

1 A. From memory, the legislation provided the department
2 with an opportunity to do those things rather than
3 a requirement to do those things - "may" conduct
4 inspections. It's a point of nuance, I realise.

5
6 Q. That won't define your duty of care --
7 A. Yes.

8
9 Q. -- given the power and the capacity?
10 A. Was it a foreseeable risk? Did we have control over
11 the risk? Did we respond appropriately?

12
13 Q. You understand all the questions.
14 A. Yes.

15
16 Q. They are not without their complexities.
17 A. Yes.

18
19 Q. But it would seem, from what we understand so far,
20 that little regard was had to that component of the duty of
21 care and whether it was breached, leaving aside the
22 question of response once allegations were known?
23 A. I did think about that aspect of it. I didn't spend
24 a huge amount of time --

25
26 Q. I didn't so much have you in mind. I had those who
27 may have looked at it before you came along.
28 A. Okay.

29
30 Q. Is that right, that the department never thought of
31 its having an obligation in those terms --
32 A. I should confine myself to what I do and don't know,
33 but it's clear from the documents that I've seen in
34 reviewing this that there is a strong view that the duty of
35 care was not always engaged simply because we had a funding
36 or regulatory role. Now, whether that view is an
37 appropriate view I haven't thought about, but that
38 reflected, as I say, the approach to this matter. We saw
39 it in those terms, not more broadly.

40
41 Q. As you rightly identify, it does continue, leaving
42 aside this case, as a relevant issue when we come to look
43 at the question of redress and the response which we might
44 recommend the State should make.
45 A. Yes, it does.

46
47 MR LLOYD: Q. Mr Coutts-Trotter, I think you identified

1 in your evidence some uncertainty about the dates when
2 permits or licences were first issued?

3 A. Yes.

4
5 Q. Can I try to help you.

6 A. Thank you.

7
8 Q. Does it accord with your recollection that on 7 June
9 1976 Mr Gordon was granted a permit pursuant to section 32
10 of the Child Welfare Act?

11 A. Yes.

12
13 Q. And that on multiple occasions in 1976 through to
14 January 1978, the section 32 permit was extended for
15 further six-month periods?

16 A. Yes, that's right.

17
18 Q. Then from December 1978 a licence pursuant to
19 section 29 of the Child Welfare Act was granted?

20 A. Yes. Yes, with conditions attached.

21
22 Q. Thank you. Could I ask you some questions about what
23 alternatives to litigation the department offered as at
24 2008. You might have heard that there were some questions
25 asked of Ms Loughman about whether advice was given to
26 these plaintiffs about litigation being a "blunt
27 instrument" and that it might not be the forum in which the
28 plaintiffs would get the acknowledgment or apology they
29 were seeking.

30
31 Are you aware, aside from commencing civil
32 proceedings, of other avenues which were available to these
33 plaintiffs to try to bring the complaints that they had
34 made in the proceedings to the attention of the department?

35 A. In 2008, no, I'm not.

36
37 Q. What about now?

38 A. Well, the lessons that we need to learn from this
39 experience are a great many. What struck me about many of
40 the women's testimony and statements was the importance
41 they placed on the ability of the Women's Legal Services to
42 communicate effectively with them, to explain in good,
43 plain terms what their choices were and what was happening
44 inside the process. It seems to me that, as an agency, we
45 should perform that task as well. We should be
46 communicative. We shouldn't ask people to rely on
47 intermediaries. We should take every opportunity to be as

1 communicative, as open and initially as believing as
2 possible when people come forward with civil claims or
3 concerns about abuse that they suffered in circumstances
4 where we have a responsibility.

5
6 Q. Has that manifested itself in any particular changes?
7 Is there anything in particular --

8 A. We've formulated a victims support services policy
9 that tries to establish the kinds of standards that we
10 should expect of ourselves and that people approaching us
11 in these circumstances can expect of us. A policy starts
12 as an intent, words on paper. It then needs to be
13 translated into training and the culture of the department.
14 This needs to become how we do things.

15
16 Q. You would have heard some evidence that at one point
17 in the litigation, it was recommended by the Crown
18 Solicitor's Office that there be some surveillance
19 undertaken of the plaintiffs?

20 A. Yes, I did hear that.

21
22 Q. You understand from the terms of that recommendation
23 that what was proposed was that after the Crown Solicitor's
24 Office had made appointments for the plaintiffs to attend
25 medico-legal psychiatrists appointments, a private
26 investigator with a video camera would follow them around
27 and record their movements?

28 A. Yes.

29
30 Q. I should say this in fairness: you're aware that the
31 department rejected that advice?

32 A. Yes. Good for us.

33
34 Q. Are there any policies or procedures in place within
35 the department about the question of whether surveillance
36 is conducted on plaintiffs in sexual abuse cases?

37 A. I would have thought we wouldn't need a policy on
38 that. Plain commonsense and decency would dictate that
39 that is just a ridiculous notion. Yes.

40
41 Q. You would be hopeful that a matter like that would be
42 comfortably dealt with with the new procedures that are in
43 place in terms of the general legal counsel and his or her
44 reporting function to you?

45 A. Yes.

46
47 Q. Finally, may I ask you some questions about specific

1 aspects of the model litigant policy for civil litigation.
2 That is to be found at tab 17 of the annexures to your
3 statement.

4 A. Yes.

5
6 Q. I want to ask you about whether, in your view, after
7 the review you've done, there was a breach of the model
8 litigant policy in a number of different respects.

9
10 First, do you think that there was a breach of
11 clause 3.2(e)(i), which provides that the State should
12 attempt to keep the costs of litigation to a minimum,
13 including by not requiring the other party to prove
14 a matter which the State or an agency knows to be true,
15 when it came to pass that the State put the plaintiffs to
16 proof of the allegations and, in particular, those
17 plaintiffs who had made complaints which led to the
18 convictions of Mr Gibson?

19 A. We completely breached our obligation there, and it
20 had the effect of asking people to relive traumatising
21 events. I can only imagine it would have been read as the
22 organisation, our agency, not believing what happened, and
23 I am very, very sorry for that.

24
25 Q. Plainly this is no personal criticism because of your
26 lack of involvement. Sitting there today, it's a matter
27 which those women who had the courage to make complaints to
28 the police and give evidence, resulting in convictions,
29 would find particularly difficult to understand in
30 circumstances where, in one forum, the State had been
31 upholding their evidence in order to indict and incarcerate
32 Mr Gibson, but, in another forum, the State was making them
33 prove the very things that had been upheld in that other
34 forum?

35 A. It would have been baffling.

36
37 Q. Secondly, can you please comment on whether there was
38 a breach of the obligation in 3.1 to act with complete
39 propriety, fairness and in accordance with the highest
40 professional standards when the State attempted to run its
41 permanent stay application on evidence it knew omitted
42 matters relevant to the application in circumstances where
43 the State bore the onus of proof?

44 A. I think you can only fairly concede that that is
45 right.

46
47 Q. If you go, please, to 3.2(f), it's at least possible

1 that that might have been breached, 3.2(f) involving the
2 obligation not to take advantage of a claimant who lacks
3 the resources to litigate?

4 A. Yes.

5
6 Q. Thirdly --

7 A. I think you are being too kind on us. I think 3.2(a).

8
9 Q. I was coming to that. In all seriousness,
10 I understand that in this respect, involving the State's
11 permanent stay application, is it right that you would also
12 concede that there is a breach of 3.2(a) --

13 A. Yes.

14
15 Q. -- which requires the State and its agencies to act
16 honestly and fairly by dealing with claims promptly and not
17 causing unnecessary delay?

18 A. Yes.

19
20 Q. Could I move on to the third area and ask you to
21 comment on this: in the State failing to agree to attend
22 a mediation by, at the latest, the middle part of 2010,
23 would you agree that that involved a breach of 3.2(a)?

24 A. Yes, I would, and as I understand it from the
25 evidence, we felt we needed to pursue the limitation matter
26 to its conclusion before having a discussion with the women
27 and their representatives, and I think it's very easy to
28 say in hindsight that was a mistake and fails in our
29 obligations under this policy.

30
31 Q. Please comment on this: that failure to have agreed
32 to go to a mediation, in circumstances where the other side
33 had been raising it and judges had been raising it, would
34 also have been a breach of 3.2(b) involving an obligation
35 to pay legitimate claims without litigation, where it is
36 clear that liability is at least as much as the amount to
37 be paid?

38 A. Look, on balance, yes. I think the failure in other
39 aspects of the policy is clearer.

40
41 Q. It probably doesn't matter if there is a breach of
42 another provision in the policy, but I also raise for your
43 attention (d), the obligation to endeavour to avoid
44 litigation wherever possible?

45 A. Yes.

46
47 Q. The fourth matter I want to ask you about is that

1 there was evidence yesterday - and you may not have been
2 here for it - that the Crown Solicitor's Office, on behalf
3 of the department, had issued a request for particulars to
4 the plaintiffs, which contained 113 paragraphs. Some of
5 those paragraphs asked the plaintiffs to particularise
6 matters which were within the State's knowledge.

7 A. Yes.

8
9 Q. Just dealing with those requests for particulars, do
10 you agree that the State making requests for particulars of
11 that nature in litigation of this sort would involve
12 a breach of 3.2(a)?

13 A. Yes.

14
15 Q. Also, one of the requests for particulars was for
16 details of the history of any criminal offences that the
17 plaintiffs had been found guilty of. Do you have
18 a response to that request?

19 A. I'm ashamed that we asked.

20
21 Q. Thank you. Could I move on to the fifth matter. You
22 would recall from your review of the file that early on the
23 State, or the Crown Solicitor's Office on behalf of the
24 State, took the position that there should be separate
25 statements of claim filed for each plaintiff?

26 A. Yes.

27
28 Q. Ultimately the court did not make those orders, and,
29 in the course of dealing with that application, a question
30 was raised by Judge Knox about whether the State had been
31 acting in breach of the model litigant policy?

32 A. Yes.

33
34 Q. Do you have a comment on whether, in adopting that
35 course, the State was in breach of, for example, 3.2(a) of
36 the model litigant policy?

37 A. Again, yes, I think we fell short on that ground.

38
39 Q. Apart from anything else on that question, filing the
40 additional 13 statements of claim might have involved the
41 payment of a separate filing fee, might it not?

42 A. Yes.

43
44 Q. Having regard to what was known, I think you've
45 conceded, by then, if there were another 13 filing fees
46 paid, that would have required the plaintiffs to come up
47 with the money, and then it was likely, on what was known,

1 the State to have to pay it when it came to settle the
2 cases?

3 A. Yes.

4
5 Q. Could I raise the sixth matter with you. The fact in
6 this case, as you well know, is that the first occasion on
7 which an apology was offered on behalf of the State was at
8 the mediation on 17 December 2013.

9 A. Yes.

10
11 Q. Do you accept that that delay involves a breach of
12 3.2(i) --

13 A. Yes.

14
15 Q. -- which provides that the State should apologise
16 where the State or agency is aware that it or its lawyers
17 have acted wrongfully or improperly?

18 A. Yes, I am.

19
20 Q. Seventhly, having regard to your evidence at
21 paragraph 168 of your statement, which, just to remind you,
22 goes to the distinction which had been drawn in dealing
23 with these proceedings by the department arising from
24 whether there was an alleged duty of care owed on the basis
25 only of the department's licensing and funding functions as
26 opposed to other types of liability --

27 A. Yes.

28
29 Q. -- would you agree that, in drawing that distinction,
30 that raised the possibility or likelihood of a breach of
31 3.2(c), which requires the State to act consistently in the
32 handling of claims and litigation?

33 A. Arguably, yes.

34
35 MR LLOYD: Those are my questions, your Honour.

36
37 THE CHAIR: Does anyone else have any questions of
38 Mr Coutts-Trotter?

39
40 MS GERACE: Yes, I do, your Honour.

41
42 <EXAMINATION BY MS GERACE:

43
44 MS GERACE: Q. Mr Coutts-Trotter, I appear for
45 Janet Loughman from the Women's Legal Services NSW.

46 A. Yes.

47

1 Q. I have just three small and discrete areas of
2 questioning, but firstly may I indicate that I will ensure
3 those instructing me convey to [AII] the matters expressed
4 by you today.

5 A. Please do.

6
7 Q. Firstly, just dealing with an issue of the duty or
8 potential duty of the department to the children of
9 Bethcar. Your statement dealt with the potential liability
10 that arose on notice of particular problems, and the
11 Commissioner and his Honour took you to another potential
12 area arising from funding or licensing.

13
14 Can I ask specifically some questions about a third
15 potential area, and that is where a child was committed to
16 the care of the Gordons by a court order. I don't know
17 whether you know the answer to this question, but did you
18 understand that where a child was committed to the care of
19 the Gordons by a court order, that was often after
20 a recommendation was made by an officer of the department
21 to the court that the child could be committed to their
22 care?

23 A. I wasn't aware of that, but I see the point you're
24 making, yes.

25
26 Q. In those circumstances, if that were in fact the case,
27 for instance - I'll take that back a step. Did you
28 understand that often if a court was making an order to
29 commit a child to the care of a person, it was similarly
30 making an order to remove the child from a particular
31 situation and ordering that child to live or reside
32 somewhere under someone else's care?

33 A. Yes.

34
35 Q. And that one of the issues being determined in that
36 process was that the child may have been at risk of harm or
37 neglect in a particular situation and therefore needed to
38 reside or live somewhere else in his or her interests?

39 A. Yes.

40
41 Q. In those circumstances, if the factual situation was
42 such that, in making that order, the court had regard to
43 a recommendation of an officer of the department as to
44 a suitable place where that child may reside, that may be
45 another potential area where the department is liable if it
46 recommends a placement with particular people, and those
47 people are not suited to that role. Would you accept that

1 as a potential area of liability?
2 A. Conceptually yes, and then you'd have to look to what
3 was available to the department and the officer making that
4 recommendation.

5
6 Q. At that time?
7 A. At that time, yes.

8
9 Q. But in its concept, without looking at all those other
10 factors and accepting they were the things that needed to
11 be considered, the department's recommendation of a
12 placement, inherent in that is an assessment, at least,
13 that that is a place that is a better place from where that
14 child has come from?
15 A. As you've described it to me, yes.

16
17 Q. Could I now just ask you some questions, moving
18 forward with the new policies that are in place?
19 A. Yes.

20
21 Q. The document at tab 23 of your statement, claims
22 against the State - just so I can clarify for those whom
23 I represent and who we have represented, that policy is now
24 operational; is that right?
25 A. It is, but it is superseded to some degree by a legal
26 policy directive, so there may be aspects of this that are
27 at odds with that - I'm not saying there are, there may be,
28 but there is a later policy directive that may have
29 superiority.

30
31 Q. In paragraph 177 of your statement, if we can bring
32 that up.
33 A. Yes. 177?

34
35 Q. I think I've misled you. Paragraph 147, I'm sorry.
36 A. Yes.

37
38 Q. You say there in your statement:

39
40 *My view is that a key principle should be*
41 *to work collaboratively with all people to*
42 *resolve disputes sensitively, efficiently*
43 *and effectively.*

44
45 A. Yes.

46
47 Q. Presumably, that comes from a commitment to ensure

1 that the interests of both claimants and the State are
2 balanced and the defence of the State as well as the
3 interests of the claimants are more evenly considered.
4 A. Yes.

5
6 Q. And that an approach that is fair and proper in all of
7 the circumstances is one that the State will strive to
8 adopt in responding to these claims?
9 A. Absolutely.

10
11 Q. I won't go back over the evidence you've already given
12 in relation to the Limitation Act, but one of the
13 difficulties that Ms Loughman faced when dealing with these
14 historical claims was the concern that the Limitation Act
15 would be raised against her clients in the event she made
16 an informal approach to the State to see if it could be
17 resolved in a more collaborative or other way. Having
18 regard to the matters you've set out in your statement and
19 the evidence given in relation to the Limitation Act, is an
20 informal approach, by lawyers acting for potential
21 claimants, to your department something that they should
22 take as an available option in order to bring these matters
23 to the department's attention in a less formal and less
24 litigious way, at least at the outset?
25 A. Yes.

26
27 Q. Secondly, one of the difficulties that was encountered
28 was obtaining all of the necessary legal documents that set
29 out the funding and licensing arrangements between the
30 department and Bethcar, for instance, in this case. In
31 line with the collaborative approach you refer to, would
32 one option be that those representing potential claimants
33 may approach the department - sorry, once they had
34 approached the department and advised those claims, that
35 they may, in appropriate circumstances, be given some form
36 of access to those documents so that the legal framework or
37 the factual background can be more readily and speedily
38 determined?
39 A. Yes.

40
41 MS GERACE: Thank you.

42
43 COMMISSIONER FITZGERALD: Q. In relation to
44 paragraph 147 to which counsel has just referred you, is
45 this a normal concept within the department? I know you've
46 only recently been appointed, but is it novel to the
47 Department of Community Services or the Department of

1 Community and Families actually to seek to collaboratively
2 work with people to resolve disputes sensitively,
3 efficiently and effectively? Is that something that was
4 present or absent from the department when you were
5 appointed as secretary?

6 A. Commissioner, I think it is not entirely novel, but it
7 has not been consistent, and our aim now is to make sure
8 that, with consistency, this is how we approach it.

9
10 Q. Given that your department has adopted this approach,
11 what efforts would need to be put in place to ensure that
12 the Crown Solicitor's Office understood that in approaching
13 matters involving your department this would be the new
14 approach that is to be taken?

15 A. Good communication and a more effective working
16 relationship.

17
18 Q. In relation to that, is there anything between your
19 department and the Crown Solicitor's Office currently on
20 foot that would better educate solicitors within the Crown
21 Solicitor's Office in relation to both child sexual abuse
22 matters generally and, in particular, in relation to this
23 particular approach that you've identified in your
24 statement?

25 A. No, but there will be, both inside our agency and with
26 our external legal advisers. We need to, and I need to
27 talk to solicitors to say, "This is what this policy is
28 about." So, for example, if someone comes forward claiming
29 child abuse, we begin by believing them. We look for
30 information to support the claim. We assist in ways that
31 are practical, rather than the reverse. Now, that
32 obviously presents challenges for a legal culture that,
33 quite appropriately in some cases, firmly - very firmly
34 protects the interests of the State and of taxpayers. I do
35 recognise that it is a challenge to ask lawyers to
36 aggressively pursue the State's interests on one day and
37 then adopt a different approach because of some very good
38 reasons of context on another, which, in my mind, just
39 underlines the inherent flaw in civil litigation as an
40 appropriate mechanism to deal with the justice and redress
41 that survivors of child abuse are seeking. It's a
42 second-best mechanism.

43
44 THE CHAIR: Q. Mr Coutts-Trotter, you've been the head
45 of three departments, I think; is that right?

46 A. Four, your Honour.

47

1 Q. Four, is it. I've missed one.

2 A. Perhaps New South Wales.

3

4 Q. Leaving aside all litigants, but is there any reason
5 why a government should not act in whatever manifestation
6 of its said administrative function, ie, any department, in
7 a way that resolves disputes sensitively, effectively and
8 efficiently? Why shouldn't that be what government accepts
9 as the way to approach all disputes? That may mean on
10 occasion yes, you have to be very firm.

11 A. Yes.

12

13 Q. Why should we think of it as confined to your
14 department?

15 A. I entirely accept the point you're making. One of the
16 departments I headed had responsibility for public works
17 and most of the civil counterparties in those disputes were
18 aggressive, legally aggressive, large Australian or
19 international firms, and the point you make is absolutely
20 valid, but sometimes the people we're dealing with are very
21 forceful and very aggressive and very tactical.

22

23 Q. Indeed, which means that, depending on the case, you
24 may have to reveal your sensitive, efficient and effective
25 mechanisms in a slightly different way.

26 A. Yes, indeed.

27

28 Q. But what you're pointing to, of course, is the issue
29 that underlies all of the adversarial system.

30 A. Yes.

31

32 Q. Which brings about aggression, when perhaps aggression
33 may not be required.

34 A. Yes, indeed.

35

36 THE CHAIR: Does anyone else have any questions?

37

38 MS ENGLAND: I might hold my fire.

39

40 <EXAMINATION BY MR MENZIES:

41

42 MR MENZIES: Q. You were asked a number of questions
43 about the Crown Solicitor's Office and how you dealt with
44 them and your response on each occasion was something to
45 the effect, "When we're dealing with external lawyers".

46 A. Yes.

47

1 Q. Do I take it from that that you instruct not only the
2 Crown Solicitor's Office but private law firms?

3 A. Yes, we do.
4

5 Q. I take it that you take the same position in each
6 case, that you are the instructor and they will do as you
7 instruct them?

8 A. We should. I think there is a subtle point here
9 around the Crown Solicitor's Office plays on core matters,
10 which is a slightly - obviously is a particular role in a
11 different relationship, but by and large the point you make
12 is absolutely valid.
13

14 Q. Core matters?

15 A. Core matters, matters where an agency has no choice
16 but to use the Crown Solicitor's Office because the legal
17 issue raised is constitutional, has whole-of-government
18 implications, is of a certain character.
19

20 THE CHAIR: Ms England?

21
22 MS ENGLAND: I have no questions, thank you.
23

24 THE CHAIR: Mr Lloyd?

25
26 MR LLOYD: No, your Honour.
27

28 THE CHAIR: Mr Coutts-Trotter, you are excused.
29 Thank you.
30

31 <THE WITNESS WITHDREW
32

33 MR LLOYD: Your Honour, I regret to say that, despite best
34 laid plans, we've run out of witnesses today.
35

36 THE CHAIR: Very well. We will adjourn, in that event,
37 but until 10am on Tuesday. Thank you.
38

39 **AT 3.15PM THE COMMISSION ADJOURNED TO**
40 **TUESDAY, 28 OCTOBER 2014 AT 10AM**
41
42
43
44
45
46
47

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ANNEXURE 5; Transcripts dated 21st April 2016 of Senate Inquiry into Taxation Disputes



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

Corporate tax avoidance

(Public)

THURSDAY, 21 APRIL 2016

CANBERRA

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SENATE

ECONOMICS REFERENCES COMMITTEE

Thursday, 21 April 2016

Members in attendance: Senators Dastyari, Edwards, Ketter, Lambie, McAllister, Smith, Whish-Wilson, Xenophon.

Terms of Reference for the Inquiry:

To inquire into and report on:

Tax avoidance and aggressive minimisation by corporations registered in Australia and multinational corporations operating in Australia, with specific reference to:

- a. the adequacy of Australia's current laws;
- b. any need for greater transparency to deter tax avoidance and provide assurance that all companies are complying fully with Australia's tax laws;
- c. the broader economic impacts of this behaviour, beyond the direct effect on government revenue;
- d. the opportunities to collaborate internationally and/or act unilaterally to address the problem;
- e. the performance and capability of the Australian Taxation Office (ATO) to investigate and launch litigation, in the wake of drastic budget cuts to staffing numbers;
- f. the role and performance of the Australian Securities and Investments Commission in working with corporations and supporting the ATO to protect public revenue;
- g. any relevant recommendations or issues arising from the Government's White Paper process on the 'Reform of Australia's Tax System'; and
- h. any other related matters.

WITNESSES

AKHTAR, Dr Shumi, Senior Lecturer in Finance, Business School, University of Sydney 8
**CRANSTON, Mr Michael, Deputy Commissioner, Private Groups and High Wealth Individuals,
Australian Taxation Office 22**
HIRSCHHORN, Mr Jeremy, Deputy Commissioner, Public Groups, Australian Taxation Office 22
JORDAN, Mr Chris, Commissioner of Taxation, Australian Taxation Office 22
KONZA, Mr Mark, Deputy Commissioner, International, Australian Taxation Office 22
LANIS, Associate Professor Roman, Associate Professor, University of Technology, Sydney 18
**McCLURE, Mr Ross William, PhD Candidate and Casual Academic, University of
Technology, Sydney 18**
WILKINSON, Ms Marian, Journalist, Four Corners, Australian Broadcasting Corporation 1
ZIRNSAK, Dr Mark Andrew, Spokesperson, Tax Justice Network Australia 8

Mr Jordan: in your administration and in this administration.

Senator EDWARDS: Self-promotion is a wonderful thing.

Senator DASTYARI: Mr Jordan, at the last Senate estimates hearing, you outlined your frustration with the judicial processes and the tactics that are being used by corporations and, I assume, individuals to delay—and I think you used to word 'frustrate'—your endeavours. What we found here and has been revealed through Mossack Fonseca will perhaps lead to prosecutions and collection actions by the tax office. But, when you look at a case like the recent Chevron case, in which the ATO was successful, how many years did that take?

Mr Jordan: I think the original assessments were for 2004 to 2008, the hearing was 2014 and the decision came down 12 months later at the end of 200015.

Senator DASTYARI: And what did it end up costing?

Mr Jordan: It was \$10 million in out-of-pockets, not salary costs, to experts and lawyers.

Senator DASTYARI: You have previously outlined to this committee that you feel that there are deliberate strategies employed by companies to drag out these processes. There are two proposals I am going to put to you that I want to get your feedback on for this inquiry and the committee. Firstly, is it time, considering the significant revenue implications for the Commonwealth in some of these matters and accepting the fact that we do not want to give people their day in court—and people have a right to challenge decisions—we should be looking at ways of fast-tracking, promoting or getting through quicker some of these court matters to do with significant tax and national revenue implications? Secondly, should we be looking at extrajudicial powers and being able to hold Australian subsidiary and related entities responsible and accountable for documents that otherwise take years for you to be able to obtain? Can I just get you to touch on those two.

Mr Jordan: We, as an organisation, do have to be very careful, because often we are criticised that we have all these large powers, resources and all of that sort of thing, so it is a fine balance. We have to be very aware of, particularly with small business, and we go out of our way to help, educate, support and work with them. What I said before was: we will always start a problem, an audit or a negotiation in good faith, wanting to get a good positive resolution. But when we are basically stooled or gamed—you know, everyone nods and grins and commits to do things and then does not deliver—we are very much hardening our approaches and quickening. So we are now in discussions—it started last year—with the Federal Court to work with them to see how we can get some of these more strategically important cases up into their lists in a quicker way.

Senator DASTYARI: So you are working with the Federal Court to fast-track—

Mr Jordan: With the Federal Court to fast-track strategically important cases where we believe a principle needs to be set, and then there might well be a whole host of other ones sitting behind them, like that Chevron one that had a particular issue around whether you could treat it as purely a separate thing and pretend it was not part of a big corporate group.

Senator DASTYARI: And you are saying that, because that has implications for a whole set of other cases, you are working with the Federal Court on a fast-track process.

Mr Jordan: They are very, very cooperative right now and interested in how we can appropriately identify—it is new; it is different—and work with them to get things up more quickly.

Senator DASTYARI: That was the first one. The second is about extrajudicial powers.

Mr Jordan: We are all ears for any initiatives that would help us get information that is required in a more practical and quicker way. We get some companies that talk about, 'Oh, of course we will cooperate,' and some of those have been witnesses to this hearing.

Senator DASTYARI: While we are on that, Mr Jordan—and I am very conscious of time—there is the case of Uber. We have gone through this before. There are companies—and I am using them as an example because they have been before this committee before and they have given evidence—where there is media commentary and questioning about whether they have structured themselves in a way where documents do not exist in Australia that you would require to adequately pursue that. Do you want to explain some of those frustrations?

Mr Jordan: It is difficult to talk about individual taxpayers. But you know the evidence, and that is on the public record. They bill from the Netherlands, so they say that the 20 per cent tax, the fee, that they take from each of those drivers is billed over there in that classic sort of activity-here-but-bill-overseas type of thing. They hold information over there that we find very difficult to get. Part of the issue here is, as a compliance measure, taxi drivers want to make sure Uber drivers are paying tax on their fees because they feel like that is unjust, and that would be wrong. So for us to get a list of the drivers would be a very useful thing to do. But sometimes some companies argue that that is held overseas, and their parent will not give it to them or it is all too difficult, so we



ANNEXURE 6; Transcripts of Senate Inquiry into Comcare



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Estimates

(Public)

FRIDAY, 5 APRIL 2019

CANBERRA

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SENATE

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

Friday, 5 April 2019

Members in attendance: Senators Askew, Brockman, Ciccone, Marshall, McCarthy, O'Neill, Paterson, Pratt, Siewert, Spender, Watt.

JOBS AND SMALL BUSINESS PORTFOLIO

In attendance

Senator Cash, Minister for Small and Family Business, Skills and Vocational Education

Senator Payne, Minister for Foreign Affairs

Department of Jobs and Small Business Executive

Ms Kerri Hartland, Secretary, Department of Jobs and Small Business

Dr Jill Charker, Deputy Secretary, Corporate

Mr Martin Hehir, Deputy Secretary, Workplaces and Small Business

Mr Nathan Smyth, Deputy Secretary, Employment

Cross Portfolio

Mr Glen Casson, Group Manager and Chief Financial Officer, Finance, Legal and Governance Group

Mr Luke de Jong, General Counsel, Finance, Legal and Governance Group

Mr Shayne Howard, Branch Manager, Finance, Legal and Governance Group

Ms Moya Drayton, Group Manager, People, Communication and Assurance Group

Ms Meredith Fairweather, Branch Manager, People, Communication and Assurance Group

Ms Heike Phillips, Director, People, Communication and Assurance Group

Mr Kraig Lowes, Branch Manager, People, Communication and Assurance Group

Mr Tim Matthews, Branch Manager, People, Communication and Assurance Group

Mr Scott Wallace, Group Manager and Chief Technology Officer, Technology and Services Group

Mr Danny Jones, Branch Manager, Technology and Services Group

Outcome 1 – Employment

Ms Janine Pitt, Group Manager, Activation and Work for the Dole Group

Ms Stephanie Bennett, Branch Manager, Activation and Work for the Dole Group

Mr Ty Emerson, Branch Manager, Activation and Work for the Dole Group

Mr Stuart Watson, Branch Manager, Activation and Work for the Dole Group

Ms Helen Boyle, Director, Activation and Work for the Dole Group

Mr Daniel Clement, Director, Activation and Work for the Dole Group

Mr Alex Harvey, Director, Activation and Work for the Dole Group

Mr Carl Heinrich, Director, Activation and Work for the Dole Group

Ms Melissa Ryan, Group Manager, Delivery and Engagement Group

Ms Benedikte Jensen, Group Manager, Employment Services 2020

Mr Nicholas Dowie, Branch Manager, Employment Services 2020

Ms Kellie Hippit, Branch Manager, Employment Services 2020

Ms Katrina Chatham, Director, Employment Services 2020

Ms Kerryn Kovacevic, Group Manager, Employment Systems Group

Ms Nicolle Johnston, Acting Branch Manager, Employment Systems Group

Mr Malcolm Greening, Acting Group Manager, Labour Market Strategy Group

Ms Katharine Blackwell, Acting Branch Manager, Labour Market Strategy Group

Mr Ivan Neville, Branch Manager, Labour Market Strategy Group

Ms Carmel O'Regan, Acting Branch Manager, Labour Market Strategy Group

Ms Marsha Milliken, Group Manager, Quality, Integrity and Evidence Group

Ms Jodie Chamberlain, Branch Manager, Quality, Integrity & Evidence Group

Mr Malcolm Cook, Acting Branch Manager, Quality, Integrity & Evidence Group

Ms Fiona MacDonald, Branch Manager, Quality, Integrity and Evidence Group

Ms Robyn Shannon, Branch Manager, Quality, Integrity and Evidence Group

Mr Sean Mullins, Director, Quality, Integrity and Evidence Group
Mr Greg Manning, Group Manager, Youth and Programs Group
Ms Angela Hope, Branch Manager, Youth and Programs Group
Mr Ali Jalayer, Branch Manager, Youth and Programs Group
Mr Derek Stiller, Branch Manager, Youth and Programs Group
Ms Jodie Wearne, Branch Manager, Youth and Programs Group

Outcome 2 – Workplaces and Small Business

Mr Peter Cully, Group Manager, Small Business and Economic Strategy Group
Mr Alistair Beasley, Branch Manager, Small Business and Economic Strategy Group
Mr Bruce Cunningham, Branch Manager, Small Business and Economic Strategy Group
Ms Rose Verspaandonk, Branch Manager, Small Business and Economic Strategy Group
Ms Jody Anderson, Group Manager, Work Health and Safety Policy Group
Mr Adrian Breen, Branch Manager, Work Health and Safety Policy Group
Mr David Cains, Branch Manager, Work Health and Safety Policy Group
Mr Grant Lovelock, Branch Manager and Federal Safety Commissioner, Work Health and Safety Policy Group
Ms Janey Kuzma, Group Manager and Chief Counsel, Workplace Relations Legal Group
Mr Matthew Graham, Acting Senior Executive Lawyer, Workplace Relations Legal Group
Mr Ben Mason, Acting Senior Executive Lawyer, Workplace Relations Legal Group
Mr David Rushton, Acting Senior Executive Lawyer, Workplace Relations Legal Group
Ms Rachel Volzke, Senior Executive Lawyer, Workplace Relations Legal Group
Ms Alison Durbin, Group Manager, Workplace Relations Policy Group
Mr David Denney, Branch Manager, Workplace Relations Policy Group
Ms Sharon Huender, Branch Manager, Workplace Relations Policy Group
Ms Lace Wang, Branch Manager, Workplace Relations Policy Group
Ms Sue Saunders, Acting Group Manager, Workplace Relations Programs Group
Mr Henry Carr, Branch Manager, Workplace Relations Programs Group
Mr Peter Krizmanits, Acting Branch Manager, Workplace Relations Programs Group
Ms Helen McCormack, Branch Manager, Workplace Relations Programs Group

Asbestos Safety and Eradication Agency

Ms Justine Ross, Chief Executive Officer
Mr Nick Miller, Director

Australian Building and Construction Commission

Mr Stephen McBurney, Commissioner
Mr Cliff Pettit, Deputy Commissioner, Operations
Ms Janine Drennan, National Manager, Building Code
Ms Jill Jepson, Deputy Commissioner, Corporate and Code
Mr Matt Kelleher, Deputy Commissioner, Legal

Australian Small Business and Family Enterprise Ombudsman

Ms Kate Carnell, Ombudsman
Dr Craig Latham, Deputy Ombudsman
Ms Anne Scott, Principal Adviser

Comcare

Ms Lynette MacLean, Acting Chief Executive Officer
Mr Aaron Hughes, General Manager, Scheme Management
Mr Justin Napier, General Manager, Regulatory Operations

Fair Work Commission

- Ms Bernadette O'Neill, General Manager
- Mrs Jennifer Anderson, Acting Executive Director, Client Services
- Ms Ailsa Carruthers, Executive Director, Corporate Services
- Mr Murray Furlong, Executive Director, Tribunal Services

Fair Work Ombudsman

- Ms Sandra Parker, Fair Work Ombudsman
- Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations
- Mr Mark Scully, Deputy Fair Work Ombudsman, Corporate
- Ms Michelle Carey, Executive Director, Finance, Assurance and Business
- Ms Kristen Hannah, Deputy Fair Work Ombudsman, Strategic Engagement and Communications
- Mr Anthony Fogarty, Executive Director, Policy, Analysis and Reporting
- Ms Lynda McAlary-Smith, Executive Director, Compliance and Enforcement
- Mr Tom O'Shea, Executive Director, Strategic Engagement and Stakeholder Relations
- Mr Jeremy O'Sullivan, Chief Counsel
- Mr Steven Ronson, Executive Director, Proactive Compliance
- Mr Russell Thackeray, Chief Financial Officer

Registered Organisations Commission

- Mr Mark Bielecki, Commissioner
- Mr Chris Enright, Executive Director

Safe Work Australia

- Ms Michelle Baxter, Chief Executive Officer
- Mr Kris Arnold, Chief Financial Officer
- Ms Meredith Bryant, Acting Branch Manager, Hazards
- Ms Sarah Costelloe, Branch Manager, Enabling Services
- Ms Amanda Johnston, Branch Manager, Legal and WHS Strategy
- Ms Anthea Raven, Acting Branch Manager, Evidence and Compensation

Committee met at 09:01

CHAIR (Senator Brockman): I declare open this meeting of the Education and Employment Legislation Committee on Friday 5 April 2019. The Senate has referred to the committee the particulars of proposed expenditure for 2019-20 and certain other documents for the Jobs and Small Business portfolio and the Education and Training portfolio. The committee may also examine the annual reports of departments and agencies appearing before it. The committee has decided that answers to questions taken on notice will be required to be returned by close of business on Thursday 23 May. The committee has resolved that written questions on notice should be received from senators by close of business on Thursday 18 April. Officers should be aware that these dates have effect notwithstanding the prorogation of parliament.

Under standing order 26 the committee must take all evidence in public session. This includes answers to questions taken on notice. I remind all witnesses that in giving evidence to the committee they are protected parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The Senate by resolution in 1999 endorsed the following test of relevance for questions at estimates hearings:

Any questions going to the operations or financial positions of the departments and agencies which are seeking funds in the estimates are relevant questions for the purpose of estimates hearings.

I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise. The Senate has resolved also that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution

prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised, which will be incorporated in *Hansard*.

The extract read as follows—

Public interest immunity claims

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer’s statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(13 May 2009 J.1941)

(Extract, Senate Standing Orders)

CHAIR: Witnesses are specifically reminded that a statement that information or a document is confidential or consists of advice to government is not a statement that meets the requirements of the 2009 order; witnesses are instead required to provide some specific indication of the harm to the public interest that could result from the disclosure of the information or the document. Witnesses are asked to keep opening statements brief and to incorporate longer statements into the *Hansard*.

Department of Jobs and Small Business

[09:04]

CHAIR: I welcome the Minister representing the Minister for Jobs and Industrial Relations, the Hon Marise Payne, and officers of the Department of Jobs and Small Business. Before I ask if you have an opening statement, I will deal with a few nuts-and-bolts issues. We are going to release four of the agencies at this point, as discussed

overnight. We can formally release ASBFEO, the Fair Work Commission, the ABCC and the ROC. They've all been made aware, but we can now formalise that. We may be releasing one other agency a little later on.

Senator Payne: Is it a secret agency or one you wish to share with the department?

CHAIR: It has been shared with the agency. It is in the education portfolio. Which one was it?

Secretary: ASQA.

CHAIR: We are waiting on confirmation that no senators have questions for ASQA. Minister Payne, did you wish to make an opening statement?

Senator Payne: No, thank you very much, Chair. It's always a pleasure to be here.

CHAIR: Welcome, Ms Hartland. Did you wish to make an opening statement?

Ms Hartland: No.

Senator MARSHALL: Good morning, Minister. Ms Hartland, I wrote to you on 3 April, which isn't very long ago, outlining some of the areas I want to cover, in order to make sure you come prepared. Do you think we are going to fulfil those requirements?

Ms Hartland: Yes, we did receive your letter and we will answer to the best of our ability. We probably don't have every detail, given the short time frame, but we will certainly be happy to go through those questions.

Senator MARSHALL: We might be able to move through very quickly then. Why don't I start with the new employment services model. I understand that there will be some extra funding available to enhance support for jobseekers. What is the additional funding?

CHAIR: We will probably move into outcome 1.

[09:07]

Ms Hartland: We are moving to outcome 1. Does that mean there is no cross-portfolio?

CHAIR: Could you hold them for a while in case any other senators have a desire for cross-portfolio, but we will release them as soon as possible.

Ms Jensen: It was stated in the budget that additional funding will be added to the Employment Fund in 2020-21 to enhance support for jobseekers. I understand that your opening question was: what is the additional funding?

Senator MARSHALL: Yes.

Ms Jensen: The additional funding was a one-off injection of \$35.3 million, which is being added to the Employment Fund in 2020-21.

Senator MARSHALL: How was that amount determined?

Ms Jensen: Employment Fund credits for new jobseekers from 1 July 2020 to 30 June 2021 will increase from \$300 to \$375 for stream A, \$850 to \$1,100 for stream B and \$1,200 to \$1,600 for stream C.

Senator MARSHALL: So you add all those up, multiplied by the number of jobseekers, to get to your total.

Ms Jensen: That is correct.

Senator MARSHALL: What are the projections for each of those streams?

Ms Jensen: We don't have that here at present. We could take that on notice.

Senator MARSHALL: Do that. Will the fund remain a flexible pool or will the added funds be available only to those participating in the digital service?

Ms Jensen: Under jobactive there'll be no changes to the eligibility and rules for use of the employment fund.

Senator MARSHALL: Will it coincide with the national rollout of the digital service?

Ms Jensen: No. The one-off employment fund injection will be added in 2020-21 only. The new—

Senator MARSHALL: So participants in the pilot won't be able to access it?

Ms Jensen: Participants in the pilot that commences in July of this year, where they are eligible for the fund, will be able to access it through their providers. For those participating in Digital Plus, the fund will be accessed through a new contact centre. For those participating in Enhanced Services, the fund will be accessed through the Enhanced Services providers.

Senator MARSHALL: Is that the digital platform?

Ms Jensen: The digital platform consists of Digital First jobseekers, who are job-ready jobseekers who will commence and be serviced through the digital platform, and Digital Plus jobseekers will be largely serviced digitally but will get additional assistance through a contact centre.

Senator MARSHALL: So there is going to be one cohort that can only access it through the digital platform. Is that right?

Ms Jensen: Yes. Those participating in Digital First will not be able to access the employment fund, because they are job ready and will be able to self-service in digital. Digital Plus jobseekers will be able to access the employment fund through the contact centre.

Senator MARSHALL: Is the digital platform currently available?

Mr Smyth: We are currently running a digital trial. That platform will effectively form the basis of our new digital platform for the pilots as well. We currently have a number of participants in that digital online servicing trial, and that will become the basis for the new digital trial that we're going to roll out as part of the pilot. So that platform already exists and it will be enhanced continually. When we get into the actual pilot phase, there will be a process where we'll go through consultation with providers, and with participants as well, to help better inform us about how the design of that new digital platform will evolve over the three years of the trial.

Senator MARSHALL: Have any of the participants in the digital trial moved away from provider case loads?

Mr Smyth: Yes, they have.

Senator MARSHALL: How many?

Mr Smyth: Bear with me for a moment.

Ms Jensen: As at 28 February 2019, there have been 9,517 referrals to the trial. So that's the number to date that have moved away from traditional provider case loads and into the digital trial.

Senator MARSHALL: Did you tell me already how many people are in the trial?

Mr Smyth: We've had 9,517 referrals into the trial, and the number of exits from the trial so far has been around 4,800. Some of those are people that have opted out. Others are people that have found employment and moved off income support payments.

Senator MARSHALL: I'm a little bit confused about the figure Ms Jensen gave me.

Ms Jensen: That figure, 9,517, is the number of people who have been referred into the trial so far, as at February 2019. It's the same figure that Mr Smyth gave.

Senator MARSHALL: I thought I'd asked how many people have moved away from provider case loads. So that's all of them, is it?

Ms Hartland: No.

Mr Smyth: We've had some people that have moved into the jobactive case load, out of the digital trial, and we've had some people that have moved off income support payments and the like. In a case load like that there are various ways to exit from the digital trial. We also have the ability for people to move back to face-to-face servicing as well, should they find that they're having some difficulties with the digital platform.

Senator MARSHALL: Can you briefly outline to me how you're managing the transitional payments to providers?

Mr Smyth: In terms of the new employment services trial model?

Senator MARSHALL: Yes, and I'm wondering whether you're in a position to table the fee schedule.

Mr Smyth: At the moment, we've commenced engagement and discussions with the eight providers in the two nominated employment trial regions—that's Mid North Coast in New South Wales and South Adelaide in South Australia. I think it was on Wednesday of this week that we released an expression of interest to those providers.

Ms Jensen: On 2 April.

Mr Smyth: I've had teams out on the ground having discussions with those providers and talking about potential payment structures that go with the new employment services model. They're still in discussion with us. We're yet to finalise any of our agreements with those providers.

Senator O'NEILL: Can I ask a follow-up question there? What are you negotiating with them? Is it the money you're going to spend?

Mr Smyth: We're in discussions with them about the new payment structure that will go with the trial.