

## AM I SPECIAL ENOUGH? THE PAYMENT OF EX-GRATIA COMPENSATION BY THE COMMONWEALTH

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Compensation for defective government  
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### Introduction

What happens when the actions of a Commonwealth agency result in a situation where the circumstances demand a remedy, but a legal entitlement to compensation does not exist?

The Commonwealth has recognised that, from time to time, there are circumstances which indicate it has a moral obligation to compensate those adversely affected by government policies or actions, or to provide assistance on compassionate grounds,<sup>1</sup> but there is no legal obligation to do so.

Compensation paid in these cases is generally referred to as ex-gratia compensation. Payment is purely discretionary, and the fact that a person has been adversely affected by a government policy does not automatically guarantee payment will be made.<sup>2</sup>

There are two kinds of ex-gratia payments:

- act of grace payments under s.34A of the *Audit Act 1901*, which are made where there are 'special circumstances', and
- payments authorised by Government (usually via a Cabinet decision) made through a specific appropriation describing the purpose of the compensation.<sup>3</sup>

The Department of Finance has policy responsibility for ex-gratia compensation matters. Experience has shown that the Department holds the firm view that ex-gratia compensation payments should only be made in unusual circumstances, and in particular, each act of grace claim must be carefully examined to ensure it meets the special circumstances test of s.34A of the *Audit Act 1901*.

### When is a case special enough to warrant an act of grace payment?

While the Ombudsman agrees with the Department of Finance's view that payment is generally only appropriate in unusual circumstances, there have been differences of view about what the term special circumstances actually means. Various holders of the office of Ombudsman have not agreed, for example, that a case has to be unique to be special.

The Federal Court has defined special circumstances as 'something unusual or different to take the matter out of the ordinary course, according to which the [provisions in question] would be expected

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to apply. As a result, the ordinary course appears less appropriate or fair'.<sup>4</sup>

In practice, the point at which a case will meet the special circumstances test of the act of grace provisions is not always clear, as the following example illustrates.

*Under the Social Security Act 1991, pensioners are required to notify the Department of Social Security prior to travelling overseas, regardless of the length of their absence. The Department then issues them with a departure certificate. If they fail to obtain a departure certificate, their pension is automatically cancelled after they have been outside Australia for more than six months. In many cases there is no way to requalify for their pension other than by returning to Australia.*

*Mr G was an 86 year old pensioner unable to care for himself. Since his wife's death in 1988, he lived part of each year with his daughter in the UK and his son in Australia. In 1992 he arrived in the UK and shortly afterwards was diagnosed as having terminal cancer. He was unfit to travel, and six months after his departure from Australia, the Department of Social Security cancelled his pension.*

*He appealed and won in the SSAT, on the grounds that the notice telling him to advise the Department of his departure was invalid in that it did not require such notification. The AAT agreed that the notice did not require Mr G to notify his departure, but determined that the decision was nevertheless correct at law, as the relevant section of the Act operates mechanically, regardless of whether such a notice was received. The AAT also determined that there is no discretion in the legislation to allow it to overturn the decision to cancel Mr G's pension. The AAT went on to comment on the harsh consequences of the legislation, and referred Mr G's case to the Ombudsman for consideration.*

*Mr G eventually died overseas without having returned to Australia, and without reclaiming his pension.*

Is Mr G's a case for an act of grace payment? Some would say yes; there are sufficiently special circumstances or the law is unjust or unreasonable or oppressive. Others would argue that his pension was properly cancelled under legislation approved by Parliament.

Investigation of Mr G's case revealed a number of other factors worthy of consideration. The notices sent to him not only did not *require* Mr G to notify the Department of his travel, they also did not inform him of the consequences of failing to obtain a departure certificate. Even if the notices had been correct, Mr G could not read them, as he had undergone surgery on his eyes and his eyesight was extremely poor. He also suffered from senility, and the AAT found he was unlikely to remember the content of the notices, even if he could read them.

Do these additional factors then qualify Mr G as having special circumstances sufficient to warrant an act of grace payment? Again, some would argue against payment, as his son and daughter could have read the notices for him and ensured he obtained a departure certificate.

In many cases, it is not only the individual's circumstances which are relevant to determining whether an ex-gratia payment should be made. Legislative, policy and administrative issues may also need to be considered. For example, further investigation of Mr G's case also revealed that:

- the Government's statement announcing the introduction of departure certificates suggests that the legislation may have been intended to affect only those pensioners wishing to live overseas

permanently or for an extended period;

- the Department's files indicate that thousands of other pensioners are departing without notifying, remaining overseas for more than six months, and returning before the Department detects their absence. Contrary to the legislation, these pensioners are not made to requalify for their pension, only to repay pension to which they were not entitled; and
- Mr G was not advised he could claim a UK pension under the terms of the reciprocal Social Security Agreement with the UK. Had he been advised of this possibility, his financial difficulties could have been significantly ameliorated.

Mr G's case also raises fundamental questions about whether, in the context of beneficial legislation, it is reasonable for the law to apply regardless of whether a pensioner has been advised of his or her obligations.<sup>5</sup>

There is no defining moment at which a case becomes worthy of compensation under the act of grace provisions. Payment will depend on the circumstances in each case. However, act of grace claims have generally been more successful in gaining approval where:

- there is maladministration by the person acting on behalf of the Commonwealth which has led to the claimant suffering financial detriment;
- the application of the law produces unintended or anomalous results;
- it is desirable to apply the benefits of changed legislation retrospectively, or
- special circumstances exist which lead to the conclusion that there is

a moral obligation on the Commonwealth to make a payment.

The majority of successful claims relate to cases where a person or persons have suffered financial detriment as a direct result of maladministration by Commonwealth government agencies or their agents. In this context, act of grace payments would not be considered appropriate where there is scope for claims under common law. If there is doubt about whether legal liability exists, the matter is referred to the Australian Government Solicitor for advice.<sup>6</sup>

#### **Claimants beware**

In reality, the distinction between whether the Commonwealth is legally liable or has a moral responsibility to pay compensation is not always clear cut. Indeed, in some cases there may be both a legal and a moral obligation for the Commonwealth to pay compensation.

The experience of the Commonwealth Ombudsman is that many agencies do not routinely consider all available avenues for compensation. In some cases, claimants are denied compensation on the basis that there is no legal liability, but are not advised that they have a right to seek an act of grace (or other ex-gratia) payment.

The Ombudsman has therefore suggested to the Department of Finance that, as a matter of policy, claimants should be advised of their review rights, especially where claims are denied or partially settled, or where a person may be otherwise dissatisfied with the treatment of their claim.

The Department of Finance's guidelines for ex-gratia compensation list a number of criteria<sup>7</sup> against which any decision to award payment of ex-gratia compensation should be tested, including whether:

- the extent of the losses is substantial relative to the capacity of those affected to absorb them (ie. they would place an unacceptably heavy burden on those affected); and
- the administrative cost involved in paying the compensation is appreciably less than the total amount of compensation.

The Ombudsman does not agree that these criteria are necessarily appropriate for considering whether payment of ex-gratia compensation should be made. A claimant's capacity to absorb a loss and the administrative costs associated with paying compensation should not usually have any bearing on a decision whether to approve a claim.

#### **Should precedents take precedence?**

The Department of Finance also takes into account whether payment would serve as a precedent. Although an act of grace payment does not give rise to a legal precedent, the Department argues it may act as a precedent against which future claims are assessed on the grounds of fairness.

Experience shows that the Department has traditionally resisted approving claims which may result in a number of similar claims. The Ombudsman's view is that a claim should not automatically be excluded because it may set a (non-legal) precedent; each claim should be considered on its merits, and if it meets the special circumstances test, it should be approved.

The potentially unreasonable nature of a judgment on the basis of these sorts of factors is demonstrated by the following case study.

*A service pensioner and his wife failed to notify the Department of Veterans' Affairs (DVA) of fluctuations in their income which affected their entitlements over a period.*

*Overpayments were calculated and repaid by instalments.*

*The pensioner complained that he and his wife had paid income tax on their pensions in the relevant tax years, but DVA had recovered the gross amount of the pensions overpaid. In effect, they were being required to pay their income tax liability twice in respect of certain periods. The Australian Taxation Office adjusted their tax commitments for the three most recent tax years, but was precluded by the Income Tax Assessment Act from adjusting for any earlier periods.*

*DVA declined to exercise a discretion available under the Veterans' Entitlements Act to waive recovery of that portion of the overpayment which equalled the amount of income tax already paid on the basis that the overpayment was attributable to the pensioners having failed to comply with the notification requirements of the Act.*

*The Ombudsman wrote to the Secretary of DVA expressing the view that it was unreasonable for the Commonwealth to make a windfall gain at the expense of an aged war veteran of modest means, and that the Commonwealth has no moral right to purport to 'recover' from a person more than he or she received. The Ombudsman recommended an act of grace payment equal to the amount of tax previously paid by the pensioners should be made. As is required under an agreement with the Department of Finance, the recommendation was referred to that Department for comment.*

*The Department of Finance opposed the payment for a number of reasons, including a concern as to the broader precedents which may be set, and hence, the lack of special circumstances in the case.*

*The Department of Finance's and DVA's refusal to agree to an act of grace payment resulted in the Ombudsman*

*taking the somewhat unusual step of reporting the matter to the Prime Minister. The Prime Minister agreed with the Ombudsman's conclusions and referred the matter back to the Minister for Finance.*

*Some four years after the complaint was received, an act of grace payment of \$2273.90 was made to the pensioners.<sup>9</sup>*

Application of the Department of Finance's criteria in this case would have ensured its rejection. First, payment of the claim would have set a "precedent" because potentially, a number of other individuals are in similar circumstances. Second, the administrative costs of arriving at a decision to pay compensation would have far outweighed the cost of the compensation in that case.

Nevertheless, the Ombudsman considered that these arguments did not sufficiently outweigh the principal issue - that an individual should not be expected to pay income tax liability twice.

#### Administrative arrangements

The power to approve an act of grace payment is unique. It is an unfettered personal discretion by the Minister for Finance (or persons authorised by him) to spend money for any purpose on any person. Conditions can be attached to payment, and if those conditions are breached, the payment becomes a debt owed to the Commonwealth.

In a submission to the Senate, the Commonwealth Ombudsman raised a number of concerns about the operation of the act of grace arrangements.<sup>9</sup>

Firstly, under 'trial' arrangements (which have been in place for seven years), most Commonwealth agency heads have been appointed as authorised persons for the purpose of approving act of grace payments up to \$50,000 arising from a recommendation by the Commonwealth

Ombudsman. All other act of grace claims (for less than \$50,000) are authorised by the Minister for Finance or an authorised person in his Department.

All claims for over \$50,000 are considered by an Advisory Committee made up of the Secretaries to the Departments of Finance and Administrative Services, and the Comptroller General of Customs. The Committee submits a recommendation to the Minister for Finance on whether the claim should be paid.

Under the 'trial' arrangements, where the Ombudsman has recommended that an act of grace payment is made, that recommendation must first be referred to the Department of Finance for 'comment'.

The Ombudsman has stated that this arrangement results in delays in the processing of requests and the Department of Finance re-canvassing the issues in a particular case, notwithstanding that an Ombudsman investigation has already been undertaken.<sup>10</sup>

The agency responsible for a matter has the final decision whether to approve small claims (less than \$50,000) after considering the outcome of the Ombudsman's investigation (where that has occurred) and the Department of Finance's comments. In the case of larger claims (over \$50,000), the responsible agency provides input to the Advisory Committee's deliberations, but has no say over the final decision to pay compensation at all.

For claimants, the process appears to be one of red tape and buck passing; it is not clear who has the responsibility and authority for making a decision on their claim.

Secondly, despite the recommendation of a Senate Committee that the power to authorise small act of grace payments should be permanently devolved,<sup>11</sup> the

Department of Finance is proposing to revoke the devolution arrangements.

If the revocation of the devolution arrangements goes ahead, all claims will have to be determined by the Minister for Finance or his Department.

The Ombudsman is of the view that the revocation of the devolution arrangements runs counter to reforms in public administration over the past decade, and that the heads of Commonwealth agencies should have the power to authorise the payment of compensation, regardless of the mechanism under which that compensation is paid.<sup>12</sup>

The Ombudsman has also commented 'it is incongruous that in an increasingly devolved financial management and accountability environment, agency heads can approve expenditure and waive large debts, but are unable to authorise the payment of compensation for defective administration'.<sup>13</sup>

Thirdly, the Ombudsman has expressed concern over the processes by which the Advisory Committee is briefed on large act of grace claims, and the membership of the Committee.

The Department of Finance is responsible for providing secretariat services to the Committee, as well as having a representative on the Committee. Under current arrangements, the Ombudsman does not have direct input to the written brief to the Committee, although a copy of her report is attached. In one recent case where an act of grace payment was recommended by the Ombudsman, but not supported by the Department of Finance, the Ombudsman requested the Department provide her with a copy of the brief to the Advisory Committee prior to its submission to the Committee.

In the Ombudsman's view, the brief clearly indicated the Department of Finance's belief that it has a role in canvassing an

investigation undertaken by the Ombudsman's office. The Ombudsman considered that this was contrary to the arrangements she understood were agreed between the Minister for Finance and the Prime Minister, which defined the Department of Finance's role as providing advice on the precedent and consistency implications of compensation cases involving an Ombudsman recommendation.

The Ombudsman provided comments on a number of assumptions made in the Department's brief and asked that any issues requiring further consideration or clarification were addressed to her prior to the brief being provided to the Advisory Committee.<sup>14</sup>

It is important that the processes for considering large act of grace claims are seen to be impartial. Claimants may perceive the Department of Finance's institutional role as protecting the public purse in advance of any objective consideration of the merits of their claim. In one case, a claimant observed that the inclusion of a representative from the Department of Finance was akin to Dracula being put in charge of the blood bank and that she was not at all confident of a fair decision being made.

Nevertheless, the Ombudsman recognises that the Department of Finance has a legitimate policy role to play in the consideration of large act of grace claims. Although it would be possible to establish a Committee of 'independent'<sup>15</sup> agency heads, the Department of Finance would still have input to any decision (given that the act of grace power is conferred on the Minister for Finance), and the Committee may therefore simply add another layer to the processes for considering large act of grace claims.

The Ombudsman has suggested to the Senate Finance and Public Administration Legislation Committee that the membership of the Advisory Committee

which considers large act of grace claims should be revised to include the Secretaries to the Department of Finance and the Attorney-General's Department and a departmental or agency head nominated by the Department of Prime Minister and Cabinet. The Ombudsman's role would be to provide input (where a matter had been investigated) to the Committee's deliberations. The agency head responsible for a matter would have ultimate responsibility for determining whether payment is approved.

This arrangement would place responsibility for determining claims where it belongs; with the agency responsible for the claim. It would also allow for speedier resolution of claims, while ensuring that the agencies responsible for the policy implications of compensation payments have appropriate input.

#### **Specific purpose appropriations for ex-gratia compensation payments**

The Department of Finance holds the view that the act of grace power is not 'a means of circumventing legislation or effectively establishing a payments scheme for remedying program or legislative deficiencies. In these latter cases, resort to specific appropriation, such as those for ex-gratia payments....may be more appropriate'.<sup>16</sup>

This mechanism for paying compensation is generally only adopted after extensive government consideration (usually via a proposal to Cabinet), and is relatively uncommon.

Historically, payments by this means have taken the form of compensation 'schemes' (such as the ones presently operating for the Australian Taxation Office and the Child Support Agency) where a number of 'individual compensation cases are dealt with within common guidelines and criteria developed for particular classes of losses'.<sup>17</sup>

Some examples<sup>18</sup> of specific purpose appropriations for ex-gratia compensation payments are:

- the compensation paid to the North Queensland forestry industry following World Heritage listing of the Queensland Wet Tropics in 1987;
- the compensation paid to grain growers for loss of the Iraq market in 1991; and
- the Government's proposal for a scheme to remedy detriment suffered as a result of defective administration.

#### **Compensation to remedy defective administration**

In the May 1995 edition of the *Australian Journal of Administrative Law*, Lachlan Roots argued there are 'compelling reasons for the introduction into our system of administrative law of a new and unique general right to damages in two separate forms: one a remedy of damages for wrongful administrative action *per se*; the other a remedy of damages for losses caused by wrongful administrative action'.<sup>18</sup>

In 1991, the Government foreshadowed the establishment of a non-statutory scheme for the payment of compensation for defective administration. The new scheme is still in its developmental stages, but will be established as a specific purpose appropriation for ex-gratia payments.

Although the Government's proposal for a new scheme for compensation for defective administration will be non-statutory, it is likely that it will be sufficiently broad and comprehensive to allow for the payment of compensation for many cases where there has been defective administration.

The Ombudsman has been negotiating with the Department of Finance for some

time over the framework for the new scheme, and the guidance provided to agencies on the operation of the scheme, given that decisions taken under the scheme will not be subject to the *Administrative Decisions and Judicial Review Act 1977*. At the time of writing, details of the scheme were being circulated to Commonwealth agencies for comment prior to being put to Cabinet.

In particular, it is hoped that the new scheme will allow for payment of compensation where a claimant has suffered a financial loss as a result of defective administration, but the relevant statute limits payment (for example, of arrears), a legal entitlement to compensation does not exist, and the claimant's circumstances are unlikely to attract an act of grace payment. The following complaint to the Ombudsman is a case in point.

*Mrs J was granted a wife's pension under the reciprocal Social Security agreement with the UK. In these circumstances, her UK pension is deducted from her Australian pension until such time as she qualifies for an Australian pension under domestic legislation. The Department of Social Security noted a review for September 1991 when Mrs J would have met the residency requirement for an age pension, and her UK pension should be treated as income, rather than as a deduction.*

*In July 1990, after she had informed the Department her husband had died, Mrs J was advised to apply for a widows pension. The Department granted the widows pension, but continued to treat her UK pension as a deduction, even though she qualified for a widows pension under Australian legislation.*

*The Department then failed to conduct a review of Mrs J's circumstances in 1991, and she was not transferred to the more generous age pension. The errors were*

*subsequently discovered some two years later.*

*The legislation prevents the payment of arrears for more than three months. Initial advice from the Australian Government Solicitor (AGS) was that the error resulted from the Department's actions, and that legal liability existed and compensation should be paid.*

*Subsequent advice from AGS stated that although the error was made by the Department, legal liability did not exist as a result of the decision in the UK. Jones v Department of Employment.<sup>20</sup>*

In *Jones v Department of Employment*, it was held that the existence of a right of appeal from a particular decision means that there is no common law duty of care on a public servant in the making of that decision.

As a result, Mrs J has no legal entitlement to compensation, and the legislation limits the payment of arrears. Mrs J's case is unlikely to attract an act of grace payment, as it does not meet the special circumstances test and would set a (non-legal) precedent.

However, Mrs J has suffered a loss through no fault of her own, and in the Ombudsman's view, should be compensable under the proposed non-statutory scheme for compensation to remedy defective administration.

As an ex-gratia specific purpose appropriation, the scheme will be highly transparent; it will feature in agencies' accounts and will be subject to parliamentary and audit scrutiny. It is also consistent with recent government reforms in that it matches authority for approving compensation payments with the individuals responsible, and makes them accountable for their actions.



### New horizons

At the end of the day, claimants have little interest in which particular mechanism governs the payment of compensation. It is not surprising that many victims of defective administration find the current arrangements confusing and bureaucratic. This often compounds a situation where they have spent considerable time and energy in obtaining an agency's acknowledgment that they have suffered as a result of defective administration.

The Audit Act is shortly to be replaced by a package of Bills, including the Financial Management and Accountability (FMA) Bill which will put in place new arrangements for the settlement of claims (where there is legal liability) and act of grace payments.

In her submission to the Senate Finance and Public Administration Legislation Committee, the Ombudsman commented that the new arrangements proposed in the FMA Bill do 'little to improve the current arrangements for agencies to remedy swiftly "injury" to a client that arises from defective administration'.<sup>21</sup>

She therefore put forward an alternate proposal on how the Commonwealth should administer the payment of compensation. The thrust of that proposal is that the current arrangements need to be reviewed as a whole, and that agency heads should have the authority to authorise payment (subject to a monetary limit) under all possible heads of compensation.

In addition, any new arrangements should operate in accordance with the following general principles, to be enshrined in executive policy:

- in settling claims, the Commonwealth should have regard to issues of fairness and justice, and should not take advantage of its position in negotiating the settlement of claims;

- agency heads should be authorised to make business judgements about a claim, that is, to pay a claim even though the merits may be open to challenge in order to avoid the expense of such a challenge, where it is appropriate to do so;
- claimants should be provided with (at least) summary reasons for decisions, and general details of how payments are calculated.<sup>22</sup> Claimants should not be expected to waive all rights where only part of a claim is settled;
- the roles of the various agencies involved in making payment should be clearly defined; and
- agencies should be accountable for their decisions via reporting to the Department of Finance, and audit and parliamentary scrutiny processes.

The Ombudsman's proposal is based on experience in negotiating the difficult landscape of ex-gratia compensation. It is designed to enable the Commonwealth to remedy its mistakes in an efficient, fair and accountable manner, with claimants compensable for the full extent of their loss.

Negotiations with the Department of Finance and the Attorney-General's Department are continuing on this matter.

In the interim, it is incongruous that the heads of Commonwealth agencies who manage large budgets and are empowered to make decisions involving millions of dollars which impact on large numbers of people, do not have the power to authorise small amounts of compensation to correct errors made by their Departments.

Endnotes

- 1 For example, to provide assistance for life saving medical treatment not available within Australia.
- 2 For example, changes in legislation which reduce or restrict entitlements do not usually result in payment of compensation to those adversely affected.
- 3 See the Department of Finance's paper 'The Payment of ex-gratia compensation by the Commonwealth', October 1993, for examples of several specific appropriations for this purpose. In recent years, appropriations have also been made to the Australian Taxation Office and the Child Support Agency to allow for ex-gratia payments to remedy 'defective administration' where no legal liability exists.
- 4 78 ALR 307
- 5 The Department of Social Security has since substantially revised arrangements for departure certificates. The new arrangements allow for suspension rather than cancellation of pension where a pensioner leaves without obtaining a departure certificate, and enable the vast majority of pensioners to requalify for their pension whilst overseas. Where a pensioner is unable to contact the Department due to circumstances beyond his or her control, he or she may be reinstated at the discretion of the Secretary up to two years after departure.
- 6 Op cit n3, p4.
- 7 Ibid, pp iii to iv.
- 8 See the Commonwealth Ombudsman's submission to the Senate Finance and Public Administration Legislation Committee's consideration of the Financial Management and Accountability Bill 1994, Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, p5.
- 9 Ibid, pp 3 to 9.
- 10 Ibid, p9.
- 11 See report from the Senate Standing Committee on Finance and Public Administration, 'Review of the Office of the Commonwealth Ombudsman', pp 31 to 34.
- 12 Op cit n8, p16.
- 13 Ibid, p10.
- 14 Ibid, p10.
- 15 The term 'independent' is used to refer to a committee of officials who do not represent any particular party to the claim (other than the Commonwealth in general).
- 16 Op cit n3, p3.
- 17 Ibid, p3.
- 18 For other examples, see Ibid, p3.
- 19 *Damages for wrongful administrative action: a future remedy needed now*. Australian Journal of Administrative Law 2(3), May 1995, p147
- 20 [1989] 1 QB 1
- 21 Op cit n8, p2
- 22 The Commonwealth would not be expected to provide details which would disclose its position and arguments were a matter to be litigated, but should provide claimants (many of whom do not have the resources to obtain independent legal advice) with sufficient general information to allow them to make an informed decision about whether an offer of compensation is reasonable.