

Senate Economics Legislation Committee
ANSWERS TO QUESTIONS ON NOTICE
Treasury Portfolio

Supplementary Budget Estimates 1 - 2 November 2006

Question: sbt 73(ASIC)
Topic: Defined Benefit Fund
Hansard Page: E43

Senator SHERRY asked:

That is another issue in this. Has APRA ever had a case that it has been required to consider where employees are required to leave a defined benefit fund?

Mr Jones—When the employer status changes leading to this circumstance that would always lead to this outcome.

Senator SHERRY—That is not what I asked.

Mr Jones—Whether there have been any in the history of APRA, I can't say. It would depend upon what privatisations have occurred.

Senator SHERRY—It is not necessarily a privatisation issue; it can be a defined benefit in the private sector as well.

Mr Venkatramani—On a broader basis the answer is yes. It has happened time and again. Our focus would be whether the trustee has followed proper processes, whether the trust deed requirements are being met and, to the extent members need to be communicated, we would be working with our sister regulator, ASIC, to make sure that appropriate disclosures have taken place. As I said, our ability to approach the employer or take action against the employer, as you would know, under SIS, is strictly limited to section 64, which talks about post-tax contributions being remitted within a 28-day period from the end of the month in which they have been deducted from an employee's pay. Other than that, we really have no legal power to take action against an employer.

Senator SHERRY—If you could take this on notice, because I would not expect you to have it here—and I will be reasonable about this—details of cases that have come before you on this principle in the recent past.

Mr Jones—Cases whereby employees have moved from a defined benefit to a—

Senator SHERRY—Where they have been required to move from a defined benefit fund, with effective loss of pension promise, without either an offer of compensation or some comparable benefit being established. I think that is the core of the issue here: a pension promise made, not being met, without an alternative scheme with comparable benefits and/or compensation—as occurred in the Qantas case. In the Qantas case, with privatisation employees required to leave the CSS, there was a comparable new section, as I understand, inserted in the Qantas trust deed to deal with this particular matter.

Mr Jones—This, I assume, was a decision made by the employer?

Senator SHERRY—As part of the discussions and negotiations in that privatisation process. You say you have had legal advice on this issue—I am not talking specifically about Telstra, but you have had general legal advice on this matter?

Mr Jones—On the issue of changes in the status of the employer and the consequences.

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Senator SHERRY—Yes. Can you provide me with that legal advice?

Mr Jones—I am not sure; I can have a look at it and see what we have.

Senator SHERRY—Take that on notice. We touched on this earlier: have you examined the constitutional issues involved here?

Mr Jones—No, we have not.

Senator SHERRY—Could I ask you to have a look at that?

Mr Jones—Can you be a bit more precise in terms of what constitutional issues there might be?

Senator SHERRY—Removing a promised benefit without compensation—expropriation of asset without compensation. I have seen some legal advice on this issue in the context of Telstra employees and I believe there is a question. Coming back to your earlier comment, an entry into a defined benefit fund is not an expectation made. There is a promise; there is a contractual obligation entered into. So it is a bit more than an expectation, is it not?

Mr Jones—It is an obligation assuming that you stay within the fund for the designated period to receive the consequences of that promise; but, when one of the requirements are that, to stay in the fund, you have to be a public sector employee, there may now be other issues as part of it.

Answer:

APRA has not sought or received legal advice on the constitutional validity of changes to defined benefit superannuation fund members' benefits without compensation.