Senate Finance and Public Administration References Committee

ANSWERS TO QUESTIONS ON NOTICE

Superannuation claims of former and current Australian Public Service employees

Thursday 5 May 2011, Canberra

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation

Senator: Xenophon

Type of question: Hansard, page number 36, 5 May 2011.

Date set by the committee for the return of answer: 1 June 2011.

Question:

Senator XENOPHON: How long did you take to investigate each matter?
Senator XENOPHON: Just leaving aside the benchmarks, it was not so much that benchmark per say, how much time, on average, was spent in assessing a claim? Is there an assessment made of that?
Senator XENOPHON: No, but, on notice, would you have records as to how much time was spent by the department, on average, in assessing these act of grace requests?

Answer:

The number of hours spent on assessing each act of grace claim is not recorded by the Department of Finance and Deregulation (Finance). However, Finance has collated the following data on the time taken to process an act of grace claim, from the time it is referred to Finance's Special Financial Claims Section to the date of the decision. In the case of Cornwell claims, the average was 314 days, which can then be broken down as follows.

Processing time for Cornwell-type claims	
Processing time (days)	Per cent of claims
0-90	9%
91-180	11%
181-365	39%
366-540	38%
540+	2%

While the processing of each claim varied, in general the following tasks constituted the bulk of the time: distribution of the questionnaire, the return of the questionnaire from the claimant, identification of the relevant (present day) agency, assessment of the material in the questionnaire and attached records and any other documents, consultation internally and with other departments, location and retrieval of personnel files, drafting of submissions and consideration of the matter by the decision maker.

While each claim varied and individual claims cannot be disclosed, there were some factors that tended to extend the claims processing time. Such factors include

- personnel files being unavailable or inaccessible;
- the claimant being employed by an organisation which was an approved authority e.g. ACTEA or TAA;
- the claimant being a widow or deceased estate;
- extended response time for questionnaires; and
- complex factual matters.

There were also some factors that in general shortened the processing time, including

- a claimant asserting a situation that was clearly non-meritorious;
- personnel files being available promptly; and
- prompt return of questionnaires.

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Question:

Senator XENOPHON: ....How much did the Cornwell case cost the Commonwealth in legal costs?

Answer:

The costs incurred by the Commonwealth in the *Cornwell* claim in the ACT Supreme Court, ACT Court of Appeal, the High Court and in assessing Mr Cornwell's damages and costs after the appeal totalled $1,111,631.80.

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Question:

Senator XENOPHON: Further to that, how much have you spent on ongoing litigation for these sorts of matters? What is the running tab for the—
Senator XENOPHON: It is at least in the hundreds of thousands?

Answer:

As at 25 May 2011, the total spent on on-going legal costs for both litigated and non-litigated claims is $5,176,674.48.

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Date set by the committee for the return of answer: 1 June 2011

Question:

Senator XENOPHON: ... When did the Commonwealth first know or first suspect that incorrect advice was being given to employees?
Senator XENOPHON: First know or suspect or was aware that there was a potential risk that incorrect advice was being given to employees?
Senator XENOPHON: On the answer if you could indicate the circumstances in which you first knew and, further to that, what policies or decisions were taken in terms of remedying the incorrect advice that had been given once there was knowledge or a concern that there was a risk that incorrect advice was given.

Answer:

To the best of our knowledge, the Department of Finance and Deregulation (Finance) first became aware of the possibility of incorrect advice when litigation by a former Commonwealth employee commenced in or about August 1998 when proceedings were commenced in the ACT Supreme Court.[1]

Since the Cornwell matter was heard by the High Court in 2007, Finance has received 728 claims from across 89 worksites. As part of our work, Finance has reviewed hundreds of personnel files and the records of employing Commonwealth agencies.

[1] The proceedings were discontinued in April 1999. The Commonwealth consented to the discontinuance and no order was made as to costs.

To date, the investigations completed by Finance and its legal advisors do not suggest that there was a systemic problem within the Commonwealth whereby incorrect information or advice was generally being provided to temporary employees about their eligibility to apply to join Commonwealth superannuation.

Rather, Finance is aware that there are some instances where incorrect information or advice was provided to temporary employees. However, the documents suggest that this was workplace and/or individual specific, and occurred mainly in the 1960s and 1970s.

Further documentary and witness evidence is available that demonstrates that the Commonwealth took reasonable steps to disseminate accurate information on superannuation entitlements.

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Thursday 5 May 2011, Canberra

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation (Finance)

Senator: Xenophon

Type of question: Hansard, page number 37, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Questions:

Senator XENOPHON: Where there appears to be a potential liability upon the Commonwealth, aren't there protocols if an agency looks as though it may have done something wrong, is responsible for a negligent misstatement, is there a protocol by which the department is notified so that you can make a risk assessment?
Senator XENOPHON: What was the process? There is a question as to how robust was the process in terms of notification and whether the triggers were early enough for the department to be aware of it. Further to that, when did the Commonwealth first take action in relation to the matters outlined and how was the action taken?

Answer:

Following the decision by the High Court on 20 April 2007 that Mr Cornwell's loss arose when he retired, Comcover, as the Commonwealth's self-managed insurance fund, became responsible for managing the claims for negligent misstatement in relation to Commonwealth superannuation.

The general process where the Commonwealth is alleged to have committed a compensable act is for the claimant to directly, or through their legal team, lodge a claim with that Department or agency. This can either be a formal legal claim (i.e. served through the court) or an informal letter of demand.

Since Comcover's inception in 1999, agencies have had the option of forwarding claims to Comcover to manage on their behalf. The process is well understood and there are guidelines on how to lodge a claim on the Comcover website. The policy requires agencies to notify Comcover of an incident that could lead to a claim being made against the Department or Agency as soon as reasonably practicable.

On 13 July 2007, the Department of Finance and Deregulation (Finance) sent a letter to all agencies covered by the *Financial Management and Accountability Act 1997* about the High Court Cornwell decision asking for their cooperation with the processing of potential claims. These agencies were also asked to pass information onto relevant portfolio bodies. Finance is confident that the process was robust and information regarding the ability to claim was disseminated widely. In addition, in April 2007, Finance established a website with Cornwell related information, which included details on how claims can be registered with Comcover.

All claims received have been and will be assessed on their merits in accordance with the *Legal Services Directions 2005*. Finance is required to act as a model litigant in the conduct of litigation and claims against the Commonwealth. In particular, this requires that the Commonwealth endeavor to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution (ADR) before initiating legal proceedings and by participating in ADR processes where appropriate. All claims settled, to date, have been though the use of ADR. ADR is defined as a process used to resolve a case through mechanisms other than judicial determination.

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Department/Agency: Department of Finance and Deregulation

Senator: Xenophon

Type of question: Hansard, page number 37, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator XENOPHON: I accept your answer, but has an inquiry been made as to whether those agencies in any way withheld information from employees, in any way concealed information from employees, or made any decisions not to publicise information about their potential risk in terms of superannuation requirements?
Senator XENOPHON: No, but has an inquiry been made on the part of the department as to whether any such actions took place?

Answer:

The Department of Finance and Deregulation (Finance) has not made any direct inquiry with Departments and Agencies as to whether they withheld information relating to superannuation entitlements from employees or in any way concealed such information.

The issue of deliberate concealment was considered by the ACT Supreme Court and later the High Court in the matter of *Cornwell*. The High Court found that the primary judge made no clear findings in relation to deliberate concealment, and certainly no findings that would support a finding of deliberate concealment.

Finance has received and assessed hundreds of personnel files and records of employing Commonwealth agencies. Our analysis is that there is no evidence of systemic misstatement or concealment across the Commonwealth.

Moreover, Finance has available a body of evidence demonstrating that the Commonwealth took reasonable steps to advise temporary employees of their eligibility to apply to join Commonwealth superannuation.

Senate Finance and Public Administration References Committee

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Thursday 5 May 2011, Canberra

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation

Senator: Bishop

Type of question: Hansard, page number 38, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator MARK BISHOP: ... Is this matter the subject of regular updates or briefings to the relevant Minister for Finance from time to time or is it just handled on an ad hoc basis?
Senator MARK BISHOP: I am not asking you for the detail of what you might advise the Minister for Finance from time to time. I am asking you whether, his office, when Mr Tanner was the minister, and her office, now that Senator Wong is the minister, is he or she the subject of regular briefings, or briefings at all, by finance on the progress of this matter?
Senator MARK BISHOP: ... Has the minister been regularly briefed on the detail and process of this matter, apart from in the way you just outlined?
Senator MARK BISHOP: If you could take on notice whether relevant ministers have been briefed regularly, how often they have been briefed and if you could give me a summary of the briefing that has been provided to them, consistent with the policy rules that apply.

Answer:

A number of Ministerial briefings were prepared during the Cornwell litigation and immediately following the High Court decision. Subsequent to this, routine quarterly briefings were submitted to the Minister on Comcover's significant claims which included a short Cornwell summary. Briefings were also provided on specific issues as required.

All claims for discretionary compensation (including all *Cornwell*-type act of grace claims) are the subject of high level, weekly updates to the Department of Finance and Deregulation executive, the office of the Minister for Finance and Deregulation and the office of the Special Minister of State.

Senate Finance and Public Administration References Committee

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Department/Agency: Department of Finance and Deregulation

Senator: Bishop

Type of question: Hansard, page number 38, 5 May 2011.

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator MARK BISHOP: ..... When you analyse each of the tables, as I have just done very briefly, so I am speaking briefly here and generally, something like 50 to 70 per cent of all temporary employees, according to your documentation, in 1950, 1960, 1970, 1980 and 1990 were employed in only six departments. They were: defence and its predecessors, army and air, but defence; veterans' affairs; treasury; foreign affairs and trade; social security; and what was latterly known as admin services, but supply. Only six departments covered 50 to 70 per cent of all temporary employees. Would you consider writing to each of those six departments, asking them to carry out an investigation as to whether their line managers at the relevant time issued any memos, notes, instructions, whatever the words are, to temporary employees employed in that department at that time, as to their rights or otherwise to join the appropriate superannuation scheme? That is not such a large job as hundreds of Commonwealth departments or agencies. Can you take that on notice?

Answer:

We have contacted each of the six Departments referred to in the question informally and their responses indicate that there is no central repository for such information nor do they have systems that would enable a search to be conducted in an efficient manner given the time periods in question.

Further, based on documents obtained through both informal and formal discovery processes we consider there is evidence demonstrating that the Commonwealth disseminated correct information from the relevant bodies responsible for the administration of superannuation to the Department and Agencies.

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Department/Agency: Department of Finance and Deregulation

Senator: Bishop

Type of question: Hansard, page number 39, 5 May 2011.

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator MARK BISHOP: In the same vein, ComSuper and its predecessors, in whatever title, would also have detailed records of both permanent and temporary employees and when they joined the appropriate superannuation scheme. Has a similar request been made of them?

Answer:

The Department of Finance and Deregulation (Finance) contacted ComSuper informally and was advised of the following:

- ComSuper has no detailed records of what information on superannuation rights was disseminated by Commonwealth agency line managers to temporary employees.

- Any discussions about superannuation rights between line managers and their staff are likely to have been guided by each agency's Personnel Service Policy Manual. ComSuper was not responsible for the content of these manuals.

- ComSuper holds both paper based and electronic records. If a member was a temporary employee in 1996 or afterwards, this information can be extracted from its electronic systems.

- Records prior to 1976 are paper based, but some have been destroyed under relevant records destruction authorities or as part of normal administrative practice.

Comsuper has advised that it would be a very resource intensive exercise to review these older files for membership details.

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Thursday 5 May 2011, Canberra

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation

Senator: Bishop

Type of question: Hansard, page number 40, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator BISHOP: If the temporary employee had joined the fund and had a benefit paid to him upon retirement and he died, his wife or spouse would receive the standard reversionary benefit for the remainder of his or her life. Why do you assert, in the case of a temporary employee who did not join because he or she received misleading information, that the wife or spouse does not have any legal right?
Senator BISHOP: ...If a public servant had a wife and he had a superannuation payment to post-retirement and he died, it has been my understanding that the wife always automatically received the four-eighths or five-eighths, whatever the benefit was, that that was not a matter of the rights of the estate, it was a right in the trust deed that gave benefits to the wife. Is that correct?
Senator BISHOP: Can you take that on notice? I would also ask you to table, on notice, that legal advice arising from that point. I take that upon consideration.

Answer:

Benefits are payable to a surviving spouse in accordance with the legislation of the relevant scheme. Eligibility for a spouse benefit depends upon there being a marital relationship at the time of the scheme member's death.

The quantum of spouse benefit is set out in the legislation of the relevant superannuation scheme. Where the scheme member was in receipt of a pension the spouse benefit is generally two thirds of the amount that would have been payable to the deceased member.

With respect to the Committee's request and the discussion preceding it, the Commonwealth's response is as follows.

1. The Commonwealth's position is that, in respect of a Cornwell-type claim, where a claim is brought by the widow on behalf of the deceased estate, the claim is assessed on its merits. However, the Commonwealth's position is that it does not owe a duty of care to the widow as an individual.

2. The Department is of the view that release of the requested legal advice may prejudice the Commonwealth's position in future matters involving surviving-spouse-related claims and therefore it is not in the public interest to disclose it.

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Thursday 5 May 2011, Canberra

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation

Senator: Xenophon

Type of question: Hansard, page number 41, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator XENOPHON: Have you been invited to look at a framework for an expedited claim process, an administrative claims process that could obviate the need for lengthy and expensive litigation?

Answer:

Following the settlement of Mr Cornwell's claim in 2007, the Commonwealth engaged in various discussions with Snedden Hall & Gallop in relation to efficient management of claims. The discussions covered topics such as what threshold material needed to be provided by the claimant and considered by the legal representatives to the Department of Finance and Deregulation (Finance) in order to assess a claim for negligent misstatement.

Finance is committed to working cooperatively with all stakeholders to resolve Cornwell-type claims, as far as practical, at the administrative level through the use of Alternative Dispute Resolution (ADR) processes.

ADR models are employed in Finance, in accordance with its model litigant obligation under the *Legal Services Directions 2005*. The forms of ADR used by Finance in relation to Cornwell-type claims include mediation, solicitors conferences, exchange of letters (for example, in relation to refining the legal issues in dispute) and formal offers of settlement.

To date, all claims that have been settled in the claimant's favour have been through ADR processes. Finance's position is that litigation is only used to determine novel areas of law, such as breach of statutory duty and the general duty of care.

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Department/Agency: Department of Finance and Deregulation

Senator: Xenophon

Type of question: Hansard, page number 43, 5 May 2011.

Date set by the committee for the return of answer: 1 June 2011.

Question:

Senator XENOPHON: Finally, on this, if the ACT has requested documents of you, in broad terms, why can't you hand them over, short of it being as part of a court process of discovery? Why can't you just voluntarily hand it over and save time and expense for the ACT government?
Senator XENOPHON: Perhaps on notice you would provide me with what those rules are. I would be grateful.

Answer:

The Commonwealth shares relevant information about specific claims with the Australian Capital Territory Government (ACT) through formal and informal discovery processes including voluntary provision of copies of personnel and ComSuper files at ACT's request when it comes within the possession of the Department.

However, there are restraints on the Commonwealth in terms of what documents it can provide to the ACT. These include:

- implied undertakings limiting the use of documents obtained in the course of legal proceedings, which prevent a party from using those documents for anything other than the legal proceedings in which they were obtained;
- confidentiality provisions in Mediation Agreements between the Commonwealth and certain individual plaintiffs and the mediator, which prevent disclosure of documents exchanged for the purposes of the mediation;
- privacy restrictions, which prevent the disclosure of information (without appropriate permission) that individuals have provided to the Commonwealth (when claims are lodged through the Department's website);

- model litigant obligations, duties to the Court and the possibility of adverse costs orders that require the Commonwealth to only provide the other parties with relevant documents; and
- other documents not relevant to the case at hand. For example, other persons' personnel files.

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Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Department/Agency: Department of Finance and Deregulation

Senator: O'Brien

Type of question: Hansard, page number 43, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator O'BRIEN: The transfer of liability arrangements. Were there specific arrangements? That is what I want to know. Was this something that happened by the fact that they took the employees that were handed over or were there specific arrangements entered into? Surely you know that.
Senator O'BRIEN: If I understand what 'emerging cost' means, it means that, for someone whose employment passes between the Commonwealth and the territory, there is a share of the cost. Is that how it works?
Senator O'BRIEN: So they pay it all?
Senator O'BRIEN: Even if the employee was inherited with a long period of service with the Commonwealth?
Senator O'BRIEN: That is the arrangement between the ACT and the Commonwealth following the creation of the territory?
Senator O'BRIEN: Yes. I would appreciate if we had that detail because, clearly, these sorts of arguments between governments are potentially expensive outcomes and everyone is keen that someone else pays the cost. It would be interesting to have that. It follows that, in relation to a class of employees inherited, there may be a substantial overhang in costs if there is found to be a liability which will fall on the territory, not the Commonwealth, for those employees. The actual employees are what I am thinking about.

Answer:

Financial arrangements (through an exchange of letters) were agreed between the Commonwealth and the ACT in June 1990 in relation to the payment by the ACT Government of their superannuation costs in respect of their employees who are members of the Commonwealth defined benefit superannuation schemes.

The ACT Government pays on an emerging cost basis. That is, the ACT Government pays the Commonwealth an amount representing the actuarially determined estimate of benefit payments that will be made to former ACT employees in a particular financial year. Actuarial reviews are completed for the ACT triennially, and updated annually.

The actuary in determining the amount to be paid by the ACT only takes into account the period of employment with the ACT Government. The Commonwealth remains responsible for meeting the costs of the employee's employment before transferring to the ACT Government.

The ACT Government reported a superannuation liability as at 30 June 2010 of $4.6 billion as published in the ACT 2009-10 Consolidated Financial Statements.

The ACT Government also has a number of employees who are members of PSSap. The ACT Government makes contributions to that scheme on a fortnightly basis.

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Department/Agency: Department of Finance and Deregulation

Senator: O'Brien

Type of question: Hansard, page number 43, 5 May 2011

Date set by the committee for the return of answer: 1 June 2011

Question:

Senator O'BRIEN: ...That is a document I have been given which I believe is accurate. Do you know if that has historically been the case, going back over the history of the CSS, that there has been a requirement that agencies make contributions?
Senator O'BRIEN: Do you know what the situation would have been, say, in the sixties?
Senator O'BRIEN: The reason I am interested, let me be very clear, is: was there an incentive in some agencies that had a high number of temporary employees to ignore the fact that they may have been eligible to join CSS because there was a cost to their budget?

Answer:

Government agencies

From available information, it would appear that it was only from 1995-96 that departments and budget-funded agencies were required to make payments to the Commonwealth in respect of their superannuation costs, initially at a weighted average rate of 16.1 per cent of superannuation salaries.

Since 1997-98, agency scheme specific rates, that take into account the membership profile of each department and agency, have applied. Currently these payments are made on a fortnightly (PAYG) basis. The PAYG rate for each agency is determined by an actuary.

Approved authorities

Since 1942, "semi-governmental bodies" have been able to participate in the Commonwealth's superannuation arrangements, subject to satisfying certain conditions. Such bodies are generally called "approved authorities". Since 1942, approved authorities have been required to reimburse the Commonwealth for the employer cost of providing superannuation benefits to their employees who were members of the Commonwealth defined benefit superannuation schemes, unless they were exempt from doing so.

The ABC became an approved authority in 1942, but was exempt from the requirement to reimburse the Commonwealth for the employer cost of providing superannuation cover in the Commonwealth superannuation scheme until 1981.

The basis of calculating superannuation costs for approved authorities has changed over time. Presently, all except three employers that participate in the Commonwealth's defined benefit superannuation schemes make fortnightly (PAYG) payments to the Commonwealth. The rate of the PAYG is determined by an actuary. The payments to the Commonwealth are made at the time the person accrues their benefit rather than when the benefit is paid.

The three employers that do not make fortnightly PAYG payments to the Commonwealth are the ACT Government, the ANU and the NT Government. These employers make payments on an emerging cost basis. That is, they pay the Commonwealth on the basis of benefit payments being paid to their former employees in a particular financial year.