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Finance and Public Administration References Committee
The Senate

VIA ONLINE SUBMISSION:

<https://senate.aph.gov.au/submissions/pages/logon.aspx>

Dear Committee members

**INQUIRY INTO SUPERANNUATION CLAIMS OF FORMER AND CURRENT
COMMONWEALTH PUBLIC SERVICE EMPLOYEES**

I refer to your letter of 4 March 2011, and thank you for your invitation to provide a written submission addressing issues of relevance to the abovementioned Senate Inquiry, through the Finance and Public Administration References Committee (hereafter "the Committee").

1 Background

- 1.1 Snedden Hall & Gallop initially received information from in or about 1996/97 to the effect that a large number of industrial blue-collar workers had been apparently advised that they were ineligible to join the Commonwealth Superannuation Scheme. At that time, investigations commenced into the matter including the obtaining of Counsel's advice about potential legal action.
- 1.2 We are the solicitors who represented John Cornwell in the matter of *Cornwell v Commonwealth* [2005] ACTSC 14, and the subsequent appeals of that matter to the ACT Court of Appeal and the High Court of Australia.¹
- 1.3 Since the High Court's decision in favour of John Cornwell in 2007, a further 6 matters relating to lost Commonwealth superannuation entitlements were heard in the ACT Supreme Court (decisions pending). We currently have a number of claims on foot in the ACT Supreme Court, and numerous claims waiting to vest. That is, there are current government employees or former employees who have not yet suffered a loss because they have not yet retired or accessed superannuation benefits and therefore their cause of action is not complete.

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¹ *Commonwealth v Cornwell* [2006] ACTEA 7 & *Commonwealth v Cornwell* (2007) 229 CLR 519

- 1.4 As a result of our involvement in these matters, we have acquired a large amount of information and knowledge regarding the eligibility rights of Commonwealth employees to Commonwealth superannuation since the 1960's, the failure to provide Commonwealth employees with information regarding their rights to Commonwealth superannuation and the incorrect advice that temporary or exempt employees were given regarding those rights. This information is sourced from former employees of the Commonwealth, documentation independently obtained and the extensive discovery process that has taken place as part of the abovementioned litigation. In respect to information derived from discovery, we have sought the consent of the Commonwealth to be released from the implied undertaking of confidentiality relating to such documentation for the purpose of this inquiry.

2 Involvement in Inquiry

- 2.1 We are happy to assist the Committee with this inquiry, through the provision of information and by attending the inquiry to give evidence and discuss the issues and answer any questions that the committee members may have. However, as noted above, we are limited by our implied undertaking to the court with respect to discovery. It is not possible for us to use that information to assist this inquiry without breaching those obligations, unless we are released from the undertaking.
- 2.2 In our submission, the major issues that need attention from the Committee are:
- 2.2.1 The need for general dissemination of information regarding the issue amongst employees and former employees of the Commonwealth and Commonwealth statutory authorities (see 3 below).
 - 2.2.2 The Commonwealth's knowledge of the problem (see 4 below).
 - 2.2.3 Claimants who are out of time to bring a claim due to a lack of knowledge about their rights, at least in part because of the failure of the Commonwealth to alert such potential claimants of their potential rights (see 5 below).
 - 2.2.4 The Commonwealth's liability for the employees of Commonwealth statutory authorities (see 6 below).
 - 2.2.5 Death claims and the legal standing of surviving spouses (see 7 below).
- 2.3 Each of these issues is expanded and discussed below.

3 The need for dissemination of the issue amongst employees and former employees of the Commonwealth and Commonwealth statutory authorities

- 3.1 Currently, we have many potential claimants who have contacted Snedden Hall & Gallop for assistance in this area. We are aware that over 650 former Commonwealth employees have also registered with Comcover for assessment of their claims. Many of the potential claimants are elderly; some have died or are gravely ill. It is essential that the process be streamlined so that justice can be delivered in a timely fashion.
- 3.2 Our contact with claimants, and information gathered in the matters of which we have carriage, indicates that this problem is wide spread across Australia, and that there are still many current or former employees of the Commonwealth or Commonwealth bodies who were given incorrect information about their eligibility to join Commonwealth superannuation, and are not aware either that that information was incorrect, or that they may be entitled to compensation for the loss suffered as a result of reliance on that information.
- 3.3 We note that the Department of Finance and Deregulation has set up a website to make information available to potential claimants. We maintain, however, that there has been no attempt to actively identify potential claimants and notify them of their rights, even though the identity of such former Commonwealth government employees lies solely within the government's knowledge.

- 3.4 The concerning matter is that as time passes, many of the claims will become statute barred, in accordance with the law as outlined by the High Court in the Cornwell case. The Commonwealth has indicated that it will rely on the Statute of Limitations in every matter where it would be applicable. In circumstances where it is the Commonwealth itself which holds the information about the identity and location of many of the employees, it is of concern that many claimants remain unaware of their entitlements.
- 3.5 In our view, it is likely that many hundreds or thousands of former Commonwealth employees are still unaware that they were misled, or not informed, and therefore were deprived of potential membership of the Commonwealth superannuation scheme. It is therefore submitted that it is essential that as many former Commonwealth employees as possible are made aware of their rights either accruing or to accrue and the time limits that apply to potential claims, and their need to get advice about such a claim. Further, it is suggested that it would be appropriate for the Commonwealth to pass legislation or otherwise agree that it will not enforce a Statute of Limitations time limit in these matters bearing in mind the circumstances as set out above.
- 3.6 For those for whom time has expired without knowledge of their entitlement, a short period of time should be allowed in which they can bring claims. A precedent exists in the area of asbestos related disease for such entitlement.

4 The Commonwealth's knowledge of the problem

- 4.1 It is submitted that it is very important that the Committee seek information as to what was known by the Commonwealth or its statutory authorities about the lack of information or the giving of incorrect information to temporary and exempt Commonwealth employees and what was known and when as to the number of such employees who may have been misled as to their eligibility.
- 4.1.1 When did the Commonwealth first know that incorrect advice was being given to employees and what policies or decisions were taken in terms of remedying the incorrect advice that had been given?
- 4.1.2 When did the Commonwealth first take action in relation to the matters outlined above and how was such action taken?
- 4.1.3 What steps have been made to identify any documents relating to the incorrect information given to employees and whether there are documents suggesting that there were policies or decisions to the effect that the knowledge of the Commonwealth about such incorrect advice would be concealed or withheld from such employees, and would not be publicised.

5 System of ex gratia payments for claimants who are out of time

- 5.1 Many claims for compensation have been denied by the Commonwealth either directly or through their solicitors on the basis that such claims are out of time or Statute barred. The Commonwealth initially argued in Cornwell and other cases that all claims were Statute barred. As such, no former employee could have acted to enforce their rights until the High Court's decision in May 2007 clarifying that the Statute of Limitations did not apply until an actual loss was suffered (at the time when there was a relevant trigger event under the Superannuation legislation such as retirement or access to superannuation).
- 5.2 In the circumstances, it would be reasonable and fair for the Commonwealth to accept claims where employees acted reasonably to notify the Commonwealth of their claims following the Cornwell decision. As suggested above, the Commonwealth should agree not to enforce the Statute of Limitations in relation to these types of claims. For those for whom time has expired without knowledge of their entitlement, a short period of time should be allowed in which they can bring claims. A precedent exists for such action for asbestos related disease for such entitlement.

- 5.3 We are aware that many former employees of the Commonwealth have registered with Comcover, but have had their claims denied on the grounds that more than 6 years has passed since the time when they retired from Commonwealth employment and/or accessed their Commonwealth superannuation.
- 5.4 In February 2009 we were contact by the solicitors for the Department of Finance and Deregulation and advised that former employees of the Commonwealth, who are now statute barred from bringing a claim in relation to superannuation entitlements, have the options to apply to the Department of Finance and Deregulation for an act of grace payment. The Commonwealth has invited those affected to make a claim under the **Financial Management and Accountability Act 1997** (Section 33) for an ex-gratia payment on the basis that they have suffered losses as a direct result of the actions of the Commonwealth but cannot proceed because of a time limit or similar issue.
- 5.5 We subsequently contacted all of the former Commonwealth employees who had made contact with us, and who we advised that, on a strict application of the decision in the High Court in Cornwell, they were probably out of time to bring a claim, advising them that the Commonwealth had indicated that they were able to apply for an act of grace payment. We are aware that a number of such clients have applied for an ex-gratia payment under the legislation and we have also assisted a large number to make an application for such a payment. Considerable work was then carried out for over 40 of those clients in assisting them to apply for a payment, and complete the subsequent questionnaire that was issued by the Special Finance Claims Section of Department of Finance and Deregulation.
- 5.6 As far as we are aware to date all such applications have been rejected. It is inconceivable that none had merit and it is submitted that the Committee should seek an explanation relating to the rejection of all such applications.

6 The Commonwealth's liability for the employees of Commonwealth statutory authorities

- 6.1 The Commonwealth has created from time to time a number of statutory authorities such as the Australian Broadcasting Corporation, the ACT Electricity Authority, the Capital Territory Health Commission and others. The Commonwealth has taken a particular approach to these claims, that is, not to accept responsibility for the actions of the statutory authorities, despite its control over those bodies. This approach means that some people may not get the entitlements that they are entitled to.
- 6.2 It is conceded that there may be issues as to contribution between the statutory bodies or those bodies that inherited their liabilities, and the Commonwealth itself but it is submitted that it is paramount that the Commonwealth resolve with such statutory authorities or other bodies the issues of contribution through alternative dispute resolution or otherwise, without delay, so as not to delay the entitlements of employees or former employees who were misled in exactly the same way as those employed directly by the Commonwealth.
- 6.3 It is submitted the that Commonwealth in creating such Statutory Authorities did not advert, or advert directly to the superannuation entitlements of temporary exempt employees of such authorities. The employees of such bodies thought that they were Commonwealth employees, and made decisions regarding their employment of that basis. The Commonwealth now takes the position that the employees of Commonwealth statutory authorities are or were not Commonwealth employees, and this leads to consequences for such employees which they had no control over.
- 6.4 It is submitted that it is essential that the Commonwealth facilitate an early resolution of this technical issue that it effectively created through the establishment of statutory authorities.

7 Death claims and the legal standing of surviving spouses

- 7.1 The superannuation legislation provides for payment to surviving spouses of deceased employees or former employees. The Commonwealth has denied that there is any right for such a spouse to make a claim arising out of the misleading or incorrect advice given to such employees or former employees about their superannuation eligibility. We have received instructions in matters where a former employee has died and the spouse of that employee seeks to bring a claim either on behalf of the estate or on their own behalf. In many cases such surviving spouses have been denied entitlements to a reversionary pension that would otherwise have been payable, had the employee been a part of the Scheme and not been misled.
- 7.2 The Commonwealth has asserted that there has been no claim available for a spouse of a deceased employee as the Commonwealth owed no duty of care to such a spouse, despite the provisions in the legislation that specifically provide for a reversionary pension to flow to the spouse.
- 7.3 It is submitted that as a matter of principle such spouses should be entitled to recover in circumstances where, simply because of the death of the former Commonwealth employee, the Commonwealth seeks to escape liability for its acts and omissions. It is submitted that it may be necessary for the Commonwealth to legislate to provide for such a remedy in those circumstances.

8 Summary

- 8.1 It is submitted that many employees or former employees of the Commonwealth have been denied what were intended to be substantial and important benefits under the Commonwealth superannuation scheme. We submit that the matters outlined above should be the subject of consideration by the Committee and we repeat that we would be happy to expand further on these issues in evidence if that would assist.

Sincerely

RICHARD FAULKS