(1) Tabled by Senator Wong

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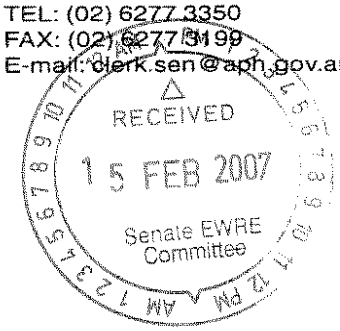


6 June 2006

Senator Penny Wong
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Wong

ESTIMATES HEARINGS
EVIDENCE BY DEPARTMENT OF EMPLOYMENT AND WORKPLACE RELATIONS

You asked for some further advice (that is, further to the advice provided by the Deputy Clerk, Dr Rosemary Laing, dated 29 May 2006) on certain answers given by the Department of Employment and Workplace Relations, and particularly by Mr J O'Sullivan of that department, at the estimates hearings of the Employment, Workplace Relations and Education Legislation Committee on 29 and 30 May 2006.

This note will be somewhat more detailed than should be necessary, because there is a great deal of ambiguity and lack of clarity in what the department put to the committee in those answers, and it is necessary to untangle various strands of the answers.

The department, in the person of Mr O'Sullivan, whose answers were not qualified by the secretary of that department, Dr Boxall, invoked subsection 13(6) of the *Public Service Act 1999* as an impediment to answering certain questions in the hearing. That subsection is one of a number of parts of the Public Service Code of Conduct, and provides:

> An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

Mr O'Sullivan, and the department, believe that this provision could be breached by disclosure of some information to a parliamentary committee. He referred to it as imposing an obligation on public servants (transcript of hearing, 29 May 2006, p. 14), and twice stated that answering some questions could be a breach of the provision (30 May 2006, p. 18).

The first point to be noted is that the subsection is not a normal statutory secrecy provision, which prohibits the disclosure of particular information. Like all statements in codes of conduct, it is cast in terms of uncertainty and judgement: it refers to "appropriate" confidentiality.

Even if it were a prescriptive secrecy provision, contrary to what Mr O'Sullivan thinks an officer cannot be in breach of such a provision by providing information to a parliamentary

committee. This matter was extensively canvassed by senators in 1991, and, after some uncertainty on the part of some government advisers, the considered view of the then Solicitor-General, in accordance with the established law on the subject, was that a statutory secrecy provision does not prevent the provision of information to a House of the Parliament or its committees unless there is something in the provision which indicates that it has that application. This established principle is shared by the current government and its advisers and was expressed in the Senate in 2003:

> A general statutory secrecy provision does not apply to disclosure of information in parliament or any of its committees unless the provision is framed to have such an application. (Senator Minchin, Minister for Finance and Administration, *Senate Debates*, 4 December 2003, pp 19442-3.)

Most departments and agencies are now aware of this point. It is most surprising that any officer of any department should still be referring to the possibility of being in breach of a statutory provision by providing information to a parliamentary committee. At one point Mr O'Sullivan referred to the statutory provision not providing a bar to questions being answered (transcript, 29 May 2006, p. 42), but that statement was inconsistent with his other references to his being in breach of the subsection by answering the questions. If he could be in breach of it, how could it not be a bar? There was, to say the least, a lack of clarity in what he put to the committee.

At one stage Mr O'Sullivan stated that the point he was raising was not a public interest immunity claim (transcript, 30 May 2006, p. 18). This is perhaps the most remarkable of his statements. The difficulty he finds with subsection 13(6) is, according to this statement, something other than the normal grounds of public interest immunity claims.

A public interest immunity claim, that is, a claim that it would not be in the public interest to disclose certain information to a parliamentary committee, is simply the vehicle by which issues about the sensitivity of particular information are raised. This is made clear by the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, published by the Department of the Prime Minister and Cabinet. In the discussion of public interest immunity claims in that document the following issues are listed as issues which may give rise to such claims, which must be made by a minister:

- material disclosing cabinet deliberations
- material consisting of advice to government
- material subject to statutory secrecy provisions.

The *Government Guidelines* refer to the following categories of information which "could form the basis of a claim of public interest immunity":

> material disclosing any deliberation or decision of the Cabinet, other than a decision that has been officially published, or purely factual material the disclosure of which would not reveal a decision or deliberation not officially published
>
> material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of the Government *where disclosure would be contrary to the public interest* [emphasis added] (para 2.32).

In relation to statutory secrecy provisions, the *Government Guidelines* refer to them as "considerations [which] may affect a decision whether to make documents or information available", and states that the Attorney-General's Department should be consulted when occasions arise involving such provisions (para 2.33).

If Mr O'Sullivan considered that the information for which he was asked could fall into either of these categories, or could be subject to a statutory secrecy provision, he should have raised them as possible grounds for a public interest immunity claim, which, as the *Government Guidelines* state, must be made by a minister. He should have indicated to the committee that he intended to ask the responsible minister to consider whether a public interest immunity claim should be raised on those grounds, after consulting with the Attorney-General's Department if he thought that a statutory secrecy provision was involved. Instead, Mr O'Sullivan and the department made their own decision that subsection 13(6) prevented the answering of the questions. It should be emphasised again that the stated grounds are only factors to be taken into consideration as to whether a public interest immunity claim should be made by a minister.

As indicated in the advice of 29 May 2006, questions about when advice was provided to ministers' offices have frequently been answered in committee hearings. In these cases, if the *Government Guidelines* have been followed, and if any consideration has been given to raising a public interest immunity claim, it has been decided either that there is no basis for such a claim or that any basis for such a claim is outweighed by the public interest in revealing the required information to the committee. It is not clear that Mr O'Sullivan and the Department of Employment and Workplace Relations realise that the issues they sought to raise are factors to be weighed by ministers in this process of public interest balance.

At another stage of the hearing, Mr O'Sullivan drew an analogy between what he regards as his obligation to comply with section 13(6) of the Public Service Act and an obligation to maintain confidentiality about a freedom of information request which might be made by a senator (transcript, 20 May 2006, p. 18). This is an unhelpful analogy. Estimates hearings, and indeed other parliamentary inquiries, are based on a constitutional premise of a great public interest in parliamentary scrutiny of how ministers and departments perform their functions, which may on rare occasions be outweighed by a public interest in not disclosing particular information. It has already been noted that this department appears not to appreciate the weighing of public interests which must occur, and the relative weight they bear. Does it think that the responsibility of a minister and a department to account to the Parliament for the minister's and department's performance of official functions has only the same public interest quota as the privacy of an FOI inquirer, or, alternatively, the performance by a senator of the senator's individual functions as a parliamentarian? Privacy is not the issue, and, on the other interpretation, the situations are hardly equivalent in terms of the public interests involved. The use of this analogy only raises more problems than it answers in relation to this department's approach to its accountability obligations.

Mr O'Sullivan and the department contended that information about when answers to questions on notice were provided to ministers' offices falls within the prohibited area (transcript, 30 May 2006, pp 17-19). It is to draw an extremely long bow to claim that such information falls within the category of advice to government. That, no doubt, is why other departments have regularly answered questions about when answers were provided to ministers' offices. The departments which answered such questions in the recent hearings

include the Department of the Prime Minister and Cabinet, the Department of Finance and Administration, and the Department of Foreign Affairs and Trade.

Subsequently it was clarified that the answers had not yet been finalised (transcript, p. 19), but there was no indication that this involved any withdrawal from the position put earlier. This only serves to indicate the lack of clarity in the position adopted by Mr O'Sullivan and the department.

Mr O'Sullivan used the language of objecting to the questions. Perhaps he thinks that his taking objection to questions automatically triggers the Senate's Privilege Resolution 1(10). This provides that, if a witness objects to answering any question, the committee is to consider the stated ground of the objection and to deliberate and make a decision upon it. That provision, however, refers to witnesses of all kinds, not specifically public service witnesses, and to all possible objections to questions (the example given in the provision is self-incrimination). In relation to public service witnesses and possible public interest immunity claims, it is not triggered unless and until a minister makes such a claim. A public servant who considers that a minister should be given opportunity to make a public interest immunity claim is covered by Privilege Resolution 1(16), which allows an officer reasonable opportunity to refer questions to superior officers or a minister. As has been indicated, the ground for not answering the questions which Mr O'Sullivan seems to have raised is one of the possible grounds of a public interest immunity claim, and if he thought that it could arise he should have referred the question to the minister under Privilege Resolution 1(16).

I suggest that this note be drawn to the attention of the minister and the department for consideration before the next estimates hearings. That course may at least achieve the goal of properly identifying and articulating any difficulty which officers see in the answering of particular questions. It should also ensure that any claims that questions should not be answered are properly considered and made by the minister.

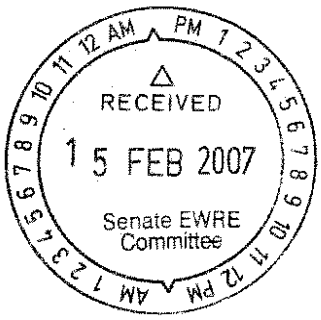
Please let me know if I can be of any further assistance in relation to this matter.

Yours sincerely

H. E.

(Harry Evans)

(2) Tabled by ComCare



Attachment A

Figure to demonstrate additional yearly amount of workers' compensation benefits payable to employee, Mr E, if the proposed SRCOLA amendment to s21 had applied since 1994.

Year	10 Year Bond Rate %	Pre SRCOLA deeemed weekly earning on lump sum of $141,132.56	deemed weekly lump sum earning amount if the post SRCOLA formula had applied	extra amount of compensation that would have been paid - per year
1994	10.0	$271.41	$0	**$0**
1995	7.4	$271.41	$71	**$3,698**
1996	9.9	$271.41	$4	**$212**
1997	8.7	$271.41	$36	**$1,877**
1998	7.6	$271.41	$64	**$3,345**
1999	6.0	$271.41	$109	**$5,674**
2000	5.5	$271.41	$123	**$6,422**
2001	6.5	$271.41	$95	**$4,926**
2002	5.8	$271.41	$113	**$5,899**
2003	5.9	$271.41	$112	**$5,829**
2004	5.3	$271.41	$126	**$6,577**
2005	5.7	$271.41	$117	**$6,097**
2006	5.4	$271.41	$124	**$6,464**
2007	5.4	$271.41	$125	**$6,492**
				$63,510

Pre 1994 situation for information only (does not apply in Mr Emery's case)

1988	13.19	$271.41	$358.03	***-$4,504***
1989	12.10	$271.41	$328.52	***-$2,970***
1990	13.41	$271.41	$363.91	***-$4,810***
1991	13.18	$271.41	$357.72	***-$4,488***
1992	10.69	$271.41	$290.16	***-$975***
1993	9.22	$271.41	$250.24	***$1,101***
				-$16,647