“Settling and mediating government litigation”

A paper by Mark Robinson SC to the Law Society of South Australia Forum 2025
On 14 February 2025 in Adelaide

This session will delve into topics such as:

- Ex Gratia Payments (or Act of Grace Schemes) (State and Federal);
- Waiver, postponement or deferral of debts under section 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth);
- The Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme);
- Mediating with Government – the traps!

These topics all come under the broad umbrella of mediating or settling government litigation.

The expression government litigation is intended to cover most matters in most state and federal tribunals as well as courts.

Ex Gratia and Act of Grace Schemes

Act of grace and ex gratia payments are described by Oscar I Roos and Yee-Fui Ng in the article ‘Act of Grace Payments and the Constitution’ (2024) 46(1) Sydney Law Review 55 in the following terms:

> “Act of grace payments are voluntary, highly discretionary ‘gifts of money’ made by the executive ‘out of grace’ in the absence of any legal duty to do so. No payment sets a precedent for future decisions, and each ‘responds to a particular case, not the generic claim’. They are akin to ex gratia payments, but the former are a ‘last resort’ concession to a specific person who has been unfairly disadvantaged by some government action, whereas the latter are governed by ‘guidelines and rules developed for a group of individuals suffering a particular class of losses’” (footnotes omitted)

The authors go on to say (at 80) that: “The potential problem for the states is that all of them bar Queensland either rely exclusively on an inherent executive power to make discretionary act of grace payments (Victoria, Tasmania and South Australia) or assert such a power in addition to their statutory arrangements (Western Australia and New South Wales).”

In South Australia

South Australia relies largely on inherent executive power to make discretionary act of grace payments. There is very little prescribed in legislation or in formal documents or decrees.

The Government of South Australia's Department of Treasury and Finance has issued a number of circulars under the authority of section 41 of the *Public Finance & Audit Act 1987* (SA)
Web: https://www.treasury.sa.gov.au/budget/treasurers-instructions

One formal decree is contained in the various SA Treasurer's Instruction series published by the SA Department of Treasury and Finance.

In Treasurer's Instruction 14 – *Ex Gratia Payments* (effective 6 July 2020) the Treasurer specifies the requirements for the approval of ex gratia payments by public authorities.

The instruction applies to all public authorities, as defined in Treasurer's Instruction 1 *Interpretation and Application* (which was issued under the *Public Finance and Audit Act 1987* (SA).

"Public authority" has the same meaning as in section 4 of the *Public Finance and Audit Act 1987* (SA) which includes government departments, Ministers, and any statutory authority that is an instrumentality of the Crown or where the accounts are audited by the Auditor-General.

The Instruction 14 is addressed to the Chief Executive of an "administrative unit" which is defined in Instruction 1 as "a government controlled entity, established or continuing in existence, under the *Public Sector Act 2009* (SA) or otherwise designated as an administrative unit by the Government".

Clauses 14.4 and 14.4A of Instruction 14 provide that before making an ex gratia payment, a Chief Executive of an administrative unit "shall" first obtain formal approvals from:

1 where the amount is $10,000 (inclusive of GST) or less - the responsible Minister;

2 where the amount is in excess of $10,000 (inclusive of GST) - the Treasurer;

3 where it is proposed that the Government intervene in a matter between two parties in the public interest - Cabinet.

Clause 14.4A provides that the agency shall obtain approval from the Attorney- General prior to making an ex gratia payment for the reimbursement (either in full or in part) of costs incurred associated with the engagement of a legal practitioner.

Clause 14.5 provides that before approvals are sought the matter should be referred to the SA Crown Solicitor where the Government might intervene between two parties in the public interest, or there may be further claims for similar payments, or there is complexity or uncertainty or a legal practitioner's costs are involved.

If the approvals under the Instruction are not sought, clause 14.6 provides that any ex gratia payment shall be funded from an administrative unit's funds operating receipts and no increase in appropriation to that administrative unit shall be made. That is the penalty.

South Australia has a history of establishing state-based redress schemes.

For example, it operated an ex gratia compensation scheme for survivors of child sexual abuse in state care. The South Australian Government established the ex gratia scheme for the benefit of victims of child sexual abuse while in state care following the 2008 report of the South Australian Children in State Care Commission of Inquiry (the Mullighan Inquiry).

In practice the SA Ombudsman may make recommendations of ex gratia payments in the report issued after an investigation made under the *Ombudsman Act 1972* (SA) esp section 25(2)(b).

Other arrangements for ex gratia payments in South Australia exist in relation to victims of crime (the Attorney-General). For example, if a prosecution fails but the victim can prove injury or financial loss. Land tax – there is ex gratia relief for affordable housing land tax; and payroll tax (RevenueSA offers a reduced payroll tax rate through ex gratia).

Also, the Government of South Australia established an $11 million Stolen Generations Reparations Scheme in 2015. A $6 million Individual Reparations Scheme provided ex-gratia payments to Aboriginal people who were eligible for reparations under the policy criteria of the scheme. In 2018, a payment of $20,000 was made to eligible applicants. Payment of an additional $10,000 to these applicants was also arranged.

A further $5 million was originally allocated to a Stolen Generations Community Reparations Fund. The Fund was established to recognise the grief, pain and loss experienced by Aboriginal communities, families and individuals and to also support a range of proposals that can assist in the healing process. Web: https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme

In New South Wales

There are two kinds of act of grace payments in NSW, statutory and non-statutory.

The statutory one is governed by the NSW Treasury Circular TC22-01 dated January 2022 titled Statutory Act of Grace Payments.

The statutory source of power for such payments is section 5.7 of the *Government Sector Finance Act 2018* (NSW) (GSF Act).

Section 5.7 provides in part:

> "(1) A Minister may, if satisfied that there are special circumstances or circumstances of a kind prescribed by the regulations, authorise an amount to be paid to a person on behalf of the State (an act of grace payment) under this section even though the payment is not—
> (a) otherwise authorised by or under law, or
> (b) required to meet an obligation.

> (2) An act of grace payment is subject to any terms and conditions that the Minister may decide to impose."

If any term or condition is breached by the recipient, the payment is recoverable as a debt (section 5.7(3)). The section also allows for the NSW Chief Commissioner of State Revenue to make an act of grace payment for matters relating to the *Taxation Administration Act 1996* (NSW) which may be recovered as if the payments were a tax debt (section 5.7(3A) and (3B) & (7)).

A Minister may delegate the function of making a statutory act of grace payments (section 5.7(4)) to:

(a) an accountable authority for a GSF agency (which is an agency listed in section 2.4 of the Act with the person responsible identified in section 2.7(2) of that Act). See also, the many more persons and agencies listed in the *Government Sector Finance Regulation 2018* (NSW), or

(b) any person employed in or by a Public Service agency if the agency is responsible to the Minister under an administrative arrangements order made for the purposes of section 50C of the *Constitution Act 1902* (NSW), or

(c) any other entity (or an entity of a kind) prescribed by the regulations.

The regulations provide for other delegation to two other groups:

1. any person employed in or by the NSW Health Service, or
2. any member of the NSW Police Force – regulation 16 of the *Government Sector Finance Regulation 2018* (NSW).

The GSF Act provides that act of grace payments are to be made using money that is otherwise lawfully available (section 5.6(5)).

It also provides that section 5.7 does not limit any power, privilege or right conferred on a Minister or any other person by another law to make payments as an act of grace (whether or not for or on behalf of the Crown or the State).

The NSW Treasury Circular TC22-01 provides that:

> "It is for the Minister, or Minister's delegate, to determine whether the particular circumstances before them are "special circumstances" which warrant the making of a Statutory Act of Grace Payment, having regard to the legal test for "special circumstances."

It does not state what the "legal test" is for special circumstances is.

It sets out three examples for guidance and notes they are not exhaustive:

- a person, or persons, have suffered financial or other detriment as a result of the workings of government, or

- a person, or persons, have suffered financial or other detriment as a result of significant natural, health, or other disasters requiring an emergency government response; and

- the State has no present legal obligation to compensate the person or persons for that detriment, but it is nonetheless morally justifiable for the State to make a payment in the circumstances.

This, of course, raises more questions than it answers.

It does open up many possibilities for claimants.

History is replete with examples. Not all of them may satisfy a "legal test".

The NSW Ombudsman's office would have a whole catalogue of them, mostly centered on a finding of maladministration.

The Circular goes on to state that when making a determination, a Minister or Minister's delegate should have regard to whether any likely legal liability arises from the workings of government that caused the financial or other detriment. The existence of such a liability may weigh against the making of a statutory act of grace payment.

This might be so. However, if the Minister is concerned about legal liability, the potential cost (both human and money) of any such litigation needs to be borne in mind. An act of grace might be significantly less expensive.

The Circular goes on to deal with how act of grace payments are to be internally recorded.

The Commonwealth

As with the situation in SA and NSW, ex gratia or act of grace payment can be made by the Australian Government if the decision maker considers it is appropriate because of special circumstances. These payments are discretionary. They are not an entitlement.

The Department of Finance advises that State matters should be directed to the State concerned. As for corporate Commonwealth entities or Commonwealth companies, an attempt to resolve the matter should be made with them first.
(Internet: https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/act-grace-payments)

The Department warns that the act of grace mechanism is generally an avenue of last resort. If you have other options available to address your situation, an act of grace payment may not be appropriate. Other options that may be available to pursue include:

- internal review through the non-corporate Commonwealth entity;
- the Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme);
- external review through the Administrative Appeals Tribunal, the Commonwealth Ombudsman or the Inspector-General of Taxation; or
- legal action through the Federal Circuit and Family Court of Australia or the Federal Court.

Section 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) sets out the Commonwealth government's statutory power for determining act of grace payments. It provides:

> (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. (my emphasis)

The situation is very similar to NSW. The expression "special circumstances" is not defined.

The *Public Governance, Performance and Accountability Rule 2014* (Cth) provides for some significant inputs for the act of grace scheme. In rule 24, it requires the Finance Minister to consider the report of an advisory committee before making certain authorisations (for example, waivers, set offs and act of grace payments) that involve amounts of money above $500,000.

The Finance Department has set out some examples of special circumstances. It says they should be specific to your situation and:

- a non-corporate Commonwealth entity has taken action, or failed to take action, and this has caused an unintended and inequitable result for you;

- Australian Government legislation or policy has had an unintended, anomalous, inequitable or otherwise unacceptable impact on you;

- the matter is not covered by legislation or specific policy, but the Australian Government intends to introduce such legislation or policy.

As in NSW and SA, the Commonwealth Ombudsman has countless files of other situations that involve a recommended ex gratia payment, usually involving maladministration.

Finance has set out forms and the application process for this on the internet - https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/application-process-act-grace-or-waiver-debt

In this process, you may have an adviser or a representative act for you. There are no time limits at all, for making the application or for the Commonwealth to decide them.

The decision will usually arrive with a statement of reasons.

The same web page advises that of the applicant is not happy with the result, he or she can complain to the Ombudsman or seek judicial review in the Federal Court of Australia or the Federal Circuit and Family Court of Australia on the basis of the constitutional writ jurisdiction (s 39B of the *Judiciary Act 1903* (Cth)) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

That last course would be very expensive, and it would expose the applicant to the other side's legal costs (which could be considerable).

In *Ashby v Commonwealth* (2022) 291 FCR 585 (Katzmann, Abraham, Goodman JJ), the appellant worked in Parliament House for the Speaker of the House of Representatives, Mr Peter Slipper MP (in 2011 and 2012). He commenced Federal Court proceedings against Mr Slipper in 2012 in which he alleged that Mr Slipper had sexually harassed him in the course of his employment and that Mr Slipper had misused parliamentary entitlements (the 2012 proceedings). He subsequently reached a settlement with Mr Slipper and he discontinued the 2012 proceedings.

As part of the settlement agreement, Mr Slipper agreed to pay the appellant $50,000 inclusive of costs. The appellant then applied to the Commonwealth for an act of grace payment (nearly 6 years later) in the amount of $4,537,000 pursuant to s 65 of the PGPA Act to cover the entirety of the legal costs he incurred in the 2012 proceedings.

By reason of a delegation in place, it fell to the Assistant Secretary of the Risk and Claims Branch, Procurement and Insurance Division of the Department of Finance to determine the

application. The monetary cap for that particular delegation was stated to be "*$50,000 per payment*". The delegate refused Mr Ashby's application.

The applicant appealed to the Federal Court in *Ashby v Commonwealth* (2021) 386 ALR 23; [2021] FCA 40 (Bromwich J). He challenged the legal validity of the act of grace decision based on legal arguments (especially about the scope and validity of the delegation) under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ss 5, 16). He also sought relief in the same proceedings under the *Fair Work Act 2009* (Cth) for a failed adverse action case.

Mr Ashby argued that the delegate was limited (by the instrument of delegation) to a maximum act of grace payment of $50,000. He said that since the delegate had the power to refuse all applications but was not authorised under the delegation to approve an application of more than $50,000, the delegation itself was beyond power. The primary judge and the appeal court each took a practical approach and held that the original application could have been dealt with by the Commonwealth in two stages. If the award was to be over the delegated limit, it could then be determined by a person who had a higher-level authority. The ultimate decision lay with the Minister. Mr Ashby lost the Federal Court case and the appeal to the Full Federal Court.

The Commonwealth's discretion to grant or refuse an act of grace application is broad and substantially unfettered.

The previous provision that existed before section 65 of the PGPA Act was section 33 of the *Financial Management and Accountability Act 1997* (Cth).

The new section is cast in substantially identical terms to the old section, including the reference to "special circumstances" which may authorise the making of a payment to a person: see: *Toomer v Slipper* [2001] FCA 981 at [8], [29]-[32] and [47], a decision which was followed and applied in *Croker v Minister for Finance* [2011] FCA 1188 and *Simeon v Minister for Finance* [2012] FCA 286.

There are many, many examples of ex gratia or act of grace payments. One of the most famous is the Midford Shirts case which was reported on 18 December 1992. See, the Commonwealth's Joint Committee of Public Accounts, Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts—The Paramount Case of a Failure of Customs, AGPS, Canberra, 1992. This was a stimulus to substantial reform of customs administration – See Lessons for public administration, August 2007, Commonwealth Ombudsman at page 22 at [10.5].

Midford Shirts was a well-known importer and manufacturer of shirts in Australia. Midford was prosecuted for alleged misuse of its import quota. Importation of its shirts from overseas was banned by Customs officers (many times). The criminal case that followed cost the Commonwealth and Midford about $8 million each. The DPP withdrew the charges. The Magistrate awarded $365,000 in legal costs to Midford. But Midford's business was ruined. Its shirts had been seized. The Ombudsman became involved in the inquiry. The Joint Committee recommended that Midford be paid its unrecovered material and legal costs. In total, damages of $27 million were paid by the Commonwealth to Midford and others.

Waiver of Debt

South Australia

In the SA's Treasurer's Instruction 5 – *Debt Recovery and Write Offs* (effective 21 January 2015) the Treasurer deals with these issues in a circular that applies to all public authorities in SA. It is meant to be read with the relevant enabling legislation, such as the *Taxation Administration Act 1996* (SA), *Public Finance and Audit Act 1987* (SA) and the *Limitation of Action Act 1936* (SA).

The objectives of the Instruction are to require each public authority to establish and implement policies for the management of debt recovery that aim to recover all amounts owing to the authority and to prescribe the circumstances under which a debt may be written off or waived by a public authority.

Under the Instruction (clause 5.13), debts may be written off when it is first approved by:

- the Treasurer, where the debt owed is equal to or greater than $50,000 (GST inclusive)
- the Treasurer or the Chief Executive, where the debt owed is less than $50,000 (GST inclusive);
- an employee of the administrative unit to whom the Chief Executive has delegated his/her authority (for any amount up to $50,000, GST inclusive) where the debt is within the limit of the authority delegated.

As to waiver of debts, clause 5.22 provides these must only occur under exceptional circumstances and it must be approved by the Treasurer (clause 5.23).

All debts written off or waived must be kept in a detailed register (clause 5.25).

New South Wales

The NSW Department of Revenue maintains a Hardship Policy - https://www.revenue.nsw.gov.au/help-centre/resources-library/hardship-policy

The policy applies if one is experiencing economic hardship, including as a result of domestic violence or when you have been affected by a natural disaster. This policy also applies if you are considered vulnerable due to a mental illness, an intellectual disability or cognitive impairment, if you are homeless, or if you have a serious addiction to drugs, alcohol or volatile substances.

The debt can be written off or a payment arrangement may be made.

Adverse decisions may be appealed to the Hardship Review Board.

Commonwealth

Waiver of debt at the Commonwealth level is governed by section 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act) which provides in part:

> "s 63(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.".

It can be waived even it the debt is not yet owing (s 63(4)) and it can be unconditional or on condition of some payments (s 63(3)).

The *Public Governance, Performance and Accountability Rule 2014* (Cth) has some relevant provisions, especially at rule 24 and the limit of $500,000.

The CDDS Scheme

The Commonwealth Scheme for Compensation for Detriment caused by Defective Administration (CDDA Scheme) - Internet at: https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/scheme-compensation-detriment-caused-defective-administration-cdda-scheme

It is a Commonwealth scheme covering a number topics, all to do with the adverse consequences of defective government.

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 provisions.

While decisions are made at the discretion of the decision-maker, payments are approved on the basis that there is a moral, rather than legal obligation to the person or body concerned.

There are no time limits and no particular forms. Appendix A sets out a suggested template claim form.

The full version of the Scheme is titled "Finance Circular No. 2006/05 To all agencies under the Financial Management and Accountability Act 1997 (Cth) Discretionary Compensation Mechanisms" it was last updated 17 April 2008.

It is 49 pages. Good luck finding the full copy (just email me).

It covers ex gratia or act of grace schemes and waiver of debts (at a time they were covered by sections 33and 34 of the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act)).

It also outlines the CDDA Scheme in considerable detail. It lists a number of audit reports and internal reviews that led to the creation of the scheme.

As to legal authority, the circular contends:

> "The legal authority for each of the mechanisms is:
>
> • The CDDA Scheme operates on the basis of authority provided to individual portfolio Ministers. CDDA payments are made in reliance on the executive power of the Commonwealth under section 61 of the *Constitution*.
> • The ability to authorise act of grace payments and waiver of debts is conferred on the Finance Minister under the FMA Act [now, the PGPA Act].
> • Ex gratia payments are made in reliance on the executive power of the Commonwealth under section 61 of the *Constitution*."

The circular summarises the CSSA Scheme in the following terms:

> "The CDDA Scheme allows Government portfolio Ministers and authorised officials in FMA (PGPA) agencies to compensate individuals or other bodies who have experienced losses caused by agencies' maladministration.
>
> The CDDA Scheme:
> • is a mechanism designed to cover losses due to an administrative failure, where there is no legal liability to compensate the person involved;
>
> • has specific criteria and limitations that apply to the payments;
>
> • is generally most relevant to agencies which have external clients; and
>
> • covers economic, non-economic and property losses."

While the act of grace and debt waiver provisions are based on the legislation, the provisions of the circular relating to ex gratia are not. They are much wider and more flexible. It is said that the aim of ex gratia payments is to allow 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. There is a flexible mechanism for this.

The circular has attachments A to D which provide information and guidance on the operation of the CDDA Scheme. They have been drafted in consultation with the Commonwealth Ombudsman and with independent legal advice.

The Scheme states that defective administration is defined as follows:

> • 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) a claimant, 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) a claimant that was, in all the circumstances, incorrect or ambiguous.

The Scheme Guideline (Attachment A at [77]) contends that 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 (the ADJR Act). However, they are potentially subject to judicial review by the Federal Court under subsection 39B(1) of the *Judiciary Act 1901* (Cth).

In my view, it is very likely that such decisions would be subject to the constitutional writ jurisdiction of the Federal Court and the High Court (as executive decisions).

The circular is compulsory reading in cases where a claim should be made.

I undertook a very difficult case in the Commonwealth Administrative Appeals Tribunal in 2004 (before it turned into the Administrative Review Tribunal in 2024).

The applicant was the victim of "bastardisation" while he was a student cadet at the Australian Defence Force Academy, and he sought (and obtained in the AAT) Commonwealth workers compensation for his long-term and shocking injuries – see - *Re "SRGGGG" and COMCARE (Department of Defence)* (2004) 80 ALD 778 (Senior Member M D Allen RFD, Members Dr J D Campbell and M A Griffin).

The Federal Court dismissed the Commonwealth's appeal in the matter - see - *Military Rehabilitation & Compensation Commission v SRGGGG* (2005) 215 ALR 459; (2005) 40 AAR 337; [2005] FCA 342 (Madgwick J).

The combination of the two cases left the applicant out of pocket in the sum of about $149,000 at the end (even though he was awarded costs for the Federal Court case).

The applicant invoked the CDDA Scheme and, after some initial discussions (concerning the complexity, the large volume of documents and the sensitivity) it was proposed by the Commonwealth that a mediation should be held in Canberra. The Commonwealth paid for the agreed mediator and for my fees for one day to attend. The matter was settled that day and the client was very happy with the result. A deed of confidentiality and release was signed.

It was all done under the CDDA Scheme. I was very impressed.

There are some constitutional law issues in all this, especially in the CDDA Scheme. They concern, for example, the scope and operation of section 61 of the Constitution (the executive power) and lawful appropriations.

In the book "Judicial Review of Administrative Action and Government Liability", 2021, 7th edition, Thomsons, Sydney by Professor Mark Aronson, Matthew Groves and Greg Weeks, the authors say, at page 397 at footnote 398:

> "Several schemes appear on the website of the Commonwealth Department of Finance. They range from act of grace payments, debt waivers, ex gratia payments, and payments made under the scheme for "Compensation for Detriment Caused by Defective Administration" (CDDA). CDDA covers several types of defective administration, including misrepresentations. In response to *Williams v Commonwealth* (2012) 248 CLR 156 [the chaplaincy services in State schools case], the government placed its spending powers (but not the criteria for spending) with regard to a large number of Executive schemes (including CDDA) onto the statute book: *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth). One of those was struck down in *Williams v Commonwealth [No 2]* (2014) 252 CLR 416 as being without power, but we submit that CDDA payments would fall within the incidental power of the departments or agencies to which they relate."

Mediating with Government

Having just described a successful mediation with the Commonwealth, I should say that my default and overwhelming position on whether a client should mediate with government (State and Federal) is simply – Don't Do It.

I say this because there a number of traps you as a practitioner or your client can fall into (sometimes headfirst).

In summary, they include:

1. The government representative does not have authority to settle the matter (or does not give a toss!);
2. The government representative has a limit on which he or she can settle and that limit is very (way too) low for the plaintiff/applicant to contemplate;

3 The government representative only has instructions to settle on a particular basis, and not on the basis the plaintiff/applicant contends for;
4 The government representative gets nervous and either spends the rest of the day on the phone or cancels the mediation and leaves;
5 An agreement is reached, but the government representative does not want to sign the settlement deed (which you have prepared and is ready to sign); and
6 Sometimes he or she simply does not wish to be the one to decide and to have to explain the reasons for the settlement to superiors, an audit committee or a Parliamentary inquiry.

Each of these things have happened to me or my clients during mediations with government.

To say the very least, they are very frustrating events.

While they do happen in say, commercial mediations, they only rarely happen.

Most of the matters can be addressed by seeking formal assurances from the government party before the mediation is conducted.

Some topics do not fit mediation well at all, such as terrorism and freedom of information.

Government conduct in litigation is governed by the model litigant rules.

In NSW, even a statutory corporation representing the Crown is bound by the model litigant principle, see, eg, *Mahenthirarasa v State Rail Authority (NSW) (No 2)* (2008) 72 NSWLR 273; [2008] NSWCA 201 at [16] – [20].

The current position is set out on the Internet at https://dcj.nsw.gov.au/legal-and-justice/strategies-and-plans/information-for-government-lawyers/litigation-involving-government-agencies.html

There is a NSW Premier's Memorandum 97-26 on the subject, that is explained in the policy titled "Litigation involving Government Agencies - The Guidelines"

The Guidelines are found at Internet- https://arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities

The Crown and all of its emanations and its legal representatives are required both by common law and by the Direction from the Premier's office to act as a "model litigant" in all dealings in civil litigation generally in courts and tribunals in New South Wales.

The aims of the Premier's guidelines are stated in the following terms:

- In the prosecution of one Government authority by another the cost to the public purse is kept to a minimum;
- Only appropriate prosecution action is taken;

- Inappropriate or irrelevant defences are not pleaded;
- The Court's time spent in resolving prosecutions or disputes involving Government authorities is kept to a minimum;
- That responsible Ministers are kept informed of pending prosecutions and possible disputes between Government authorities; and
- Government authorities act, so far as is possible, as model litigants in proceedings before the Court.

In addition to *Mahenthirarasa*, above, there are a number of cases that explain the model litigant principle – for example, *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)* [1973] 2 NSWLR 366 at 383 (per Mahoney J); *Melbourne Steamship Company Ltd v Moorehead* (1912) 15 CLR 333; [1912] HCA 69 at 342 (per Griffiths CJ); *Yong v Minister for Immigration & Multicultural Affairs* (1997) 75 FCR 155; 144 ALR 695 at 166E (Beaumont, Burchett and Goldberg JJ); and *Scott v Handley* (1999) 58 ALD 373; [1999] FCA 404 (Spender, Finn and Weinberg JJ). See also Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537; 41 LGRA 116 (Mahoney JA); *Department of Ageing, Disability and Home Care v Lambert* (2009) 74 NSWLR 523; [2009] NSWCA 102 at [96] (per Basten JA).

For the Commonwealth, the model litigant principles are to be found in the Legal Service Directions issued by the Attorney-General issued under s 55ZF of the *Judiciary Act 1903* (Cth). The Legal Services Directions 2017 are a detailed set of binding rules issued by the Attorney-General about the performance of Commonwealth legal work.

They are published on the Federal Register of Legislation. See also Internet https://www.ag.gov.au/legal-system/office-legal-services-coordination/legal-services-directions-and-guidance-notes

See also: Litigation involving the Commonwealth at Internet https://www.ag.gov.au/legal-system/publications/litigation-involving-commonwealth

Some Notable Cases – Settled or Otherwise

Cornelia Rau

See - M Palmer, *Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005) Report to the Australian Government Minister for Immigration and Multicultural Affairs. See also Community Services Ministers' Advisory Council, Submission PR 47, 28 July 2006.

Ms Rau was apprehended by police in Queensland in March 2004. At that time she identified herself as a German tourist and gave a number of names which were variants of Anna Sue Broetmeyer and Anna Sue Schmidt. She also gave conflicting accounts of her date of birth, her origins in Germany and her activities in Australia. In an effort to establish her identity Queensland State police contacted DIMA, who found no record of her, and instructed the police to hold her in custody as a suspected unlawful non-citizen. The Inquiry found this action to be

reasonable, subject to the qualification that her status needed to be established quickly, implying hours, or at most days, would be a reasonable period for such enquiries.

In April 2004 Ms Rau was transferred to Brisbane where, because there was no detention centre, she was accommodated in the general population in a women's prison. There she remained for six months. Between April and October sporadic enquiries were made by the Department of Immigration (DIMA) to identify her, including attempts to secure her a German passport. In August she was psychiatrically assessed as not being mentally ill. On 11 August (while still in immigration detention in a Brisbane prison) she was reported missing by her family, which started independent police enquiries.

In October 2004 Ms Rau was transferred to an immigration detention centre (called Baxter) near Adelaide, presumably to allow for her administrative detention outside the prison system. She was again diagnosed as not having a mental illness, but rather centre staff assessed her as having a personality disorder and exhibiting 'attention seeking' behaviour. In November 2004 attempts were made to have Ms Rau further assessed in a psychiatric unit but an administrative mix-up incorrectly removed her from the waiting list. On 24 November, some eight months after her initial detention, a case-manager in Baxter Immigration Detention Centre raised the view that Ms Rau might be an Australian citizen.

In January 2005, the German Consulate notified DIMA that despite intense efforts, they could not identify Ms Rau as a German citizen. After speaking with her, the German Consul advised DIMA that Ms Rau's grasp of German was 'childlike'. The same month newspapers published a story about Ms Rau titled 'mystery woman held at Baxter could be ill'. On 3 February 2005 Ms Rau's family became aware of the story and contacted NSW police who contacted DIMA. Ms Rau was released from detention on 4 February and transferred to a mental hospital.
The Palmer inquiry found that while DIMA had acted reasonably in initially detaining Ms Rau, it was improper to continue her detention for 10 months. Palmer severely criticised DIMA management of this case, but his most scathing comments were aimed at the failure of corporate governance in the department. He found that DIMA failed one of the most vulnerable in the Australian community, and placed the blame squarely on the tone and culture set by executive leadership of the department: 'a strong government policy calls for strong executive leadership ... [the problems in DIMA] stem from a failure of executive leadership' which had allowed deep-seated cultural and attitudinal problems to develop in the department. He criticised DIMA leadership for allowing a culture to develop that was self-protective and defensive, and for encouraging a management approach with a 'predominant, and often sole, emphasis on the achievement of quantitative yardsticks rather than qualitative performance'.

The Palmer Report into the detention of Cornelia Rau exposed a number of problems with the department that, had they been isolated, may not have been disastrous to DIMA administration. While there were some damning findings that DIMA officers were exercising extraordinary powers without adequate training or supervision, much of the problem may have been left to internal correction of what could have been characterised as poor care and diligence.

Cornelia Rau reportedly agreed to accept $2.4 million in damages for 10 months of false imprisonment from the Commonwealth (Sydney Morning Herald, 19 February 2008, page 2; See

also the Research Brief dated 31 March 2005 by the Commonwealth's Department of Parliamentary Services titled "The detention of Cornelia Rau: legal issues") (If calculated, the daily rate for the 300 days Ms Rau spent in detention would be about $8,000 per day).

A French Tourist

In February 2005, media reports stated that the Commonwealth paid $25,000 compensation to a French tourist wrongly held in Sydney's Villawood detention centre for four days (Research Brief dated 31 March 2005 by the Commonwealth's Department of Parliamentary Services at page 22, ABC Radio transcript, AM, 15 February 2005). (If calculated, the daily rate for the 4 days would be about $6,250 per day.)

Vivian Solon - Vivian Alvarez

There were various media reports about Ms Vivian Solon, the disabled Australian woman, an Australian citizen, who was found after falling into a deep drain in Lismore and taken to hospital where she was subsequently admitted as an involuntary psychiatric patient. She had also sustained spinal injuries that limited movement in her arms and legs. The matter was reported to The Department of Immigration by a social worker who thought Ms Alvarez might be an illegal immigrant. The Department interviewed Ms Alvarez in May and, without further investigation, presumed her not to be lawfully in Australia (an unlawful non-citizen). She was wrongly deported to the Philippines and left there for four years. Even after the Department realized its mistake, they left her there in the Philippines. The matter of compensation was mediated by Sir Anthony Mason AC. The matter was settled for an undisclosed sum. However, her lawyers made it well known that they were seeking damages in the order of $10 million (see, for example, "Settlement Here for Deported Solon", 6 December 2006, www.lawyersweekly.com.au).

Brittney Higgins

In about 2021, the Commonwealth agreed to pay $2.4 million under a settlement with Brittany Higgins that included $1.48 million for lost earning capacity – See https://www.smh.com.au/national/nsw/details-of-brittany-higgins-2-4-million-settlement-with-commonwealth-revealed-20231207-p5epyx.html

She had raised a range of potential legal claims that might be available to her "against the Commonwealth, Mr Lehrmann, [her former bosses] Senator [Linda] Reynolds, Senator Michaelia] Cash, the Commonwealth … and the Liberal Party of Australia".

Her claim was settled without any admission of liability by the Commonwealth.

Lindy Chamberlain

Lindy Chamberlain received $1.3 million in compensation from the Australian government in 1992 for her wrongful conviction. She also received $396,000 for legal costs and $19,000 for her family car, which was destroyed during forensic investigations. See - https://en.wikipedia.org/wiki/Lindy_Chamberlain-

Creighton#:~:text=She%20and%20her%20husband%20Michael,Chamberlain%20%241.3%20million%20in%20compensation.
And
https://famous-trials.com/dingo

Kathleen Folbigg

Is currently seeking compensation for 20 years in prison.

Thank You

Some Sources

Waiver of Debt – Department of Finance
https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/waiver-debt

CDDA Scheme – Department of Finance
https://www.finance.gov.au/cdda-scheme

Act of Grace Payments-Department of Finance
https://www.finance.gov.au/individuals/act-grace-payments-waiver-debts-commonwealth-compensation-detriment-caused-defective-administration-cdda/act-grace-payments

RMG 409
https://www.finance.gov.au/publications/resource-management-guides/scheme-compensation-detriment-caused-defective-administration-rmg-409