding any taxation implications arising from an act of grace payment.

### **Settlement of requests**

#### **Information provided to applicants**

38. Applicants will be provided with reasons for the decision maker's decision on his or her application. For applications that have been submitted via an agency, it is important that a copy of the letter from Finance to the agency, setting out the reasons why an application has been approved or declined, is made available to the applicant by the agency.

39. For requests which have been declined, information about options which may be available to the applicant will be provided, such as review mechanisms.

#### **Conditions attached to payments**

40. Section 33(3) of the FMA Act allows the Finance Minister, or delegate, to attach conditions to an act of grace payment. In such circumstances, an applicant will need to accept the conditions of the payment in writing, prior to the payment being made. If a condition is breached the responsible agency can recover the payment as a debt in a court of competent jurisdiction.

#### **Deeds of release and indemnity**

41. In certain circumstances, as a condition of payment, an applicant may be requested to release the Commonwealth from any potential legal action in relation to the circumstances of the act of grace request. This agreement will generally be in the form of a Deed of Release. If an applicant does not accept the offer of payment, or sign the Deed of Release, the offer may be withdrawn.

42. In some circumstances an applicant may also be required to indemnify the Commonwealth from other claims arising out of the circumstances of the act of grace request.

## **Review mechanisms**

### **Reconsideration**

43. For applications that are declined, applicants can seek a review of the decision. However, reconsideration of the decision will only be conducted if pertinent new evidence/facts/arguments are presented.

### **Role of the Commonwealth Ombudsman**

44. Applicants are entitled to contact the Commonwealth Ombudsman (Ombudsman) about act of grace requests that have been declined. After investigating the matter, the Ombudsman may write to Finance, suggesting that the decision maker reconsider a case, stating why he or she thinks reconsideration would be warranted. However, a decision maker is not bound to reconsider his or her decision.

### **Judicial Review**

45. The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) applies to a decision to decline an act of grace request. An applicant can apply for a Statement of Reasons under section 13 of the ADJR Act. Within 28 calendar days of the application, the decision maker will provide the applicant with a Statement of Reasons, setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision.

46. Applicants may also seek judicial review of the decision itself, under section 5 of the ADJR Act, in the Federal Court or the Federal Magistrates Court. In the event that the Court found some legal error in the decision making process, it may remit the matter to the decision maker for reconsideration but cannot substitute a decision to make an act of grace payment.

47. It is recommended that applicants seek independent legal advice prior to commencing any legal action.

## **Funding and reporting**

48. Although act of grace payments must be authorised by the Finance Minister or a delegate, payments are generally funded from a Departmental Appropriation and reported under the associated outcome of the agency to which the act of grace request relates. The number and quantum of payments must be included in the notes to the agency's financial statements each year.

49. Once an act of grace payment has been authorised by the Minister, or delegate, the Special Financial Claims Section will notify the relevant agency so that payment can be arranged and will ask the agency to notify Finance when the decision is implemented.

## **Liaison with the Australian National Audit Office (ANAO)**

50. To ensure that decisions to make act of grace payments are being appropriately implemented and reported, on a six monthly basis Finance provides each agency (and the ANAO for the purpose of its financial statement audits) with a record of the act of grace payments which have been approved in the past six months. This process provides agencies with an opportunity to compare Finance's data with its own data and correct any anomalies or inconsistencies in the recording of act of grace payments. This also assists in establishing an appropriate audit trail on act of grace requests.

## **Contacts**

51. Inquiries on this guidance can be directed to the Special Financial Claims Section, Finance on 1800 227 572 or [SFC@finance.gov.au](mailto:SFC@finance.gov.au).

## **Waiver of Amounts Owing to the Commonwealth**

### **Introduction**

1. The waiver of debt power under section 34(1)(a) of the *Financial Management and Accountability Act 1997* (FMA Act) allows the Finance Minister, or delegate, to waive an amount owing to the Commonwealth.
2. This is a guidance document and is not intended to be exhaustive. However, it describes the principles and processes that underlie decisions to waive a debt. In addition, the guidance also discusses reporting arrangements.

### **The nature of the waiver power**

3. Section 34(1)(a) of the FMA Act provides that:
  - (1) The Finance Minister may, on behalf of the Commonwealth:
    - (a) waive the Commonwealth's right to payment of an amount owing to the Commonwealth.
4. A waiver is a special concession granted to a person or organisation that extinguishes a debt owed to the Commonwealth. That is, the debt is completely forgiven so the Commonwealth cannot pursue the debt at a later date should that person's or organisation's financial circumstances improve.
5. The key features of the waiver of debt mechanism are:
  - that there is a certain and ascertainable amount owing to the Commonwealth which:
    - a. is now payable or will become payable in the future by reasons of a present obligation; and
    - b. could be recovered in an action for debt;
  - each request is considered on its individual merits;
  - decisions are made at the discretion of the decision maker; and
  - decisions do not establish precedents.

### **Applying for a waiver of debt**

#### **How to apply**

6. Any individual, company or other organisation can submit a waiver request, either for themselves or for a third party when authorised. An application can be submitted through the agency to which the application relates, direct to the Minister for Finance and Deregulation, or to the Department of Finance and Deregulation (Finance).
7. There is no particular form in which a waiver of debt request is to be made. However, in making an application, applicants should:
  - state which FMA Act agency or agencies his or her debt relates;
  - outline how the debt arose and why waiver would be appropriate in the circumstances;
  - if the request is based on financial hardship, provide information about his or her financial circumstances; and
  - provide evidence in support of his or her application.

## Time in which to apply

8. There is no time limit in which a waiver of debt request must be submitted. However, significant lapses in time between the event giving rise to the debt and submitting the application may exacerbate any difficulties that arise in gathering evidence and verifying the facts of a case.

## Determining a waiver request

9. Once a waiver of debt request has been received by Finance, it is allocated to a Finance official in the Special Financial Claims Section to be investigated. Where necessary, the official will liaise with the responsible agency and applicant, to ascertain the following:

- whether there is an alternative avenue that should be pursued before waiver under the FMA Act is considered;
- whether the waiver provisions would normally apply to the matter to which the application relates;
- whether, if the matter is not one usually examined, there are any exceptional reasons to do so in the particular case;
- determining, if it appears that the applicant owes a debt to the Commonwealth that can be examined under section 34 of the FMA Act, the amount owed to the Commonwealth;
- whether it would be appropriate to waive the debt; and
- whether or not, and under what conditions, a waiver or partial waiver should be approved.

10. Prior to preparing a written report for consideration by the relevant decision maker, in accordance with procedural fairness requirements (see [paragraphs 32-37](#)), Finance will ensure that the applicant has been provided with an opportunity to comment on the material that will be considered by the decision maker.

11. Based on all available information, a Finance official will then prepare a written report and recommendation for consideration by the Finance Minister, or delegate. All information provided by the applicant will be attached to the report. Having considered the report and attached documents, the decision maker will determine the matter on its individual merits.

## Authority of decision makers

12. Section 34 of the FMA Act allows the Finance Minister to authorise waiver of an amount owing to the Commonwealth.

13. Section 18C of the *Acts Interpretation Act 1901* (AI Act) gives the Finance Minister the power to authorise a non-portfolio Minister to act on his or her behalf in the performance of statutory functions and the exercise of statutory powers. Under Section 18C of the AI Act the Finance Minister has authorised the Assistant Treasurer to act on his behalf in determining requests made under section 34(1)(a) of the FMA Act.

14. Section 62 of the FMA Act gives the Finance Minister the power to delegate his or her powers or functions under the FMA Act. The Finance Minister has delegated his power to authorise waiver of debts with directions to the Chief Executive of Finance, the Australian Securities and Investments Commission and ComSuper.

15. Section 53 of the FMA Act gives a Chief Executive the power to delegate his or her powers or functions under the FMA Act to an agency official. The Chief Executive of Finance has delegated the power to authorise waiver of debts to the following Finance officials:

- General Manager, Asset Management Group;
- Division Manager, Government Business, Special Claims and Land Policy Division; and
- Branch Manager, Special Claims and Land Policy Branch.

16. Section 65 of the FMA Act allows for the making of Regulations, in particular relating to the Finance Minister considering a report from specified persons before authorising under section 34(1) a total amount that is more than a specified amount.

17. Regulation 29 of the FMA Regulations provides that if a proposed authorisation under section 34(1) of the FMA Act would involve, or be likely to involve, a total amount of more than \$250,000, the Finance Minister must request the report of an Advisory Committee detailing the proposed authorisation and must not authorise the waiver of debt without considering the report.

18. In accordance with Regulation 29 of the FMA Act, the members of Advisory Committees are the Chief Executives of Finance, the Australian Customs and Border Protection Service (ACS), and the agency responsible for the matter on which the Committee is reporting. If the responsible agency is Finance or the ACS, the Finance Minister may appoint the Chief Executive of another FMA Agency, generally the Chief Executive of the Attorney-General's Department. An Advisory Committee member can appoint a deputy to act in his or her place.

## Parameters of the waiver of debt power

19. The circumstances under which waiver of debt requests are approved can broadly be characterised as where the Minister or delegate considers that it is appropriate to provide redress because recovery of the debt would, in the particular circumstances of a case, be inequitable or cause ongoing financial hardship. For example:

- an inequity may arise if through the direct involvement of a Commonwealth agent/agency, a person sustains a debt that should not have arisen and repayment would leave the person in worse circumstances than if the debt had never arisen. For example, the person may have been overpaid an allowance and may have spent it for the purposes it appeared to be intended to cover, even though he or she had no entitlement to the allowance;
- an inequity may also arise if the impact of implementing a Commonwealth law in a person's particular circumstances, whether or not it arose from defective administration, has caused a person or entity to incur an unintended debt to the Commonwealth;
- [financial hardship](#) may arise where there are sound reasons supporting the view that a person's financial circumstances will not improve to the point where he or she could repay the debt in full or by instalments without suffering a reduction in living standards that is unacceptable by community standards.

20. The waiver power is available to provide a remedy in respect of all FMA Act agencies. However, it is generally a remedy of last resort and used only where there is no other viable remedy. As a matter of practice the waiver of debt power is generally not available:

- in respect to amounts owing to Commonwealth authorities and companies which have a separate legal identity to the Commonwealth and operate under the *Commonwealth Authorities and Companies Act 1997*;

- where it would be more appropriate to allow payment of an amount owing to the Commonwealth by instalments under section 34(1)(c). This power has been delegated to the Chief Executive of all FMA Act agencies;
- where it would be more appropriate to defer the time for payment of an amount owing to the Commonwealth under section 34(1)(d). This power has been delegated to the Chief Executive of all FMA Act agencies;
- where it would be more appropriate for the Chief Executive of an FMA Act agency to write off a debt, under section 47 of the FMA Act;
- where a legal remedy can reasonably be expected to provide an equitable solution for the applicant;
- where the provisions of other Commonwealth legislation can reasonably be expected to provide an equitable solution for the applicant<sup>9</sup>;
- to most debts that have been established by a judicial decision of a Court, which are separate from the decisions of the executive arm of the Australian Government;
- to most debts owed to the Commonwealth on behalf of third parties;
- to debts that have arisen through deliberate fraudulence or other illegal activities in which the applicant had a direct role and reasonably should have been or was aware of the consequences of his or her actions;
- to most waiver of debt requests submitted by companies on the grounds of financial hardship<sup>10</sup>; or
- where an amount owing to the Commonwealth is not certain or ascertainable in the circumstances of a particular case.

21. The waiver of debt mechanism should not be seen as a means to circumvent legislative or policy provisions that are operating as intended in the applicant's circumstances, unless the waiver will address an actual anomaly in the legislation, or the applicant is in severe ongoing financial hardship.

## **Agreement to pay part of an amount owing to the Commonwealth**

22. Sections 34(1) and 34(3) allow a waiver to be made on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances.

23. In some circumstances, an individual may make an offer of part payment in full satisfaction of an amount owing to an agency. Alternatively, an agency may wish to make such an offer to an individual. However, prior to an agency entering into such an arrangement, the agency must first seek approval under sections 34(1) and (3) in respect of the amount that the Commonwealth will forgo.

24. Should the Finance Minister, or delegate, consider it appropriate to approve waiver, the decision will be conditional on a specified amount being paid. It is the responsibility of the agency to ensure that the debt is not extinguished until the conditions have been met.

<sup>9</sup> For example, under the *Taxation Laws Amendment Act (No 6) 2003*, the Commissioner for Taxation has the power to release a claimant from certain taxation liabilities in cases of serious hardship; and the *Bankruptcy Act 1966* provides a number of options to individuals and companies to deal with unmanageable debt.

<sup>10</sup> This is because in the cases concerned the companies, rather than the individuals involved, are liable for the debts.

## **What criteria are used to define financial hardship?**

25. Financial hardship is generally considered to exist where payment of the amount owing to the Commonwealth would result in the applicant being left without the means to achieve reasonable acquisition of food, clothing, medical supplies, accommodation, education and other basic needs.

26. Where an individual requests waiver of debt on financial hardship grounds, a person's assets, future income earning capacity, health, family and other relevant circumstances will be taken into consideration. Generally, an applicant will be required to complete a statement of financial details form to assist in assessing his or her financial circumstances.

27. For an applicant with very significant debts, waiver of an amount owing to the Commonwealth may not alleviate the applicant's overall hardship and in such cases waiver may be declined as it may be more appropriate for bankruptcy proceedings to commence.

28. While a commercial entity is unlikely to meet the general criteria for financial hardship, in some circumstances it may be appropriate to give consideration to the financial position of a commercial entity. In such cases, full financial statements will need to be provided for consideration.

## **Agency submissions to Finance**

29. The Special Financial Claims Section, Finance, is responsible for coordinating requests for waiver of debt to ensure that the decision maker has sufficient information to enable an informed decision. This will generally include a submission from the responsible agency.

30. Agencies are requested to provide sufficient information to enable an informed and independent assessment of the case, including as appropriate:

- a copy of the applicant's original request, if the agency is referring the request to Finance;
- details of the relevant section(s) of legislation to which the debt may relate and of the debtor's circumstances in relation to that legislation;
- specific details of the Commonwealth's role, if any, that may have directly contributed to the debtor's situation;
- any history/background to the case, including any available information on the assets, income, future income earning capacity, other debts, health and family circumstances of the family unit/household to which the person belongs;
- whether the responsible agency has considered repayment by instalment, deferring the time for payment, or writing off the debt under sections 34(1)(c), 34(1)(d) and 47 of the FMA Act, respectively;
- whether or not the responsible agency supports the request and supporting reasons;
- details about the amount owing to the Commonwealth including the size of the liability, how it is comprised and when it is due for payment; and
- any other information that may be relevant to the decision maker's consideration of the particular circumstances.

31. In the cases where an amount owing to the Commonwealth is for the benefit of a third party, the responsible agency will give the third party an opportunity to comment in writing on the impact he or she considers that a proposed waiver may have. The agency should advise Finance of the third parties' comments.



## **Procedural fairness**

32. Prior to a decision being made, it is important to ensure that the applicant has been afforded procedural fairness. This includes:

- providing an opportunity for the applicant to present his or her claims/allegations in writing;
- providing an opportunity for the applicant to comment on all relevant information/material/documents and /or adverse comment that will be considered by the decision maker; and
- that the determination of the application is free from bias.

33. In accordance with procedural fairness requirements, and in the absence of any reason why the information contained in an agency's submission should remain confidential (for reasons which include, but may not be limited to, legal professional privilege, national security, privacy, etc.), an agency should provide a copy of its submission to the applicant for comment.

34. Agencies should advise applicants to provide any further information to Finance within a reasonable period of time. A date for the applicant to respond by, usually 14 days, should be specified in the submission or covering letter provided to the applicant.

35. The applicant should be advised that the decision on his or her request will be based on all information that Finance holds which includes, but is not limited to, the agencies submission and any comments which the applicant may make in relation to the submission.

36. When providing its submission to Finance, agencies should advise if the applicant has been provided with a copy of its submission, and by what date the applicant is to respond.

37. Finance may sometimes need to seek additional information from the relevant agency or elsewhere, including directly from the applicant as appropriate, in order to ensure the decision maker has all the necessary facts before determining a case. Any additional information obtained would be subject to procedural fairness requirements and would also be provided to the applicant. While this can appear overly time consuming in some cases, it serves to ensure the integrity of the process underlying the examination of waiver of debt requests.

## **Settlement of requests**

### **Information provided to applicants**

38. Applicants will be provided with reasons for the decision maker's decision on his or her application. For applications that have been submitted via an agency, it is important that the letter from Finance to the agency, setting out the reasons why an application has been approved or declined, is made available to the applicant by the agency.

39. For requests which have been declined, information about options which may be available to the applicant will be provided, such as review mechanisms.

### **Conditions attached to waivers of debt**

40. Section 34(3) of the FMA Act allows the Finance Minister, or delegate, to approve waiver of a debt on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances. In such cases, an applicant will need to agree to the conditions of the waiver prior to the debt being extinguished. If a condition is breached the responsible agency can recover the whole amount owing to the Commonwealth.

## Review mechanisms

### Reconsideration

41. For applications that are declined, applicants can seek a review of the decision. However, reconsideration of the decision will only be conducted if pertinent new evidence/facts/arguments are presented.

### Role of the Commonwealth Ombudsman

42. Applicants are entitled to contact the Commonwealth Ombudsman (Ombudsman) about waiver of debt requests that have been declined. After investigating the matter, the Ombudsman may write to Finance, suggesting that the decision maker reconsider a case and stating why he or she thinks reconsideration would be warranted.

### Judicial Review

43. The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) applies to a decision to decline to waive a debt. In such circumstances, an applicant can apply for a Statement of Reasons under section 13 of the ADJR Act. Within 28 calendar days of the application, the decision maker will provide the applicant with a Statement of Reasons, setting out the findings of material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision.

44. Applicants may also seek judicial review of the decision itself, under section 5 of the ADJR Act, in the Federal Court or the Federal Magistrates Court. In the event that the Court found some legal error in the decision making process, it may remit the matter to the decision maker for reconsideration but cannot substitute a decision to waive a debt.

45. It is recommended that applicants seek independent legal advice prior to commencing any legal action.

## Reporting

46. Waiver of debts must be reported in the annual report of the agency concerned in accordance with the policy requirements set out in the Finance Minister's Orders: *Financial Reporting Requirements for Commonwealth Agencies and Authorities*.

47. Once a waiver of debt has been authorised by the Minister, or delegate, the Special Financial Claims Section will notify the relevant agency so that it can implement the decision. The agency should notify Finance when the decision has been implemented.

## The Role of the Australian National Audit Office (ANAO)

48. To ensure that decisions to waive amounts owing to the Commonwealth are being appropriately implemented and reported, on a six monthly basis Finance provides each agency (and the ANAO for the purpose of its financial statement audits) with a record of the debts which have been waived in the past six months. This process provides agencies with an opportunity to compare Finance's data with its own data and correct any anomalies or inconsistencies in the recording of waiver of debt decisions. This also assists in establishing an appropriate audit trail on waiver of debt requests.

## Contacts

49. Inquiries on this guidance can be directed to the Special Financial Claims Section of Finance on 1800 227 572 or [SFC@finance.gov.au](mailto:SFC@finance.gov.au).

## **EX GRATIA PAYMENTS**

### **Introduction**

1. The basis for ex gratia payments is not set out in any specific legislative provision, but emanates from the Government's executive powers under section 61 of the Constitution. The ex gratia power provides flexibility to the Government in that it can be called upon at short notice to deliver financial relief quickly. For this reason, the power is necessarily flexible to produce workable outcomes and does not have criteria in the same way as other discretionary schemes.

2. Ex gratia payments are generally only considered after full consideration of all the other available schemes. As a general rule, in the following circumstances the Government is unlikely to be able to make an ex gratia payment:

- where there is legislation which fixes the level of payments payable to a particular group of people and it is proposed to 'top up' that payment; or
- where there is legislation that sets conditions for a particular payment and it is proposed to make an ex gratia payment to people who do not meet one or more of those conditions.

3. Proposed legislative amendments to increase benefits and schemes will not generally constitute a basis for using ex gratia payments if it is considered that the existing legislation displaces, or is likely to displace, the executive power.

### **Process for obtaining approval for ex gratia payments**

4. Approval of ex gratia payments should only be sought from the Prime Minister and/or Cabinet after all other possible alternative avenues for redress have been explored. In particular, consideration should be given to whether it is really necessary to resort to ex gratia payments if the desired outcome can be achieved through existing Government legislative provisions.

5. Legal advice should be sought with regard to any decision to implement an ex gratia payment to determine whether a legislative provision is more appropriate than an ex gratia payment.

6. If it appears that the ex gratia mechanism may be appropriate, agencies should determine, as early as possible, the likely number of people affected and the amount of money involved. Consideration should also be given as to how the proposal would be funded.

7. Prior to initiating Ministerial correspondence, and after considering all other avenues for redress (including those discussed in this Circular), agencies should seek advice from the Department of the Prime Minister and Cabinet (PM&C) and the Department of Finance and Deregulation (Finance) regarding the proposal to make an ex gratia payment and as to the information they will need to provide. Agencies should consult with their relevant Agency Advice Units (AAU), Budget Group, Finance. Where appropriate, the AAU may consult further with the Central Agencies AAU, which is responsible for matters arising from the PM&C portfolio.

8. The AAUs will assess the impact of the proposal on the overall Budget, and the portfolio agency appropriations in particular, and provide advice in relation to the most appropriate means of funding the proposal, as well as any offsetting measures which may be required, and how the payments will be reported in the Budget papers. Once agencies have obtained the necessary advice from PM&C and Finance, the portfolio Minister should write to the Prime Minister providing full details of the proposal including:

- why an ex gratia payment is proposed and is appropriate in preference to alternatives; and
  - whether additional funding is required.
9. The portfolio Minister should provide a copy of this letter to the Finance Minister.
10. If the Prime Minister and/or Cabinet gives written authorisation for ex gratia payments to be made, the relevant agency will need to:
- develop eligibility criteria for payment;
  - confirm the numbers and identities of the people who might be eligible to receive payments;
  - confirm the amounts to be paid;
  - liaise with the AAU in relation to appropriation issues;
  - implement arrangements for the processing and delivery of payments; and
  - ensure that the payments will be reported in the notes to the financial statements.
11. In considering the proposal, the Prime Minister may decide to impose certain conditions, for example, additional eligibility criteria.

### **Source of appropriation for ex gratia payments**

12. Ex gratia payments can be made from either Departmental or Administered Appropriations. However, the appropriation must have an outcome that covers the payment.

### **Taxation**

13. Taxation may be payable on some ex gratia payments. Agencies may wish to liaise with the Australian Taxation Office (ATO) regarding any taxation implication which may arise as a result of a proposed ex gratia payment. However, it is ultimately the recipient's responsibility to declare all taxable income. It is recommended that recipient seek independent financial advice or contact the ATO regarding any taxation implications arising from an ex gratia payment.

### **Advance to the Finance Minister**

14. Where insufficient funding is available to fund ex gratia payments, it will be necessary for the relevant agency to seek additional appropriation from the Finance Minister through an Advance to the Finance Minister (AFM), or through the Additional Estimates process. The relevant AAU can provide further advice on this.

15. Where additional appropriation through the AFM process is to be sought, agencies must have regard to section 11 of the Appropriation Acts 1, 2, 3 and 4, which states that the Finance Minister must be satisfied that:

- there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in the Schedules; and
- the additional expenditure is not provided for, or is insufficiently provided for, in the Schedules:
  - a. because of an erroneous omission or understatement; or
  - b. because the additional expenditure was unforeseen until after the last day on which it was practicable to provide for it in the Appropriation Bills before those Bills were introduced into the House of Representatives.

## **Ex gratia payments as budget measures**

17. All decisions of the Government (with relevant authority from the Prime Minister or the Cabinet) which may have a real or potential financial impact (within the current financial year, forward estimates period or beyond) on the Budget must be reported as a Budget Measure in Budget Paper No. 2 and in the Portfolio Budget Statements. As all ex gratia payments result from a decision of the Government, and will have an impact on the Budget, they are required under the Budget Process Operational Rules to be reported.

## **Reporting of ex gratia payments**

18. Ex gratia payments must also be reported in an agency's financial statements. Policy 7A(d) of the Finance Minister's Orders provides that the financial statements must include a note that shows the number and aggregate amount of any ex gratia payments during the reporting period. Policy 7A applies to Departmental and Administered items, both of which must be distinguished in the relevant note to the financial statement.

## **Contacts**

19. Inquiries in relation to ex gratia payments can be directed to PM&C on 02 6271 5111.