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PARLIAMENT OF TASMANIA

# **AUDITOR-GENERAL SPECIAL REPORT**

## **EX-GRATIA PAYMENT TO THE FORMER GOVERNOR MR R W BUTLER AC**

### **August 2004**

*Presented to both Houses of Parliament in accordance with the  
provisions of Section 57 of the Financial Management and Audit Act  
1990*

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24 August 2004

President  
Legislative Council  
HOBART

Speaker  
House of Assembly  
HOBART

Dear Mr President  
Dear Mr Speaker

**SPECIAL REPORT  
EX-GRATIA PAYMENT TO THE FORMER GOVERNOR  
MR R W BUTLER AC**

This report has been prepared consequent to an examination conducted under section 44 of the *Financial Management and Audit Act 1990*, for submission to Parliament under the provisions of section 57 of the Act.

This examination was in response to a request from the Leader of the Opposition for me to comment to him on various matters relating to an ex-gratia payment to the former Governor, Mr R W Butler AC.

Yours sincerely

A handwritten signature in black ink, appearing to read 'H M Blake', with a long horizontal flourish extending to the right.

H M Blake  
**AUDITOR-GENERAL**



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## **INTRODUCTION**

On 9 August 2004 the Premier of Tasmania entered into a Deed of Release with Mr Butler which, amongst other matters, recorded the resignation by Mr Butler of his Commission as the Governor of Tasmania and an ex-gratia payment of \$650,000 to him.

On 12 August 2004 Mr Rene Hidding, MHA, Leader of the Opposition wrote to me seeking my advice on various matters connected with the ex-gratia payment of \$650,000. The fact that Mr Hidding had decided to contact me was already public information. I decided to:

- Research the matters raised; and
- Provide a written response in the form of a report to the Parliament.

## **MANDATE**

I am not obliged to investigate matters referred to me by the Leader of the Opposition. However, under the provisions of section 44(a) of the *Financial Management and Audit Act 1990* the Auditor-General may:

“at any time conduct any investigation that the Auditor-General considers necessary concerning any matter relating to the accounts of the Treasurer ....”

## **HOW DID I APPROACH THIS MATTER?**

I approached my examination from the perspective of an “auditor”. As a result, in responding to the matters raised by the Leader of the Opposition, I set out to answer the following question:

“was the ex-gratia payment made by a person with appropriate authority following the receipt of legal advice from a suitable person and was the offer made consistent with that legal advice?”

## **WHAT DID I DO?**

I have limited my investigation to the matters raised by the Leader of the Opposition in his letter to me. The matters raised either specifically or inferred were:

- There was no requirement for the Premier, from both a Constitutional or legal point of view, to offer an ex-gratia payment to the former Governor, Richard Butler;
- My opinion was sought on the propriety of making an ex-gratia payment to a public official;

- My opinion was sought on the legality of making an ex-gratia payment to a public official; and
- My guidance was sought on what steps may be taken to have the ex-gratia payment rescinded before Mr Butler leaves the State.

In conducting this examination I have:

- reviewed what I regarded as relevant legislation;
- raised various issues with officers from the Department of Treasury and Finance and the Department of Premier and Cabinet and met with the Solicitor-General;
- read the Deed of Release;
- read the legal advice provided;
- read the Tasmanian Government Gazette dated 14 March 1986 which confirmed the Constitution of the Office of Governor; and
- read the Commission appointing Mr R W Butler AC to be Governor during Our Pleasure (with "Our" being Her Majesty the Queen and the Premier of Tasmania).

I have not interviewed the Premier nor Mr Butler.

## **WHAT DID I FIND?**

***There was no requirement for the Premier, from either a Constitutional or legal point of view, to offer an ex-gratia payment to the former Governor, Richard Butler.***

I concur with this statement.

Mr Butler resigned his commission as Governor of Tasmania. My reading of the documentation that I examined suggest to me that there was no Constitutional or legal requirement for the Premier to offer Mr Butler any ex-gratia payment.

The fact that the payment is "ex-gratia" confirms that there was no legal requirement for the payment to be made.

***My opinion was sought on the propriety of making an ex-gratia payment to a public official***

I have looked at this from two perspectives – firstly, was it reasonable for an ex-gratia payment to have been made and secondly, is the amount of \$650,000 reasonable?

*The propriety of making an ex-gratia payment*

In reviewing the propriety of making any ex-gratia payment, I gave consideration to a number of factors and I asked myself:

“what would a reasonable person expect in the circumstances”

and in considering this I gave regard, in no particular order, to:

- Are there any precedents for this – the only perhaps relevant precedent that I was able to independently confirm was what occurred on the resignation of Dr Hollingworth as Governor-General of Australia. I am advised that – “Dr Hollingworth: pension benefits are provided for in legislation and other benefits are consistent with existing conventions.”
- Whether or not ex-gratia or similar payments are reasonably common where employment contracts (or similar arrangements) with senior employees are broken whatever the circumstances. It is my experience that such payments, whilst not necessarily called for within the terms of employment, are not uncommon in either the public or private sectors;
- The circumstances under which the resignation was given;
- What were the individual’s expectations on accepting the position of Governor and, in particular, the length of time that the individual may have expected to remain in the position under normal circumstances bearing in mind that the Commission is at “Our Pleasure”, and what further income he may have earned in the position;
- Whether or not the person could reasonably anticipate gaining employment following resignation at a level commensurate with his current level of remuneration;
- From the perspective of the Government, having accepted the resignation, how should the departure be best managed – gracefully or not and what was in the best interests of all concerned including the people of Tasmania. In this regard, it is necessary to ask the further question – “what is it worth to the Government for the individual to leave quietly?”; and
- Is the question of offering an ex-gratia payment a matter of government policy, which, in my capacity as Auditor-General, I should not comment on?

There are no doubt other considerations that I could have had regard to and I have not asked the Premier which, if any or other, matters were assessed in arriving at the decision to make an ex-gratia payment to Mr Butler.

I also inquired as to the existence of guidelines or instructions governing the making of ex-gratia payments and whether or not ex-gratia payments are reasonably common. The responses to this were that:

- ex-gratia payments have been made in the past although generally for lesser amounts and for differing purposes;
- small ex-gratia payments can be made at the discretion of Heads of Agencies without reference to Ministers; and
- large ex-gratia payments require the advance approval of the Treasurer.

From my discussions with officials in the Department of Treasury and Finance I am advised of their intention to codify these arrangements.

### **CONCLUSION IN RELATION TO THE PROPRIETY OF MAKING AN EX-GRATIA PAYMENT**

Based on my examination, I have concluded that, in the circumstances, it is not unreasonable for an ex-gratia payment to have been made.

*Is the amount of \$650,000 reasonable?*

I was not asked by the Leader of the Opposition to comment on the quantum of the ex-gratia payment. However, having concluded that the offer of an ex-gratia payment was not unreasonable, I did give consideration to the quantum.

### **OTHER CONCLUSIONS**

I concluded that the reasonableness or unreasonableness of the quantum of \$650,000 is a matter for the Government to determine and to justify to the Parliament and to the people of Tasmania.

I support the removal of the confidentiality clause in the Deed of Release and that this payment was made public.

However, whilst this fact has been made known, public perceptions about the reasons for making the ex-gratia payment remain. This could to some extent be resolved, and public confidence maintained, if the Deed of Release is made public.

I am advised that the Premier concurs with the need to make the Deed of Release public and that he will do so.

### ***My opinion on the legality of making an ex-gratia payment to a public official***

In having regard to this matter I have reviewed relevant legislation and sought advice from appropriate persons. In addition, I have read the

legal advice provided and I am satisfied that the Premier received legal advice from an appropriate person and he had the necessary legal authority to make an ex-gratia payment.

***My guidance on what steps may be taken to have the ex-gratia payment rescinded before Mr Butler leaves the State.***

I have reviewed the Deed of Release entered into between Mr Butler and the Government. This is a binding agreement, which I do not believe can be rescinded without both parties agreeing to do so.

**MECHANISM UNDER WHICH TO EFFECT PAYMENT OF THE \$650,000**

I have inquired into how the payment of \$650,000 will be effected. The process to follow is:

- The Agency responsible for making the payment – Department of Premier and Cabinet (DPAC) or The Office of the Governor (The Office) must, in the first instance, pay this from an Output appropriated in the Appropriation Act;
- As this payment was unforeseen and will require a variation from the expenditure plans expressed in the Appropriation Act, the Treasurer may approve the provision of additional funding from the Treasurer's Reserve pursuant to section 11 of the *Public Account Act 1986*. The Minister responsible for the Agency making the payment must submit a request for extra funds using established budget management processes. In this case, the request will be made by the Minister responsible for DPAC or The Office – in both cases this is the Premier;
- All expenditure in excess of appropriation is tabled in Parliament in accordance with section 19 of the *Public Account Act 1986* on a quarterly basis. In addition, the total excess expenditure for a financial year is presented in the Treasurer's Annual Financial Report; and
- Section 11(7) of the *Public Account Act 1986* requires that all expenditure under S11 in any financial year must be submitted to, and approved by, the Parliament before the close of the following financial year.

**OVERALL CONCLUSION**

**Based on the objective that I set for myself when commencing this examination, I am satisfied that the Premier received legal advice from an appropriate person and he had the necessary legal authority to make an ex-gratia payment.**

**COMMENTS BY THE SECRETARIES OF PREMIER AND CABINET  
AND TREASURY AND FINANCE**

I offered both Secretaries the opportunity to include comment in this Report which they both declined.