



SENATE FINANCE AND PUBLIC ADMINISTRATION

REFERENCES COMMITTEE

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

SUBMISSION

Submission Number: 16

Submitter Details: ACT Government



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DEPUTY CHIEF MINISTER

TREASURER

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Ms Christine McDonald
Secretary
Standing Committee on Finance and Public Administration
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

I thank you for your invitation to make a submission to the *Inquiry into superannuation claims of former and current Commonwealth Public Service employees* by the Senate Finance and Public Administration Committee.

I understand from the Terms of Reference that the scope of this inquiry relates to those "former and current Commonwealth Public Service employees employed on a full-time, part-time or temporary basis prior to the introduction of compulsory superannuation in 1992, who were either not aware or [not] correctly advised of their eligibility for Commonwealth superannuation".

Following self government under the *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) in 1989, a large number of Commonwealth Public Service employees were transferred to the Territory. The Territory's databases show that on 1 July 1994 at the commencement of the *Public Service Management Act (ACT) 1994* and the *Public Sector Management (Consequential and Transitional Provisions) Act 1994 (ACT)* (PSM Consequential Act), around 18,000 employees were transferred to the ACT Government.

Scope of the Inquiry – potential impact on the ACT

While these matters relate to acts or omissions of the Commonwealth in relation to Commonwealth employees predating the establishment of the ACT Government, the ACT's interest in this inquiry relates to liability. It is possible that some of those affected former employees were transferred to the ACT Government Service following self government. The issues that are relevant to claims of this kind have been the employment arrangements, governance of the statutory authorities and also liabilities accruing at the relevant times. The ACT is concerned that it could potentially be held liable for or expected to contribute to liabilities that arise as a result of the Commonwealth's acts and omissions at a time when the ACT did not exist.

Prior to self government, the Australian Parliament, in its capacity as the local government for the ACT (as it then was), created numerous statutory authorities responsible for the administration

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and delivery of services to the ACT community. These were staffed by Australian Public Service employees and the Commonwealth was responsible for the terms and conditions under which these people were employed.

By 1978, there were 93 individual statutory authorities created for the ACT by the Commonwealth¹. Relevantly, these included the ACT Schools Authority, the ACT Electricity Authority, the Canberra Community Hospital Management Board and the Capital Territory Health Commission.

- The ACT Schools Authority was established on 4 November 1976.
- The Capital Territory Health Commission was established in 1975.
- The ACT Electricity Authority was established 1 July 1963.

For more details on the legislative history of these entities refer to Attachment A. In relation to the ACT Electricity Authority, I understand that ACTEW Corporation Limited will be making a submission to this inquiry separately.

The Commonwealth enacted the *Superannuation Act 1976* (and its predecessor, the *Superannuation Act 1922*), which established the Commonwealth Superannuation Scheme (CSS). As such, the Commonwealth was responsible, together with the Commissioner for Superannuation, for the administration of superannuation matters arising under this legislation, including contributions, compliance, information distribution and membership.

Following the High Court's decision in *Commonwealth v Cornwell* [2007] HCA 16 (*Cornwell*) there has been a general awareness of the Commonwealth's potential liability for unpaid superannuation entitlements in relation to former and current Commonwealth employees.

Litigation on foot where the ACT is a party as a result of Commonwealth acts or omissions

The ACT is currently a defendant, together with the Commonwealth, in three separate proceedings commenced in the ACT Supreme Court regarding alleged unpaid superannuation. While this submission does not reference the specific facts or merits of those proceedings, the legal issues facing the ACT as part of its defence of those claims and (any others that may arise) are common to each. For the ACT, the issue of liability, if it arises at all, is problematic and complex.

Previous Litigation

The ACT Government has previously been joined as a party as a result of Commonwealth employees' acts or omissions in relation to former Commonwealth Public Service employees. These cases have been satisfactorily settled, or the plaintiff has withdrawn actions against us.

Management of unpaid superannuation entitlement litigation

The ACT Government has been working cooperatively and collaboratively with the Commonwealth to locate and exchange personnel records. One of the challenges with claims of this nature has been the availability and location of historical records. This is because most of

¹ Statutory Authorities of the Commonwealth, First Report, Senate Standing Committee on Finance and Government Operations, Australian Government Publishing Service, December 1978, pp.24-25.

these claims relate to employment during the 1970s and 1980s making searches both difficult and often resource intensive.

Due to the vast number of employees transferred to the ACT in 1994, there are potentially large consequences for the ACT should the legislative transfer of employees and consequential transfer of "rights" and "liabilities" be held to be effective at transferring liability for what would ordinarily be viewed as a Commonwealth responsibility prior to the establishment of the ACT Government. As such, the ACT is keenly interested in the outcomes of this inquiry.

The ACT welcomes the Committee's inquiry and hopes that it provides some clarity and knowledge with regard to the parameters and scope of the claims. At present the magnitude, scope and direct impact on the ACT in relation to these types of claims is unclear. The ACT looks forward to continuing its cooperative relationship with the Commonwealth in its endeavours to resolve current or future claims involving employees that transferred to the ACT Government following self government.

I trust this submission is both informative and beneficial to the inquiry.

Yours sincerely

Katy Gallagher MLA
Treasurer

21.4.11

ATTACHMENT A

Following self government in 1989, the relevant entities transferred Commonwealth Public Service employees to the ACT Government under the *Public Service Management Act (ACT)* on 1 July 1994 with the exception of the Capital Territory Health Commission whose employees transferred to the ACT Government under the *Health (Consequential Provisions) Act 1990 (ACT)* on 1 July 1993.

Capital Territory Health Commission (CTHC)

The CTHC was established in 1975 in accordance with the *Health Commission Ordinance 1975 (Cwth)*. Section 34 of the Health Commission Ordinance enabled the CTHC to appoint officers or engage temporary staff.

The *Health Services Ordinance 1985 (Cwth)* was enacted, which abolished the CTHC and established the Australian Capital Territory Health Authority (ACTHA).

- Pursuant to section 23, all rights, privileges, obligations and liabilities of the CTHC were vested in the ACTHA.

The *Health Authority Ordinance 1985 (Cwth)* replaced the existing Authority with a new Authority.

- Pursuant to section 89, all rights, privileges, obligations and liabilities of the ACTHA were transferred to the new Authority.

Subsequently, the *Health Authority (Amendment) Ordinance (No.2) 1987 (Cwth)* replaced the former ACTHA with a new Authority as a corporation.

- Pursuant to section 29 transferred all rights, privileges, obligations and liabilities from the former ACTHA to the new ACTHA.

Later in 1988, the ACTHA was succeeded by the ACT Community Health Service (ACTCHS) under the *Community and Health Service (Amendment) Act 1988 (Cwth)*.

As a consequence of self government, the existing Community and Health Service Ordinance became a statute of the Territory.

The *ACT Self-Government (Consequential Provisions) Act 1989 (Cwth)* established "transitional staff" which comprised those Commonwealth (Australian) Public Service (APS) employees who were employed for the conduct of public administration of the Government of the Territory (see section 21 and definitions in section 3). This did not appear to automatically render transitional staff as employees of the Territory.

Later, the *Health Services Act 1990 (ACT)* established the Board of Health (the Board).

- Section 10 of the *Health Services (Consequential Provisions) Act 1990 (ACT)* transferred all rights, privileges, obligations and liabilities from the ACTCHS to the Board.

In 1993, the *Health Act 1993* (ACT) was enacted and abolished the Board.

- Under the *Health (Consequential Provisions) Act 1993* (ACT), all rights and liabilities were transferred from the Board to the Territory (section 16).
- People employed by the Board consequently became employees of the Territory on 1 July 1993.

On 1 July 1994, the *Public Sector Management Act 1994* (PSM Act) was enacted to govern employees and officers of the Territory. The *Public Sector Management (Consequential and Transitional Provisions) Act 1994* (PSM Consequential Act) transferred employees or officers of the APS (where applicable) into the employment of the Territory. This included transitional staff described in the *Self-Government (Consequential Provisions) Act* (ACT).

ACT Schools Authority

The ACT Schools Authority was established by the *Schools Authority Ordinance 1976* (Cwth). Staff of the ACT Schools Authority was employed by the Commonwealth under the *Public Service Act 1922* (Cwth) or the *Commonwealth Teaching Service Act 1972* (Cwth).

As a consequence of Self-Government, the Schools Authority Ordinance became an Act and Commonwealth responsibility transferred to the ACT². Employees remained employed by the Commonwealth. It was not until the introduction of the PSM Act and the PSM Consequential Act on 1 July 1994, that staff of the Authority became employees of the Territory.

The ACT Schools Authority Act was later abolished by the *Education Act 2004* (Cwth) and pursuant to section 157 the assets and liabilities of the Authority were vested in the Territory.

² Refer: *Self-Government (Consequential Amendments) Act 1989* (ACT), Schedule 1, pg 99-100.