

Standing Committee on Finance and Public Administration

ANSWER TO QUESTION ON NOTICE

Finance and Deregulation Portfolio

Department of Finance and Deregulation

Supplementary Estimates Hearing – October 2010

Outcome 2, Program 2.3

Topic: ABC Journalists and Access Computer in 1970s

Question reference number: F99

Type of Question: Written

Date set by the committee for the return of answer: 3 December 2010

Number of Pages: 4

Senator Xenophon asked:

a) During the last Senate Estimates, you advised that Act of Grace determinations on a number of claims had not yet been made. What is the status of these applications?

Answer:

Further to the evidence provided at the 26 May 2010 Senate Estimates by officers from the Department of Finance and Deregulation (Finance), the Secretary of Finance subsequently wrote to the Committee Secretary, Ms Christine McDonald, to clarify the evidence given regarding ABC employees.

We attach our letter of 29 June 2010 which provides Finance's response regarding ABC employees be amended to *"three claims were outside the statute of limitations period of six years, and those claimants were advised of the option of applying for an act of grace payment. Only one of the three statute-barred ABC claimants chose to request an act of grace payment, and that claim was declined. No other Cornwell-related act of grace claims have been received from former ABC employees."*

Accordingly, there are no outstanding act of grace determinations on ABC employees.

b) We have been told that all of the Act of Grace Applications have been denied. On what basis were these applications denied? Will they be reviewed?

Answer:

As stated in the answer to question (a), only one act of grace claim from an ABC employee has been received and that claim was denied.

This request was declined on the basis that the claimant joined the Commonwealth Superannuation Scheme within the qualifying period for temporary employees. Generally, a matter is not reconsidered or reviewed unless the claimant provides

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relevant new information or shows that the decision maker made a serious factual mistake.

c) Why are these matters not all subject to Alternative Dispute Resolution, bearing in mind the Model Litigant requirements under the Legal Services Directions?

Answer:

All of the Cornwell claims, including those which are litigated, are being considered in compliance with the Alternative Dispute Resolution (ADR) requirements under the Legal Services Directions 2005. The Commonwealth is working cooperatively with claimants and, where represented, their solicitors to resolve Cornwell-type claims through the use of ADR processes. Where the Commonwealth concludes there is no prospect of liability, the Commonwealth may still consider participating in an ADR process to narrow the issues in dispute.

d) I understand that at least 15 cases have now been settled successfully, with six pending court decisions. Given the commonalities between the cases, does the Department concede that it is fundamentally unfair to make each claimant pursue individual courses of actions at extreme expense and lengthy delays?

Answer:

The six cases being heard by the ACT Supreme Court and subject to judgement plead damages for negligent misstatement, negligence generally and breach of statutory duty. The Commonwealth's view is that, as the law currently stands, there is no duty to advise employees of their entitlements.

In relation to claims for negligent misstatement, the Commonwealth is assessing each case on its own merits and is bound by the Legal Services Directions 2005 to settle a matter only if the Commonwealth has meaningful prospects of liability. Each claim is unique with its own individual circumstances which requires assessment, management, and where appropriate, settlement, on a case-by-case basis.

Where there are commonalities between claims, the Commonwealth is managing these claims using a common strategy and where possible resolution through ADR. In cases where ADR is not successful some claims may need to be litigated.

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e) Does the Department agree that the ABC at the time did have a duty to provide all relevant information about employment conditions to its employees?

Answer:

No.

As stated above, the Commonwealth's view is that, as the law currently stands, there is no duty to advise employees of their entitlements. This view has been affirmed by the Federal Court in *Mulcahy and Ors v the Hydro-Electric Commission* (1988) 85 FCR.

f) Does the Department agree that the Commonwealth at the time, including the ABC, did have a duty to provide all relevant information about employment conditions to its employees?

Answer:

No.

For the reasons stated in question (e), neither the ABC nor the Commonwealth had an obligation to provide information regarding superannuation entitlements to its employees.

g) Would such an omission be accepted today?

Answer:

For the reasons stated in question (e), the Commonwealth is not under a duty to provide information regarding superannuation entitlements to its employees.

h) If this sort of behaviour would not be accepted today, how is it that the Department can continue to deny compensation to these claimants?

Answer:

For the reasons stated in question (e), neither the ABC nor the Commonwealth had an obligation to provide information regarding superannuation entitlements to its employees.

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i) What is the Department doing to actively find people affected by this lack of information, to encourage them to make applications for compensation?

Answer:

Finance's website at <http://www.finance.gov.au/comcover/cornwell.html> contains information regarding Cornwell-type claims. This page states the criteria for eligibility and procedures for making a claim if former or current Commonwealth employees consider they have received negligent advice regarding their eligibility to join a Commonwealth superannuation scheme.

Finance is aware that at the time of handing down the Cornwell claim there were numerous media articles and various agency publications updating their employees of the decision.

Finance is also aware that various plaintiff solicitor firms and unions have run targeted advertising media campaigns in the media for former and current Commonwealth employees seeking legal advice if they consider they may have a valid claim.

j) Is the Department aware of the total number of persons under the purview of the Department in the 1970s who might be able to claim compensation?

Answer:

No.

Finance has received approximately 696 claims from current and former Commonwealth employees who believe they received incorrect advice regarding their superannuation entitlements in the 1960s and 1970s. The rate of new claims being received has slowed considerably.

Although it is difficult to predict the number of potential claimants who may have valid claims, it seems there are specific worksites where particular representors may have made misrepresentations to fellow employees regarding their eligibility to join a Commonwealth superannuation scheme. Accordingly, Finance considers as a result of "word of mouth" communication between these employees engaged at these worksites, the majority of claims have been received from these sites.