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No. 6 2001–02

Compensation (Japanese Internment) Bill 2001

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Compensation (Japanese Internment) Bill 2001

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Social Policy Group
31 July 2001

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Compensation (Japanese Internment) Bill 2001

Date Introduced: 22 May 2001

House: Representatives

Portfolio: Veterans' Affairs

Commencement: Royal Assent

Passage and Assent: The Bill was passed by the House of Representatives on 23 May 2001 and the Senate on 24 May 2001 without amendment and received Royal Assent on 25 May 2001.

Purpose

To provide a one-off compensation payment to those interned as a prisoner of war (POW) by the Japanese in World War Two (WWII).

Rationale

To give recognition to the hardship and suffering endured by those Australians who were held captive by Japan during WWII.

Who will receive payment

The Explanatory Memorandum at page 1 sets out who it is intended will be eligible for the one-off \$25,000 payment. They are:

- a veteran who was a prisoner of war of Japan between 7 December 1941 and 29 October 1945; or
- a widow or widower of a veteran who was a prisoner of war of Japan between 7 December 1941 and 29 October 1945;
- an Australian civilian who was interned by Japan between:
 - 7 December 1941 and 29 October 1945; or

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- a widow or widower of an Australian civilian who was interned by Japan between 7 December 1941 and 29 October 1945.

Who were alive on 1 January 2001.

In cases where an eligible recipient was alive on 1 January 2001 but has since died, the payment will be made to their estate.

Financial implications

The provision of a one-off compensation payment of \$25 000 each, to former POWs of the Japanese in WWII, was announced by the Government in the 2001-2002 Budget.¹

The Budget papers report that the total cost of the measure is \$247.8 million, with the Explanatory Memorandum detailing at page ii that the net outlays to be expended under the Bill to be \$133.975 million. Why the difference? The difference between these two figures arises as the payments of \$25 000 each to POWs known to the Department of Veterans' Affairs (DVA), can be made by regulation, ie. some \$113.825 million. For those individual POWs and widows etc not known to DVA, they have to claim under this Bill, and that is why at page ii of the Explanatory Memorandum a sum of \$133.975 million is allocated to be expended against the Bill.

Background

Australian POWs of World War Two (WWII)

By the completion of demobilisation as of February 1947, some 522 261 service personnel were discharged having served in WWII. During WWII, some 19 000 (3.6%) were killed in action. 8000 service personnel were captured by the Germans and the Italians and of these 7700 (96%) returned to Australia. Between 1942 and 1945, some 22 000 Australian service personnel were POWs of the Imperial Japanese Army and of these only 14 000 (64%) returned to Australia and many of these have died since as a result of their POW experience.

This very high death rate (36%) for Japanese POWs, contrasts with the death rate for POWs held by the German and Italian Armies (4%).

1951 Peace Treaty of San Francisco – between the Allied powers (including Australia) and Japan

In 1951 some 47 Allied powers (including Australia) signed a peace treaty with Japan in San Francisco. Under this 1951 Peace Treaty, in article 14(a) Japan agreed to:

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“make reparation to the Allied powers for the damage and suffering caused by it during the war.”

The San Francisco Peace Treaty of 8 September 1951 was seen by Australian politicians of the day as largely a creation of the USA, a treaty the other Allied governments were pressured into ratifying, in view of the overall world situation. There was some caution about vigorously pursuing reparations, given the history of reparations sought from the Germans after World War One. The USA was particularly concerned to have a sympathetic Japan as a buffer and counter to the newly emerging threat of communist China.

In presenting the *Treaty of Peace (Japan) Bill 1952* (the ratification instrument) to the House in 1952, the Minister for External Affairs (Casey) said:

“The Australian Government has been particularly insistent that Japan should make some atonement for the personal suffering and hardship caused to many thousands of Allied prisoners-of-war, and to the wives and families of those who succumbed to the harsh treatment they underwent. We were able in the end to secure the agreement of the United States of America, the United Kingdom and other Allied Governments to the insertion in the treaty of a provision that Japan be deprived of its assets in neutral and former enemy countries, and that these be liquidated and distributed among former prisoners-of-war and their dependants by the International Committee of the Red Cross.”²

The parliamentary debates of the time centred on the likely future threat of a revived Japan, rather than appropriate POW reparation, especially as the terms of the 1951 Treaty did not require any Japanese disarmament. Casey, in presenting the Bill to the House, made particular comment about the Treaty being negotiated and signed in the context of the then current broader East Asian international situation. Casey further said the government was by no means wholly satisfied with the Treaty, but the same can be said of the some 47 other Allied governments that have signed.

Australia was instrumental in obtaining reparations from the Japanese for the suffering and hardship to Allied prisoners of war and had been instrumental in having reparations included as Article 26. This article provided that all reparations were to be met by Japan but no further reparation would be sought unless Japan negotiated a different arrangement with any country.

It is now believed that such a separate arrangement was made each with Burma and Switzerland in the 1950s.

However, no detail of these compensation arrangements, extracted from the Japanese by Burma or Switzerland in the 1950s, is known. The presence of these other separate agreements would appear to prime-facie allow Article 26 to be invoked and allow the Treaty signatories to again approach Japan for further reparation. Notwithstanding this knowledge, no other government has approached Japan under Article 26.

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Payments to Australian POWs by Japan

Under the terms of the 1951 San Francisco Treaty, all Japanese assets in Australia became the property of the Australian Government. The proceeds from the sale of these assets were distributed by the Government to all known former POWs of the Japanese or their surviving dependants.

These funds, combined with funds distributed by the International Red Cross from the sale of Japanese assets overseas, resulted in each recipient being granted a total of £102 pounds and ten shillings between 1952 and 1963. This amount would now be equivalent to approximately \$A2000, assuming it had been paid in 1957. The total amount distributed was in excess of £2.2 million.

Proponents of further compensation for Japanese POWs now consider that the eventual sums paid to individual applicants were so small as to be almost derisory. They also claim the amounts paid were undoubtedly well below any adequate compensation for the suffering of POWs and the value of their forced labour to Japan.

Legal requirement for Japan to provide compensation to POWs

Separate to the 1951 San Francisco Treaty, it has been argued there is a legal obligation for Japan to provide compensation to POWs. While Japan was not the signatory to any international agreements prior to and during WWII, a claimed principle of obligation to make reparation, has formed the basis of further claims for 'adequate' compensation from Japan. This claimed principle relies on reference to the famous judgement of the Permanent Court of International Justice (PCIS), the predecessor of the present International Court of Justice, in the Chorzow Factory case (1928)³. In that judgement, the Court declared:

"...it is a principle of International Law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".

It is claimed that Japan, by its treatment of POWs, was in breach of established rules of International Customary Law in force during 1942-45, ie. rules of general application existing apart from any treaty provisions. Support for the argument that Japan was subject to these obligations, although not the signatory to any formal agreement, is provided in the Judgements of the International Military Tribunals in Nuremberg 1946 and Tokyo 1948.⁴

To date, Japan has not provided any significant compensation for POWs, and it could be argued it is highly unlikely Japan ever will do so, as evidenced by more recent unsuccessful claims arising from the use of 'comfort women'.

In the absence of any 'significant' POW compensation payment from Japan, the issue then arises as to whether the Australian government should take up this obligation. This issue has been very much heightened with the recent payments by several former Allied countries to their Japanese POWs of WWII, ie. Canada (1998), United Kingdom (UK) (2000), New Zealand (2001).

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Payments and assistance to POWs of the Japanese in WWII by the Australian Government

By the end of 1946, the medical treatment of POWs had become the most pressing medical issue for the Repatriation Department.

POWs themselves were anxious to avoid being treated as 'a race apart'. In 1947 a special medical committee, including four doctors who had also been POWs was appointed. They recommended POWs should not be treated as a class apart and that a survey of medical needs be conducted. A popular view at the time was that POWs had suffered some psychological damage. However, a survey by the Department of Labour and National Service found that POWs settled back into work and society better than other veterans did.

Flowing from the investigations by the special medical committee, a survey of all known POWs was conducted, with some 13 000 POWs of the Japanese participating. This was a very high response rate, with the survey finding many needed medical treatment but for various reasons had not taken up the opportunities to seek assistance.

Demands for a POW payment

In the immediate post-war years, the payment of special benefits to ex-POWs was a very controversial issue. The Chifley government was urged to pay a special subsistence allowance for POWs, especially for POWs of Japan. The government felt it had done enough for veterans through its £80m post-war rehabilitation scheme, war gratuity payments of £70m and established and comprehensive repatriation benefits. Others argued that the sought for £6 per week or so in special subsistence allowance should be extracted from the Japanese.

The sought for weekly subsistence allowance for POWs was sought for in other Allied countries and was consistent with the United States (US) government paying a daily allowance for POWs. Contrasting with this was the UK government, which declined to provide anything.

Menzies, as Opposition leader, promised an inquiry into a POW allowance, and after coming into office in late 1949 a Committee of Inquiry was appointed. The Committee comprised W F L Owen, a justice of the NSW Supreme Court, Lieutenant General S G Savage and Dr W E Fisher, President of the 8th Division Council and a former POW.

In a majority report, Owen and Savage did not make any specific recommendation as to a special subsistence allowance, but implied such a payment should not be paid, concluding that there was no moral obligation on the Australian government to make a special monetary payment to POWs of the Japanese. Further, they argued any special payment might precipitate approaches by all POWs, and demands from other veterans groups with special needs or demands, unrelated to captivity.

In a minority report, Fisher recommended a payment of 3 shillings for each day the POW was captive and payment to next of kin for POWs deceased in captivity.

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The Menzies government accepted the majority report, that there was no moral obligation on the Australian government to make a subsistence allowance, although it contributed £250 000 to a trust fund to relieve special cases of hardship amongst former POWs.

Australian Government Prisoner of War Fund

In 1952, the then Australian Government set up a Prisoner of War Fund to provide payments to members of the armed forces who had suffered exceptional hardship as POWs and who needed financial assistance. Payments from this fund were up to £250 per person. By the time the fund was wound up in 1977 it had dispersed almost \$1 million in aid. The £250 would be equivalent to about \$A4,000 in today's terms, assuming it had been paid in 1966.

Other Australian government assistance to POWs – veterans' Gold Card

In the 1974-75 Budget, the Whitlam government extended to all POWs of WWII free medical, hospital, dental and optical treatment irrespective of whether their injuries were war related or not. This is now provided in the form of the veterans' Gold Card.

Value of the veterans' Gold Card to POWs?

Given the Gold Card is a health treatment card, use and associated cost of the card varies tremendously between individuals. The expanded access that was provided from 1 January 1999 to all qualifying WWII personnel, involved an estimated extra 50 000 cards at a cost of \$508 million over four years. This reduces to an annual cost per card of \$2 540. This annual unit card cost may be slightly higher for POWs for two main reasons:

- the WWII POWs probably have higher health costs than other service personnel of WWII.
- the cost to government in providing health care servicing has increased by about 2.3% a year, extra to the increased cost of living (CPI), over past years.

This is due to increased use of technology, an ageing population and a steady expansion of government provided or subsidised health care servicing.

Other Australian government assistance to POWs – payment of the resident contribution in nursing homes for POWs

Normally, veterans and war widows/ers admitted to nursing homes are required to pay a resident contribution towards the cost of their food and accommodation. This is a standard fee equal to 87.5% of the single rate of aged or service pension including rent assistance. The only exemption is for POWs, who have their resident contribution amount paid by the Department of Veterans' Affairs (DVA). As at March 2001, the single rate of pension was \$402.00 per fortnight. Therefore, 87.5% of the single pension rate is \$351.75 per

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fortnight, or, \$9145.50 a year. This amount is the benefit to POWs, but only those in nursing homes.

Canadian POWs of the Japanese in WWII

Approximately 2,100 Canadian military service personnel were captured in Hong-Kong on Christmas Day 1941 and held by the Japanese for 44 months during WWII.

Canadian government assistance specifically for POWs

Canada is the only Allied country that pays specific on-going compensation to POWs. POWs of the Japanese during WWII imprisoned for 89-364 days are paid 20% of the basic war disability pension and those imprisoned for 365 days or more are paid 50% of the war pension. POWs of any other power for 89-364 days are paid 10% and 15% if imprisoned for between 365-564 days and 25% for 565 days or more.

POW compensation is basically a payment for undiagnosed/unestablished conditions arising from the stress of capture, enforced inactivity/deprivation, etc. This form of compensation arose when, after WWII it was found that first the Hong-Kong and then European theatre POWs suffered from abnormally high rates of morbidity, rates that could be roughly associated with the length of their captivity. The veterans who were incarcerated by the Japanese are in a special category because of the length and severity of their captivity. Hence the payment is in addition to any amount payable for a disability arising from a medical condition due to, or exacerbated by, military service.

Historical development of Canadian POW payments

In 1971, the Canadian government awarded a minimum disability pension of 50% of the full war disability pension to all POWs of the Japanese in WWII who had an assessed disability and had been imprisoned for a year or more. This POW payment arose from a 1965 health study comparing Japanese POWs with other WWII veterans. The main beneficiaries were POWs who had previously been receiving a disability pension of less than 50%.

In 1976, the minimum 50% disability pension for POWs was replaced by an equivalent payment under the new *Compensation for Former Prisoners of War Act*.

This Act established a new benefit, which remains unique among veterans' benefits provided by Allied powers.

Former POWs are eligible for a monthly compensation payment, whether or not they have a disability arising from wartime service. Qualification for and the amount paid vary between individuals depending on the enemy power involved and time spent in captivity – see above.

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Canadian POWs of the Japanese in Hong-Kong during WWII qualify for the maximum amount under this prisoner of war compensation payment. The maximum amount of compensation for prisoners of other powers was the equivalent of 20% of the war disability pension, the lesser amount a reflection the exceptionally harsh treatment suffered by the Hong-Kong veterans.

As at December 1996, some 448 Hong-Kong POWs and 299 widows of Hong-Kong POWs were receiving payments. The Canadian government also pays for the health care costs and independent living needs arising from war related disabilities for POWs.

How does Canadian government POW assistance contrast with government assistance in Australia and the UK?

The Canadian government, in providing a POW specific compensation pension, is somewhat unique. This is not provided in Australia or in the UK. In Australia, the only POW specific assistance is the veterans' Gold Card (health treatment card) and the payment of any nursing home accommodation fee, as described above.

POW compensation examined by Canadian Parliamentary Committee

In 1997, the Foreign Affairs and International Trade Standing Committee of the Canadian Parliament sat in March to consider the implications of compensation to Japanese POWs. Of course, representatives of Canadian POWs of the Japanese in WWII made submissions to the Committee recommending the payment of compensation.

The view of the Canadian government on compensation, as presented to the 1997 Canadian Parliamentary Committee, was:

*"It is the position of the Government of Canada that the peace treaty of 1952 constitutes a complete and final settlement of all claims against Japan arising out of the prosecution of World War Two."*⁵

Much of the other evidence presented to the Committee by the Canadian government was a chronology of the compensation and assistance arrangements that had been previously provided to POWs.

See *Canadian government assistance specifically for POWs* above.

In the end the Committee recommend the payment of compensation to POWs.

Committee recommendation taken into account:

The Minister shall take into account the recommendation of the Standing Committee of the House of Commons on Foreign Affairs and International Trade that the compensation be in the amount of twenty three thousand, nine hundred and forty dollars to every surviving Hong Kong veteran prisoner and every surviving widow of a Hong Kong veteran prisoner.

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One-off ex-gratia payment by Canadian Government instigated by a private Member's Bill

On 3 December 1998, Mr Peter Goldring moved for leave to introduce a Bill and it was read a first time to provide for compensation to those Canadian veterans who were taken prisoner by the Japanese in 1941 in Hong Kong and forced to work in labour camps. In introducing the Bill he said:

Mr. Speaker, Christmas Day 1941 started a despicable period of time when 2,000 Canadian soldiers, who defended Hong-Kong, were interned by the Japanese and put into forced labour in Japanese industries. Since that period of incarceration, Japan made a settlement of \$1 a day in the early 1950s which was not a settlement in kind. The Canadian government went on in 1955 to conspire against further compensation to these same war veterans. This bill is to set right a gross wrong that occurred many years ago. It is long overdue. It is fair, right and has all-party support. I must be done.

\$C24 000 ex-gratia payment to POWs

In December 1998, the Canadian government announced a one-off ex-gratia payment of \$C24 000. The origins of the payment arise from a private Member's Bill, the second reading speech of the presenter, Mr Peter Goldring (Edmonton East, Rep.) is set out above.

What was the basis for the amount of \$C24 000?

The amount of \$C24 000 for the ex-gratia payment was based on the Geneva Convention provision that POWs required to undertake work be compensated at the applicable daily rate for a labourer of the interning country (calculated at the equivalent of \$C18).

For Canadians POWs captured in Hong-Kong on Christmas Day 1941, and freed in mid-August 1945, the calculation was \$18 x 1 328 days = \$C24 000 when rounded up.

United Kingdom (UK) Government Assistance for POWs

In the UK, former Japanese POWs of WWII had been campaigning for many years, trying to obtain compensation from the Japanese Government, but without any success or prospect of a positive result. News of the Canadian government decision in December 1998, to give their survivors an ex-gratia payment from Canadian government coffers, galvanised the resolve to seek the same or like measure from the British government.

Then the Manx Parliament (the Tynwald) decided to provide POWs of the Japanese with an ex-gratia payment very like that provided by the Canadian government. The Tynwald is the Parliament on the Isle of Man, which, while a UK crown dependency, has a high level of internal self-government.

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They have a very small number of eligible POWs but their decision considerably increased the pressure for the British government to do likewise, to recognise that there was a fair case, that the Japanese were unlikely to pay, and that they should do so instead.

The payment arose from a review the Prime Minister initiated, following a meeting with the Secretary General of the Royal British Legion about these matters, held on 10 April 2000.⁶

British £10 000 ex-gratia payment to POWs – November 2000

On 7 November 2000, the British government announced that it would pay the sum of £10 000 sterling (about \$A26 000 depending on exchange rates) to former POWs and other detainees of Japan during WWII. Set out below is some description, background and comment on this ex-gratia payment.

Brief details about the payment are set out below:

- Funding for the payment comes from the British government
- Every eligible person gets the same amount of £10 000
- The payment is not taxed or income for pension/benefit purposes
- Payments commenced to be made from 1 February 2001
- It is anticipated that up to 16 700 people may be entitled
- Anticipated cost to government is £167m

Why £10 000?

The figure of £10 000 has been around for many years, and it's about the same amount as various POW groups in different countries have settled on. It is the same amount, which the Isle of Man decided to offer, and roughly the equivalent of the Canadian sum.

The £10 000 does not represent any pro-rata payment for days of captivity or forced labour. Some discussions were had about using a pro-rata payment, but these were rejected on the grounds that it was a symbolic payment and all should get the same.

The Government has been keen to stress that it's an 'ex-gratia' payment rather than compensation. This probably stems from concerns about compensating service personnel, in terms of the precedent it might set for other claims, and also it has been argued compensation implies fault, which the British government is hardly likely to accept in this case.

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NZ government decides in April 2001 to provide a \$NZ30 000 ex-gratia payment to Japanese POWs

On 23 April 2001, the NZ government announced the payment of a one-off \$NZ30 000 ex-gratia payment to ex POWs of the Japanese. Spurred on by the ex-gratia payments to POWs in the UK, Canada and the Isle of Man, NZ veterans have been pressing for a like payment.

A one-off payment by the Australian Government to Japanese POWs of WWII – will it lead to other claims?

One of the concerns for any government in making payments to a new group or class of persons is the potential for other like groups or cases to ask for the same or like assistance. The power for governments to resist like claims will probably mainly rest on the fact that the Japanese POWs are a unique group. However, the history of repatriation in Australia is very much one of catch-up claims by disaffected groups.

One group that may be inspired to seek a similar payment are POWs of the Germans and Italians of WWII.

Main Provisions

Item 4 of provides for a description of those eligible for the one-off payment and only one payment can be made to an eligible person.

Item 5 stipulates that the only amount payable is \$25 000.

Item 6 requires a claim for the payment to be lodged in a form approved by the Secretary of the Department of Veterans' Affairs.

Item 8 provides for the payment to be made to the estate of a person where they have claimed, are eligible but have died prior to the payment being made.

Item 11 provides for the \$25 000 to be exempt as taxable income.

Item 12 provides for the \$25 000 to be deducted from the value of the person's assets, for the purposes of the assets test applied under the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*. This is a one-off deduction so the payment has no effect under the assets test.

This does not exempt any income earned if the monies are invested from impacting on the income test, or, any accumulated or appreciated additional capital value gained from being treated as an asset.

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Concluding Comments

The payment of compensation payment by the Australian government in respect of POWs of the Japanese of WWII follows like payments by the Canadian, UK and NZ governments in the past few years. This payment will certainly be welcomed by WWII veterans generally and POWs of the Japanese of WWII especially.

It remains to be seen whether this payment instigates claims for a similar payment by other POWs, ie. POWs of the Germans and Italians of WWII.

As the name of this Bill explicitly states, the payment by the Australian government is described as 'compensation'. This contrasts with the descriptions provided for the United Kingdom and New Zealand payments, called 'ex-gratia' payments. The New Zealand government explicitly stated their payment was an ex-gratia payment and had no bearing on claims for compensation by former POWs and internees from other governments.⁷ The Canadian payment was described as compensation and the legislation itself was titled the *Hong Kong Veteran Prisoner Compensation Act 1998*.⁸

Endnotes

- 1 Portfolio Budget Statements 2001-2002 - Department of Veterans' Affairs Portfolio, Budget Paper No. 1.4B, page 32.
- 2 House of Representatives *Hansard*, Vol 216, p. 21.
- 3 Permanent Court of International Justice, Ser A No 17.
- 4 Submission to the Human Rights Commission of the United Nations Organisation by the Queensland ex-POWs Reparations Committee, 22 March 1990., pages 22-28.
- 5 Mr Gilbert Laurin – (Deputy Director, Legal Operations Division, Department of Foreign Affairs and International Trade), to the Foreign Affairs Committee of the Canadian Parliament of March 1997.
- 6 Press Release No. 2001/054, The UK Department of Social Security - *£10 000 Ex-Gratia Payments Sent Out To Prisoners Of War And Other Captives Of The Japanese*, 1 February 2001.
- 7 Prime Ministers' Media Release – *Ex gratia payments to ex-POWs and civilian internees of Japan*, 23 April 2001.
- 8 Bill C-463 *Hong Kong Veteran Prisoner Compensation Act 1998*., 1st Session 36th Parliament – House of Commons of Canada.

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