



## Australian Public Service Commission submission

### Senate Standing Committee of Finance and Public Administration (Legislation Committee) - Inquiry into the Public Service Amendment (Payment in Special Circumstances) Bill 2011

21 July 2011

#### Introduction

1. The Australian Public Service Commission (APSC) thanks the Committee for its invitation to provide a submission to the Inquiry into the Public Service Amendment (Payments in Special Circumstances) Bill 2011 (PS Act Amendment Bill). As noted in the terms of reference provided, the Committee has been asked to consider five matters connected with the availability of compensation for claimants who have been disadvantaged as a result of administrative errors by the Commonwealth. As the agency responsible for the *Public Service Act 1999* (PS Act), the APSC's submission will restrict itself to item 5 – “the limitations of discretionary payments in the *Public Service Act 1999*”.
2. The proposed amendments to the PS Act would remove the ceiling on discretionary payments under s.73 of the PS Act as a means of providing increased scope to make payments to persons who cannot be compensated under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA).
3. For the reasons outlined below, the APSC does not consider it appropriate to remove the ceiling on payments under s.73.
4. However, we agree that consideration could be given to increasing the ceiling and/or introducing a mechanism for automatic adjustment of that ceiling, given that the amount available under s.73 has remained unchanged since 1999.

#### Background to s.73 of the *Public Service Act 1999*

5. Under s.73 of the PS Act, the Public Service Minister (currently the Special Minister of State for the Public Service and Integrity, the Hon. Gary Gray MP), may authorise the making of payments in special circumstances that arise out of, or relate to, a person's employment by the Commonwealth.
6. Payments that are able to be authorised include payments which would not otherwise be authorised by law, or required to meet a legal liability. These payments may be a lump sum, or periodic.
7. Importantly, whether the payment is a single amount or a series of periodic payments, the Minister is not able to authorise such a payment where the total amount exceeds, or is likely to exceed, \$100,000. This restriction was intended

to ensure that where an amount might exceed \$100,000 it would have to be referred for decision by the Minister for Finance and Deregulation under the general arrangements for act of grace payments by the Commonwealth.<sup>1</sup> This reflected the then requirement for act of grace payments above \$100,000 to be subject to a report by an Advisory Committee before the Finance Minister could authorise such an amount under s.33 of the *Financial Management and Accountability Act 1997* (FMA Act). The requirement for a report by the Advisory Committee now applies to amounts over \$250,000 and is set out in Regulation 29 of the FMA Regulations. The Advisory Committee normally comprises the Secretary of the Department of Finance and Deregulation, the CEO of Customs and the Chief Executive of the agency that the matter relates to, or their appointed deputies.

8. A note which appears under ss.73(5) in the PS Act makes clear that payments under s.73 must be made from money appropriated by the Parliament. Generally, a payment can be debited against an agency's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration.
9. The power to make payments under s.73 has been delegated to Agency Heads and it must be exercised personally (that is, it cannot be further delegated within an Agency). As such, in practical terms the Public Service Minister has not had a direct role in determining individual payments.
10. This provision had its origin in a similar provision in the predecessor *Public Service Act 1922*. The Explanatory Memorandum to the Public Service Bill 1999 noted that under the predecessor Act, the power had been used rarely but had been useful in circumstances such as:
  - the reimbursement of legal costs incurred by APS employees in the course of, or in connection with, their employment;
  - payments in lieu of entitlements lost as a result of incorrect advice;
  - the settlement of unfair termination claims; or
  - the payment of compensation following a recommendation of the (former) Merit Protection and Review Agency.
11. While the APSC does not have data on the frequency of use of s.73, given that the power has been delegated to individual Agency Heads, our understanding is that it continues to be used rarely.
12. Section 73 is one of a range of discretionary payment mechanisms available in the Commonwealth to provide payments to persons in special circumstances or to provide financial relief. Other mechanisms include:
  - The Scheme for Compensation for Detriment caused by Defective Administration (CDDA);
  - Act of grace payments made under s.33 of the FMA Act;

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<sup>1</sup> Explanatory Memorandum to the Public Service Bill 1999, paragraph 11.1.9

- Waiver of amounts owing to the Commonwealth under s.34(1)(a) of the FMA Act;
- Write-off of debts under s.47 of the FMA Act, or paying debts by instalment and deferring time for payment;
- Payments in settlement of legal claims made under the *Attorney-General's Legal Services Directions*; and
- Ex gratia payments made under the authority of s.61 of the Constitution.

### **The Comcare matter and s.73 of the PS Act**

13. The explanatory memorandum to the PS Act Amendment Bill indicates that the genesis of the proposed amendments to the PS Act was two cases of alleged defective administration by Comcare in relation to employees' workers compensation entitlements which were the subject of an investigation report published by the Commonwealth Ombudsman in March 2010<sup>2</sup>. The explanatory memorandum further notes that while one of the claimants was invited to make a claim for compensation under the CDDA scheme, the CDDA scheme applies only to agencies covered by the FMA Act, and Comcare is not an FMA Act agency. This precluded such a claim being made, and as such, left s.73 of the PS Act as "the only avenue for compensation".<sup>3</sup>
14. While we understand that some payments have already been made to the claimants in these two cases to compensate them for errors in the original calculations made by Comcare, in one of the cases full compensation has not been paid, with part of the reason being that the amount has been calculated to be in excess of \$100,000 (and hence, beyond the amount available under s.73 of the PS Act).

### **The APSC's position on the proposed amendments**

15. As foreshadowed in the introduction, the APSC does not support the proposal to remove the ceiling on s.73 payments.
16. The APSC's rationale for doing so is that the Parliament specifically legislated for a ceiling in the interests of providing an appropriate level of accountability and centralised oversight for any larger payments (through the act of grace payment mechanisms under s.33 of the FMA Act), while providing the Public Service Minister (and by delegation, Agency Heads) with a reasonable capacity to make payments relating to circumstances arising out of a person's Commonwealth employment.
17. In our view it remains prudent for payments made under s.73 to be subject to a greater level of accountability where they involve large amounts of public

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<sup>2</sup> Commonwealth Ombudsman, March 2010 *'Comcare and the Department of Finance and Deregulation: Discretionary Payments of Compensation'*

<sup>3</sup> Explanatory Memorandum to the Public Service Amendment (Payments in Special Circumstances) Bill 2011

money. However the APSC notes that the current ceiling has not changed since 1999 even though the ceiling amount was based on the FMA Act that has been increased.

18. The APSC will give consideration to setting a higher ceiling by tying the amount available under s.73 of the PS Act to the amount available under s.33 of the FMA Act (currently \$250,000), hence restoring the link to the FMA Act ceiling.
19. As the Committee may be aware, amendments to the PS Act are currently being drafted to reflect the recommendations of the *Blueprint for the Reform of Australian Government Administration* and other related matters. Amendments to s.73 could be considered as part of that process.

***Australian Public Service Commission***  
***21 July 2011***