

# **Senate Review of Government Compensation**

## **Submission to the Standing Committee on Legal and Constitutional Affairs**

by the Department of Finance and Deregulation

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## 1 INTRODUCTION

- 1.1. Australians rightly expect that their interactions with government should be just and fair and not leave them in a worse position than they would otherwise have been. The Australian Government responds appropriately to address unintended, anomalous, inequitable or otherwise unacceptable outcomes for people affected by Commonwealth policies, programs or legislation. Financial relief is provided to assist people affected by disasters or national emergencies, or where repayment of a debt to the Commonwealth would cause severe ongoing financial hardship.
- 1.2. The Australian Government does not compensate for matters that lie outside its jurisdictional responsibility. Nor does it compensate people either for failing to meet eligibility criteria for Commonwealth benefits, or for the consequences of imprudent decisions or a lack of diligence in managing their affairs. Equally, it is expected that a debt owed to the Commonwealth will be repaid, if necessary by instalments, wherever possible. In particular, as a matter of sound public policy, costs incurred as a result of failed litigation against the Commonwealth are not relieved in the absence of extenuating circumstances.
- 1.3. Since 1901, the Parliament of Australia and successive Australian Governments have faced challenges in developing legislation which covers all circumstances likely to arise in its operation. As well, challenges associated with the administration of legislation sometimes lead to defective administration. The Parliament of Australia and successive Australian Governments have therefore recognised the need for flexibility in providing financial relief or compensation for unintended outcomes and unforeseen events, while ensuring that such avenues should not provide a means to circumvent Parliamentary intent.
- 1.4. The avenues for financial relief and compensation include:
  - act of grace payments (under section 33 of the *Financial Management and Accountability Act 1997* (FMA Act));
  - the *Scheme for Compensation for Detriment caused by Defective Administration* (the CDDA Scheme) - a non-statutory administrative scheme obtaining its authority under section 61 of the Constitution;
  - ex gratia payments - a non-statutory administrative mechanism that also relies on section 61 of the Constitution, and requires decisions by the Prime Minister, relevant portfolio Ministers, with the Finance Minister consulted about budget aspects;
  - Australian Public Service (APS) employment payments under section 73 of the *Public Service Act 1999*;
  - compensation for workplace injuries under the *Safety, Rehabilitation and Compensation Act 1988*;
  - settlement of monetary claims against the Commonwealth (legal liability) authorised by section 55ZF of the *Judiciary Act 1903*;
  - waiver of debt under section 34(1)(a) of the FMA Act;
  - payment of a debt by instalment under section 34(1)(c) of the FMA Act;
  - deferral of time to pay a debt under section 34(1)(d) of the FMA Act; and
  - write off of debts under section 47 of the FMA Act.

- 1.1. The Department of Finance and Deregulation (Finance) administers and provides policy guidance on act of grace payments and waiver of amounts owing to the Commonwealth. It also provides policy advice on the CDDA Scheme. The Department of the Prime Minister and Cabinet (PM&C) is responsible for the policy and administration of ex gratia payments.
- 1.2. Through its administration and provision of policy advice, Finance contributes to more efficient and fairer government operations where the impact of government activities has unintentionally and unfairly affected people's lives adversely.
- 1.3. Finance provides an external and objective review of the circumstances giving rise to an applicant's grievance. Its central perspective allows Finance to identify systemic anomalies in the application of legislation on groups of people or in special circumstances, and to highlight the need for legislative amendment, where appropriate. It can also identify patterns of administrative error or inefficiencies, and contribute to improved Commonwealth administrative practices.
- 1.4. A key feature of the avenues is that there is no automatic entitlement to a payment or financial relief. A decision under any of these avenues is therefore at the discretion of the decision maker.
- 1.5. In view of the diversity and complexity of legislation and Commonwealth administration, general principles, rather than prescriptive rules, underlie the remedies. These principles aim to achieve consistency and impartiality in evaluating the merits of cases in different circumstances. Updated and published in November 2009, the Finance Circular 2009/09 – *Discretionary Compensation and Waiver of Debt Mechanisms* (Appendix 1) sets out the current guidelines for the avenues of obtaining financial relief and compensation.
- 1.6. Finance has recently provided comments to the National Alternative Dispute Resolution Advisory Council (NADRAC) on a proposed Model Dispute Management Plan (Appendix 2). It is envisaged that the Model Dispute Management Plan would be available as a resource to assist agencies in developing their own specific plans for managing all internal and external disputes. Finance recommended that all dispute resolution capabilities which are available to the Australian Government should be considered in any given dispute.

## **2 AVENUES OF DISCRETIONARY COMMONWEALTH ASSISTANCE**

- 2.1. The different avenues detailed below provide a suite of options that allows the Government to offer the remedy most appropriate to the individual circumstance of need. Case studies have been provided at Appendix 3, and referenced in the submission, to illustrate the application of those remedies administered by Finance.

### **ACT OF GRACE PAYMENTS**

- 2.2. The act of grace function is intended to ensure consistency and equity in the impact of government activities where other legislative and administrative provisions do not take sufficient account of the unique circumstances of individual cases. Under the act of grace power in section 33 of the FMA Act, the Finance Minister or delegate is able to authorise one-off and/or periodic payments to individuals or entities if it is appropriate in special

circumstances, even though the payment(s) would not have otherwise been authorised by law or required to meet a legal liability.

- 2.3. Special circumstances are not defined, but may apply where a decision maker is satisfied that:
- the action or inaction of the Australian Government has directly resulted in a loss; or
  - the application of Commonwealth legislation or policy has caused an unintentional or inequitable outcome; or
  - there is some other relevant anomaly or issue of moral concern.
- (Case Study 1 at Appendix 3 refers.)
- 2.4. In *Clement v Minister for Finance and Deregulation* [2009] FMCA 43 (30 January 2009), Federal Magistrate Warwick Neville observed that the act of grace power is premised both on there being no other remedies available to the applicant, and on the Minister choosing to act, as a matter of moral responsibility or obligation, so as to remedy an injustice that otherwise remains incapable of repair or solution through the ordinary or usual processes of the law. He noted that “*there is never any formal duty or compulsion on the part of the Minister to authorise a payment...even if, as section 33 requires, there exist ‘special circumstances’*”.
- 2.5. Any individual or organisation can submit an act of grace application and there is no time limit in which an application must be submitted. Each application is considered on its merits and decisions do not create precedents.

### **SCHEME FOR COMPENSATION FOR DETRIMENT CAUSED BY DEFECTIVE ADMINISTRATION (CDDA SCHEME)**

- 2.6. In its nature and purpose the CDDA Scheme is different from the act of grace provision. This difference is discussed in section 3.
- 2.7. The CDDA Scheme was established in 1995 and enables portfolio Ministers and authorised officials of FMA Act agencies to compensate individuals or other bodies that have suffered detriment (quantifiable financial loss) caused by an agency’s defective administration. The Scheme is flexible and accessible and provides an opportunity for an agency to examine and address systemic issues arising from its administration. The authority to make CDDA payments comes from the Executive Power under section 61 of the Constitution.
- 2.8. 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.
- 2.9. An unreasonable lapse or failure occurs 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.

- 2.10. Any individual or entity can submit a CDDA application and there is no time limit in which an application must be submitted. Each application is considered on its merits and documentary or incontrovertible proof of defective administration is not essential.
- 2.11. Compensation is payable only where an applicant is found to have suffered detriment as a direct cause of the defective administration. There is no financial ceiling on payments, which are generally approved on the basis that there is a moral, rather than legal, obligation to the claimant.
- 2.12. Reviews of the CDDA Scheme have been conducted by the Commonwealth Ombudsman in 1999<sup>1</sup>, the Australian National Audit Office (ANAO) in 2003-04<sup>2</sup>, Finance in 2005<sup>3</sup> and the Commonwealth Ombudsman in 2009<sup>4</sup>.
- 2.13. Arising from the Ombudsman's 2009 report, Finance established an Interagency Forum on Discretionary Compensation Mechanisms in August 2009. The Forum discusses how the administration of discretionary claims might be improved and lessons learnt in the handling of claims. The Ombudsman's Office has a standing invitation to attend the Forum to inform its members about particular issues noted in its consideration of complaints arising from discretionary claims.

## **EX GRATIA PAYMENTS**

- 2.14. The authority for ex gratia payments comes from the Executive Power under section 61 of the Constitution. The Government can call upon the ex gratia power to deliver financial relief quickly at short notice. For this reason, it is the most appropriate response for groups of people affected by a common set of circumstances and for unexpected events.
- 2.15. Approval of ex gratia payments is sought from the Prime Minister and/or Cabinet and the Finance Minister (in relation to funding) after all other possible alternative avenues for redress have been explored. Further information on the administration of ex gratia payments can be sought from PM&C.

## **WAIVER OF DEBT**

- 2.16. The waiver of debt power is a critical accounting function for the Australian Government. Section 34(1)(a) of the FMA Act enables the Finance Minister or delegate to waive an amount owing to the Commonwealth such as taxation debts, student loans or court costs. Although the Commonwealth may choose to write off a debt as unrecoverable, write-off does not provide the benefit of waiver, which irrevocably extinguishes the debt.

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<sup>1</sup> Commonwealth Ombudsman, Report under section 35A of the *Ombudsman Act 1976*, September 1999, *To compensate or not to compensate?*.

<sup>2</sup> ANAO, Report No. 35 2003-04, *Compensation Payments and Debt Relief in Special Circumstances*

<sup>3</sup> An unpublished review was undertaken by Finance in 2005.

<sup>4</sup> Commonwealth Ombudsman, Report No.11|2009, *Putting things right: compensating for defective administration*.

- 2.17. Debts are usually waived where the decision maker considers recovery of the debt would be inequitable or cause ongoing financial hardship and that other debt treatment options are not appropriate. Unlike a debt that has been written off, a waived debt cannot be resurrected if the person's circumstances later change.
- 2.18. Inequity may also arise regardless of administrative error, if an unintended debt to the Commonwealth is caused through the application of legislation in the particular circumstances of an individual.
- 2.19. Financial hardship may be considered where payment of the debt would cause hardship that is unacceptable by ordinary community standards. However, even if financial hardship can be demonstrated, the decision maker may still consider that a debt should not be waived. (See Case Study 2 at Appendix 3.)
- 2.20. Any individual or entity can submit an application for waiver of debt and there is no time limit in which an application must be submitted. Each application is considered on its merits and decisions do not create precedents.
- 2.21. Powers under section 34(1) parts (b), (c) and (d) of the FMA Act have been delegated to agency Chief Executive Officers and provide a range of debt treatment options including postponement, deferment and recovery by instalment. In addition, section 47 of the FMA Act enables agencies to write off debts as irrecoverable in certain circumstances.
- 2.22. A number of agencies have limited waiver powers, which relate to specific and easily definable circumstances of limited complexity and predominantly involving routine administration, under specific legislation, as shown below:
  - the *Income Tax Assessment Act 1936* gives the Commissioner of Taxation limited powers to remit personal income tax debts, certain other associated debts and General Interest Charges;
  - the *Social Security Act 1991* gives a limited power to waive a debt if the money had been received in good faith, if the money was paid because of an administrative error, if the debt had existed for a period longer than six weeks and if the person is in financial hardship; and
  - the *Child Support (Registration and Collection) Act 1988* gives the CSA a limited power to remit late payment penalties.
- 2.23. Limited waiver powers have also been delegated under section 34 of the FMA Act to officers in other agencies:
  - the head of Australian Securities and Investments Commission, who has a limited power to waive application fees; and
  - the head of ComSuper, who has a limited power to waive certain debts in relation to the *Papua New Guinea Acts 1974 and 1975*.

### **3 WHICH COMPENSATION REMEDY APPLIES?**

- 3.1. The act of grace power, ex gratia arrangements and CDDA Scheme all provide for compensation payments. The issue is what differentiates them so the most appropriate remedy is selected in an individual case. In this regard, the information given in Section 2 is relevant.

- 3.2. Payments under the CDDA Scheme are made to redress detriment suffered as a direct result of administrative error, omission or other fault. Ex gratia payments are made in response to national emergencies or to deliver financial assistance quickly to groups of people adversely affected by a common event or set of circumstances, which are usually outside the control either of the Australian Government or of the people affected.
- 3.3. As noted in *Clement v Minister for Finance and Deregulation* [2009] FMCA 43, act of grace payments are made to remedy an injustice that could not otherwise be remedied through the usual processes of law or administrative action.
- 3.4. Accordingly, it is appropriate to consider the act of grace remedy where no defective administration has occurred, or where the claimant considers that a departmental finding of no such error was incorrect. The act of grace power is an essential safeguard against unintended or inequitable outcomes from the application of Commonwealth legislation, and the circumstances and merits of an individual case are critical to the decision.
- 3.5. Both the ex-gratia and the act of grace powers provide very broad discretion to the relevant decision makers to approve payments within a context which assumes that the power will be used responsibly, and that the proper processes underpinning all other aspects of public administration will be observed.

## 4 ADMINISTRATION

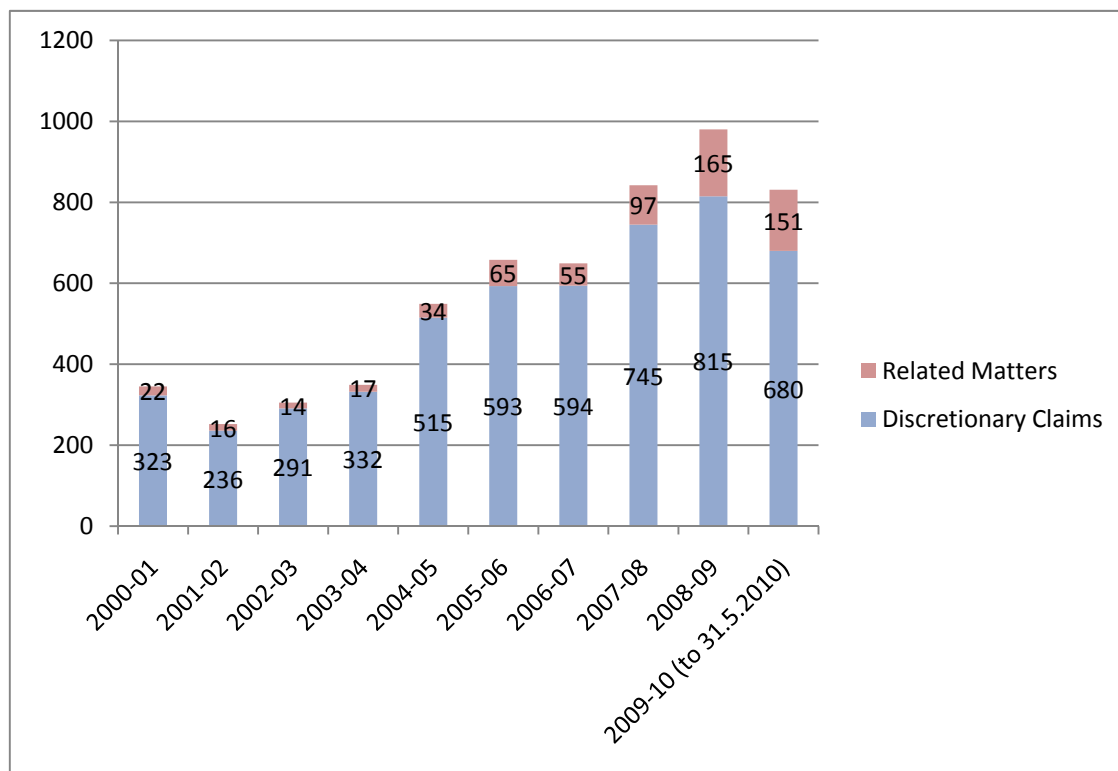
- 4.1. Finance investigates act of grace and waiver of debt claims and consults with the applicant and relevant agencies before submitting details of the case to the Finance Minister, or Departmental delegate, for decision.
- 4.2. Demands upon the remedies have increased in recent years, possibly due to growing complexity of dealings with government, and an increasingly discerning and educated population<sup>5</sup>. As several cases studies in Appendix 3 demonstrate, some applicants will aggressively present their case and pursue a favourable outcome.
- 4.3. It appears that this pursuit is often driven by the claimant's own unrealistic expectations, or expectations raised by their advocates. As the avenues of act of grace and waiver of debt are generally used only as an avenue of last resort, some claimants have been through multiple levels of unsuccessful appeals and review. (Case Studies 5-7 at Appendix 3 refer.)
- 4.4. Figure 1 demonstrates the steady increase in the number of discretionary claims (act of grace and waiver of debt) received by Finance over the past ten years, and related litigation and requests for statements of reasons, or copies of records under Freedom of Information (FOI) legislation, and other matters for Ministerial attention relating to the discretionary avenues of relief.

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<sup>5</sup> Commonwealth Ombudsman, Report No.11 | 2009, *Putting things right: compensating for defective administration*, paragraph 1.18.

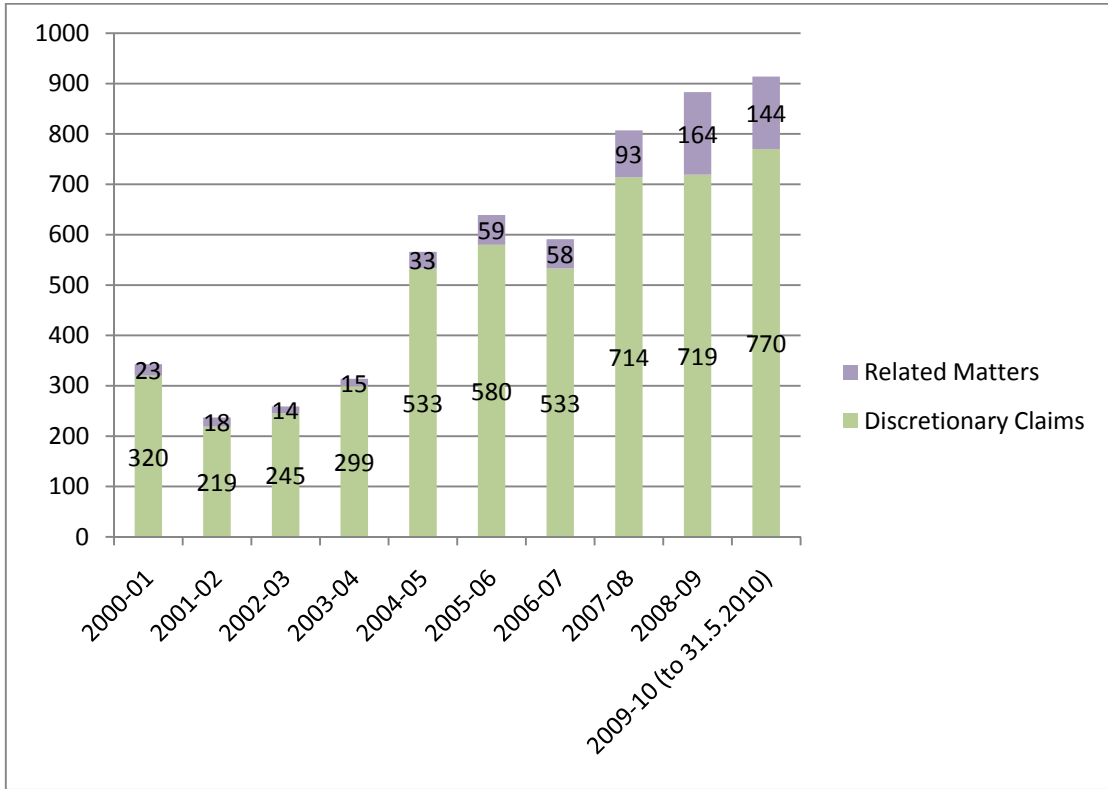


**Figure 1: Number of discretionary claim applications and miscellaneous matters received by Finance by financial year**

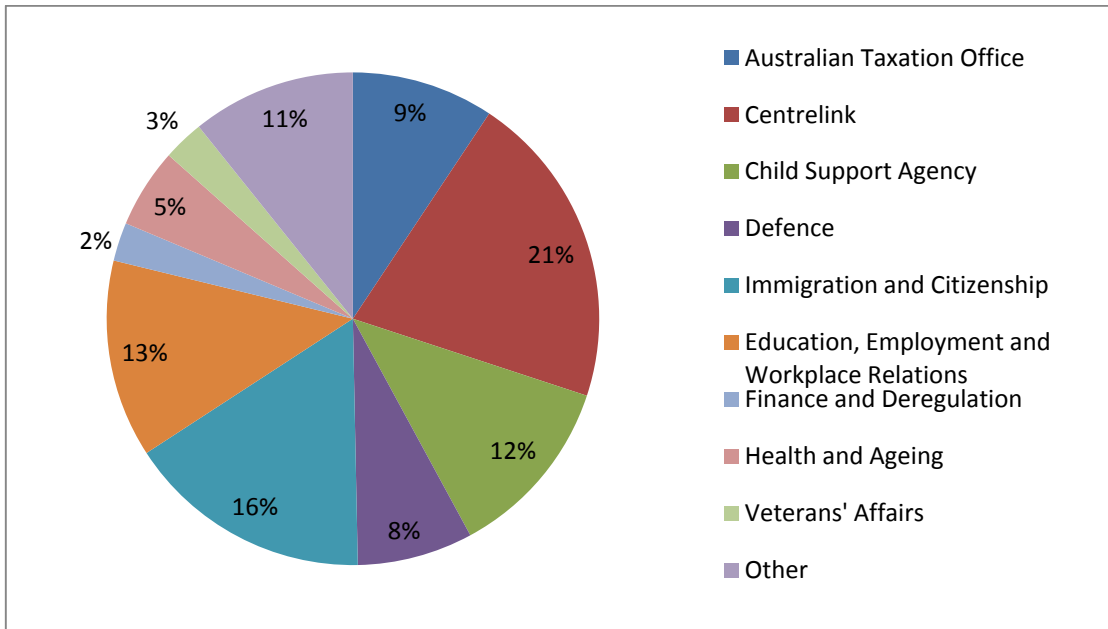


- 4.5. Figures 1 and 2 refer to caseload, rather than claimant numbers.
- 4.6. The 2007-08 financial year saw a significant increase from the previous year in the number of claims received. This increase can largely be attributed to the Federal Election which resulted in a number of unsuccessful applicants reapplying following the change of Government. Additionally, in 2008-09, Finance received 84 unanticipated statute barred claims relating to the decision in *Commonwealth of Australia v Cornwell* [2007] HCA 16 (20 April 2007) which had to be managed. In 2009-10, another 13 such claims were received.
- 4.7. Figure 2 demonstrates the number of discretionary and related matters completed from 2000-01. Finance is able to respond quickly to redress an adversity when an immediate remedy is needed, but all claims require investigation and include attendant administrative costs, regardless of merit (Case Studies 3-5 at Appendix 3 refer).
- 4.8. Figure 3 shows the number of discretionary claim cases which relate to individual departments or agencies thus far for the 2009-10 financial year (to 31 May 2010).

**Figure 2: Number of discretionary claim applications and miscellaneous matters completed by Finance by financial year**



**Figure 3: Discretionary claim applications relating to relevant departments or agencies for 2009-10 (to 30 April 2010)**



4.9. Given the range of matters covered by the discretionary mechanisms and that some applicants have unrealistic expectations of compensation, it is difficult to discern any meaningful trends in requests for financial redress. However, from Figure 4 it can be noted that amounts approved have not significantly varied since the 2004-05 financial year.

**Figure 4: Financial amounts for discretionary claim applications by financial year**

<b>Act of Grace Payments</b>		
<b>Financial Year</b>	<b>Amount Sought</b>	<b>Amount Approved</b>
2000-2001	\$18,238,198.92	\$8,566,323.34
2001-2002	\$6,818,571.00	\$1,026,721.52
2002-2003	\$12,061,680.22	\$546,410.42
2003-2004	\$26,729,812.48	\$10,051,731.31
2004-2005	\$31,732,071.52	\$4,999,360.96
2005-2006	\$133,930,660.84	\$1,521,037.45
2006-2007	\$18,249,828.32	\$1,615,746.02
2007-2008	\$26,860,648.37	\$2,892,400.30
2008-2009	\$363,181,264.76	\$3,230,513.30
2009-2010 (as at 31.05.2010)	\$96,308,535.14	\$805,791.02
<b>Waiver of Debt</b>		
<b>Financial Year</b>	<b>Amount Sought</b>	<b>Amount Approved</b>
2000-2001	\$55,745,140.24	\$53,528,073.97
2001-2002	\$58,601,638.57	\$56,951,736.20
2002-2003	\$11,986,783.69	\$8,777,070.80
2003-2004	\$28,067,655.26	\$23,857,611.28
2004-2005	\$16,652,254.87	\$8,471,868.65
2005-2006	\$9,824,114.73	\$2,810,525.31
2006-2007	\$21,972,546.81	\$2,925,807.82
2007-2008	\$28,708,020.99	\$7,362,363.62
2008-2009	\$23,904,955.27	\$3,117,584.05
2009-2010 (as at 31.05.2010)	\$16,364,046.15	\$2,314,001.98

4.10. Applicants seeking discretionary assistance are afforded procedural fairness by Finance and other agencies, including:

- the opportunity to present his or her claims in writing;
- the opportunity 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.

4.11. The applicant is given an explanation of the reasons for the decision and information about review options in respect of the decision, such as seeking a detailed statement of reasons under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and/or of appealing to the Ombudsman. Applicants and agencies have access to information regarding the avenues on the Finance website (<http://www.finance.gov.au>). In addition, Finance maintains a toll-free customer helpline and dedicated email address for claim inquiries. Act of grace and waiver application forms currently being developed will be made available online.

- 4.12. Finance's customised claims database contains records from 1990 to the present. A database record is created when an application is received, and updated to record the history of the investigation and decision. A post-decision audit is conducted for quality assurance. The database allows a range of search queries to be executed and is linked to Microsoft SQL Server Reporting Services.
- 4.13. The database reporting tool is used to produce detailed and accurate statistics and report to the Finance Minister, the ANAO and Finance executive on act of grace payments and waivers of debt matters.
- 4.14. The reporting protocol enables Finance to effectively and appropriately allocate resources; monitor sensitive, high risk and older cases; support quality assurance and accuracy of data; comply with auditing requirements; promote transparency and openness; respond to client inquiries with immediate status updates; and assist with the accuracy of whole of government reporting.

## REVIEW OPTIONS

- 4.15. As CDDA decisions rely on section 61 of the Constitution, and are not made under an enactment or law, decisions are not subject to review under the ADJR Act, but may be subject to judicial review under section 75 of the Constitution or section 39B(1) of the *Judiciary Act 1901*. Some agencies may also provide internal review mechanisms and applicants are able to lodge complaints to the Commonwealth Ombudsman.
- 4.16. Act of grace and waiver of debt decisions can be reviewed by the Federal Magistrates Court and the Federal Court under the ADJR Act. The grounds for review include a breach of procedural fairness, an improper exercise of power or an error of law.
- 4.17. Either court can set aside the decision and remit the case to the Finance Minister for further consideration. However, the court cannot review the merits of the decision, or direct that an act of grace payment or waiver of debt be approved.
- 4.18. Once made, a decision is usually not reconsidered, unless new and relevant evidence or argument is provided, or a relevant and significant mistake of fact is identified.

## PUBLIC REPORTING AND ACCOUNTABILITY

- 4.19. Section 65(2)(1a) of the FMA Act and regulation 29 of the *Financial Management and Accountability Regulations 1997* stipulate that the Finance Minister must not authorise a payment or waiver of debt of more than \$250,000 without first considering the report of an Advisory Committee. The Committee is comprised of the Chief Executive Officer or his or her deputy from Finance, the Australian Customs and Border Protection Service and the agency responsible for the subject matter of the claim.
- 4.20. The Minister is not obliged to accept the Committee's recommendations. There is benefit nonetheless in requiring that regard should be given to different views on the merits of the case and the policy issues identified.

- 4.21. In accordance with the Finance Minister's Orders for Financial Reporting 2009-2010, agencies' financial statements must include a note showing departmental and administered expenses and/or liabilities including nil balances in relation to act of grace, CDDA and ex gratia payments and waivers of debt.
- 4.22. 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.
- 4.23. To ensure that decisions to make act of grace payments and waivers of debt are being appropriately implemented and reported, Finance provides six monthly statements to each agency (and to the ANAO for its financial statement audits) of the act of grace payments and waivers of debt which have been approved in the past six months. This process allows agencies to cross-check data and contributes to a stronger audit trail.

### **INFLUENCING IMPROVEMENTS IN PUBLIC ADMINISTRATION**

- 4.24. Through its examination of the impact of government policy in individual cases, Finance is able to evaluate and assess the application of relevant legislation and policy, and to recommend changes that should reduce the need for compensation in individual cases.
- 4.25. Some examples of changes initiated by Finance and influenced through claims-based evidence over recent years are given below.
- Carer Allowance (CA) - the requirement for the carer and care receiver to live in the same residence to qualify for CA was removed.
  - CA(Child) - reported problems with the CA(Child) system were considered in a review of the benefit.
  - Employer Superannuation Contribution - the time employers have to make superannuation contributions on behalf of their employees without incurring penalties was extended by an additional 28 days.
  - Superannuation Guarantee (SG) Charge - the SG legislation was amended so that employers no longer have to pay SG twice.
  - Early Release of Superannuation for Terminally Ill - early release of lump sum superannuation is now tax free for people with a terminal illness.
  - 19AB Exemptions - the Department of Health and Ageing is working to improve its management of Medicare exemption certificates for overseas medical practitioners
  - The Tactical Payment Scheme (TPS) - the statutory scheme was established at Finance's recommendation, to allow the Department of Defence to make payments to local nationals who are injured, killed or have personal property damaged due to Australian Defence Force activities overseas.
  - Abolition of Detention Debt - the *Migration Amendment (Abolishing Detention Debt) Act 2009* abolished detention debts imposed on immigration detainees.
- 4.26. Finance has also liaised with other agencies to assist in managing policy or administrative issues, such as supporting the CSA to develop debt management and case resolution strategies.

## 5 THE WAY FORWARD

- 5.1. Demands on the act of grace and waiver of debt avenues have increased, taking account of the diversity and complexity of Commonwealth activity and developments in technology. Finance is not aware of the current or past volume of requests referred to PM&C for ex gratia payments.
- 5.2. Increased connectivity and transparency through initiatives such as Government 2.0 provide the opportunity for government to improve the effectiveness and efficiency of service delivery, public administration and community engagement<sup>6</sup>. It will also increase obligations on Australians to be better informed about their responsibilities.
- 5.3. In evaluating the effectiveness of the current mechanisms, Finance has canvassed alternative ways of administering the avenues of discretionary assistance. It recognises that any change should promote both the Commonwealth's capacity to respond quickly and flexibly to unexpected needs for assistance and legitimate claims for compensation, and the objectives of transparency and accountability in decision making<sup>7</sup>.
- 5.4. It could be argued that devolution of the act of grace and waiver powers to agencies would simplify the process and allow Finance to focus on monitoring outcomes and provide policy advice and oversight.
- 5.5. Finance does not support devolution. Decisions on act of grace payments and waiver of debt are underpinned by the principle that the claimant's individual circumstances are assessed independently, free from the operational considerations of individual agencies. It is arguably appropriate for a single agency to administer those provisions, given their nature.
- 5.6. Additionally, devolution of the act of grace and debt waiver powers would not deliver any net cost benefit and could result in less robust decisions, particularly as agencies with fewer claims would develop less expertise in applying the relevant considerations.
- 5.7. Another option might be to centralise the management of all discretionary compensation and financial relief arrangements, by moving responsibility for the CDDA Scheme and ex gratia payments to Finance.
- 5.8. It is appropriate to retain the management of the ex gratia power in PM&C. Ex gratia payments are part of Australia's emergency response measures that are recognised as best practice internationally. When disasters or national emergencies occur, the lead agency asked to coordinate the whole of government response must be in the best position to advise the government immediately or very quickly on the need for payments, the amounts to be paid and the criteria for payment. PM&C is best placed to do this.
- 5.9. Finance considers that there is merit in the current CDDA Scheme arrangements which require individual agencies to critically examine their own administrative practices and

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<sup>6</sup> Joint Media Release 26 | 2010, Minister for Finance and Deregulation and Special Minister of State, *Rudd Government Releases Gov 2.0 Response*, 3 May 2010.

<sup>7</sup> Finance is currently resourced to manage act of grace and waiver of debt claims, support the Interagency Forum on discretionary compensation mechanisms, and provide policy advice on the CDDA Scheme. It also provides advice to departments/agencies as required. A wider role for Finance would have attendant resource implications.

impact in any particular case, and redress any financial detriment caused. The CDDA Scheme was designed to do precisely this. Removing CDDA claims to a central agency would remove the benefit of the portfolio agency's ownership of the problem and awareness of the issues involved, which logically lead to improved administrative practice.

- 5.10. The Commonwealth Ombudsman Report No.11 (2009) *Putting things right: compensating for defective administration*<sup>8</sup> recommended that an interagency panel chaired by Finance be established to examine difficult defective administration claims. Finance commented that the utility of the panel would need to be assessed against priorities and resources.
- 5.11. Finance considers that the Interagency Forum is working effectively as a whole-of-government vehicle for sharing information and identifying best practice in addressing administrative error or oversight, and raising emerging issues of concern. In particular, it provides a forum for matters of systemic defective administration to be brought to light, where programs are delivered by a number of agencies.
- 5.12. In this regard, the Forum is functioning, to some degree, as the interagency panel envisaged by the Ombudsman, although it does not provide a forum for review of particular matters. Finance considers that resourcing an additional body is not warranted at present. There could be merit, however, in establishing an Advisory Committee for defective administration claims of \$250,000 or more, to provide broader oversight of such decisions, similar to that in section 65(2)(1a) of the FMA Act.
- 5.13. The most recent meeting of the Interagency Forum on 21 May 2010 demonstrated its role in sharing information to promote improved administrative practice in making compensation payments. The Australian Taxation Office (ATO) case study 8 at Appendix 3 refers.
- 5.14. The Ombudsman also supports incorporating a safety net provision in all new legislation, to allow portfolios to quickly correct unintended outcomes from the application of Commonwealth law<sup>9</sup>. Finance supports the incorporation of safety nets in new legislation, and adequate risk management measures in the development of administrative schemes<sup>10</sup>.
- 5.15. Finance considers that the discretionary mechanisms are sufficiently flexible to adapt to government priorities and the needs of society and that the overall costs of changed administrative responsibility would outweigh the benefits of implementing such changes. Finance is looking instead to streamline current processes such as providing targeted information online in order to set realistic expectations for applicants and filtering manifestly unmeritorious applications.
- 5.16. Finance is considering whether the Finance Minister could issue guidelines under section 64 of the FMA Act to identify in broad terms circumstances which would allow discretion not to investigate a claim unless it were established that there was a substantive case of complaint. Under the United Kingdom model for discretionary compensation, for example, consideration of the claim itself is discretionary: unless the

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<sup>8</sup> Commonwealth Ombudsman, Report No.11|2009, *Putting things right: compensating for defective administration*

<sup>9</sup> Ibid

<sup>10</sup> Comcover, *Better Practice Guide – Risk Management*, June 2008

statement of claim establishes a substantive cause of complaint, the case may not be referred for decision<sup>11</sup>.

- 5.17. The British model is not established in statute, but appears to have the advantage of targeting administrative effort in the handling of claims more efficiently. As mentioned in paragraph 5.14, a concerted effort is needed to reduce the potential for claims by including safety nets in legislation, and encouraging departments and agencies responsible for their legislation to continually review the effectiveness and operation of the legislation.
- 5.18. The approach in paragraph 5.15 would not discourage legitimate claims, nor remove the presumption that the fact of legislation having been applied as intended does not, of itself, mean that an inequity has not occurred, which should be redressed through the act of grace power.
- 5.19. Finance believes that the following measures could contribute to improved government operations and open and transparent government:
- enhancement of guidance material on ex gratia payments;
  - a central record of all decisions under ex gratia, act of grace, the CDDA Scheme and waiver of debt arrangements;
  - consideration be given to the establishment of an Advisory Committee similar to the Advisory Committee in section 65(2)(1a) of the FMA Act for defective administration claims of \$250,000 or more; and
  - Ministerial guidelines to exempt investigation of discretionary claims without merit.
- 5.20. Finance is currently resourced to manage claims for act of grace and waiver of debt, support the Interagency Forum on Discretionary Compensation Mechanisms, and provide policy advice on the CDDA Scheme. It also provides advice to departments/agencies as required. A wider role for Finance would have attendant resource implications.
- 5.21. Finance is committed to promoting administrative excellence through its provision of policy advice, through ongoing communication with agencies and specialist advice where necessary, to drive consistency and accountability in decision making and to balance the competing needs of aggrieved individuals with fiscal efficiency and whole-of-government policy.

## 6 CONCLUSION

- 6.1. In summary, Finance believes that the suite of mechanisms for Commonwealth discretionary compensation and financial relief works effectively to deliver assistance where appropriate, and meets Australians' expectations of government in this regard.
- 6.2. Greater efficiency could be achieved through allowing discretion not to investigate applications for act of grace payments and debt waiver that are manifestly unmeritorious.
- 6.3. While access to Commonwealth discretionary assistance should continue to be generous by world standards, principles-based compensation arrangements do not underwrite risk

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<sup>11</sup> Department for Social Development *Financial Redress Administration Guide*, November 2005, [www.dsdni.gov.uk](http://www.dsdni.gov.uk)



incurred by private individuals or corporations for imprudent financial decisions, nor for tardiness in applying for Commonwealth benefits.

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