Australian Government
Department of Finance

Requests for discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013*

Resource Management Guide No. 401

April 2018

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ISBN: 978-1-922096-43-2 (Online)

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Audience

This guide is relevant to staff in non-corporate Commonwealth entities (NCEs) who deal with requests to the Finance Minister to approve discretionary financial assistance under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

Key points

This guide:

- describes the types of discretionary financial assistance that can be authorised by the Finance Minister under the PGPA Act, including act of grace payments, waivers of debt and set-off
- replaces all previous versions.

Resources

This guide is available on the Department of Finance (Finance) website at *www.finance.gov.au.*

Members of the public who are considering making an application for discretionary financial assistance can find fact sheets and application forms at *http://www.finance.gov.au/home/explore-finance-services*.

Other relevant publications include:

- Resource Management Guide No, 409: *Scheme for Compensation for Detriment caused by Defective Administration*.

Introduction

1. Each request to the Finance Minister for discretionary financial assistance:
    - is considered on its individual merits
    - is decided at the discretion of the decision-maker
    - once decided, does not establish a precedent for other requests.
2. In accordance with the *Acts Interpretation Act 1901*, the 'Finance Minister' is any Minister in the Finance portfolio who administers the PGPA Act. The power to consider requests for act of grace payments and waivers of debt has been delegated to senior officials in Finance.

Part 1 – Act of Grace Payments

Public Governance, Performance and Accountability Act 2013

Section 65 – Act of grace payments by the Commonwealth

(1) The Finance Minister may, on behalf of the Commonwealth, authorise, in writing, one or more payments to be made to a person if the Finance Minister considers it appropriate to do so because of special circumstances.

Note 1: A payment may be authorised even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability.

Note 2: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against a non-corporate Commonwealth entity's annual appropriation, providing that it relates to some matter that has arisen in the course of the administration of the entity.

(2) An authorisation of a payment must be in accordance with any requirements prescribed by the rules.

(3) Conditions may be attached to a payment. If a condition is contravened, the payment is recoverable by the Commonwealth as a debt in a court of competent jurisdiction.

(4) An authorisation of a payment is not a legislative instrument.

Act of grace and other remedies

3. The act of grace mechanism is generally a remedy of last resort and is not used when there is another viable remedy available to provide redress in the circumstances giving rise to the application.
4. If other avenues exist for a person to receive financial assistance from the Commonwealth (such as existing legislation or schemes), it is recommended that those avenues are investigated before a request is made for an act of grace payment.

5. Most decisions about Australian Government benefits are subject to internal statutory review. A person is expected to undertake these reviews to ensure that they are ineligible for financial assistance, before being assessed for an act of grace payment. Instruments to consider could include the *Legal Services Directions 2005*, the *Public Service Act 1999,* and the *Scheme for Compensation for Detriment caused by Defective Administration* (CDDA Scheme).
6. If a person is claiming that a decision is incorrect at law, existing legal review mechanisms must be used.

Act of grace considerations

7. The PGPA Act does not provide a time limit on making a claim under the act of grace mechanism.
8. The act of grace mechanism is permissive. It enables decision-makers to approve payments but does not obligate them to do so. There is no entitlement to an act of grace payment.
9. 'Special circumstances' and 'appropriate' are not defined in the PGPA Act and are for the decision-maker to assess.
10. Examples of special circumstances that may make it appropriate to approve an act of grace payment include instances when:
    - an act of a non-corporate Commonwealth entity (NCE) has caused an unintended and inequitable result to a person seeking a payment.
    - Commonwealth legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on the applicant's circumstances, and those circumstances were:
        - specific to the applicant
        - outside the parameters of events for which the applicant was responsible or had the capacity to adequately control
        - consistent with what could be considered to be the broad intention of the relevant legislation.
    - the matter is not covered by legislation or specific policy, but the Commonwealth 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.
11. The Commonwealth uses contracted providers for some services. The actions of contracted providers are not within the scope of the CDDA Scheme. Where a person alleges that the actions of a contracted provider may have caused financial detriment to them, the matter may be considered under the act of grace mechanism.

12. Act of grace payments may not be approved, for example, when:

    - the proposed payments would have the effect of supplementing capped payments set by other specific legislation, in circumstances where that legislation expresses the clear intention that particular payment levels cannot be exceeded in any circumstances
    - the proposed payments would have the effect of establishing a payment scheme to apply to a group of individuals, without considering the merits of their requests on an individual basis.

13. Payments under the act of grace mechanism must be made from money appropriated by the Parliament. Therefore, as a matter of practice, the act of grace mechanism is generally not available:

    - when a request has arisen from private circumstances outside the sphere of Commonwealth administration, there has been no involvement of an agent or NCE of the Commonwealth and the matter is not related to the impact of any Commonwealth legislation
    - in respect of a matter that relates solely to the involvement of corporate Commonwealth entities which have a separate legal identity to the Commonwealth
    - 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.

14. Act of grace requests are generally not approved in cases where an applicant's sole assertion is that it is unfair that they have been historically ineligible to receive a benefit for which a person in a similar contemporary situation would now be eligible. They are also generally not approved in cases where a person was historically eligible for a payment but is now ineligible due to a change in the criteria. In many of these cases, the legislative changes simply reflect the evolving nature of Australian Government policy interpretation and analysis, including incremental legislative amendment.

15. If an applicant is dissatisfied with the decision, it is open to them to:

    - lodge a complaint with the Commonwealth Ombudsman
    - seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*
    - request reconsideration of the decision if relevant new information or a serious factual error is identified.

The role of Finance

16. Discretionary Payments within Finance provides support to decision-makers under the act of grace mechanism.

17. Finance liaises with the applicant and the relevant NCEs, where appropriate. Where Finance receives an application directly from a member of the public, a company or other organisation, Finance usually seeks further information from the NCE responsible for the matter.

18. To assist potential claimants, application forms and fact sheets are available at *http://www.finance.gov.au/home/explore-finance-services/act-grace-payments*.

19. Finance will advise the relevant NCEs once a decision is made.

The role of NCEs

Providing advice

20. NCEs are encouraged to address the following in their submissions to Finance regarding act of grace requests:

    - whether there is an alternative avenue of redress that could be pursued, and whether that avenue is viable in the applicant's circumstances (such as a statutory review mechanism)
    - the relevant sections of legislation and details of the applicant's circumstances in relation to that legislation
    - specific details of the actions of an NCE, if any, that may have directly contributed to the applicant's situation
    - any history or background to the case, including any consideration of the case under the CDDA Scheme, decisions of any tribunals or other review bodies, or other claims arising from the same circumstances
    - if there is a perceived anomaly in the law or policy, an estimate of the likely number of people affected and the likely number of applications
    - whether or not the NCE supports the act of grace request and reasons. Finance may seek the NCE's opinion in this regard as the policy owner and recognising the NCE's policy expertise
    - whether any other NCE may be able to provide additional relevant advice on the policy or legislation related to the matter
    - any other information that may be relevant to the decision-maker in determining whether special circumstances exist.

21. If an NCE receives a request from an applicant direct, or decides to initiate a request on an individual's behalf, the NCE must prepare a submission and then forward it to Finance, along with any other relevant documents, within four weeks. If a response cannot be provided within four weeks, the NCE must advise Finance of the reasons for the delay and seek an extension accordingly.

22. Before a decision is made, the applicant is given an opportunity to comment on the NCE submission. For procedural fairness, NCEs are required to provide a complete copy of the submission to the applicant at the same time it is sent to Finance and ask the applicant to respond to Finance within four weeks. Finance can provide examples of covering letters.

23. If a payment of more than $500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee must consist of: the Secretary of the Department responsible for administering the *Infrastructure Australia Act 2008*; the Finance Secretary, and the accountable authority of the NCE responsible for the matter. Finance will liaise with the relevant NCE on matters that require an advisory committee report.

Funding and reporting

24. While act of grace payments can only be authorised by the Finance Minister, or a delegate within Finance, the actual payments are funded under an appropriation of the relevant NCE. Generally, payments should be made out of departmental appropriations.

Part 2 – Waiver of Debt

Public Governance, Performance and Accountability Act 2013

Section 63 – Waiver of amounts or modification of payment terms

(1) The Finance Minister may, on behalf of the Commonwealth, authorise:

(a) the waiver of an amount owing to the Commonwealth; or

(b) the modification of the terms and conditions on which an amount owing to the Commonwealth is to be paid to the Commonwealth.

(2) An authorisation of a waiver or modification must be in accordance with any requirements prescribed by the rules.

(3) An authorisation of a waiver may be made either unconditionally or on the condition that a person agrees to pay an amount to the Commonwealth in specified circumstances.

(4) To avoid doubt, an amount may be owing to the Commonwealth even if it is not yet due for payment.

(5) An authorisation of a waiver or modification is not a legislative instrument.

Waiver and other debt management options

25. Section 11 of the PGPA Rule requires accountable authorities of NCEs to recover debts, unless the accountable authority considers that it is not economical to pursue recovery of the debt; is satisfied that the debt is not legally recoverable; or if the debt has been written off as authorised by an Act.

26. When a debt is raised, the Commonwealth has a legal right and, under section 11 of the PGPA Rule, an obligation to pursue recovery of the amount. Recovery rights include circumstances where a person has been erroneously paid more than their legal entitlement.[1]

[1] Certain legislation has specific waiver provisions for circumstances where a debt has arisen solely due to the error of an NCE. Some debts may also be found to be irrecoverable at law.

27. A waiver is a special concession that extinguishes a debt owed to the Commonwealth. The Commonwealth cannot pursue the debt at a later date if the financial circumstances of the person or organisation improve.

28. The waiver power is generally a remedy of last resort. It will generally not be used when there is another viable remedy available to address the specific circumstances of a matter.

29. Individuals and organisations will often have review rights when a debt has been raised against them. It is expected that these review mechanisms would be used before a waiver of the debt is sought.

30. If an individual or organisation is claiming that there is no legal basis for a debt to exist, they are encouraged to use legal review mechanisms.

31. If other avenues exist for a debt to be managed those avenues are strongly recommended to be investigated prior to considering a waiver. This includes debt management options in existing legislation. NCE's internal control documents will provide further advice on relevant debt management options and modification of terms and conditions.

Waiver of debt considerations

32. The PGPA Act does not provide a time limit on making a claim under the waiver of debt mechanism.

33. The waiver of debt mechanism is permissive. It enables decision-makers to approve a request but does not obligate them to do so. There is no entitlement to a waiver of debt.

34. The decision-maker will consider the merits of a person or organisation having a debt waived that the Commonwealth has a legal right to recover. The current and possible future circumstances of the person or organisation, including the financial situation, may be taken into account. Why the debt arose and what role the Commonwealth had in the debt arising may also be considered.

35. The existence of other debt management options (which would allow the Commonwealth to maintain the right to recover the debt at some later date) and whether they would be more appropriate in the circumstances must be considered.

36. There are some circumstances where the standard considerations listed above would not be relevant, and the debt would be unlikely to be waived. These include:

    - debts that have been established by a judicial decision of a court, which are separate from the decisions of the executive arm of the Commonwealth
    - debts owed to the Commonwealth that will be paid on to third parties
    - debts that have arisen through deliberate fraudulent or other illegal actions
    - requests submitted by companies on the grounds of financial hardship[2]
    - where an amount owing to the Commonwealth is not certain or ascertainable.

[2] This is because the companies, rather than the individuals involved, are liable for the debts.

37. If a claimant is dissatisfied with the decision, it is open to them to:

    - lodge a complaint with the Commonwealth Ombudsman
    - seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977*
    - request reconsideration of the decision if relevant new information or a serious factual error is identified.

The role of the Department of Finance

38. The Discretionary Payments Section in Finance provides support to decision-makers under the waiver of debt mechanism.

39. Finance liaises with the applicant and relevant NCEs, where appropriate. For a request that is received directly from a member of the public, a company or other organisation, Finance usually seeks further information from the NCEs responsible for the matter.

40. To assist potential claimants, application forms and fact sheets are available at *http://www.finance.gov.au/home/explore-finance-services/waiver-debt*.

41. Finance will advise the relevant NCEs once a decision is made.

The role of NCEs

Providing advice

42. NCEs are encouraged to address the following in their submissions on waiver of debt requests:

    - the amount owing to the Commonwealth, including why it was incurred, how it is comprised, and when it is due for payment
    - any history or background to the case, including any information held by the NCE on the assets, income, future earning capacity, other debts, health and family circumstances of the family unit or household to which the debtor belongs
    - whether the responsible NCE has considered other debt management strategies
    - whether or not the responsible NCE supports the request and reasons. Finance may seek the NCE's opinion in this regard as the policy owner and recognising the NCE's policy expertise.
    - any other information that may be relevant to the decision-maker's consideration of the particular circumstances.

43. If an NCE receives a request from an applicant directly, or decides to initiate a claim on an individual or organisation's behalf, the NCE must prepare a submission and then forward it to Finance, along with any other relevant documents, within four weeks. If a response cannot be provided within four weeks, the NCE must advise Finance of the reasons for the delay and seek an extension accordingly.

44. Before a decision is made, the applicant is given an opportunity to comment on the NCE submission. For procedural fairness, NCEs are required to provide a complete copy of the submission to the applicant at the same time it is sent to Finance and ask the applicant to respond to Finance within four weeks. Finance can provide examples of covering letters.

45. If a waiver of a debt of more than $500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee must consist of: the Secretary of the Department responsible for administering the *Infrastructure Australia Act 2008;* the Finance Secretary, and the accountable authority of the NCE responsible for the matter. Finance will liaise with the relevant NCE on matters that require an advisory committee report.

Part 3 – Set Off

Public Governance, Performance and Accountability Act 2013

Section 64 – Setting off amounts owed to, and by, the Commonwealth

(1) If:

(a) an amount (the ***first amount***) is owing to the Commonwealth by a person; and

(b) an amount (the ***second amount***) is owing by the Commonwealth to the person;

the Finance Minister may, on behalf of the Commonwealth, authorise the set-off of the whole or a part of the first amount against the whole or a part of the second amount.

(1A) An authorisation of a set-off must be in accordance with any requirements prescribed by the rules.

(2) Paragraph (1)(b) does not apply in relation to a payment if:

(a) a law of the Commonwealth provides that the payment is inalienable or absolutely inalienable; or

(b) a law of the Commonwealth provides that the payment, or the right to the payment, cannot be assigned.

(3) To avoid doubt, an amount may be owing to, or by, the Commonwealth even if it is not yet due for payment.

(4) An authorisation of a set-off is not a legislative instrument.

46. If an NCE receives a request for set-off under section 64 of the PGPA Act, the NCE must contact Discretionary Payments within Finance to discuss handling of the matter. There are no delegations from the Finance Minister to NCEs in respect of section 64 of the PGPA Act.

47. If set-off of an amount of more than $500,000 is proposed, section 24 of the PGPA Rule requires the Finance Minister to first consider the report of an advisory committee. The advisory committee must consist of: the Secretary of the Department responsible for administering the *Infrastructure Australia Act 2008;* the Finance Secretary, and the accountable authority of the NCE responsible for the matter. The Department of Finance will liaise with the relevant NCE on matters that require an advisory committee report.