

Attachment D – Legal issues

THE NATURE OF THE CLAIMS AND RELEVANT LAW

In practice, most claims involve a suite of causes of action. In general, a claimant's primary allegation is negligent misstatement but claims are also being made for negligence generally; and/or breach of statutory duty.

There are a number of other legal issues arising from the claims for compensation. They include vicarious liability, contributory negligence and failure of a claimant to mitigate their loss.

Each of these issues are the subject of or have arisen out of proceedings currently before the Courts, requiring proper argument and determination by the Court. What is set out below, and elsewhere in this Submission, is the summary of the position taken by the Commonwealth - noting that in some cases the issues are yet to be determined by the Courts. It is expected that further guidance as to the assessment and handling of *Cornwell* type cases will be available when the outcome of the current proceedings, including the six ACT matters in which the decision of the court is reserved (that is where the hearing of the matter is complete but the parties are awaiting the decision of the Court), are known.

Negligent Misrepresentation

In both litigated and unlitigated claims, a claimant's primary allegation is of negligent misrepresentation. The elements of this type of claim, and whether it can result in damages for pure economic loss, are well established. In essence, the components of this type of claim are:

- the existence of a duty of care to the person;
- breach of the duty by the making of a negligent misrepresentation by someone in authority;
- reasonable reliance by the claimant upon the misrepresentation, including that they would have applied to join and been admitted to the superannuation scheme if not for the wrong information; and
- reliance causes the claimant's loss and the loss is not too remote.

In handling litigated and unlitigated claims, the Commonwealth considers the prospects of each claim within this legal framework, using current case law from the ACT Supreme Court's and High Court's judgment in *Cornwell*, as well as many relevant High Court and other authorities, as guidance.

Plaintiffs in litigated claims must prove their case on the balance of probabilities and must commence their claim within the limitation period.

Additional Allegations Made by the Plaintiffs in Litigated Claims

The plaintiffs in litigated claims also make alternative allegations of negligence generally, breach of statutory duty and, in some cases, breach of the *Trade Practices Act 1974* (Cth) (now called the *Competition and Consumer Act 2010* (Cth)).

The components of the tort of negligence are well established, being existence of a duty of care, breach of that duty, causation and damage. The fact that damages can be awarded for pure economic loss¹ is also well established.

In response to the negligence allegations, the Commonwealth has taken the position that the common law does not impose a positive duty on an employer to take reasonable steps to prevent financial detriment relating to superannuation entitlements being suffered by its employees. In other words, the Commonwealth does not have a duty to bring general financial matters such as superannuation to the attention of the claimants.

The decision in *Mulcahy v The Hydro-Electric Commission* (1998) 85 FCR 170 is a relevant precedent upon which the Commonwealth has relied. In that case, similar claims to the *Cornwell* claim were made by employees of the Tasmanian Hydro Electric Commission, who alleged that they suffered loss because they received incorrect advice from their employer as to their eligibility to join the government superannuation scheme. In *Mulcahy*, the Federal Court held that the employer owed no common law duty of care of the sort alleged. The High Court decision in *Perre v Apand* 198 CLR 180 supports its denial of the existence of a duty of the sort alleged.

Similarly, in answer to the breach of statutory duty allegations, Finance's position is that the Superannuation Acts do not give rise to any statutory duty, the breach of which entitles an individual to damages. This is ultimately a matter of statutory construction but, again, the *Mulcahy* decision supports Finance's approach.

In answer to the *Competition and Consumer Act 2010* (Cth) allegations, Finance's central position is that representations made about employee entitlements is not conduct covered by the relevant part of the Act.

The Terms of Reference at question (a) includes reference to employees impacted because they were 'not aware' of their eligibility to join Commonwealth superannuation. The Commonwealth's position is that it had no tortious or statutory duty to inform employees about superannuation. Hence, employees who were 'not aware' of their eligibility but are otherwise unable to allege or establish that they received incorrect information or advice about their eligibility were not impacted in the sense that *Cornwell*-type claimants may have been.

Vicarious Liability

It is also well established that an employer such as the Commonwealth can be vicariously liable for the negligent acts and omissions of its employees (such as representors) acting within the scope of their duties. That is the basis on which the Commonwealth was liable in *Cornwell* for the actions of Mr Cornwell's manager.

¹ Pure economic loss in this context refers to financial loss suffered by a claimant for money they may have lost or otherwise had the use of.

Contributory Negligence and Failure to Mitigate

If a claimant is found to have been partly responsible for their own loss, their damages can be reduced by a proportion which reflects their responsibility. For example, it is open to the Commonwealth to argue in some matters that a claimant's damages should be reduced if they have failed to take steps to help themselves and mitigate their loss, such as failing to take up alternative superannuation arrangements. In litigated matters, this is ultimately a matter for evidence or determination by the Court.

Other Potential Defendants

Some of the claims are made by former temporary employees of separate legal entities established by Commonwealth legislation, including the Australian National Airlines Commission (established in 1945), the Australian Capital Territory Electricity Authority (established in 1963) and the Capital Territory Health Commission (established in 1975). These entities have been the subject of asset sales or legislative succession, through which they have become different (non-Commonwealth) entities. For example, Australian National Airlines Commission has become AAL Aviation Limited; the Australian Capital Territory Electricity Authority has become ACTEW Corporation Limited; and the Capital Territory Health Commission is now part of the Australian Capital Territory.

Importantly, these successor entities have, in many cases, acquired the legal liabilities of the former entity. This has occurred through contractual terms or express statements in legislation.

In litigated cases arising from the three workplaces identified above, the successor entities are defendants alongside the Commonwealth.

The plaintiffs allege transfer of any legal liability which the former entity had (for example, because it employed and was vicariously liable for the representor) to the successor entity. The Commonwealth admits those allegations. In general terms, the other defendants do not admit the allegations.

However, adding to the complexity of determining who is ultimately responsible for each claim, is the fact that some plaintiffs also allege Crown agency and dual employment. These are allegations by which the plaintiffs assert that the Commonwealth is responsible for claims (even if the employer of the representor was a separate legal entity whose liabilities have been transferred). That is because the usual effect of these allegations is, if successful, that the legal liabilities would always have been - and would remain with - the Commonwealth. Where alleged, the Commonwealth has denied the allegations of Crown agency and dual employment.

These issues involve complex questions of law and fact. Therefore, in order to ascertain who is ultimately responsible for each claim, factual investigation and legal consideration is required on a case by case basis. As indicated above, the issues will be a matter for proper argument and determination by the Court.

In unlitigated claims, the Commonwealth considers these same issues. If the Commonwealth forms the opinion that the former entity was legally liable and that there has been transfer of

liability, the Commonwealth notifies the successor entity as to the likelihood that it, rather than the Commonwealth, is responsible for the claim and liaises with the successor entity as to claim management. The Commonwealth also informs the claimant of its position, so that the claimant can consider the issue, take legal advice if they wish and pursue the proper respondent.

Consistent with the governing principles set out above including obligations set out in the *Legal Services Directions 2005*, the Commonwealth cannot compromise claims in respect of which it is not, because of the issues outlined above, likely to be ultimately responsible.