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Senate Finance and Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Submission to Inquiry into superannuation claims of former and current Commonwealth Public Service employees

The following submission by the Community and Public Sector Union is limited to its members employed by the Australian Broadcasting Corporation and its predecessor, the Australian Broadcasting Commission.

The PSU Group of the CPSU represents workers in the Australian Public Service, the ACT and Northern Territory Public Services, the telecommunications sector, call centres, employment services and broadcasting. We are a national union with members in every state and territory. Our members work in the areas of administration, sales, engineering, communications, information technology, legal, technical, scientific research, broadcasting and many other fields. The CPSU was formed from the amalgamation of a number of unions representing employees in the community and public sector industries. One of these unions was the Australian Broadcasting Corporation Staff Union.

The CPSU has cooperated with the Media Entertainment and Arts Alliance (The Alliance) in the surveying of ABC staff who may have been disadvantaged through the provision of misleading advice concerning their eligibility to join the 1922 scheme, the 1976 scheme or the 1990 superannuation scheme prior to the introduction of mandatory superannuation arrangements. We have categorised the responses to The Alliance survey within the following groups. This categorisation has assisted us in considering how the claims should be approached and managed.

1. Temporary employees who were not provided with any information concerning the availability of superannuation scheme.
2. Temporary employees who were provided with misleading, incorrect or incomplete information. The misleading, incorrect or incomplete information falls into two distinct categories:
 - (a) Temporary employees who were told that they were ineligible to join the superannuation scheme until they were made permanent; and
 - (b) Temporary employees who were advised that that they were ineligible to join the superannuation scheme where that advice was not qualified by the proviso that they could join, or make application to join if their employment continued.

The CPSU notes that different arguments may apply to each of these categories and that consideration may also need to be given to how these circumstances interact with the three superannuation schemes, i.e. the 1922, 1976 and 1990 schemes.

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The Treasury advice of 20 June 1949 (and subsequent advices) placed responsibility on each Department (including the then Australian Broadcasting Commission under the Post Master General) to provide advice to temporary employees of their eligibility to join a superannuation scheme. The apparent failure of the ABC to apply that advice to its employees is viewed as creating a liability on the employer to provide compensation to the class of employees in the our first identified group, i.e. where the required advice was not provided and there is a demonstrable financial loss.

The second category where employees were provided with incorrect misleading or incomplete information falls comfortably within the case law settled in *Cornwell*. While some employees reported that they were given advice to the effect that they were ineligible to join the superannuation scheme, the failure by the employer to further clarify the advice by stating that after a qualifying period they would be eligible to apply amounts to misleading and incorrect advice.

The issues that remain to be dealt with in our identified categories are limited to how the above cases may now be effectively managed. They are in essence administrative rather than judicial issues to be resolved.

ABC employees

The majority of employees in CPSU coverage commenced their employment as permanent officers. Accordingly 'Cornwell' issues did not arise because their entry into the superannuation scheme was mandatory. An exception however were our members employed at the ABC where the employer made regular use of the Exempt or Temporary employment under the Public Service Act and Australian Broadcasting Corporation Act.

The ABC made extensive use of the Exempt and Temporary employment in a range of trainee positions. The staff who were employed to work in the operational (sound, camera, lighting and panel operation) and technical (broadcast technical installation and maintenance) areas of the ABC were, in most cases, engaged on structured traineeships that lasted for about four years. At the satisfactory conclusion of their traineeships, the staff were made permanent. The survey undertaken by The Alliance on behalf of the CPSU reveals a common response by many of the ex-trainees who remain at the ABC. That response is that they were advised in their training classes at induction that they were ineligible to join the superannuation scheme.

The most common survey response was that respondents recall being advised either by their trainer or by a representative of Personnel section that superannuation was only available to permanent employees. This response was commonly reported by members engaged in traineeships where they attended structured training and induction courses. The most common response from employees who were not engaged in traineeships (eg employed in areas such as staging and set construction) was that they were provided with no advice at all about their eligibility to join a superannuation scheme.

The survey has also revealed that there have also been other cases where persons initially engaged as temporary employees and subsequently converted to permanent, were then not admitted to the superannuation scheme. The CPSU has recently written to ABC management about an employee in this situation. The ABC has denied responsibility for the matter and believes that the matter should be treated as a 'Cornwell type' claim, i.e. by referring the matter to *ComCover*.

The CPSU disagrees with the approach being taken by the ABC and considers that 'Cornwell' should not be inflated to address every form of administrative failure by an employer. The

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remedy available in these cases is for the employer to support the retrospective admission of the employee to the scheme from the date the employee was initially required to join. Only in the event that Comsuper rejects their retrospective admission should consideration be given to grouping these cases with Cornwell type claims for the purpose of providing compensation.

The issue of establishing applicants' claims should involve an examination of the employee's employment history and employee experiences concerning commonwealth superannuation fund membership. The final paragraphs of the CPSU's submission are relevant in this regard.

The issue of establishing the credibility of applicants' claims about either absent or incorrect advice is central to the resolution of 'Cornwell type' claims. In assessing the credibility of the applicants' claims consideration should be also given to our knowledge of the behaviour of the employer. Where a pattern can be established where employees have consistently reported that their Trainers and Personnel Managers have provided advice to the effect that Temporary Employees were ineligible to join, a reasonable person would assume that that advice reflected the organisations' understanding of legislation. That assessment would be even more reasonable where it can be established that the employer had a history of misapplication of the legislation.

The CPSU requests that the Committee take into account the ABC's history of poor compliance in meeting its superannuation requirements when considering both the question of how to assess applicant's claims and how to best administer the resolution of these disputes. In 1996 an inquiry was conducted by Graham Glenn, ex head of the Public Service Board at the invitation of the then Managing Director, Brian Johns into the systemic failure by the ABC to enrol new ongoing employees to the PSS (db) scheme, and their deliberate placement of employees in inferior superannuation schemes. Mr Glenn's major findings were that:

- the decision to treat staff as 'temporary' was made "...despite clear advice from the then Retirement Benefits Office (RBO) on the law"
- that "...the Corporate Human Resources area did not function in a professional manner" in that they did not ensure that the implications of the Employment Agreement were understood by the Divisions or by the Executive
- "...that the TV Division applied pressure on others to have its policy approach on superannuation accepted. It maintained this approach following considerable debate and despite well held contrary views by ABC staff and the PSU"
- "The ABC managers concerned failed to either correctly interpret the law or to have the law checked with an appropriate authority."
- that while these "lapses were inexcusable, they were overshadowed by Corporate Human Resources attempts to mislead PSU by providing to it a document which omitted the critical part of the RBO's advice indicating that contributions to the PSS were mandatory. This was reprehensible."

These findings warrant consideration in the context of the current review. The Glenn Review established a pattern of behaviour at the ABC of deliberate misinformation directed at minimising superannuation costs. While it is not clear whether these were the same managers responsible for providing incorrect advice to the ABC Trainers and ABC Personnel staff, it points to a management culture of avoidance of superannuation responsibilities.

Recommendations

The CPSU notes that The Alliance has made a number of recommendations concerning the treatment of these cases. The CPSU supports the broad thrust of the recommendations.

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Those recommendations focused on the development of machinery that would reduce the time spent in resolving the issues and the costs of litigation. The CPSU notes that in many cases the persons who may have been relied on to provide evidence about what information had been provided to new employees in the 1970s and 1980s have left their employment at the ABC, or in some cases have died.

The CPSU supports a model of resolution of these disputes similar to that adopted in NSW for the determination of asbestos related claims. The CPSU suggests that the overall objectives of the dust diseases claims resolution process are worthy of consideration:

DUST DISEASES TRIBUNAL REGULATION 2007 - REG 13

13 Objectives of claims resolution process

The objectives of the claims resolution process are as follows:

- (a) to foster the early provision of information and particulars concerning claims in respect of asbestos-related conditions,
- (b) to encourage early settlement of those claims,
- (c) to reduce legal and administrative costs in connection with those claims.

Accordingly, the CPSU suggests that in situations where a pattern of behaviour has been established by an employer to provide incorrect or misleading advice or not provide advice to employees over their eligibility to join the superannuation scheme, then the employer should be assumed to have provided that form of advice to other employees and such cases advanced by other employees in those circumstances should be dealt with favourably.

The CPSU further suggests that the Courts are neither appropriate nor effective means of resolving these disputes and should be avoided wherever possible. The CPSU proposes that the claims would be more effectively dealt with by administrative action by an independent person of high standing to determine claims above a particular threshold. Access to the courts should be available only where the matter cannot be resolved through administrative action.

Graeme Thomson
ABC Section Secretary
Community and Public Sector Union