



FINANCIAL MANAGEMENT ACT 1996 - EXPLAINED
PART 10 – MISCELLANEOUS

March 2007

CONTENTS

Miscellaneous	3
Section 130 Act of grace payments	3
Section 131 Waiver of debts etc	7
Section 132 Payments in relation to deceased estates	10
Section 133 Guideline-making power	12
Section 134 Regulation-making power.....	13
Appendices.....	15
Appendix A: Act of grace payment	16
Appendix B: Instrument of Waiver.....	17

Miscellaneous

Section 130 Act of grace payments

- (1) If the Treasurer considers it appropriate to do so because of special circumstances, the Treasurer may authorise the payment by a department of an amount to a person (the *payee*) although the payment of that amount (the *relevant amount*) would not otherwise be authorised by law or required to meet a legal liability.
- (2) The authorisation may provide for the relevant amount to be paid by-
 - (a) more than 1 instalment and on the dates specified in the authorisation; or
 - (b) periodical payments of an amount, and for the period, specified in the authorisation.
- (3) An authorisation may be expressed to be subject to conditions to be complied with by the payee.
- (4) If a condition is contravened, the Treasurer may by written notice addressed to the last-known address of the payee require the payee, within 30 days of receipt of the notice, to pay an amount equal to all or part of the relevant amount.
- (5) If the payee does not pay the amount specified in the notice under subsection (4), the amount may be recovered by the Territory as a debt.
- (6) If the payment of an amount by a department is authorised under this section, the Treasurer must—
 - (a) direct that the amount be paid from an appropriate appropriation for the department specified by the Treasurer; or
 - (b) authorise payment of the amount under section 18; or
 - (c) authorise payment of the amount out of the public money of the Territory.
- (7) The public money of the Territory is appropriated for subsection (6) (c).

- (8) A payment made by a department under this section must be reported in notes to the financial statements of the department that relate to the financial year when the payment was made.
- (9) The notes must indicate in relation to each payment under this section the amount and grounds for the payment.
- (10) The notes relating to a payment under this section must not disclose the identity of the payee unless disclosure was agreed to by the payee as a condition of authorising the payment.

Explanatory Note:

Section 130(1)

Act of grace payments are a means of providing equitable remedies to persons who may have been unfairly disadvantaged by the Government but have no legal claim against it. An act of grace payment is intended to be a special ‘one-off’ payment.

In practice

These payments are only to be used as a last resort, when all other avenues of redress are exhausted.

The Treasurer may authorise the act of grace payment by an agency only where the agency is a department under the FMA. ‘Departments’ are defined in subsection 3 of the FMA as ‘administrative units’. Agencies should refer to the current Administrative Arrangement Orders (AAO) to see if they are included in this definition. A department may also be defined in the Financial Management (Departments) Guidelines 2006¹. If an agency is not included in either definition, then section 130 does not apply. Note that agencies that do not satisfy the definition of ‘department’ for FMA purposes, such as territory authorities, have their own enacting legislation. The agency will need to ascertain whether the agency’s act includes a section that provides it with sufficient authority to make an act of grace, or similar payment.

¹ FMA Guidelines are available on the ACT’s Legislation website at <http://www.legislation.act.gov.au>

Act of grace payments are approved by the Treasurer or delegate where the Treasurer or delegate considers it appropriate to do so because of special circumstances. The Treasurer or delegate uses their discretion to approve each act of grace request on a case-by-case basis. Generally, the conditions under which act of grace claims are determined can broadly be characterised as those where the Territory considers it has a moral obligation, as opposed to a legal obligation, to provide redress.

Act of grace payments cannot be made unless:

- there are special circumstances that warrant such a payment by the Treasurer or their delegate; and
- the payment is not otherwise authorised by law; or
- the payment is not required to meet a legal liability of the Government.

Section 130(2)

The authorisation for the act of grace payment may allow the payment to be made by more than one instalment, or in the form of periodical payments. The amount of the payment(s) and timing of the payment(s) must be specified in the authorisation.

Section 130(3)

An act of grace payment may be subject to certain conditions being met, for example the payee may be required to sign an indemnification releasing the Government from any liability. Any conditions must be included in the authority signed by the Treasurer or delegate.

Section 130(4) and (5)

If a condition defined under section 130(3) is breached the Treasurer may demand all or part payment back from the payee. Should a breach occur, the Territory may recover the payment as a debt.

Section 130(6)

The Treasurer must identify the appropriation out of which the payment is to be paid when authorising an act of grace payment. The Treasurer has 3 options:

- *subsection 130(6)(a)* - a department's existing appropriation if the claim falls within the operational responsibility of the agency and therefore should be met within the department's budget; or

- *subsection 130(6)(b)* - section 18 of the FMA if the claim meets the criteria of being urgent, unforeseen and requiring payment within the financial year concerned. This option requires a separate instrument under FMA section 18 Treasurer's Advance to be prepared and authorised; or
- *subsection 130(6)(c)* - A payment from public money under this paragraph may be required where it is recommended that Territory revenues be refunded due to exceptional circumstances. In this instance, the refund cannot be facilitated through an existing appropriation and section 130(7) creates an appropriation for the payment.

Section 130(7)

Subsection 130(7) provides a standing appropriation for payment under paragraph 130(6)(c). A standing appropriation creates an appropriation outside the Appropriation Act processes for a particular purpose and is usually extraordinary in nature.

Sections 130(8), (9) and (10)

The above sections detail the reporting requirements in annual financial statements for act of grace payments. They are:

- *section 130(8)* - agencies are required to ensure that all grace payments made by them are reported in the notes to their annual financial statements for the relevant year;
- *section 130(9)* - the notes to the annual financial statements must include the amount and the reason for each act of grace payment made; and
- *section 130(10)* - the notes to the annual financial statements must not disclose the identity of the payee, unless disclosure was agreed to by the payee as a condition of payment.

Where agencies have act of grace payments the following is an example of a note that may be used.²

Payments pursuant to authorisations given under Section 130 of the *Financial Management Act 1996* were:

	200X	200Y
Amount	\$xxx	\$xxx
Number of Act of Grace Payments	x	x

The act of grace payments relate to [*insert reason, for example, redressing anomalous circumstances suffered by applicant*].

² Model Financial Statements for ACT Government Departments 2005-06 page 50

In practice

All act of grace payments must be requested through the Department of Treasury. After reviewing an agency request for an act of grace payment, Treasury will prepare an instrument for the Treasurer's (or delegate's) signature. (See [Appendix A](#)). Senior officers of Treasury hold limited delegations.

Section 131 Waiver of debts etc

- (1) The Treasurer may, in writing, on behalf of the Territory—
 - (a) waive the Territory's right to payment of an amount payable to the Territory; or
 - (b) postpone any right of the Territory to be paid a debt in priority to another debt; or
 - (c) allow the payment by instalments of an amount payable to the Territory; or
 - (d) defer the time for payment of an amount payable to the Territory.
- (2) A waiver relating to an amount payable to the Territory by a person may be expressed to be subject to a condition that the person agrees to pay an amount to the Territory in circumstances specified in the waiver.
- (3) A waiver relating to an amount payable to the Territory must be reported in the notes to the financial statements of the relevant department that relate to the year in which the right to payment was waived.

Explanatory Note:

Section 131 allows the Treasurer or delegate, to waive the Territory's right to payment of an amount payable to the Territory, or to allow the payment to be made in instalments, or to defer the time of payment.

A waiver occurs when one party can legally demand the strict performance of a contract, for example, payment of an amount, but relinquishes that right in full or in

part.³ A waiver permanently prohibits the future recovery of a debt. That is, once a debt has been waived, recovery of the debt cannot be pursued at a later date.

A waiver is different from a write-off, as a write-off does not extinguish the legal right of the Territory to collect a debt. ‘Write-off’ action is the accounting process to remove the debt from the books. Writing off a debt involves a decision as to whether the cost of debt recovery outweighs the benefit of receiving the outstanding monies. For example, an uncollectable library book fine would generally be written off, as the amount involved would generally be small in nature and clearly outweighs the cost of pursuing the outstanding debt. However, unless there are additional considerations, a waiver would be unnecessary, as it would not be important to relinquish the legal right to recover the debt. Write-off does not preclude recovery of the debt at a later date.

Conversely, a waiver should be considered only when it is desirable to relinquish the legal right to recover the debt. This may be the case when a waiver would correct an inequitable situation causing a debt, or the creditor has financial reasons for requiring the legal extinguishment of the debt, for example, observing debt covenant provisions. Waivers would not generally be required for small amounts owing.

Specifically:

Section 131(1)(a) enables the Treasurer to completely waive the Territory’s right to payment of an amount payable.

Section 131(1)(b) enables the Treasurer to postpone the timing of the Territory’s right to payment of an amount payable in priority to another debt.

Section 131 (1)(c) allows the Treasurer to accept payment by instalments. This enables the payment due to the Territory to still be made, however, the payment is made in small amounts, over a specified period of time.

Section 131(1)(d) enables the Treasurer to defer the timing of the Territory’s right to payment of an amount payable.

³ *Financial Delegations Better Practice Guideline February 2004* page 18

Section 131(2)

This section provides that a waiver may be subject to certain conditions being met, for example, implementing six monthly reviews to determine an individual’s capacity to repay the debt.

Section 131(3)

Agencies are required to ensure that the details of the right to payment for amounts that are waived are reported in the notes to their annual financial statements for the relevant year. An example of the note follows⁴:

The waivers listed below have occurred during the reporting period for ‘Example Department’.

	No.	200X \$’000	No.	200Y \$’000
Waivers				
Waiver X	x	xxx	x	xxx
Waiver Y	x	<u>xxx</u>	x	<u>xxx</u>
Total Waivers	x	<u>xxx</u>	x	<u>xxx</u>

In practice

Unless a department has been given specific delegations under section 131, all waivers must be requested through the Department of Treasury. [Appendix B](#) provides an example of a waiver instrument. The Treasurer may delegate limited waiver powers to chief executives who may then sub-delegate to other officers in the department.

Currently, limited delegations have been given to ACT Treasury, Housing ACT, Department of Disability, Housing and Community Services, Department of Justice and Community Safety and Department of Territory and Municipal Services.

⁴Model Financial Statements for ACT Government Departments 2005-06 page 49

Section 132 Payments in relation to deceased estates

- (1) If, at the time of a person's death (whether before or after the commencement of this section), the Territory owed an amount to the person, the Treasurer may pay that amount to the person who the Treasurer considers should receive the payment.
- (2) In deciding who should be paid, the Treasurer must have regard to—
 - (a) the provisions of any will of the deceased person that identify the persons entitled to property under the will; and
 - (b) the law relating to the disposition of the property of deceased people.
- (3) Before making a payment to a person, the Treasurer may require the person to produce any documents and other evidence relating to—
 - (a) the disposition of the deceased person's estate; or
 - (b) the family of the deceased person and any other persons apparently entitled to share in the estate of the deceased person.
- (4) Subject to subsection (3), the Treasurer may make the payment without requiring the production of probate of the will, or letters of administration of the estate, of the deceased person.
- (5) If a payment is made in relation to an amount owing to a deceased person, the Territory is discharged from any further liability in relation to that amount.
- (6) This section does not relieve the recipient of a payment from liability to deal with the money in accordance with law.

Explanatory Note:

Section 132(1)

This section allows the Treasurer to make certain payments in respect of a deceased estate in instances where the Territory owes an amount of money to a deceased person.

If the Territory owes money, for example wages, to someone who dies, the Territory cannot legally pay the money to anyone else. However, this section allows the Treasurer to determine to whom the money should be paid.

Section 132(2)

In making the determination as to who should receive the deceased persons money, the Treasurer is required to take into account the deceased person's will and any law that relates to the deceased person's property.

Section 132(3)

This section enables the Treasurer to request the person to whom the payment may be made, to produce evidence relating to the nature of the deceased's estate or any other persons entitled to share in the deceased's estate. This allows the Treasurer access to documents that may assist in the determination of legal entitlements.

Section 132(4)

In circumstances where the Treasurer has requested evidence under section 132(3) the Treasurer can proceed in making the payment without sighting the probate of the will or letters of administration of the estate of the deceased person.

Section 132(5)

This section provides that once the payment, in relation to an amount owing to a deceased person is made, the effect of the payment is to extinguish the Territory's liability in relation to that amount. That is, no one else can claim that right from the Territory.

Section 132(6)

This section provides that the person receiving the payment must deal with the money by adhering to the law.

Section 133 Guideline-making power

- (1) The Treasurer may, in writing, make financial management guidelines for this Act.
- (2) A financial management guideline is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act*.

Explanatory Note:

The Treasurer may issue Financial Management Guidelines (FMGs) to prescribe various matters required or permitted by the FMA, or necessary or convenient for the administration of the FMA.⁵ The guidelines impose certain requirements on agencies and Chief Executives and they prescribe more detail than is considered appropriate to include in the FMA. FMGs have the force of law.

For example, as the form of financial statements and reports are subject to constant revision and refinement by the accounting profession, it is more practicable to use the Treasurer's Financial Management Guidelines rather than the FMA itself to articulate and implement such evolving changes. The guidelines are therefore the vehicle used for specifying the form and list of names of all relevant budget documentation.⁶

In particular, the current FMGs set out the requirements for:

- financial statements for the Territory budgets, department budgets, public trading enterprise budgets, and pre-election budget update;
- statements of intent for Territory authorities;
- financial statements for budget review – general government sector;
- annual financial statements of the Territory, departments, and Territory authorities;
- periodic financial statements of the Territory;
- period for provision of financial statements to the Auditor-General;
- public liability insurance for use of Territory land and premises;
- the meaning of *urgent expenditure* in section 18 'Treasurer's advance';

⁵ *Financial Management Amendment Bill 2000 (No 2) Explanatory Memorandum* page 2

⁶ *Financial Management Amendment Bill 2001 (No. 3), Explanatory Memorandum*, page 3

- prescribed investments, use of derivatives, and investment plans;
- authorised Territory Authorities;
- engagement of investment fund managers; and
- administrative units prescribed as departments.

Section 134 Regulation-making power

The Executive may make regulations for this Act.

Note Regulations must be notified, and presented to the Legislative Assembly, under the *Legislation Act*.

Explanatory Note:

Section 134 allows the Executive to make regulations for the purposes of the FMA. The members of the Executive are the Chief Minister and all other Ministers appointed by the Chief Minister.⁷ Regulations have the force of law.

⁷*Australian Capital Territory (Self-Government) Act 1988* Section 39

Appendices



Financial Management Act 1996
Act of Grace Payment under Section 130

Pursuant to section 130 of the *Financial Management Act 1996*, I hereby approve an act of grace payment by the Department of X to Mr John Citizen, for the amount of \$x,xxx.

The funds are to be made available from the Department of X appropriation for outputs.

This Instrument is bound by the following condition.

Mr John Citizen is to sign an indemnification releasing the Government from any liability.

Treasurer [*or Delegate*]

Date:



Financial Management Act 1996 Instrument of Waiver under Section 131

Pursuant to section 131 of the *Financial Management Act 1996*, I, [*name of delegate, title of delegate, delegate of*] the Treasurer do hereby authorise under section 131(1)(c) of the *Financial Management Act 1996* the repayment by [Mr John Citizen] of [\$xx,xxx] owing to the Territory in fortnightly instalments commencing at [\$xx per fortnight]. Under section 131(2), this authority is subject to the following condition:

- that six monthly reviews be undertaken by one or more officers of the Department of X, or equivalent Administrative Unit, to determine Mr Citizen's capacity to repay at a greater rate as provided by his circumstances as the amount owing to the Territory is repaid.

Treasurer [*or Delegate*]

Date: