COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Superannuation claims of former and current Australian Public Service employees

THURSDAY, 5 MAY 2011

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SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Thursday, 5 May 2011

Senators in attendance: Senators Bishop, Fifield, Kroger, O'Brien and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

The superannuation claims of 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 correctly advised of their eligibility for Commonwealth superannuation (the Commonwealth Superannuation Scheme), with particular reference to:

(a) the number of employees in the Commonwealth Public Service impacted, because they were not aware or correctly advised of their eligibility to Commonwealth superannuation prior to the introduction of compulsory superannuation in 1992, including, but not limited to, employees of the following Commonwealth departments and statutory authorities:

(i) Department of the Interior (which included Transport, Forestry and Conservation, and Agriculture),

(ii) Department of Works (later renamed the Department of Housing and Construction, and then the Department of Construction) in the Australian Capital Territory and New South Wales,

(iii) Department of Administrative Services in the Australian Capital Territory and Western Australia,

(iv) Department of Education in the Australian Capital Territory,

(v) Department of Supply in South Australia and the Australian Capital Territory,

(vi) Post-Master General's Department in the Australian Capital Territory and New South Wales,

(vii) Australian Government Printing Office in the Australian Capital Territory and New South Wales,

(viii) Defence—Research Weapons Establishment in South Australia,

(ix) Defence—Defence Science and Technology Organisation in South Australia,

(x) Defence—Defence Research Centre in South Australia,

(xi) Australian Broadcasting Commission in South Australia, Tasmania, the Northern Territory and New South Wales,

(xii) Australian Atomic Energy Commission (now Australian Nuclear Science and Technology Organisation) in New South Wales,

(xiii) ACT Electricity Authority in the Australian Capital Territory,

(xiv) Northern Territory Electricity Commission in the Northern Territory,

(xv)Australian Antarctic Division in Tasmania,

(xvi) Australian National Airlines Commission (trading as Trans Australian Airlines (TAA) in New South Wales, and

(xvii) Commonwealth Scientific and Industrial Research Organisation in the Australian Capital Territory, Queensland and Tasmania;

(b) the impact on the retirement incomes of these employees as a result of not being aware or correctly advised of their eligibility to the Commonwealth Superannuation Scheme;

(c) the handling of these cases by the Department of Finance and Deregulation;

(d) what, if any, actions the Department of Finance and Deregulation has taken to notify persons who may be applicable for these claims;

(e) consideration of cases under the Act of Grace by the Department of Finance and Deregulation; and

(f) any other related matters.

WITNESSES

SULLIVAN, Mr Mark, Managing Director, ACTEW Corporation Ltd

Committee met at 12:00

CHAIR (Senator Fifield): Good afternoon. The committee will now commence its enquiry into superannuation claims of former and current Commonwealth public service employees. I welcome Mr Mark Sullivan of ACTEW Corporation. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I will invite you to make a short opening statement after which I will invite colleagues to ask questions, but if at the outset, for the benefit of Hansard, I could ask you to state your name and the capacity in which you appear.

Mr Sullivan: Thank you, Chair. Thank you for the opportunity to submit to this inquiry and to appear before you. To give you some very short background, ACTEW Corporation is a public unlisted company formed in 1995. It is owned by the ACT government. Prior to that, as part of its corporatisation, it took over the functions of an Australian Capital Territory statutory authority called the Australian Capital Territory Electricity and Water Authority, and it was established in 1988. That ACT statutory authority took over functions that had been conducted by the ACTEA, or Australian Capital Territory Electricity Authority, which was a Commonwealth statutory authority established in July 1963.

We have seven matters listed in the courts, and we have 32 notices of intention to take action by former employees of ACTEA, which is the former Commonwealth statutory authority, regarding their entitlement to superannuation when they were employees of ACTEA. Through self-government in the ACT, we saw a move of that organisation to an ACT statutory authority and, as necessary, a transfer of certain liabilities from the Commonwealth to the ACT. In the incorporation of ACTEW we saw a transfer of certain liabilities from the ACT government to the ACTEW Corporation, and this is why ACTEW now finds itself with a group of employees of a Commonwealth statutory authority, being the responsible business, which will contest a matter of whether the Commonwealth back in time properly dealt with superannuation entitlements.

That is our involvement. It is a difficult legal matter. Discovery on all parts is being found to be a difficult exercise in terms of just the location of records. We have potentially about 100 cases, we think, that could be caught up with ACTEW. Our hope is that in some way a process can be found which is not taking every matter through the courts to determine whether or not a liability, what that liability is, and where that liability lies, because for us that seems to be the major question, while doing justice to each of the claimants. Thank you.

CHAIR: Thanks, Mr Sullivan. Senator Xenophon.

Senator XENOPHON: Mr Sullivan, thank you for your evidence and for your submission. You have suggested that the committee may consider making recommendations in relation to a more efficient method for resolving claims, including alternative dispute resolution or referral to a specialist tribunal. Could you elaborate on that, please?

Mr Sullivan: It is basically what I said in my opening statement. If we adopt traditional legal processes on a case by case basis here, we are finding our obligations under discovery to be a very difficult exercise. We have a corporation view as set by my board, if there is a view, that evidence emerges that a person was entitled to join a super fund and was not allowed to join a super fund, we would not seek to proceed with legal action; we would seek to settle the matter.

It is probably finding evidence to support that contention, without suggesting that there is great evidence not to support the contention, is the issue. It seems to me that there just needs to be a process, be it a novel process or a process that has been tried somewhere before, which may be able to shortcut those processes and establish on some balance of probability or some framework of determination a simpler route through to getting a result for the corporations and governments involved and for the individuals who are making the claims.

Senator XENOPHON: Could I just go to a few issues in relation to liability and process. This has arisen as a result of self-government; there was a transfer of liabilities. Do you have any knowledge that at the time of self-government and the transfer of liabilities whether this issue was in any way foreshadowed in the transfer?

Mr Sullivan: I do not feel competent to answer that in any formal way.

Senator XENOPHON: If you could take that on notice: if there was any indication this could be a potential liability?

Mr Sullivan: My answer would have to be framed by checking with the ACT government—who I think are appearing before you this afternoon—as to whether or not there was any litigation or proposed litigation at that time. My own view is I do not think there was, back at the time of self-government.

Senator XENOPHON: No, and I think the Cornwell decision was—

Mr Sullivan: It was certainly post self-government.

Senator XENOPHON: A decade or a number of years post that. In terms of the liability, are you able to indicate what your organisation is facing in terms of the upper limits of that liability?

Mr Sullivan: The claims vary. We have seven matters before the court with varying claims from, I think it would be fair to say, tens of thousands of dollars into hundreds of thousands of dollars. If you take the extreme of someone who may have been able to be in the Commonwealth Superannuation Fund for 40 years with an exit salary of, say, $60,000 or $70,000 they would have been looking at an eligibility for a pension of about $30,000 for life plus the return of their contributions and earnings which, in an instance like that from my knowledge, would probably be about a quarter of a million dollars in accumulated contributions.

That is not all of our cases by any means. We have a mixture of people who are still employed by us and are now covered by superannuation of various schemes. We have people as they move from the trades area into other areas of the statutory authority who are then accepted into the super scheme. It is a question of their late acceptance into the super scheme. We have got a variety. It would be very hard to put a limit of liability at the moment. We are, in terms of our own accounting practice, attempting to put a contingency on this matter, but we have not yet.

Senator XENOPHON: Has the Commonwealth been joined in any of these actions?

Mr Sullivan: In our matters the Commonwealth is joined with us.

Senator XENOPHON: Is there any arrangement in terms of liability for costs? Are you indemnified by the Commonwealth for costs, or is there a joint and several liability?

Mr Sullivan: There is joint and several liability.

Senator XENOPHON: Are you constrained that, if you wanted to resolve a case but the Commonwealth did not, then—

Mr Sullivan: There is no such restraint on us. We could settle our matter. The Commonwealth has settled other matters, and we can settle our own matters.

Senator XENOPHON: If you settle unilaterally, that could be in the absence of any Commonwealth support for that claim?

Mr Sullivan: Yes.

Senator XENOPHON: Is that what has occurred already?

Mr Sullivan: The cases we have settled without Commonwealth—we have not settled claims that have gone to litigation. We have settled matters prior to litigation from our own resources.

Senator XENOPHON: Without the Commonwealth contributing?

Mr Sullivan: Without the Commonwealth.

Senator XENOPHON: Even though many would argue that you have been left holding the baby, so to speak, as a result of the transference of liability.

Mr Sullivan: Yes. I know a corporation can never present itself as an innocent victim of change. In fact, we have not settled any cases I have just been—I thought we had. We have a view to settle cases. We have not settled cases.

Senator XENOPHON: Has the attitude of the Commonwealth in relation to the resolution of claims been a fetter or in any way has that affected your ability to resolve claims? In other words, has the Commonwealth been a reluctant or recalcitrant party in all this?

Mr Sullivan: I should not talk for the Commonwealth, but I understand the Commonwealth's attitude in respect to claims against the ACTEW Corporation is the Commonwealth has no liability. That liability has been effectively transferred to ACTEW through self-government and then corporatisation of ACTEW. That is my understanding of the Commonwealth's position.

Senator XENOPHON: That is not necessarily ACTEW's view, though, is it?

Mr Sullivan: No, it is not necessarily ACTEW's view.

Senator XENOPHON: There could be a bunfight between the Commonwealth and ACTEW in terms of liability?

Mr Sullivan: You never know what could happen. It is a real issue. I do not think there is any doubt if you look at—what happened in transfer of self-government, a lot of liabilities, as need to be transferred, were

transferred; the same with the creation of a corporation. When you move the liabilities from a government to a corporation, that needs to happen and there needs to be certainty. The issue which you started with is the issue here, and that is: would anyone have envisaged that a liability arising from the actions of the Commonwealth from the forties through to whenever was meant to be covered by that? It may be that literally, regardless of what was meant, it was covered. That probably is the position of some. Others would say, well, forget the literal, this was never envisaged, and we are talking about the actions of Commonwealth officers in Commonwealth agencies from which these claims arise.

Senator XENOPHON: The Commonwealth can provide for act of grace payments; do you have a similar mechanism?

Mr Sullivan: We do not call them those, but we can settle.

Senator XENOPHON: Yes, so it is effectively the same.

Mr Sullivan: We can settle informally and we will have a deed of settlement and say that is the end of the matter. It is open to us to settle on any matter.

Senator XENOPHON: Have you been satisfied with the level of cooperation ACTEW has had with the Commonwealth government in relation to these claims?

Mr Sullivan: In terms of formal cooperation—discovery and that—we cannot complain about the Commonwealth.

Senator XENOPHON: And in terms of informal cooperation?

Mr Sullivan: We have a question of liability, on which there is a difference.

Senator XENOPHON: Are the former and existing members of ACTEW aware of the potential liability? What have you done to publicise that?

Mr Sullivan: We do not believe that the situation exists for any member of our staff at the moment. All members of staff are covered by superannuation. They are in superannuation schemes. It is a question of those who are not. I do not think there is any doubt that either former members of ACTEA who became ACTEW employees, or those existing members of ACTEW who were former ACTEA members, are fully aware of the cases that are being run by other people.

Senator XENOPHON: Two more questions: in relation to the High Court's decision in Cornwell, is that the template by which you are considering these matters, given there was a decision of the High Court in relation to this whole issue? First, if you could answer that.

Mr Sullivan: I think it is probably the basis of consideration, but again I have got a board whose determination is that, if I satisfy myself that there is an issue here, they wish to deal with the matter positively.

Senator XENOPHON: Is there an issue in terms of appropriate record-keeping? Are those records held by the Commonwealth or ACTEW?

Mr Sullivan: Yes. There were no ACTEW records in respect of this matter, so it is a matter of records held by a variety of systems—the Commonwealth and the ACT—which we are seeking to access and which we are required to find for others to access in matters affecting us. That is difficult, and the discovery of those records is time and resource consuming, and is not always satisfactory in terms of outcome, being able to find what you need to find.

Senator XENOPHON: You are in the firing line legally, but do not have direct access to the records upon which a claim might be based on?

Mr Sullivan: That is often the case.

Senator XENOPHON: Thank you, Chair.

CHAIR: Thank you. Any other questions? Senator O'Brien.

Senator O'BRIEN: Thanks for your evidence, Mr Sullivan. What is the situation with regard to current or former ACTEW employees who were and possibly still are members of the CSS? Who is liable for the superannuation entitlements of those employees?

Mr Sullivan: ACTEW still covers people in the Commonwealth Superannuation Scheme, and so there are staff of ACTEW who are currently in the CSS. We have a very complex arrangement whereby from ACTEW as a corporation, then there are two partnerships which form ActewAGL, which is a significant utility company in the ACT which is a joint venture. The way corporatisation of ACTEW and ActewAGL occurred is that there is about 300 staff who are in ActewAGL who are still seconded to ACTEW and could be covered by CSS. For those, the employer, be it ActewAGL or ACTEW, is responsible for making a notional contribution to the CSS for the

employer side of the CSS. That, I think, runs to the ACT government, who then work with the CSS and then the superannuation liability then lies with the CSS. But the funding of it lies through the employer.

Senator O'BRIEN: In relation to employees ultimately inherited from the Commonwealth, there was an understanding that there would be an obligation on ACTEW to fund the employer contribution of their superannuation.

Mr Sullivan: That is right, yes.

Senator O'BRIEN: The issue between the Commonwealth and ACTEW is the degree of knowledge that ACTEW had necessarily about the nature of its obligation?

Mr Sullivan: No, it is not the degree of knowledge, it is just whether or not we have inherited the problem. We did not exist when the issue occurred, so it is a matter of saying that legally you inherit this issue, is the position being put, and that is the position that we have to deal with. We have got two issues here: one, whether we accept that we have legally inherited the issue; and, two, then the matter of if we accept we have inherited the issue, is the settlement through either legal process or through informal process or some other process of the determination of whether a case can be made or not.

Senator O'BRIEN: Presumably, the part of the issue ACTEW or the ACT government inherit would be from the point that they took over this group of employees?

Mr Sullivan: Yes. There are two points in contention: there is 1985, self-government; and then there is 1995 with ACTEW Corporation. So the corporatisation of ACTEW sees a further transfer of liability and responsibility from the ACT government to the corporation, and the self-government saw the possible transfer of liability from the Commonwealth to the ACT government.

Senator O'BRIEN: Is that the subject of documentation in terms of agreements?

Mr Sullivan: The contention of some would be that a literal reading of the self-government legislation and of the take-up of the Corporations Act would be that that saw the effect of transfer of all liabilities. Those liabilities, you would say, were largely foreseen in terms of the responsibility over property leases, responsibility over a whole set of foreseen events. This was not a foreseen event.

Senator O'BRIEN: Do not many successions in business lead to assuming risks that were not necessarily foreseen at the time of succession?

Mr Sullivan: Yes. You must have certainty in succession about risks. Very few risks then come back to say, well, this was a risk not disclosed, foreseen, and may have involved the actions of the relevant authority, being the Commonwealth at the time, and whether that changes what is reasonable practice in respect of transfer of liability.

Senator O'BRIEN: With an employee who was employed prior to self-government, do I correctly presume that ACTEW would, if they were to be obliged to pay a contribution, only be obliged to pay back to the date of self-government?

Mr Sullivan: I do not think that is resolved. We may be liable for the entire issue.

Senator O'BRIEN: Because of the nature of the Self-Government Act?

Mr Sullivan: You would need to talk to legal people about that. I do not think I am qualified to say. My understanding is that I will not be limited to the period of time because most of these issues were resolved by the time ACTEW Corporation was incorporated.

Senator O'BRIEN: In terms of an alternative resolution mechanism, you are suggesting, I think, to the committee that they recommend something as an alternative to the jurisdiction of the courts. Are you suggesting we do that as an alternative to which both parties agree, or are you suggesting we do that as a mandatory reason?

Mr Sullivan: I think agreement of the parties would be much preferable.

Senator O'BRIEN: That is right.

Mr Sullivan: Because I think if you are going to get into a more informal process with maybe a different set of rules and you want acceptance, you need sign-on, not—

Senator O'BRIEN: In essence is it not possible for some other form of adjudication to be agreed between the parties now?

Mr Sullivan: I am not qualified to answer that one, Senator, sorry. It may be.

Senator O'BRIEN: I understand that in most civil actions the parties are encouraged to find resolution.

Mr Sullivan: I think Senator Xenophon was leading to. We have two critical issues here: it is who is liable—and I do not think there is agreement between all of the parties who have been tied into this as to who is

liable; then there is the matter between whoever is liable and the people who feel aggrieved and are taking action. I think there has to be a resolution as to where the liability sits and agreement as to how that is to be determined. Secondly, then there is a process of then saying, all right, we now know who is going to accept the accountability of this issue, and then let us deal with it. We have to resolve the first. Our position is a simple one: we are in the legal firing line and that is why we are the respondent in these matters, along with the Commonwealth. It is a more complex picture than that that needs to be resolved.

CHAIR: Mr Sullivan, thank you for your attendance today. The committee will now suspend.

Proceedings suspended from 12:23 to 13:23

LEBISH, Mrs Sue, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury

CHAIR: Good afternoon. Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. I remind witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state or territory 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 developed. The committee has a submission from the ACT. I will invite you to make an opening statement, after which I will invite colleagues to ask questions.

Ms Lebish: Thank you. Unfortunately, Mr McDonald, who was scheduled to appear before you, is unavailable and I apologise, but I have been the project manager since the superannuation issue was first identified within the ACT government back in 2003. I will discuss this project later. A primary issue for the ACT relates to former Commonwealth employees that transferred to the ACT government following self-government. Further to the matters raised in the ACT's written submission, it is important for the ACT to highlight to this committee the impact its involvement in claims regarding superannuation has had and the challenges it faces in light of complex legislative arrangements and historical factual background.

To date, the ACT's involvement where the Commonwealth is also involved has focussed on the former Capital Territory Health Commission, the Schools Authority and ACTEW. In the case of each entity, the ACT is said to inherit liabilities of each entity through successive legislative changes following self-government. As the committee would appreciate, in most cases, if not all involving former employees, the claims related to circumstances which occurred before the ACT existed. In addition to the complex legal arrangements regarding these entities, the factual matrix pertaining to each claim has required detailed analysis and examination of arrangements between the Commonwealth and each entity regarding, among other things, staff.

The question of employment arrangements and the conditions for staff working within each entity remains at present unresolved. This is due to the unavailability of, and access to, historical records relating to such arrangements. In light of these complexities, the ACT is currently reviewing any claims on a case-by-case basis. The circumstances applying to the ACT are quite unique in the way that it has been joined into claims that involve actions pre-dating its existence and, accordingly, alleged misstatements of Commonwealth employees at the time, not territory employees. Of particular concern for the ACT is that each employee may have been allegedly advised in relation to superannuation by a different person at different times and in different circumstances. The committee would no doubt appreciate that these allegations are said to occur prior to the ACT's existence.

The issues of the transfer of employees following self-government are complex, and there is the additional question of whether the respective statutes are capable of specifically transferring the liability for superannuation claims in relation to former Commonwealth employees; a question which would depend upon the facts of each case. The three current cases the ACT is involved in have shown the imbalance of information available to the ACT and the other parties. As the relevant and applicable policies and information date back to the fifties, sixties and seventies, it has been a challenge to identify what documents have transferred to the ACT following self-government and what documents have remained in the possession and control of the Commonwealth.

The balance of information to date has been in the Commonwealth's favour, which also has the advantage of having been involved in these claims for a much longer period of time than the ACT. Given the volume of claims handled to date, the Commonwealth and the claimants' solicitors have had an advantage in relation to considering claims based on the information and knowledge collated since the issue was first identified. Bearing in mind this imbalance, the territory is doing its own investigations and evaluations of their claims but, as the ACT is a small jurisdiction, this has been comparatively resource intensive. Many records were transferred to the ACT upon self-government and the ACT has been working on locating and retrieving relevant archived records. Given the length of time that has passed, that task has been at least challenging. The ACT would certainly welcome and benefit from greater access to information and less restraints on sharing such information.

The territory has had some experience in best practice management of claims similar to those being considered within the scope of today's inquiry. In addition, the ACT has settled one case that involved an ACT government superannuation liability successfully. Our experience was going through Totalcare Industries Ltd, a territory owned corporation. The ACT government discovered, in its own investigations, a problem regarding Totalcare employees who were not enrolled in PSS or, in some instances, CSS. As a result, the territory set up a

small dedicated team to investigate, review and settle any liabilities that were identified. These cases have all been considered on a case-by-case basis; that is, 3200 at least.

The territory has applied rigorous and robust procedures assessing all former employees of Totalcare. Consistent with its obligations as a model litigant, this process has avoided legal proceedings and the resultant high litigation costs. This project has been externally audited and our processes have been reported to be sound and best practice. In conclusion, the ACT looks forward to continuing its collaborative and cooperative relationship with the Commonwealth in relation to claims jointly affecting both governments. It is hoped that this inquiry may identify measures that streamline the assessment, processing and resolution of claims. Certainly the ACT supports early resolution of any claims considered meritorious after due consideration.

The ACT notes with interest ACTEW's suggestion for a dedicated tribunal and sees this as a sensible conduit to consider the merits of potential claimants. Of course, further consideration of such a proposal would be required at our ministerial level. I am happy to take questions from the committee. Thank you.

CHAIR: Thank you, very much. Senator Xenophon.

Senator XENOPHON: Thank you for your submission and your opening statement, Ms Lebish. You have said that there is a complex factual matrix and that there is a difficulty with the availability of historical records, is that because a significant proportion or parts of those records still are with the Commonwealth?

Ms Lebish: Yes.

Senator XENOPHON: Has the Commonwealth been cooperative in providing those records to you?

Ms Lebish: To an extent, yes.

Senator XENOPHON: What does 'to an extent' mean, or are you just being diplomatic?

Ms Lebish: No. We are both working collaboratively with the Commonwealth but in some instances the records are in discovery phases of cases so we cannot get hold of them.

Senator XENOPHON: Sorry, can you just clarify that? The records are in existence but because of the discovery process you cannot access them?

Ms Lebish: Correct.

Senator XENOPHON: You are both parties to the litigation though, aren't you?

Ms Lebish: Until they are put into court and discovery is then open.

Senator XENOPHON: The Commonwealth is not sharing that information with you?

Ms Lebish: The discovery process has not been completed in all three cases, no.

Senator XENOPHON: The ACT government is in the firing line for liability in relation to this—is that correct?

Ms Lebish: Correct, yes.

Senator XENOPHON: You have inherited this as a result of self-government and the transfer of some liabilities?

Ms Lebish: We do not agree that we have inherited it, no.

Senator XENOPHON: Sorry. You have potentially inherited it.

Ms Lebish: We potentially may have inherited it.

Senator XENOPHON: Potentially may have inherited, so there is a live issue there as to whether you are liable or whether the Commonwealth is liable, but there is a potential liability?

Ms Lebish: Yes.

Senator XENOPHON: That is right. I know you are not conceding the liability and I appreciate that, but it seems curious that the Commonwealth will not provide you with that information. Have they given a reason why they will not share that information with you and that you potentially have a—

Ms Lebish: In once instance that I am aware, there is over 8000 documents in discovery and the processing and getting that into a format is still in its infancy within the cases, so the cases are not yet going to court as such, they are just in the infancy of the case.

Senator XENOPHON: You said in your opening statement that there should be, 'less restraints on sharing some information'. That implies that there have been restraints in the first place.

Ms Lebish: Yes, we do have that issue.

Senator XENOPHON: Is this an issue that has been raised at a government to government level?

Ms Lebish: Yes, it has been raised.

Senator XENOPHON: For how long has it been raised?

Ms Lebish: We have been negotiating extremely well with the Commonwealth for the last three to four years but now we have been drawn—

Senator XENOPHON: I would not want you negotiating extremely poorly.

Ms Lebish: The Commonwealth and the ACT has now been drawn into cases and before that we had not been, we were just part of the process and we were giving the information to the Commonwealth and asking for that information to be brought back. Now that we are new to these cases, since 2008 the documentation that they have has not been given to us in full, no, because of the discovery process.

Senator XENOPHON: Again, the argument is that you are potentially in this together, so it seems curious that the Commonwealth is withholding documents or not being open with you in terms of the documents provided. ACTEW's submission talks about having a fast track, or a streamlined process, to deal with claims. That is the position of the ACT government as well, isn't it?

Ms Lebish: Yes.

Senator XENOPHON: Have you estimated what the cost of litigation would be if it is a case of case-by-case being slugged out in the courts. Have you allowed for the potential costs for each case?

Ms Lebish: At this stage I cannot give you that information.

Senator XENOPHON: Because you do not have it or you are not at liberty to provide that?

Ms Lebish: I am not at liberty to provide that.

Senator XENOPHON: If I were to tell you, as an old personal injuries lawyer, where sometimes the costs involved in a case could be very significant, it could be in the tens of thousands, not hundreds of thousands per case, would that be unreasonable given other cases that the ACT would have litigated?

Ms Lebish: No, it would not be unreasonable. That is one of the reasons within Totalcare Industries Ltd that the ACT government was of the mind not to litigate, to work through the processes as fairly and as quickly as possible so that everyone who had a liability was paid.

Senator XENOPHON: Going back to the issue of the restraints and sharing some information—again this will be a decision for the committee—would you feel less constrained to talk about that in camera?

Ms Lebish: Yes.

Senator KROGER: Ms Lebish, I think had something further to add—

Senator XENOPHON: Yes.

Ms Lebish: Yes.

CHAIR: Sorry.

Senator KROGER: which might feed into that consideration

CHAIR: Senator Xenophon was inquiring whether you would feel less constrained if the hearing was in camera.

Ms Lebish: We would not feel less constrained in the fact that the Commonwealth is not withholding, it has just not exchanged as yet. In the process of court cases, you go for discovery and discovery has not been exchanged as yet.

Senator XENOPHON: There is nothing much more you could add if you were in camera?

Ms Lebish: Not really, no.

Senator XENOPHON: I will not pursue it then, Chair. Thank you.

CHAIR: Senator O'Brien.

Senator O'BRIEN: Thank you. I am curious. The Totalcare claims that have been settled were settled between the ACT government and the claimants?

Ms Lebish: Totalcare is a territory owned corporation which is outside, but not really outside, the ACT government. The Totalcare board has agreed, and with the ACT government's backing, to pay out where there was a necessary claim to pay.

Senator O'BRIEN: That relates to an employee who was formerly an employee of the Commonwealth?

Ms Lebish: I can give you a brief history of that if you would like.

Senator O'BRIEN: Yes, just to be clear. Yes, thank you.

Ms Lebish: 1992, Totalcare Industries Ltd was started and as such all the employees were transferred over from ACT government departments and part of that transfer was, as soon as they became Totalcare employees, they were permanent employees; whereas, as we are looking through here, they were temporary before that. As a permanent employee, they had to join PSS at that stage and they could have applied to the Treasurer of the federal government to get an exemption from joining but it was not done so when, in the process of starting to wind down Totalcare, they found this issue had happened, the government put its foot forward and said where there was a liability they would pay up. It is in that proceeding seven years now, we have reviewed every ex-employee of Totalcare to see if there was a liability; if there was a liability, it was paid out and we are processing that to the final thing at this stage.

Senator O'BRIEN: In that case, what took place to effect their entitlement took place after self-government?

Ms Lebish: No, there was not an entitlement after self-government. It was when they transferred to Totalcare from the ACT government. That could be at the stage of 1992 to 1997-98 and 2000.

Senator O'BRIEN: I am just trying to find out whether there was Commonwealth employment and entitlement under the Commonwealth scheme at any time for the employees, the subject of the settlements?

Ms Lebish: Yes.

Senator O'BRIEN: There was?

Ms Lebish: Yes. As a permanent employee they had to be joined to the Commonwealth schemes.

Senator O'BRIEN: Was the Commonwealth involved in the settlement?

Ms Lebish: No, not at all.

Senator O'BRIEN: Did the ACT government seek a contribution from the Commonwealth to the settlement?

Ms Lebish: No, because they were from 1992 only.

Senator O'BRIEN: I am still trying to understand how we should differentiate the Totalcare claims from, for example, actuary claims?

Ms Lebish: They were all post self-government, so from 1992 onwards the liability was raised, not preceding that.

Senator O'BRIEN: Have there been any claims settled in relation to employees who were inherited by the ACT government from the Commonwealth in the process of self-government?

Ms Lebish: In the process of employees transferring from Totalcare?

Senator O'BRIEN: No, not necessarily Totalcare.

Ms Lebish: This is the process that I am saying. From Totalcare back into the ACT government, there were some people who were permanent and within that criteria legally should be within the Commonwealth's superannuation scheme. We are reviewing those as well at the moment and we are settling them where there is a liability, but only for the ACT government side of things.

Senator O'BRIEN: I think you are answering my question by saying that there are no claims arising from a transition of employment from the Commonwealth to the ACT or its entity.

Ms Lebish: At this stage, no.

Senator O'BRIEN: Did the ACT accept or reject employees transferred at the time of, or subsequent to, self-government on the basis of their superannuation status?

Ms Lebish: I am not aware and I could not answer that so I will take that on notice.

Senator O'BRIEN: Can you take that on notice? Thank you. What specific funding arrangements, if any, were entered into between the Commonwealth and the ACT regarding the superannuation liabilities inherited by the ACT from the Commonwealth?

Ms Lebish: Based on the research to date, the short answer is there were no liabilities apart from the superannuation that they had at that point. There were no liabilities for litigation further on down the track.

Senator O'BRIEN: No, I did not ask about liabilities, I asked about specific funding arrangements.

Ms Lebish: The specific funding arrangement on transfer between the Commonwealth to the ACT was the superannuation would be paid and transferred over to the ACT government, as in each agency.

Senator O'BRIEN: There was a transaction between the Commonwealth and the ACT for each employee as to their current liability?

Ms Lebish: Liability, yes. If they were with—

Senator O'BRIEN: If there was someone in the CSS at the time they transferred, how was that transaction reflected in the financial arrangements between the Commonwealth and the territory?

Ms Lebish: For more detailed information, I will take that question on notice.

Senator O'BRIEN: Please do. I am interested to know, in the context of what is obviously a current argument between the ACT government and the Commonwealth government as to liability in some cases, what arrangements were put in place at the time of self-government between the Commonwealth and the ACT about emerging financial obligations regarding employees inherited by the ACT from the Commonwealth?

Ms Lebish: In a more detailed answer, I will take that on notice.

Senator O'BRIEN: Thank you for that.

CHAIR: Senator Kroger.

Senator KROGER: If I can I can just follow on from Senator Xenophon's questions, Ms Lebish, in relation to the discovery process. Has there been any advice to you as to the state of the records, the integrity of the records that they are looking at, the historical records? Has it been indicated that that is part of the problem?

Ms Lebish: Yes, it is. Tracking down records that may have been situated in some form in a card system that is not part of a recording process back then, but as now it is and they are having trouble, as the ACT government is having trouble locating records.

Senator KROGER: Do you have any sense of the volume of records proportion of the situation that we are looking at, to what extent that is a problem?

Ms Lebish: A large problem.

Senator KROGER: Would you say 60 per cent or half? I am just trying to get my head around the size of the issue here that has to be dealt with by both the Commonwealth and yourself.

Ms Lebish: In my opinion it would be roughly 50 per cent of the problem. It would be locating the appropriate files, locating the appropriate employees' files and locating the appropriate policy files.

Senator KROGER: What sort of resources have you had to direct to this task?

Ms Lebish: Within the ACT government we have our own archiving systems. We have a dedicated team and within that we have three staff members who are literally, we could say, going down rabbit warrens looking for information.

Senator KROGER: You have got three staff members trying to discover files of how many former employees are we talking about here?

Ms Lebish: At the moment we have three claims before the court but, in the process for Totalcare Industries, that was over 3000 personnel files that we were reviewing at the time.

Senator KROGER: I presume you have regular dialogue with the Commonwealth in relation to the status?

Ms Lebish: Yes.

Senator KROGER: How often do you have those meetings?

Ms Lebish: We are in continual communication with the Commonwealth in asking for files from them, especially personnel files that could be in relation to an employee who may not have transferred over but there were inquiries on his personnel and in the last three months we have had meetings with the Commonwealth at least every second month, continually.

Senator KROGER: Unlike my colleague here, not being a lawyer by profession—

Senator XENOPHON: I will not hold it against you.

Senator KROGER: Did it ever help you, though, Senator Xenophon? Are there any privacy issues that are of concern that have come up through this discovery process?

Ms Lebish: The privacy issues that we have, we maintain the privacy of the employees as requested. If we get a claim as such we ask for a privacy statement from the employee so we can review their files and we then transfer that to the Commonwealth, or the Commonwealth do the same to us.

Senator KROGER: That would be initiated by the Commonwealth through their discovery process—and you can correct me if I am wrong—identifying that there is a potential claimant and for them to pass that onto you, you then have to seek approval from the individual concerned. Am I right?

Ms Lebish: The individual concerned or the individual's lawyer.

Senator KROGER: Has any indication been provided to you by the Commonwealth as to a timeframe that they are hoping to address this by?

Ms Lebish: I have not been informed, no.

Senator KROGER: Have you sought any guidance on this matter?

Ms Lebish: This matter has been continuing since 2006, so it is not a matter that we are looking for information in two months' time, you could say; it is a continuing process. As you have heard from ACTEW, there are people in the wings to say, and the Commonwealth has their number of claimants on their books, so it is a continuing process. In each one we get a listing of names, we go searching. If we cannot find them, we inform the Commonwealth, and its vice versa. If we need information from the Commonwealth or personnel files, we ask the Commonwealth and they will inform us.

Senator KROGER: Thanks, Ms Lebish.

CHAIR: There are no further questions, so thank you for your attendance today.

NOCK, Mr Trevor Ronald, Superannuation Advisor, Superannuated Commonwealth Officers Association

[13:50]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I will ask you to make an opening statement, after which my colleagues will ask you questions.

Mr Nock: The Superannuated Commonwealth Officers' Association, SCOA, as we are commonly called, has, for more than 85 years, represented retired Commonwealth employees such as those receiving pensions from the Commonwealth Superannuation Schemes and those with preserved benefits in those schemes. SCOA represents more than 50 per cent of all members of those schemes, that is, some 285,000 scheme members.

There has been a considerable number of former and current Commonwealth employees that have lost superannuation benefits because they did not join the Commonwealth superannuation scheme, commonly called the CSS, when they were eligible to do so. The size of the pension payable from the CSS is mainly based on the length of time the person has been a member of the scheme. The longer the person is a member, the higher their superannuation will be. Delaying the commencement of membership reduces the amount of the superannuation pension the person will receive.

After a certain qualifying period, temporary employees had the right to join the CSS if their employer certified that they were likely to complete a further period of employment. A number of temporary employees did not know that they could join the CSS after completing that qualifying period of employment and some employers were reluctant to certify that the temporary employee would complete the required period, and advised them that they could not join the CSS.

Most of these temporary employees later became members of the CSS when they became permanent employees. The fact that they did not know that they were eligible to join the CSS when eligible to do so has substantially reduced their pension benefits from the CSS or, later, the PSS.

Had these temporary employees joined the CSS when they were eligible to do so, they would have received their proper entitlement, and the Commonwealth would have been liable for the cost of paying their superannuation pensions. We believe that by applying strict legal processes to determine if any of these former employees are entitled to compensation is counterproductive as most of the cost involved may be more than the additional pension payments spread over the life of the pensioner.

Our recommendation is that the rules of the CSS be changed so that those employees that had an entitlement to join the CSS at a certain date be given the option to have the commencement of their membership in the CSS regarded as the date that they were eligible to become members of the CSS.

The government has previously changed the rules of the CSS to correct injustices. I recall that the government in 2007 amended the rules of the CSS applying to the widows of former Commonwealth employees who, before July 1976, had their pensions terminated on remarriage. The government changed the rules to allow the pensions previously paid to those widows to be reinstated from 1 January 2008 at the rate their pensions would have been paid over the more than 30 year period since they remarried.

Accordingly, there is no reason why the government could not change the rules to allow these former temporary employees to become members of the CSS from the time they were eligible to become members of the CSS.

CHAIR: You have concluded, Mr Nock?

Mr Nock: Yes.

CHAIR: Thank you very much. Senator Xenophon.

Senator XENOPHON: Thank you, Mr Nock, for your submission. You have talked about employers remaining reluctant to certify continuing employment for a further three years. Could you just elaborate on that? Is that how things were done back then and is there a continuing reluctance to do so?

Mr Nock: I do not think there is a continuing reluctance, but back in the 1960s and 1970s I happened to be working at ComSuper at the time, and I do recall that some employers were reluctant to certify that they would be employed for the required time.

Senator XENOPHON: Because of potential liabilities arising from that?

Mr Nock: Probably because they thought that they may not be an employee for much longer, and therefore it was not appropriate for them to join the CSS.

Senator XENOPHON: In some cases people went on to work for a number of years?

Mr Nock: Yes, they did.

Senator XENOPHON: Once they had reached that limit—I think it was initially seven years, then it was reduced, was it not, to—

Mr Nock: Yes, that is right.

Senator XENOPHON: three and then one, is that right?

Mr Nock: It is three years now.

Senator XENOPHON: Once you had reached that period you would be deemed to be eligible?

Mr Nock: No. They had already worked the original qualifying period but at any point in time the employer was still required to certify that they would be employed for a further period, whether it was five years or three years, at the appropriate time.

Senator XENOPHON: Seven years. Just to get this straight: it was the act of certification to say you would be employed for a further period, whether it was seven years or three years, that triggered the entitlement to be a member of the CSS?

Mr Nock: That is right.

Senator XENOPHON: Notwithstanding that somebody could have been employed for a number of years, there was no obligation on the part of the employer to provide that certification?

Mr Nock: That is right.

Senator XENOPHON: It could have been even for capricious reasons. There was no recourse by that employee against the lack of certification?

Mr Nock: The employee could appeal against that decision, there was a provision in the legislation at the time to allow for an appeal, and that appeal was to the Treasurer of the day.

Senator XENOPHON: What year was this?

Mr Nock: This was right up until 1976. The rules changed in 1976 substantially when the requirement was then reduced. Before 1976 this operated under the 1922 scheme, and the appeal was to the Treasurer.

Senator XENOPHON: You do not know how many appeals were made to Phillip Lynch at the time?

Mr Nock: I do not know. But there were appeals at the time.

Senator XENOPHON: There may not have been that many appeals because people may not have been aware of the implications of not being a member.

Mr Nock: Generally the employees were not told they had appeal rights.

Senator XENOPHON: Can I just go to the issue of the Cornwell decision. That decision was based on a negligent misstatement; that is your understanding?

Mr Nock: That is right.

Senator XENOPHON: In terms of an active duty of care, there has been no specific decision as to whether there is a duty of care to positively inform employees of their rights; is that your understanding?

Mr Nock: Yes.

Senator XENOPHON: Is it your understanding, though, that there should have been a positive obligation on employers to say, 'Here are your potential rights in terms of superannuation, which schemes you could join'?

Mr Nock: There should have been, yes, and it should have been an obligation on the employer to tell people at that time that they had a right to join the CSS.

Senator XENOPHON: You worked in superannuation for ComSuper at the time, you indicated.

Mr Nock: That is right.

Senator XENOPHON: In terms of your knowledge of superannuation matters, are you aware what other schemes did in advising employees of their rights as to superannuation?

Mr Nock: No, the only scheme that I was involved in was the CSS at the time.

Senator XENOPHON: You have said that the Commonwealth seems to be putting a number of obstacles in the way of accepting that these employees could have been a member of the CSS at a much earlier date. There is an obligation on the part of the Commonwealth to be a model litigant, and there are quite specific rules about how

the Commonwealth should behave as a model litigant. What sort of obstacles do you say the Commonwealth has put in place?

Mr Nock: I am not a lawyer, but there seems to be a lot of—

Senator XENOPHON: Probably a good thing.

Mr Nock: a lot of details that former employees have to provide to get their claims to be made successful. I believe that all this could be short-circuited because we know the date the person joined their employment. We know the date that they would have qualified for the period of service; therefore it would be easy and there would not be all that much trouble if you then gave these people the option to become members of the CSS from the date they were eligible to do so.

Senator XENOPHON: Thank you for those details. Would you be able to, on notice, provide details of how would you foresee a streamlined system working? If you could flesh out some details in the course of—whether you want to do that now or consider that. You have had the ACT government and ACTEW give evidence that they think there ought to be some streamlined system, it would reduce the costs of litigation, but it would have to be something fair and robust from an evidentiary point of view. If you could indicate what sort of things you think should be essential elements of a fast-tracked scheme. You may want to take that on notice.

Mr Nock: Yes, but there would have to be an amendment to the legislation, and that is what I would do, would be to allow these people to elect to join at the time that they were eligible to join. That would backdate their service and provide an increase in their pension benefits.

Senator O'BRIEN: So they all would.

Mr Nock: I beg your pardon?

Senator O'BRIEN: They all would, if you gave them that option.

Mr Nock: Most of them would.

Senator O'BRIEN: Why wouldn't they? I know a bit about the CSS. Why wouldn't you say yes? I cannot think of a reason why you would not.

Mr Nock: No, you would not, because you would end up in most cases—

Senator O'BRIEN: Much better off. Election would be like effectively electing to, if you will forgive the comparison, sign up to a share of a winning ticket in Tattslotto.

Mr Nock: But they did have a right at that time.

Senator O'BRIEN: I am not arguing that. I am just saying you are suggesting that the solution is that people should simply be granted without proving anything a right to simply say, by election, I get this benefit.

Mr Nock: Yes.

Senator O'BRIEN: Irrespective of the historic circumstances. Irrespective of whether they in fact did have an opportunity and chose not to avail themselves of it.

Mr Nock: Yes.

Senator O'BRIEN: That is what you are saying.

Mr Nock: Yes, I am saying that, because it was part of their remuneration package.

Senator O'BRIEN: If they elected.

Mr Nock: Even if they did not. You had two people together, one a member of the scheme and the other was not a scheme, only because one person probably did not know that he could join.

Senator O'BRIEN: That is a different question, with respect, but I will come to that.

Senator XENOPHON: Can I just follow, and I will conclude shortly, Chair. Further to Senator O'Brien's line of questioning, it could be that some people would not have elected at the time. What is relevant is what occurred at the time, I guess: if they were fully informed of their rights some would have said, 'No, because of my circumstances,' for whatever circumstances they had they did not want to be part of that scheme, for whatever reason. Would an alternative approach be to say how do you assess a person's claim historically? What was their term of service, what information were they provided or not provided, and then look at each person's individual circumstances in terms of an assessment?

Mr Nock: That would be ideal in an ideal world, but the problem is that most of those details have disappeared. We do not know what happened.

Senator XENOPHON: Yes, I will leave it there. Thank you, Chair.

Senator O'BRIEN: Mr Nock, I have experience with a similar circumstance in Tasmania, representing a class of employees in an area where they were classed as temporary but were ongoing temporary for years, in some cases decade, and who were denied the opportunity to enter the scheme but ultimately, through pursuit of the organisation I worked for, were made eligible to join and many did join the scheme. I have sympathy for the concept that people have not been given access to their rights and should be given that access.

With that in mind, your submission states:

Temporary employees were disadvantaged because they were not advised of their rights in relation to joining the CSS, especially after they had completed the qualifying period to become a member.

Can you say that with accuracy in every case or is that a generalisation from your experience?

Mr Nock: It is a generalisation. It did not occur in every case. It depended on the employer. Some employers were keen to sign up people to the CSS.

Senator O'BRIEN: Following from that, were there classes of employees or places of employment that you think can be identified as, on the balance of probabilities, not providing that information to their employees?

Mr Nock: There may be, but I could not identify them.

Senator O'BRIEN: You are aware of people who are raising claims. Is there any class or group of employees or class of employees that stand out in those claims?

Mr Nock: We are not aware of individual claims. SCOA does not represent any individual members. We have not got the resources to do so.

Senator O'BRIEN: Nevertheless I thought you might be aware, but I accept that you are not.

Mr Nock: No, we are not aware of it.

Senator O'BRIEN: In your experience, when working in the superannuation branch, are you able to identify any areas where, on the balance of probabilities, we might find that the information was not being passed to temporary employees?

Mr Nock: I would not be able to provide that information. I do not know because it is years since I have worked in that area.

Senator O'BRIEN: Thanks very much.

Senator KROGER: Mr Nock, just following on from that, though, in your experience do you believe there is any way that we can ascertain whether or not they were advised?

Mr Nock: I do not know. That is a difficult question.

Senator KROGER: On what basis can that judgement be made some years down the track?

Mr Nock: Yes, these events happened in the 1960s, 1970s and 1980s. I know that some people were advised and others were not, but I cannot identify which agencies did not advise or advised their employees.

Senator KROGER: Have you received many direct complaints about the review process conducted by the department?

Mr Nock: No, we have not. As far as I am aware, the SCOA office has not received any complaints about the issue.

Senator KROGER: Thanks so much.

CHAIR: Thank you. Senator Xenophon.

Senator XENOPHON: Take on notice if you want to further consider a way that you could see claims being effectively handled through some fast-track alternative dispute resolution process.

Mr Nock: Yes, I will do that.

Senator XENOPHON: Thank you.

Mr Nock: Thank you.

CHAIR: Thank you, Mr Nock.

FAULKS, Mr Richard, Managing Director, Snedden, Hall and Gallop Pty Ltd

GORDON, Mr John Raymond Christopher, Barrister, instructed by Snedden, Hall and Gallop Pty Ltd

[14:14]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee notes the order of 21 April 2011 made by Justice Refshauge in the ACT Supreme Court in relation to certain information. The committee has had provided to it a copy of that order of Refshauge J, which relates to the use of documents produced under discovery and their possible use in these proceedings. It is ultimately up to this committee itself as to what matters are canvassed and what documents are received, so I was wondering if I could seek at the outset an indication from yourselves as to what your intention is in relation to the documents to which Justice Refshauge's order refers.

Mr Gordon: We sought that order so that we could be at liberty to refer to any document in answer to any matter that is raised or any submission that we wanted to make to the Senate. We wanted to be released from the implied undertaking to the court so that we could do that. We sought the consent of the Commonwealth. They gave a qualified consent, and therefore the matter went before his Honour, and the order was made in accordance with the terms that the committee has seen.

We would wish to refer briefly, certainly in opening, to some historical records relating to documents emanating from the treasury, for instance, just very briefly by way of an historical context, and then we do not foresee what specific documents we would need to refer to until we hear what issues are of concern to the committee.

CHAIR: When you say historical treasury documents, I think you said—

Mr Gordon: Yes.

CHAIR: Commonwealth treasury documents, are these documents which relate to the cases or circumstances of individuals or are they documents that relate to policy and process?

Mr Gordon: Statements of policy; initially a statement from *Hansard* and then a couple of statements: one from the Treasurer, a direction to all government departments; and another being a statement from the Department of Prime Minister and Cabinet to the Public Service Board.

Mr Faulks: It is certainly my understanding that the major concern that the Department of Finance had was in relation to the disclosure of personal details of particular individuals, and we are sensitive to that and we do not envisage, subject to any questions you might ask, having to divulge any of those sorts of details or refer to specific documents that might been obtained through that discovery process.

CHAIR: Senator Xenophon.

Senator XENOPHON: But you could, Mr Faulks, talk about the sorts of difficulties some of your clients have had without in any way identifying them?

Mr Faulks: Any information that I have received through our processes, I do not see that they are the subject of this discovery limitation, and we would feel at liberty to talk openly about the information we have received from our clients if that would assist you.

Senator XENOPHON: Yes.

CHAIR: Sorry, I just missed that, I was chatting to the secretary.

Mr Faulks: I was saying that the information we can provide comes not from the discovery material necessarily, and we would not seek to necessarily discuss any individual's personal details, but we have also, from our own clients, received a lot of information and documentation, and we are not restrained in any way from using that information in addressing you.

CHAIR: While the courts cannot determine how the committees of the parliament conduct themselves or bind the parliament or its committees, nevertheless parliamentary committees do not look to go out of their way to be at odds with the courts, so we endeavour to operate on a basis of cooperation where that is possible. In light of that, I ask you, with the consent of the committee, at this stage to limit your comments to those documents which are not part of the discovery process. You are at liberty to provide documentation to the committee from that process and the committee can then make an assessment as to how that should be used. If, however, there are some documents from that discovery process which are nevertheless themselves public documents—I think you

referred to *Hansard*, for instance—then I do not see any issue with you referring to documents which are already public through another means. Is the committee comfortable with that approach?

Senator O'BRIEN: Yes.

CHAIR: Thank you. With those comments in mind I invite you to make an opening statement, after which we will ask questions.

Mr Gordon: From our perspective there has been a grave injustice done to potentially many thousands of Australians employed by the Commonwealth as a result of the failure to provide them with information regarding their superannuation entitlements, and in the provision of misleading information to certain employees who sought information regarding their superannuation entitlement. We say that despite what we regard as the clearest indication from the parliament and from governments regarding the rights and entitlements and what should happen in respect of temporary employees of the Commonwealth.

That emanates initially from the second reading speech of Mr Chifley, the then Treasurer, to the house when he brought in the right for temporary employees to have access to Commonwealth superannuation in 1942, when he said that:

> This Government considers that the superannuation scheme should be extended to those persons who are for all practical purposes, although not in name, permanent employees of the Commonwealth. Investigation has disclosed that about 5,000 employees, who are classed as temporary, are employed full time, and are occupying positions, the duties of which are of a permanent character. Furthermore, their positions are necessary for the carrying on of the work of the departments. Whilst many of these persons have been employed for short periods only, others have had long continuous service.

Similar sentiments were written and expressed at the time the Superannuation Act was amended in 1976, and the view of the government that formulated the amendments in 1975, represented by the statements of the Honourable Ken Wriedt, were that the government considers superannuation to be a right of all employees.

That was the attitude from parliament. As early as 1949, as is recorded in the judgment in Cornwell in the ACT Supreme Court, on 20 June 1949 treasury considered it necessary to request departments to notify all temporary employees of their section 4(5) rights after completing five years continuous service. That is, at that stage, the employment requirement before entry to the Commonwealth scheme for temporary employees was five years, and treasury directed, as Chief Justice Higgins observed there, all departments to inform employees of their rights. That was the clear view of government: temporary employees had a right to be informed of their right to superannuation. That direction from treasury was reiterated throughout the succeeding 40 years and there were observations that that direction was not being adhered to and attempts to ensure that it was. For the reasons outlined, I will not go to the specific details of that.

Consequently, by the time that temporary employees in the 1990s were entitled as of right to superannuation there were many thousands who had not been informed of their right to be in the Commonwealth Super Scheme, or had been misinformed of their rights upon enquiry. The issue was first taken up in the matter of Cornwell, where Mr Cornwell succeeded at first instance, on appeal and in the High Court. That had established a precedent, we say, for claims of a similar nature, where there was a misrepresentation and an entitlement that was never received.

The injustice, we think, is evident. Many persons who were entitled, who had given a lifetime of service to the Commonwealth, were not able to retire when they wished to or, when they retired, lived in impecunious circumstances and without the entitlements in retirement to which they should have been entitled. That is the grave injustice of which we speak.

Leon Fuller, in his book *The Morality of Law*, said:

> It is also plain that if the laws are not made readily available there is no check against the disregard of them by those charged with their application and enforcement.

We consider that in these circumstances that is a fair summary of what has occurred in respect of the failure to inform these employees of their rights.

We are happy to assist in all matters that the committee wishes to raise. We have some particular issues with some of the matters that have been raised by the Department of Finance in its submission, but perhaps we will come back and deal with any of those that are not addressed in the questioning by the committee.

CHAIR: Thank you, Mr Gordon. Mr Faulks, do you have anything to add?

Mr Faulks: No, I am content with that as an opening statement. There are numerous issues, one of which we wish to address very much is the issue of the limitation period and how the Commonwealth is choosing to apply that to the numerous claims that they are now aware of, and their strict application of that limitation period, even to people who were not aware of their rights at any stage before the period had expired, and to many people who

would have been unclear about how that law applied to their claim until the Cornwell decision which was handed down in May 2007. We would strongly encourage the committee to look at that issue and to open the door for those persons to be able to bring a claim in whatever form the committee may recommend without the Commonwealth simply putting up the stopper on those claims alleging that they are out of time. That has been the almost universal response to matters which are outside the strict six-year time limit. That is one area that we would focus on.

We also want to address the applications that have been made under the act of grace provisions and the hundred per cent rejection of those claims to date. Despite the Commonwealth's invitation to people who may have been strictly out of time to make a claim under those provisions, each and every one of them has been rejected to date other than, I think, four that are still under consideration, as is conceded in the Commonwealth's own submission. We can make some specific comments about that and draw your attention to some examples if that would assist you. Other than that, I do not know if it would assist you to hear about where the litigation process is up to and what has happened in the claims that we are involved in. If that would assist you, I can give you a brief summary of it so that you know what has happened since Cornwell was decided.

CHAIR: That would be helpful, thank you.

Mr Faulks: There were a number of claims that had been filed in the court prior to Cornwell being decided in May 2007, but I think it is fair to say that most of those people who had sought advice wanted to see what would be the outcome of that case. The Commonwealth had argued right from the beginning of the Cornwell period, which goes back to the late 1990s, that every one of the claimants was out of time under the limitation law because the time limit had to run from the time when the misrepresentation or breach had occurred, which in almost all of these cases was, as you have heard, back in the sixties and seventies. Everyone who approached the government about this, either formally or in the form of litigation, faced a resistance on the basis that, 'You are out of time, we are not going to resolve your matter.'

It was decided that Cornwell would effectively be run to test that law and to see how the limitation period applied. As you have heard my colleague John say, the Cornwell matter went through three layers of court over many years, and at significant cost, until the High Court clarified the limitation period in particular in that case and said that the period of time did not run until the person would suffer their loss, namely, when they would retire and access their superannuation. By that stage there were many, as you can imagine, by the passage of time, ex-employees who had long since left government or accessed their super. Even though the Cornwell decision was good for John Cornwell in the sense that it found that he was in time and helped others who were either still employed or had not yet accessed their superannuation. There were still many who, even by the time that case was decided, were outside the six-year period. We say it is unfair that those people are disadvantaged, and that is exactly the type of case that either should be dealt with by a release from the Limitation Act or by the application of the act of grace payments. In fact, that is what the Government said, 'If you are out of time, make your application under these act of grace payments, and even though you technically cannot bring a claim in the court, we will look at it.'

We have assisted 40 or more people to do that, and you have seen the statistics from the Commonwealth that they have had 101 act of grace applications; every one has been rejected. Our submission is that is simply not feasible; there must have been a claim with merit amongst them. In all the 40 that we have dealt with, on a justice basis, each of them had merit. There was evidence of representation, there was evidence of a loss, and that they were rejected purely on a time limit issue. We think that is an area that needs very careful attention. We can give an example of one: I will show you a letter that my client received in rejection of it, if that would assist you. We say they are very important issues. There are a number of people there who may have had claims but have not commenced them for that reason; that they are now out of time. There are some subsequent matters that have been commenced and there had been some matters resolved through alternative dispute resolution. You have seen in the statistics that finance has indicated that they have settled 21 matters; we have been involved in 20 of those matters. They were matters where litigation had either been commenced or the process had been advanced to some extent and then they were resolved. We do not know what the other one was that finance has settled directly apparently.

There were six matters that went to trial in the ACT Supreme Court at the end of 2009 and early 2010 over five weeks of hearing involving two particular workplaces. The decision on those matters has been reserved and has not yet been handed down, and all parties await that decision, obviously. There are, as you have heard from Mr Sullivan and the ACT's representative, some other actions that we have commenced where we have named ACTEW Corporation or the ACT as a defendant because of this confusion about the sharing of liability, and our awkward position that we have to protect the position of our client by alleging a liability against potential

defendants, and no apparent readiness for them to come to some agreement about contribution. We can make some more comments about what might be done to help that process too, if it would assist you.

I cannot give you a precise number, but we have a large number of other matters that have not yet vested because the employee has not yet ceased work, and those matters will be commenced or processed in a different way if that comes to reality. The Commonwealth so far has made it clear that they will not look at any potential claims and will only look at claims that have actually vested, namely, where someone has retired and accessed superannuation. As John said, the problem with that is that many of these people are still working into their late sixties or, in some cases, seventies, because they do not have the money to retire. The Commonwealth is saying, 'We won't look at those, because your claim hasn't vested.' We think the Commonwealth should be looking at those in a potential sense as well.

Mr Gordon: Can I just add on that question of the refusal of the claims. There are a number of issues that we have with the approach which the Commonwealth appears to have adopted. It appears that there were 823 people who had contacted the Commonwealth, according to the finance submission, and outside of the Snedden, Hall and Gallop process only one has received compensation. Snedden, Hall and Gallop have represented 20 which have settled. All of the 97 act of grace claims determined have been refused. The basis upon which they have been refused concerns us because the department says that the test they are adopting is that in the Legal Services Directive, which is whether or not there is a meaningful prospect of legal liability arising which, if there is, they would consider making a payment. Yet, they have refused claims where the person was apparently out of time when there were still issues relating to whether the Commonwealth deliberately concealed people's rights, and where there are issues relating to whether or not taking certain steps causes a claim to vest or not. There has been a blanket rejection on the basis if it is more than six years, you are out.

Secondly, they have been refused on the basis that they are not a misrepresentation claim, that is, they did not seek advice and were given a misrepresentation, when there is still the issue of the general duty of care, that is, whether they should have been told that they had a right rather than to seek the information. That issue is still before the court and we believe is impacted by some of the materials that I referred to at the outset. Thirdly, they have refused claims on the basis that the advice given by the officer in circumstances where the temporary employee sought information regarding his or her rights was correct, and that is asserted on the basis that, if they were still within the qualifying period of initial employment before they were entitled to join the Commonwealth Superannuation Scheme, the three years or that earlier period, whatever it was as it changed, then they say the advice that you were not eligible is correct. The problem with that is, is that no one was ever told, 'You are not eligible, come back in three years, or two years, or in six months,' and no one was told, 'You are eligible, but you just can't join now.'

Where people have been given wrong advice because the officer giving the advice was ignorant of the right of the temporary employee to join at all, that has been construed by the Commonwealth as being correct advice if the circumstance is that they were in that initial qualifying period and not as of right then entitled. We have real concerns that act of grace and other claims, it would seem, have been refused on the basis of adoption of those sorts of principles when the claims have meaningful prospects of legal liability.

CHAIR: Thank you. I might give the call first to the deputy chair, Senator Bishop, but colleagues should feel free to seek the call if they wish to follow on from a question. Senator Bishop.

Senator MARK BISHOP: Thank you, Chair. Off the top of my head, it strikes me there are potentially three types of claimants here: those who were not provided any information at all; those who were provided with misinformation or disinformation and hence, had misleading information; and, thirdly, those who were simply denied entry for whatever reason, which may or may not have had a sound basis at the time. Do you regard each of those three different potential claimant groups as being equally meritorious?

Mr Gordon: In a sense, but qualified in this way: legal liability in respect of the misrepresentation cases we say has been determined except insofar as the facts might differ in each individual case. In the cases we see, the facts do not seem to differ very much. It was the misapprehension of Commonwealth officers about the entitlements of temporary employees that led to the misinformation or disinformation. That was the Cornwell case; we think they are highly meritorious. In respect of those who received no information, our position is that they are meritorious, but we are yet to have a judicial pronouncement on it, a judgment on it, but we say they are meritorious for the reasons that I indicated at the outset, that government and the treasury for example, directed—

Senator MARK BISHOP: Had a policy.

Mr Gordon: that people be told, and they were not. We say that that enlivened a duty to inform. There were also attempts from time to time to adopt that process, but they were inadequate. But we say that there was a duty,

therefore, we say they are meritorious but we accept that that issue is to be determined, possibly in the judgment that we are awaiting from the ACT Supreme Court. The third category, there really are not too many cases where people who made application were denied the entitlement to join the scheme. By 1970 the Commonwealth's own records demonstrate that something like three of four per cent of any applications that were made to the superannuation authorities were rejected on the basis of future employment grounds. It was almost as of right, and that was—

Mr Faulks: The third category is not a significant area of the people that we have had contact with. Indeed, our case is that, if people had got the right information and approached the employer and applied to join, it is more likely than not, or even at a greater level, that they would have been accepted into the scheme.

Senator XENOPHON: Sorry, chair, can I just ask something just quickly?

CHAIR: Sure.

Senator XENOPHON: In which category would you put the people that the Superannuate Commonwealth Officers Association put, that those who were not advised of their rights but they did not get the certificate of continuing employment for another three years, notwithstanding that they had been there for a number of years, or seven years, or three years, depending on the period of time.

Mr Faulks: We have very little evidence of that, and we have not found evidence of it in the material that we have seen, if I can put it in that general—

Senator XENOPHON: They would be in the third category that Senator Bishop was referring to.

Mr Faulks: They would be the third category.

Senator MARK BISHOP: Second issue: model litigant. I have had some experience in other portfolios of the Commonwealth as a model litigant. In those matters that have gone to litigation, can you advise us as to whether you believe the solicitor or solicitors acting on behalf of the relevant agency has indeed acted at all times consistent with the provisions in the model litigation directives that come out of Attorney-General's to all Commonwealth departments? That is, are you critical there?

Mr Gordon: We are not critical of the legal representatives who have acted for the Commonwealth—

Senator MARK BISHOP: No, it was in the context of whether the legal representatives of the Commonwealth have been conducting themselves properly as model litigants, not properly as solicitors. They are different things.

Mr Gordon: We have concerns that the process of assessment of claims that have been put forward for seeking settlement out of court are being assessed on a basis which is inconsistent with the legal services directives. In terms of those that have been litigated, we have no criticism at all of the way that the solicitors behaved.

Senator MARK BISHOP: The third issue: have you sought in any of the matters where proceedings have been initiated in the appropriate tribunal, to join the—what is the agency called that runs the Commonwealth Superannuation Scheme?

Mr Faulks: ComSuper.

Senator MARK BISHOP: Have you sought to join them as a party to any of the proceedings?

Mr Faulks: No, we have not. It has been the view that we have formed that they certainly had no liability in terms of the misrepresentation aspect of those matters. As to whether they or their predecessors, the Superannuation Board or whatever, had a duty of care which has not been exercised, that is a matter that we have not formulated a final view on, but we have chosen not to—

Senator MARK BISHOP: No, I am not even chasing that particular burrow, whether they—

Mr Faulks: They have not been joined as a party for any of the litigation.

Senator MARK BISHOP: No, it will become clear what I am after in a minute. Is finance the agency acting on behalf of all other Commonwealth agencies?

Mr Faulks: Yes, they are.

Senator MARK BISHOP: In your discussions with finance, have you pressed upon them any request to engage in survey material or to exactly try to find out the extent of people who might have been employed in the relevant period who were denied access?

Mr Faulks: If you ask me whether there is a letter that says, 'Will you please identify and notify every former employee'—

Senator MARK BISHOP: No, the agency as an employer. At some stage each of these departments is going to have records and information as to what occurred in the forties, fifties, sixties and seventies. It is there.

Mr Faulks: We agree.

Senator MARK BISHOP: It is there, and it might be very expensive and very difficult to access it, and I just wonder have you, in your negotiations, pressed upon finance the need to start accessing that information from relevant line portfolios?

Mr Faulks: Insofar as any case has been litigated, in the discovery process we have sought all relevant records. In 1975-76 there was a royal commission, at which point every department was asked to provide records of temporary employees within that department. There would be a standing record at that point of all of the temporary employees employed by the Commonwealth.

Senator MARK BISHOP: Yes. There will be extant records of directions and policies issued by line managers for each of the departments back in those days. I will ask finance that question in due course. Similarly, in respect of my question of the superannuation agency, they will have information in their records from each agency as to which classes of persons in the forties, fifties, sixties and seventies who joined the appropriate agency, and it would be very interesting to analyse that information in terms of temporary employees as to why perhaps all the temporary employees in the AFP, for example, joined it and none joined in, for example, the ABC. I will ask them that.

Mr Faulks: We believe that information is available and there was some evidence given about it in the litigated matters, so the department should be able to answer that.

Senator MARK BISHOP: Yes, it will be available.

CHAIR: Senator Xenophon.

Senator XENOPHON: Mr Gordon, going to the model litigants code, it makes reference to the Commonwealth or an agency has to deal with claims promptly and not cause any unnecessary delay. Do you think that has been complied with here?

Mr Gordon: In respect of the matters that have gone to court, I do not think we could say that there has been any unnecessary delay on the part of the Commonwealth.

Senator XENOPHON: For those that have not gone to court?

Mr Gordon: We invited the Commonwealth to engage in an administrative process for the resolution of claims after Cornwell. We had hoped that that would cause a process to be adopted which was expeditious and determined many claims very quickly, and that invitation has not been accepted. I would say that is probably in that context.

Senator XENOPHON: So that would be inconsistent with subclause (2)(d):

The nature of the obligation which is endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings.

Mr Gordon: Yes.

Senator XENOPHON: That is that aspect of it. You referred to the issue of the Limitation of Actions Act or statute of limitations. I am not familiar with the provisions as to the grounds upon which an extension of time can be granted, but are there provisions if there is a material fact or is it a sudden death approach?

Mr Faulks: In the ACT there is no provision for an extension of time; there is an absolute six-year limitation period for this type of matter. It is different from personal injury litigation in that regard, in that in most cases there is a discretion to extend. In all the cases where the six years is expired, there is an absolute prohibition on legal proceedings being commenced and no provision to extend.

Mr Gordon: Save for unless there has been deliberate concealment by the party asserting the statute, in which case time is suspended for the duration of that concealment.

Mr Faulks: That is an argument that we have made in the litigated matters that we have presented so far.

Senator XENOPHON: That is still a live argument that will be subject to the ACT Supreme Court.

Mr Gordon: Yes.

Senator XENOPHON: And judgment has been reserved in relation to those cases?

Mr Gordon: Yes.

Mr Faulks: I should say, though, it probably is the case that the decision that will be handed down will not deal with that aspect only because each of those six litigants were within time and therefore did not have to rely on the deliberate concealment. There were other matters where that was a live issue.

Senator O'BRIEN: There were other matters, but they have been settled?

Mr Faulks: There have been some matters that have been resolved, there are some matters which litigation has been commenced and are yet to reach a hearing stage, and where limitation has been pleaded as a defence.

Senator XENOPHON: It is fair to say that the Cornwell decision, which both of you were involved in, the High Court decided on the basis of a negligent misstatement, it was not necessary for them to decide as to whether there was a duty of care as such, was there?

Mr Faulks: That is correct.

Senator XENOPHON: The decision did not turn on that, but the decision of the ACT Supreme Court may turn on the issue of the duty of care.

Mr Gordon: It was litigated in Cornwell, but because there was a negligent misrepresentation the court at each level and in the first instance on appeal said, 'Don't need to decide it because the claim is successful on the misrepresentation issue.' It was again litigated in the six that were run last year in the ACT Supreme Court. Again, there is the possibility the court will not need to go to the issue if the claims succeed on misrepresentation because they are all misrepresentation claims as well. It is an issue which is there, and there will be claims where there is no misrepresentation and simply duty of care issues, but they have not been litigated yet.

Senator XENOPHON: Further to Senator Bishop's line of questioning, it seems that, if there is a finding of a negligent misstatement, would put you in a stronger position than in respect of a duty of care claim.

Mr Gordon: At the moment that is the case, yes.

Senator XENOPHON: Because there is no precedent or no decision has been made in these cases.

Mr Gordon: Relating to the general duty of care.

Senator XENOPHON: Duty of care.

Mr Gordon: No, not yet.

Senator XENOPHON: Is there any case law on the general duty of care for such matters?

Mr Gordon: There have been some cases where that has been an issue in certain circumstances, which we would say are not really parallel to those here. There was a decision arising out of some issues in Tasmania, called Mulcahy, where that issue was canvassed. On the facts in that case and on the law as it stood in Australia in 1996, it was found there was no duty of care. The facts here are very different, not least of which because of the treasury directives which we have referred to, and because the law has changed since then on the basis of Perre v Apand and the other High Court decisions.

Senator XENOPHON: Perre v Apand relates to the nature of the loss.

Mr Gordon: The relevant part of the case is the way in which a party asserting economic loss as a result of a breach of a duty of care, the relevant criteria for determining whether there is a legal duty. We say that is applicable and we say, on the basis of that case, these cases are all cases in which a duty of care arises.

Senator XENOPHON: The High Court in Perre v Apand expanded the categories of loss in a sense.

Mr Gordon: They defined the criteria to be applied in determining whether there is a duty beyond simple foreseeability and proximity.

Senator XENOPHON: I do not know whether you would want to speak about this openly or in camera, but in the way that the claims have been handled before they have gone to court, has there been frustration on the part of either of you or your clients in terms of the way that matters have been dealt with before proceedings were issued?

Mr Gordon: The cases that have been litigated, we accept that, given the novelty of them and the complexity of them, there was a need to address them and the difficulties that arose within them were attendant upon resolution of those difficulties, so as test case litigation there is always going to be a tough first couple of cases. Once these cases are resolved we think then the test arises whether or not parties come to the party in terms of what has always happened where there has been a big issue, many plaintiffs and a resolution of test cases. Is there a process then for expeditious resolution, such as in asbestos, HIV and so on, in those earlier sorts of cases.

Senator XENOPHON: In relation to that—perhaps you could take on notice—what do you see as being an equitable but robust method of assessing claims, whether it's a Dust Diseases New South Wales Tribunal-type approach?

Mr Gordon: We have considered that, and we think that it would be as simple as appointing a Federal Court judge to sit in Canberra with a docket only for superannuation claims. Once these initial test cases have been resolved, most of the issues will have been resolved. Then it is just going to be the novel issues that might arise in a smaller number of cases that need resolution, or if there is a fundamental dispute on the damages that are payable. But most of the issues will be resolved by this test case litigation. Simply having a judge sitting as a Federal Court judge in Canberra for a year, maybe two years, possibly to resolve the contribution issues between the Commonwealth and the ACTEW or the ACT, in case stated form, have a case, determine the issue, move on. We think that that would be a very quick and expeditious way of resolving those claims which are still in dispute after the resolution of the test cases, which we hope are not many.

Senator XENOPHON: Finally, you are making an assumption that that would resolve time limit problems because it seems that—

Mr Faulks: No. That needs special attention in the sense of, unless the door is opened and there is an agreement by the Commonwealth, and indeed other parties, that they will not rely on that limitation period, every plaintiff is going to be faced with that absolute six-year cut off.

Senator XENOPHON: Because whichever jurisdiction you are bringing it in you are still subject to the Commonwealth Limitation Acts.

Mr Faulks: No. Each jurisdiction has its own limitation law, but our examination of those laws—and most of them have related to the ACT, so in this particular type of case there is no discretion to extend. What we are suggesting is that either the Commonwealth, as it did in the Voyager cases, should simply abandon reliance upon limitation for a reasonable period of time to enable matters to be properly assessed, or there should be a suspension of those laws to enable them to be dealt with. Otherwise there are going to be numerous people who are going to be unfairly disadvantaged. As you have heard, the alternative act of grace process is, to be quite honest, a nonsense; it simply has resulted in no outcome.

Can I come back and deal with one area of frustration in terms of individual plaintiffs. The difficulty that we have faced is that often it has taken litigation to bring about a process of discussion and an examination of the issues. Many of the people that we are dealing with are elderly or, in many cases, quite ill, they do not have any assets or very little income and, to commence legal proceedings in the face of a potential adverse cost order if they do not succeed, is a very daunting task and many have chosen not to proceed with that step for that very reason. Our attempts to engage the department in direct negotiation without litigation I think it is fair to say have been frustrated, and we would really encourage a more open approach to that regard. As my colleague said, right from the time when Cornwell was decided, we said, 'Let's set up an administrative process where we can give you the information, we will go to some alternative dispute resolution, whether it's through a mediator or otherwise,' that just simply has not happened. It might be a resource issue or whatever, but it has not happened.

Senator XENOPHON: They have got the resources to litigate it though, haven't they?

Mr Faulks: I cannot comment on that. Once you get into the court and you start a process of directions and discovery and every other thing, the costs naturally snowball, and I do not think that is in the interests of either party, would be our submission.

Senator XENOPHON: Finance said in their submission that they have a rigorous and consistent approach to claims, I suppose they are being consistent in relation to the 97 claims they have knocked back.

Mr Faulks: The act of grace ones, very consistent.

Senator XENOPHON: Yes.

CHAIR: Senator O'Brien.

Senator O'BRIEN: You may or may not be able to answer this: in relation to the act of grace payments process and guidelines from the Department of Finance, do you know if they are different from the process and guidelines for processing a defective administration claim?

Mr Faulks: I cannot honestly say whether the provisions are the same or not. The particular section, which is 33(1), I think, of the Financial Management and Accountability Act says that where there is merit in a claim relating to something that the government has done, to put it in its simplest terms, then the government will look at that, whether or not there is technically a reason why that claim cannot proceed. We say that all of these matters which are technically out of time fall into that category. Every letter that has been received in response to an

application says, 'Yes, this is a case that is out of time, but we will look at it under this section,' but each of those claims has then been rejected for one of the reasons that John outlined before, 'We're not satisfied there was a representation,' or one of the other reasons.

Senator O'BRIEN: Is the out of time, there is no legal liability, a constant in rejections?

Mr Faulks: Yes. To be honest though, that is why the application has been made, because they are out of time.

Senator O'BRIEN: I understood that in relation to defective administration claims you can only apply for a payment where it is accepted there is no legal liability.

Mr Faulks: Sorry, I may have misled you. I agree with you and that is the context in which each of those applications has been made. There is no legal liability in the sense that it is out of time and therefore a claim cannot be brought. But otherwise we say almost all, if not all, have been meritorious.

Senator O'BRIEN: I am just trying to find a reason as to why these act of grace payments might be rejected, as you suggest, on the basis that there is not a legal liability if that is really the basis for making a claim.

Mr Faulks: There are a variety of reasons, some being that the representation was made during the period of qualification. Coming back to the very matters that are being contested in the litigation, some being that—what was the other example that you gave before—that there was no representation, they are simply duty of care cases. Some have been on the basis that there is no corroborative evidence of the representation. In other words, effectively saying you have not presented your case like you would in court. In one case, where all of those things were ticked off, the reason was given that you probably would not have got your seven year certification, the very matter that was raised by Mr Nock earlier, without any evidence of that at all. Without being perhaps unkind, we see this as a justification of a position rather than the proper determination of a position. Of course, those people can appeal to the Federal Court under legislation from that administrative decision but the cost implications of doing that are huge, so they are really faced with no option.

Senator O'BRIEN: Has anyone?

Mr Faulks: No, not that we are aware of. As I said, we are dealing with people who are of very limited means.

Mr Gordon: Appeal is limited to natural justice or error of law, so no, it is too constrained.

Senator O'BRIEN: I understand that proposition. In relation to the classes of employees or workplaces that are represented in these claims, do you say there is any pattern that can be deduced from the evidence that you have been able to collect as to a likelihood or balance of probabilities finding in relation to classes of employees or places of work?

Mr Faulks: Yes. We say there is a clear pattern of particular departments or areas of departments where a larger number of employees have been misled or given incorrect information. In some cases there has been acceptance by the Commonwealth, at least in negotiation, that they accept there may have been misrepresentations made. In the six matters that went to litigation there was an absolute denial that there were any misrepresentations made. The distinguishing features of those were that the representors, if I can put it that way, were still alive and had given information to the Commonwealth about what they had said or not said. That ultimately will be a matter for the court as to how they determine that.

Senator O'BRIEN: That is an easier one, isn't it?

Mr Faulks: It is. ACTEA, for example—and you heard from Mr Sullivan earlier—we have a large number of people who appear to have been given incorrect information in that particular workplace. Forestry, which was one of the ones which was litigated a large number in that. There are patterns of particular employers, or employer departments, where the misinformation seems to have been more common.

Senator O'BRIEN: Are there claims in areas where it was not uncommon for temporary employees to join, say, the CSS; in other words, an isolated example?

Mr Faulks: Where there were many people who joined and maybe one or two who did not?

Senator O'BRIEN: Yes.

Mr Faulks: We have not come across that. In fact, the evidence that we have in the ones that we have dealt with have been that most people were either not given information or given incorrect information, and there were a few who, usually through someone else outside or whatever, got information independently and joined through that method.

Senator O'BRIEN: Presumably the onus of proof in those matters, if you get down to the facts, is the balance of probabilities.

Mr Faulks: It is, yes.

Senator O'BRIEN: Yes.

Mr Faulks: The standard is, yes.

Senator O'BRIEN: Can you just familiarise me with the circumstances of Cornwell?

Mr Gordon: Yes, Mr Cornwell was a spray painter at the Kingston depot of the Department of Transport. He joined the Commonwealth in 1962 and he had three years qualification period. During that period there was a union meeting at which the union representative had raised a concern that they were entitled to be in Commonwealth superannuation, that is, the industrial temporary workers at that workplace were entitled to be in, and took that to the supervisors, the managers of the department, and were told, 'No, you are not eligible.' Mr Cornwell then took it on himself to go back and query that with the manager of transport for the ACT, who was told, 'No, you are a temporary employee, you are not entitled to superannuation,' which repeats what has been said many, many times, in our experience, 'but I will look into it for you.'

That was the last Mr Cornwell ever heard about it. He was never given any other information, he was never invited to a seminar or given a booklet until he became invited to become a permanent employee in 1987, at which time he was required to join the Commonwealth Superannuation Scheme. In the intervening period, shortly after he had seen Mr Simpson, the manager, Mr Simpson in fact made an inquiry to the super board and papers were sent back for Mr Cornwell to complete, but they were never given to him, they remained on the file in the Department of Transport. There were various private superannuation representatives who used to attend these workplaces; that was commonplace in many of the workplaces. Very odd when you consider that they required permission of the Commonwealth to enter these Commonwealth workplaces to sell private superannuation policies, and yet all of these workers were entitled to Commonwealth superannuation.

Mr Cornwell never took advantage of that and so, when he retired, he had no superannuation. It was not until he reviewed his personnel file many years later, when this issue first emerged in the late 1990s, that he saw the papers that had been sent back to Mr Simpson for him to complete and realised that he had been denied.

Senator O'BRIEN: He had been dudded.

Mr Gordon: Yes.

Senator O'BRIEN: In your experience—you talked about other claimants—presumably like facts will lead to settlements rather than court cases, I would have thought—

Mr Gordon: You would hope so.

Senator O'BRIEN: Given that that has taken place, are there many of those cases that you say exist?

Mr Gordon: The form of words differs slightly from claim to claim, but there is a consistency. The apprehension appears to have been abroad in the senior levels of the Commonwealth government, or the middle and senior levels of the Commonwealth government in the sixties, seventies and eighties that temporary industrial employees were not eligible for super, that it was a scheme for public servants or only for permanents. So the words interchanged those words, but it was almost always the same representation. It is the same in the six that have been litigated, that that was the form of words that was used consistently. That is the nature of the claim that is made and, hopefully as you say, if, for example, these six are successful then that will lead to a resolution of others.

Senator O'BRIEN: Thanks very much.

Mr Faulks: Could I add one matter, please, Chair?

CHAIR: Sure, please do.

Mr Faulks: Or two matters. One related to the statutory corporation matters. The plaintiffs in those matters are placed in a particularly difficult position because of this issue between the Commonwealth and, say, ACTEW about who is liable. Those matters are being dragged out and in one case the plaintiff has already died and his estate has had to be substituted. We would like to invite the committee to look at a situation where, for example, the Commonwealth agreed to, at least on an initial position, accept liability for paying those claims and then sort out its position in terms of ACTEW or whoever it might be, through a test case or whatever, without unduly delaying the claims by the meritorious plaintiffs. There may be issues in each of those cases that prevents that happening, but can we raise that as an issue—

Senator O'BRIEN: It would have to be both governments, wouldn't it, to accept that?

Mr Faulks: It would have to be. Secondly, just on the Totalcare matters, Senator O'Brien, in terms of the way they were dealt with, because I thought that there may have been some confusion. The Totalcare matters were in a defined class and they involved people who had joined Totalcare and become permanent employees and therefore were entitled immediately to a membership. Some of those have still got other claims relating to their earlier period of employment with the Commonwealth which are extant and not yet determined, and would not involve Totalcare but may involve ACTEW Corporation or other bodies, and so the issues are still there. Those Totalcare settlements had nothing to do with the earlier period of employment. I do not know if that assists you, but they were quite different.

Senator O'BRIEN: Thanks for helping, it was a complex answer.

CHAIR: Just before we finish at this point, if there are any documents that you would like to provide to the committee—they could be those documents that were subject to that discovery ruling from Justice Refshauge—then please do. The committee will receive those; the committee will determine how it handles them. If that is something that you would like to do, then—

Mr Gordon: Can I say it would probably assist us if the committee indicated that it would like to see those documents, in which event we would be at liberty under the rule to disclose them.

Senator XENOPHON: Yes.

Senator O'BRIEN: We would like you to present a full submission, and if that involves producing those documents, we would like those documents.

CHAIR: Some senators have indicated an interest in those documents, so thank you.

Mr Faulks: We will make them available.

CHAIR: Thank you very much, gentlemen.

CUMMING, Mr Don, ACT Branch President, Media, Entertainment and Arts Alliance

HANNAN, Ms Debra, National Claims Officer, Media, Entertainment and Arts Alliance

WARREN, Mr Chris, Federal Secretary, Media, Entertainment and Arts Alliance

[15:19]

CHAIR: Good afternoon. Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The committee has your submission. I will invite you to make a short opening statement, after which I will invite colleagues to ask questions, but if, for the benefit of Hansard, you could state your names and the capacities in which you appear.

Mr Cumming: I appear in two capacities this afternoon: firstly, as an individual who has a strong personal financial interest in the outcome of these proceedings; and, secondly, as the ACT branch president of the media alliance, a voluntary elected position that I have held for over 10 years. At the outset, can I say thank you for the opportunity to appear before you this afternoon, and I would especially like to thank Senator Xenophon, who I understand was largely responsible for this matter being referred to the committee.

Senator XENOPHON: That is true. My colleagues voted for the referral, so it is—

Mr Cumming: Thank you, senator. As the media alliance has stated in its written submission, and as indeed I think have just about all other submissions, this matter is one of fairness and equity. As I said at the outset, I have a strong interest in this. My circumstances were that I joined the ABC News department in Sydney as a full-time journalist in March 1975. That was after about six months as working as what was termed a casual journalist. The widespread practice back in those years was that journalists who came from commercial news were first employed by ABC News as a casual, usually for about three shifts a week.

CHAIR: For a cleansing, was that?

Mr Cumming: For a cleansing. If they then proved their worth, they were taken on as temporary journalists, usually at a lower grade. Casuals were employed at the B grade rate, which was around about the middle of the ladder and then, if they proved their worth after a period of time, they were taken on probably as a D grade or a C grade, but at a lower grade. In fact, I first worked as a casual journalist for ABC News in 1968, but I left the ABC voluntarily for the safety net of a permanent position back in newspapers, because at that stage I was facing two years national service, and I was subsequently conscripted for two years, and then came back, worked for the newspapers, and then it was not until 1975 that I rejoined the ABC.

I worked supposedly as a temporary journalist for the ABC for a total of 11 years, including as News editor here in Canberra, and as a political correspondent for Radio Australia working in the press gallery in the Old Parliament House. In 1985 I transferred to the Australian government Department of Agriculture and I worked there in a number of communications roles until I accepted voluntary redundancy in 2009. I retired from the Department of Agriculture as Manager, Media and Ministerial Communications. I now work in a very part-time role as a contract speech writer for a couple of government departments and MPs and senators.

For the first eight years of the 11 years when I worked for ABC News I did not contribute to superannuation, so that was eight years that I was denied my entitlements, and the entitlements that people had who were sitting next to me and doing much the same work. Those are entitlements that my family and I are still denied. This was because I was advised at the time that journalists were temporary, as opposed to permanent employees, although in all other respects our employment was identical. You will see from the alliance's submission that this was a common experience back in those years. My understanding is that there were many others who were classified as temporary but who were in fact for all intents and purposes full-time employees, that is, full-time employees with all the responsibilities of full-time employment, yet they were denied their superannuation rights.

In fact, unless the government takes action to publicise this right and establish fair mechanisms to deal with claims of this type, many others I believe will miss out. My circumstances were that I was given incorrect advice on a number of occasions by the then chief of staff of ABC News in Sydney, whose name was Mr Len Annear. I was also incorrectly advised by various people in the ABC's personnel area. In those years even the most hardened of journalists would not dare question a ruling from the all-powerful chief of staff, and any suggestion that a journalist might seek clarification from personnel in the hallowed halls of Broadcast House was tantamount to a direct breach of the chain of command.

I cannot recall how I learnt that I was in fact eligible to contribute to superannuation, but I do recall that I signed up as soon as I found out. I then continued to contribute to superannuation until my retirement. As ACT Branch President of the media alliance I became aware of the Cornwell superannuation case soon after the High Court handed down its decision in 2007. I have not lodged a claim with the Department of Finance and Deregulation, but instead have monitored the situation. The committee would be aware that very few claims made through the Department of Finance have been successful. This is not to criticise the department, but merely to point out that the framework it appears to be operating in is clearly not conducive to fair results for claimants.

In the meantime, none of us is getting any younger. We need a better system and, as I said at the outset, this is a matter of fairness and equity. I do not imagine the committee members, after taking into account my submission and the submissions of others in similar circumstances, will disagree. The government has an obligation to ensure consistency and equity in the impact of its activities. I appeal to the committee to take the necessary action urged upon it to remedy this situation. I believe the approach put forward by the alliance is the correct one. Should the committee wish to progress the matter by inviting interested parties to review the alliance's proposal, I know the alliance would be happy to participate in any discussions.

For the reasons I have given, I hope this committee will recommend, and that the parliament will adopt, the proposals in the media alliance's submission to enable a fresh, joint approach to remedy this issue once and for all. Thank you.

CHAIR: Thank you, Mr Cumming. Mr Warren or Ms Hanna: anything to add at the outset?

Mr Warren: Our submission and Don's very passionate explanation of our concerns in this matter explain the situation we are in and we are happy to answer questions from senators.

CHAIR: Thank you. Senator Xenophon.

Senator XENOPHON: Thank you for your submission and for your opening statement, Mr Cumming. Effectively, you have set out what you think needs to be done here, and that is to have an alternative dispute resolution system, a fast-tracking system, a panel to deal with these matters. If possible, could you provide some further details as to how you think it might work procedurally and have you had discussions, for instance, with the lawyers that have acted in the Cornwell case about a common approach as to what could be done to resolve these matters expeditiously?

Mr Warren: We have had discussions with a number of the lawyers, we have also had extensive discussions with the ABC, because from our perspective it is the journalists of the ABC who, as Don said were, for various historical reasons, engaged as temporary employees from 1948 until 1991.

Senator XENOPHON: That is because it was regarded that journalists could only ever be temporary, is that right?

Mr Warren: That is right. There were three types of small J journalists working at the ABC—I could talk for hours about forms of employment at the ABC, if you like—there were journalists who were employed as public affairs officers, who worked on public affairs programs in radio or television, such as *Today Tonight* or *Four Corners* or *AM*, they were permanent employees and were entitled to and were required to join the Commonwealth Superannuation Scheme; there were capital J journalists who were employed in the newsroom, and were engaged as temporary employees; and then there were the managers of the newsroom who were also permanent employees and received superannuation.

There were a number of capital J journalists who were temporary employees, did not receive superannuation, who would have received superannuation either because they had worked for a period in public affairs or they had started as an ABC trainee. One of the anomalies was, if you did your training at the ABC, obviously you were a permanent employee for superannuation purposes, or because they had spent a period in ABC management, or, in Mr Cummings' case, because they withstood the culture and the orthodoxy of the newsroom, which is that you did not get superannuation and pushed themselves forward. I do not know the historical reason about why journalists were always temporary employees, but that was the fact.

Senator XENOPHON: Has the alliance got an estimate of the number of ABC employees who could be potentially affected by Cornwell's case?

Mr Warren: We estimate that if you look at the people who would have passed through the newsroom in a non-superannuated capacity between, say, 1975 to 1990-91 when circumstances changed, or when employment changed, there would be somewhere between 500 and 1000 people. It is hard to narrow it down more than that. All of them are the same case; they are working in a place where the accepted employment culture is that you are not entitled to superannuation. Don talked about Len Annear, who was the chief of staff for a long time in the ABC newsroom. I do not believe Len would have ever acted out of bad faith. He would have understood those

were the rules, and those were the rules as they applied. Certainly, when I first became involved in what was then the Australian Journalists Association, on the state committee of the Australian Journalists Association as an honorary member back in the late seventies and early eighties, it was a matter of discussion then, and it was accepted, that temporary journalists were not entitled to it. The point is where do we go forward on that. We have said there needs to be a less confrontational structure, a more cooperative structure, because this has been dealt with as a matter of claims that are to be tested and litigated, rather than an underpayment and wrong that has been done to a class of employees that should be set right. By having a less confrontational or less litigation based approach, treating it more as a human resources issue, which is really what it is at one level, that the cases of the people should be able to be dealt with.

Senator XENOPHON: The Department of Finance—and I am not sure whether you have seen the Department of Finance and Deregulation's submission in relation to this—has said that there is an assessment and investigation of claims, at paragraph 32 of their submission:

> Where the claim is litigated, witnesses are located and interviewed, statements or affidavits are prepared, actuarial evidence is obtained and served in accordance with court rules.

That is what happens if there is litigation. In terms of the act of grace payments or an alternative dispute resolution process, what is your understanding in terms of the alliance's dealings on behalf of your members with the Department of Finance?

Mr Warren: The two key tests that get in the way of resolution are the requirement for there to be able to establish that there was negligent misstatement, and, secondly, the six-year period for claims. I know the previous speakers talked a lot about the six years but we think that certainly for our class of people who are affected—and that does not mean I exclude anyone else, they are the group I can talk knowledgeably about—there was a pattern of treatment, and whether it consisted of negligent misstatements or lack of duty of care, the problem is you have people who had an entitlement to a superannuation payment, they did not receive that entitlement, they are now suffering as a result of not receiving that. The assessment should be, rather than worrying about who said what to whom 40 years ago, which is difficult to establish in the best of circumstances, it should be who are the people affected, what would their entitlement have been, how can we make that payment right, and have a simple, more administrative process for dealing with that.

Senator XENOPHON: Do you have a view as to the categories of claims, I think Senator Bishop alluded to it earlier, whether it is the cases of those who have been the subject of a negligent misstatement or a misrepresentation, secondly, whether you have a view as to whether nothing was said to them, whether there ought to be a positive duty of care on the part of employers, the ABC in your case, to have said something, to advise people of their rights. The third category is that narrower category about whether there was a certification from being a temporary to a permanent employee, where there was a lack of certification, which is a much narrower category. In terms of the duty of care, what is your view about that?

Mr Warren: Dealing with that third category, I could be wrong on this, but I do not think that has been a major issue for our members because, generally speaking, when people did move from the newsroom to public affairs, for example, and therefore moved from being a temporary employee to being a permanent employee, then they were always required to join the superannuation scheme.

In the case of this group of members, the test of an eligibility statement is actually almost an impossible test for most people to meet. In many ways the Cornwell case was a fortuitous accident because he was someone who kept all his records and had a sense that he had been mistreated from the beginning. Any of us who have spent any time representing members in trade unions, or as lawyers, or whatever, would know that those sorts of people are extraordinarily rare, that most people who have been dudded do not keep any records, they accept what they are told. So the requirement that people have to establish a negligent misstatement, as distinct from the lack of a duty of care I think is an artificial test that has acted to preclude the overall majority of people who would be eligible for it; and it is why a number of people, I know in our category, have not pursued it. I do not know about you, but I do not have any of my employment records from the seventies or eighties; I struggle to have the ones from last year, really.

Senator XENOPHON: No one would ever employ me so I do not have any.

Mr Warren: This should be treated as a human resources issue and as an administrative issue rather than as a negligence claims issue.

Senator XENOPHON: Thank you. Thank you, Chair.

CHAIR: Senator Bishop.

Senator MARK BISHOP: I have just a couple of questions. I notice in all of the case studies in your submission, Mr Warren, they were all from current, former or retired ABC employees, so clearly a particular problem in the ABC. You would have members in a range of other Commonwealth departments who are journalists, not the ABC. Have you had any complaints from any of those other people?

Mr Warren: No. They were all journalists employed as public affairs officer or as capital J journalists in various departments, or in *Hansard*, where we also have representation; have been permanent employees and have always been treated as permanent employees and always been required to join it. The one exception to that, where there is a potential overlap, is that we often have members who will work as press secretaries or media advisers to ministers. Under the way the Members of Parliament (Staff) Act and rules, in this relevant period, work is that, if those people were permanent employees and were therefore members of the CSS at the time they started employment as a member of parliamentary staff, they would continue to receive their superannuation entitlements, whereas, if they came from outside, they would not receive superannuation entitlements. Generally speaking, the length of employment is probably not sufficient for that to be an issue, except in this case, but there are a not insignificant number of people—some of them quite high-profile people—who would have worked at the ABC as temporary employees, should have been in the superannuation scheme, have gone to work as ministerial advisers for various governments, including at the state level; if they had been in the super scheme, as they should have been in the ABC, they would have carried that through in their category as a ministerial adviser but because they were not, they did not, so the dudding was, if you like, compounded for those people. We are probably talking somewhere around 50 to 100 people, but it is quite significant.

Senator MARK BISHOP: But you are comfortable in saying that it is a particular ABC problem?

Mr Warren: Yes.

Senator MARK BISHOP: Have you initiated any move to seek negotiations with the ABC to settle some or all of these matters?

Mr Warren: We have been having extensive discussions with the ABC, aiming at two things: the first is to try to identify who are the people who are affected and, where people are still employed or retired at the ABC recently, that is reasonably simple.

Senator MARK BISHOP: Their personal records should exist.

Mr Warren: Yes, and also in 1995-96 there was a negotiated process between ourselves and the ABC that rectified everyone's superannuation at that time. Two things happened: the introduction of the PSS scheme in 1991; and then, in 1991, the distinction between temporary and permanent employees at the ABC was abolished and all employees became continuing employees. So there was an acceptance that they were eligible for that so that in the mid-nineties there was a general clarification of everyone's superannuation and everyone who was then an employee of the ABC had their superannuation in the PSS rectified back to about 1991 or their commencement date, if it was after that date. That reduces the list although there are still people in that category—in fact, some who are still employed at the ABC—who still have a period prior to 1990, or some earlier date if they joined the scheme, where they were not admitted into the CSS and so they have a claim. It is going through a long process trying to identify all these people. Those people are relatively easy. People who have left the ABC are obviously a bit more problematic. We have been publicising it in our material and our regular ebulletins to members, encouraging people at the ABC to talk to people who they know who used to work at the ABC.

Senator MARK BISHOP: That process is underway.

Mr Warren: We have also been talking to the ABC about what documentation they have because I think the ABC accepts—privately, I am not sure if they say this publicly—that that was the culture, that you were a temporary employee and you did not join the fund, and they are trying to establish whether there is any documentation in the staff rules or anything that would help that. I am not sure whether that process has been as useful.

Senator MARK BISHOP: You have been dealing on those two approaches with the ABC but you have not lifted it out of the ABC to finance.

Mr Warren: No. Our goal has been, 'Let's try to work out the scale of the problem,' and then take that as an issue, because it will be a not insignificant amount of money. We estimate it could be anywhere between $20 million and $30 million that people have been short paid.

Senator MARK BISHOP: Yes, it will be. Thank you, chair, thank you, Mr Warren.

CHAIR: Senator O'Brien.

Senator O'BRIEN: I am curious, Mr Warren. You talked about late seventies-early eighties AJA experience that you had. Do you know why the union accepted that its journalists then were as 'temporary employees' not entitled to join the CSS?

Mr Warren: I think it was accepted that that was the rule, that, if you were a temporary employee, you were not eligible to join the CSS; I think that was just accepted that that was part of the rules.

Senator O'BRIEN: You do not know why that was accepted, because that clearly was not the case completely.

Mr Warren: No, I do not. When I then went to work for the union in 1986—one of my first jobs was working on negotiating superannuation and the introduction of the superannuation guarantee levy. The discussions in relation to the ABC then tended to be absorbed into the broader public sector union; the discussions that all the public sector unions were having with the government. The only reason I can speculate—and it is only speculation—about why journalists were temporary employees is that the difference between the way journalists were employed, that is, capital J journalists in the newsroom, and other people in the ABC employees is that ABC employees other than journalists were employed in a position, as most public servants were and are, whereas journalists in the newsroom were employed on a skills basis, on our grading system, which was then an alphabetical system of A, B, C, D.

Mr Cumming: Also on a 24-roster, which most of our colleagues who worked in public affairs, for example, were not.

Mr Warren: And did not receive penalties until the mid-seventies.

Mr Cumming: That is correct, yes.

Senator O'BRIEN: Was there something about their employment that indicated that they were unlikely to be ongoing?

Mr Warren: No. The ABC was what they call in the industry an employer of destination. It was a place where people went to the ABC and then tended to stay at the ABC, which is why you then tended to have this pool of people who had worked elsewhere in the ABC, doing similar work, and then coming back to the newsroom.

Senator O'BRIEN: Was there any reason why management of the ABC would have considered it unlikely that people would stay for three years, or seven years, whatever the case may have been at the relevant time?

Mr Warren: They would have assumed that anybody who was working at the ABC was there for the duration, really.

Senator O'BRIEN: Management at ABC, as a corollary of that answer, were either deliberately concealing information from those small J journalists, I think, as you have described them—

Mr Warren: Capital J journalists, yes.

Senator O'BRIEN: Or were ignorant of those journalists' rights.

Mr Warren: That is right. Because I am a generous person, I tend to think it was more likely the latter.

Senator O'BRIEN: That is very good of you, Mr Warren, and just as often this committee will do the same, I am sure.

Mr Cumming: To support Chris's comment about the ABC being seen as an employer of destination, any journalist who worked for the ABC saw it as a career. There was a career structure, and there still is a career structure, in working for ABC News and no doubt senators have seen people progress through state press galleries and the press gallery here and Washington et cetera.

Senator O'BRIEN: Nevertheless, membership of the CSS, depending on election at retirement, or resignation, I should say, would potentially have entitled those small J journalists to a much better benefit on reaching retirement age.

Mr Warren: That is right. The other great unknown is to what extent that would have—when the CSS had zero vesting or 100 per cent vesting on retirement—whether that would have encouraged people to remain in the—some people who may have left the ABC for financial reasons, they may well have been encouraged to—

Senator O'BRIEN: When did the vesting change?

Mr Warren: I think that was until 1990, wasn't it? It did not change until the PSS came in, but I could be wrong on that.

Mr Cumming: I do not recall.

Senator O'BRIEN: I am sure the department will be able to tell us that, if I can remember to ask the question. Do you know how an employee's membership of CSS affected ABC finances, if at all?

Mr Warren: I do not know the situation prior to 1990 under the CSS. I do know that after 1990 the contributions to the PSS were a liability of the ABC, not of the corporation. I know that because there was a question mark about the way the ABC managed the transition to the PSS. It was of course compulsory for everyone to be in the PSS. As you know, often the hardest thing to get anyone to do is to sign a document that actually gives them a benefit. Any person who did not join the PSS, and there was probably about a third of the newsroom that did not, even though we actively encouraged them to do so, had their SGL contributions, and it was only SGL contributions, paid into JustSuper, which was the industry superannuation fund for journalists, which meant of course they were short changed because they were receiving three or four per cent, depending on the level of the SGL, rather than the more generous payments that were to be paid through the PSS. I think the evidence is pretty clear that that was a deliberate costs-saving decision by the ABC, and that is why had this dispute them in 1995-96 about rectifying that. The ABC had to wear that cost of the payments back to 1990 for all their journalist employees.

Senator O'BRIEN: Clearly, I am trying to find out whether there was any financial reason why the ABC might not be keen.

Mr Warren: Clearly, there would have been a financial reason, because it was cheaper.

Senator O'BRIEN: Post that decision, but you do not know what the situation was prior.

Mr Warren: Yes, I do not. Obviously it was cheaper for them prior to 1990, but whether that was a motivating factor for them—

Senator O'BRIEN: We do not know that, but whether potentially it was is the question that arises.

Mr Warren: Yes.

Senator O'BRIEN: Thank you for that.

CHAIR: Any other questions or comments? Senator Xenophon?

Senator XENOPHON: No, just that, if you can be a bit more prescriptive about how you would see a system working, that would be useful.

Mr Warren: Yes. We have noted the comments that have been made today and the submissions of the other parties and we will make a further submission on it that hopefully will give some guidance on that.

Senator XENOPHON: Yes, just how you would see a framework operating; that would be useful.

Mr Warren: Yes.

Senator XENOPHON: Thank you.

CHAIR: There are no further questions, so thank you very much for your attendance today.

BROWN, Mr Bruce William, Special Counsel, Department of Finance and Deregulation

EDGE, Mr John, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation

GREENSLADE, Mr Alan, First Assistant Secretary, Department of Finance and Deregulation

SMITH, Mr Philip, Branch Manager, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation

VERNEY, Dr Guy, Assistant Secretary, Special Claims and Land Policy Branch, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation

[15:50]

CHAIR: Welcome. Information on parliamentary privilege and the protection of witnesses and evidence has been provided. I remind witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state 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. The committee has the department's submission. I will invite the department to make a short opening statement, after which colleagues will ask questions.

Mr Edge: We would like to make a brief opening statement and, if that is fine with you, we will do that now.

CHAIR: Please do. Thank you.

Mr Edge: Thank you for the opportunity to make the statement. I would like to state at the outset that finance is sympathetic to former and current employees of the APS who were misinformed about the superannuation entitlements, where it has been demonstrated that they properly relied on information and subsequently received less in the way of entitlements than they would otherwise have received. The terms of reference include a class of people on whom the Commonwealth is unable to comment. Finance is unable to comment on matters regarding employees who were not provided with information relating to superannuation, as distinct from those who were wrongly informed. The Federal Court's position regarding whether the Commonwealth has a duty to inform employees of their entitlements is clear; there is no duty. Further, given that there is still litigation on this principle in the ACT Supreme Court, it would be inappropriate to speculate about the outcome.

In relation to the finance submission, I draw your attention to the following key points. In accordance with policy and statutory requirements in the Financial Management and Accountability Act 1997 and the Legal Services Direction 2005 and current law, finance has instituted a fair, robust and efficient system that provides a process to assess each compensation claim on its merits. Litigation is rare and a last resort. Of the 823 claims received to date, 21 have been litigated and at least four decisions by finance have been considered by the Commonwealth Ombudsman under the Ombudsman Act. Claims for compensation have been managed by Comcover, the Commonwealth's general self-insurance fund, because negligent misstatement is an insurable risk. All claims are subject to the relevant jurisdiction's legislated time limits for commencing a claim; in the ACT, for example, the Limitation Act 1985 sets a six-year limitation period. Claims outside these legislated time limits are referred to statute barred. Where, after initial consideration by Comcover, claims are assessed as being statute barred, the claimants have been advised in writing of their option to have their claim considered under the discretionary compensation mechanisms of the Financial Management and Accountability Act 1997. Further, the

process enables claimants to exercise their right of review. Claimants can contest the decisions through litigation or, in relation to decisions under the FMA Act, request a review by the Ombudsman.

A number of challenges have arisen in terms of finance's role in handling claims. Given the passage of time between the alleged misstatement and the claim for compensation, in a number of cases being up to 45 years, these investigations by finance can be complex, time consuming and challenging. Consequently, gathering definitive evidence is a difficult task, particularly when records such as personnel files cannot be found. In some cases records are inclusive or are simply no longer available. A further difficulty in some cases is that witnesses may have little recollection of precise events and some of the people involved are infirm and some people have subsequently deceased. As stated previously, a small number of claims are currently being litigated. Claims may be litigated for a variety of reasons. However, the Commonwealth considers its position in each and every case and, if appropriate under the Legal Services Directions, attempts to resolve the matters through alternative dispute resolution involving mediation.

While the primary allegation in the Cornwell matters is negligent misstatement, there are other courses of action being considered by the courts. In November-December 2009 and February 2010, six Cornwell-related claims were heard in the ACT Supreme Court. The six matters covered two Commonwealth workplaces: ACT Forests and the Fyshwick transport depot. Each plaintiff alleged that he received incorrect advice regarding his eligibility to join Commonwealth superannuation. Each plaintiff brought a claim based on negligent misstatement by the Commonwealth with respect to information provided regarding entitlements, negligence with respect to an alleged general duty on employers to inform employees of their entitlements, and all breach of statutory duty. Finance is interested in the outcome of the litigation, which will inform the future handling of all claims. However, finance will continue to manage claims on a case-by-case basis in accordance with current law and existing processes, which have proved robust. In short, where claimants have come forward alleging misinformation from the Commonwealth which meets the criteria established by the High Court, based on available evidence leading to a meaningful prospect of liability, claimants have received compensation.

In contrast to the sequence set above, it has been suggested that the onus should be on the Commonwealth to actively identify and seek out potential claimants. This is neither practical nor an effective use of public money. To seek out potential claimants would require extensive examination of every single personnel file from the past four decades from every single agency, including past iterations of an agency. The precise number of personnel with a mere potential to have been affected is open to considerable speculation. The total number of temporary employees listed in an attachment to the Department of Finance's submission, attachment L, may in fact underestimate the number of potential claimants because of the departure and arrival of new staff during the relevant decade. The quality of available records since 1942 would then inject more uncertainty into the calculations. This figure would only then provide a list of temporary employees rather than those who may have been misrepresented to and who would also have joined a superannuation scheme.

The path chosen by finance was as follows. After the 2007 High Court judgment, finance wrote to all Commonwealth departments, informing them of the High Court's decision and consequent claims handling process. I propose to table the letter that finance sent to the Commonwealth departments for the committee's information. Finance has also relied on dissemination of information about how to lodge a claim through the finance website and finance is also aware of extensive information in the media and information provided by unions and also law firm seminars directed at potential claimants. This reflects the balance between an ideal world of examining every single employee's file for information and the more effective approach of inviting applicants to come forward and affording those applicants an appropriately extensive, indeed, forensic, examination.

It should be noted that the original Cornwell decision did not disclose any systemic witnesses which would justify such a major undertaking. While finance has sought to deliver a result that is satisfactory to claimants at all times, its primary objective has been to ensure that the process has been fair and that, when funds are being spent, such expenditure is defensible and in accordance with the rules that bind the Commonwealth.

That is the conclusion of our statement, Chair.

CHAIR: Thank you very much, Mr Edge. Senator Xenophon.

Senator XENOPHON: Mr Edge, you have made terminations of 97 act of grace payments. That is correct?

Mr Edge: Yes, that is correct.

Senator XENOPHON: And you rejected how many?

Mr Edge: My understanding is that none of the claims have been accepted.

Senator XENOPHON: So you have rejected 97.

Mr Edge: Yes.

Senator XENOPHON: Is that what you mean by the department being consistent when it makes its decisions?

Mr Edge: No, that is not what I mean.

Senator XENOPHON: Are you saying that none of those claims had any merit within the guidelines for act of grace payments?

Mr Edge: That would be the implication, yes.

Senator XENOPHON: When you say that you are sympathetic to claims, what do you mean by that?

Mr Edge: As I mentioned in the opening statement, finance has sympathy for the individuals involved, but in terms of—

Senator XENOPHON: But you will not give them any redress?

Mr Edge: We have to assess claims on their merits.

Senator XENOPHON: When you assessed all 97 claims, of the 97 determinations you made for act of grace payments—we will get to the litigation in a minute—what did you do? Did you take statements? What process did you use? What resources did you put into each and all of those 97 claims?

Mr Edge: Dr Verney may add to my answer in a minute but, in an overall sense, quite significant resources. We went to considerable efforts to locate personnel files for individuals involved. We sought any corroborative evidence that was also available, if that was not offered by the applicant in the first instance. We also undertook quite an extensive survey, which contained a number of questions directed at applicants to provide more detail about their claim. That was quite a resource-intensive exercise. Dr Verney, do you want to add anything to that, in terms of the steps that were taken?

Senator XENOPHON: Dr Verney, you were involved with Comcare previously—is that right?

Dr Verney: No.

Mr Edge: Dr Verney's role is branch manager, special claims and land policy, in the department and he has responsibility for the discretionary compensation mechanisms.

Dr Verney: It might be useful to identify for the Senate the basis of the act of grace power. It is in statute in the Financial Management and Accountability Act. It is a non-legal mechanism, non-legal, it is discretionary. The minister, or his delegates, makes a decision in terms of the special circumstances and agrees to a payment, where appropriate. That is a non-legal mechanism. I would like to clarify that for the committee. In terms of the issues about the different mechanisms, Senator O'Brien, I would refer you to the submission by finance to the Standing Committee on Legal and Constitutional Affairs recently; the review of government compensation payments. That explains the features of the different mechanisms, particularly act of grace and the defective administration scheme.

Senator O'BRIEN: I am not familiar with that, so it might be better if you—

Dr Verney: No. I have pages 7 and 8 here which we can provide to the committee, but there was a submission provided to that committee on the mechanisms and how they operate. The process by which we assess claims is exhaustive and robust and has stood the test of time. We seek to find as many facts and evidence as we possibly can in looking at the particular claim and brief in accordance with the general guidance that is provided in the finance circular. None of the claims were rejected on the basis that has been stated previously today, on the basis that they were not eligible under the statute of limitations. As I said, it is a non-legal mechanism, discretionary, and we go through a process where we consult, we go to other departments, we require forms signed that we can obtain information, we search the archives and we also, as Mr Edge pointed out, had a questionnaire which enabled us to drill further into particulars if we could, and that included where people might have talked about witnesses or other people involved with that. That process has been quite exhaustive.

Senator XENOPHON: You go out and take statements?

Dr Verney: No, we do not take statements. We ask claimants to provide information to us, we ask claimants to provide comment on documents that we have as part of this process and, in terms of procedural fairness, because the claimants that we do manage are subject to scrutiny under the Ombudsman Act by the Ombudsman's office, as well as the Administrative Decisions (Judicial Review) Act, for people who want to take a statement of reasons and then pursue the process by which we did things in the Federal Court, we attached to each decision letter the options for review that people may pursue. In relation to the act of grace claims that we have considered, the 97, two people requested that we go to the Ombudsman's office. There is another one with the Ombudsman's

office at the moment but, of those two that were considered by the Ombudsman's office, we were not asked to reconsider what we had done.

Senator XENOPHON: It says, as I understand it:

What might be appropriate and what may be a special circumstance would be the involvement of a government agency or the involvement caused an unintended and inequitable outcome for the applicant or the application of the legislation or policy with the involvement caused has resulted in an unintended inequitable and anomalous effect of the applicant's particular circumstances—

Were they the criteria by which you judged these 97 applications?

Dr Verney: Those are the general issues by which we look at these matters, yes.

Senator XENOPHON: Not one of them merited an act of grace payment?

Dr Verney: No.

Senator XENOPHON: How long did you take to investigate each matter?

Dr Verney: I do not have the particular benchmarks for you in relation to the Cornwell matter specifically, but I can tell you that the targets which we have had over the last five to six years are these, that 50 per cent of the cases are completed with 21 days and 17 per cent of cases are completed with 35 days, and we have met those benchmarks in dealing with—

Senator XENOPHON: Just leaving aside the benchmarks, it was not so much that benchmark per say, how much time, on average, was spent in assessing a claim? Is there an assessment made of that?

Dr Verney: Each claim is considered on its merits and has its own particular features, so that being able to generalise and average out that we take X—

Senator XENOPHON: No, but, on notice, would you have records as to how much time was spent by the department, on average, in assessing these act of grace requests?

Mr Edge: We could take that question on notice.

Senator XENOPHON: Yes. I would be grateful if you could indicate how many hours were actually spent in assessing those claims. How much did the Cornwell case cost the Commonwealth in legal costs?

Mr Edge: I would have to take the question on notice. We may be able to just check while we are here and we may be able to answer that, but I do not have that figure in front of me.

Senator XENOPHON: Further to that, how much have you spent on ongoing litigation for these sorts of matters? What is the running tab for the—

Mr Edge: I would have to take that question on notice as well. I do not have that figure.

Senator XENOPHON: It is at least in the hundreds of thousands?

Mr Edge: I would not like to speculate. I do not know; I would have to take the question on notice.

Senator XENOPHON: I was being very conservative then. When did the Commonwealth first know or first suspect that incorrect advice was being given to employees?

Mr Edge: When did the Commonwealth first know?

Senator XENOPHON: First know or suspect or was aware that there was a potential risk that incorrect advice was being given to employees?

Mr Edge: You mean pre-Cornwell?

Senator XENOPHON: Yes.

Mr Edge: You mean way back?

Senator XENOPHON: Yes.

Mr Edge: I would have to take that on notice. I do not know exactly when that would be.

Senator XENOPHON: On the answer if you could indicate the circumstances in which you first knew and, further to that, what policies or decisions were taken in terms of remedying the incorrect advice that had been given once there was knowledge or a concern that there was a risk that incorrect advice was given. Do you want to take that on notice?

Mr Edge: Yes, we will. I think that the important point to note is that it is not necessarily within the knowledge of the Department of Finance and Deregulation generally as to what steps agencies may or may not have taken to inform employees.

Senator XENOPHON: Hang on. Ultimately the buck stops with the department, to put it colloquially. It stops with the department, doesn't it? You sign the cheques.

Mr Edge: The department's responsibilities in terms of this matter now effectively are twofold. There is the department's involvement through the Comcover scheme, in terms of the claims that are now before us in relation to the Cornwell decision and, as I mentioned in the opening statement, the Comcover scheme covers insurance for negligent misstatements, so, Comcover and the department are acting on behalf of a range of Commonwealth agencies where its employees or former employees have brought a claim forward. Finance is also involved in the discretionary compensation mechanisms, obviously, in terms of the act of grace claims that have been brought to the department for consideration. We are involved effectively in those two areas. The department overall had no broader responsibility in terms of disseminating information about superannuation entitlements across the Commonwealth, going back in time. That was clearly a matter for the relevant Commonwealth superannuation bodies, the various Commonwealth agencies that employed the individuals.

Senator XENOPHON: Where there appears to be a potential liability upon the Commonwealth, aren't there protocols if an agency looks as though it may have done something wrong, is responsible for a negligent misstatement, is there a protocol by which the department is notified so that you can make a risk assessment?

Mr Edge: Yes, there is. If your question is when were we notified through that process of a potential claim, we can certainly take that on notice.

Senator XENOPHON: What was the process? There is a question as to how robust was the process in terms of notification and whether the triggers were early enough for the department to be aware of it. Further to that, when did the Commonwealth first take action in relation to the matters outlined and how was the action taken? Do you want to take that on notice, if it would be appropriate?

Mr Edge: Yes.

Senator XENOPHON: What steps have been made to identify any documents relating to the incorrect information given to employees and whether there are documents suggesting there were policies or discussions to the effect that the knowledge of the Commonwealth about such incorrect advice would be concealed or withheld from employees and would not be publicised?

Mr Edge: Just to clarify your question, what steps has finance taken to identify documents that would have been provided to employees?

Senator XENOPHON: In relation to the incorrect information. I understand the role of finance, that you were not the agency, but the buck stops with you, and whether there are documents suggesting there were policies or decisions to the effect that those agencies, or, indeed, the Commonwealth broadly, those documents would be concealed or withheld from employees and would not be publicised?

Mr Edge: As part of the work we have been doing, we have obviously been looking at documentation around superannuation and superannuation entitlements and documentation that was provided at various points in time, through various agencies, and there has obviously been quite considerable effort put into identifying those documents.

Senator XENOPHON: Are you satisfied, Mr Edge, that there has been no attempt to conceal or withhold information from employees from the time that this became an issue?

Mr Edge: No attempt to conceal or withhold information from employees by who?

Senator XENOPHON: By the agencies.

Mr Edge: I could not really comment on that. I could not provide a view on what individual agencies have or have not done. To the best of my knowledge, I am not aware of any instances that have been brought to our attention where that has been the case.

Senator XENOPHON: I accept your answer, but has an inquiry been made as to whether those agencies in any way withheld information from employees, in any way concealed information from employees, or made any decisions not to publicise information about their potential risk in terms of superannuation requirements?

Mr Edge: I am not aware of any such events or any such actions on the part of agencies.

Senator XENOPHON: No, but has an inquiry been made on the part of the department as to whether any such actions took place?

Mr Edge: I would have to take that question on notice. I cannot answer that question.

CHAIR: Senator Xenophon, I am sorry to interrupt, but Senator Bishop needs to leave at half-past.

Senator XENOPHON: Yes. I am sorry; I was not aware of that.

CHAIR: No, that is fine. I just thought I might give him the call now and we can come back to you. Mr Edge.

Mr Edge: I would add that, following the Cornwell decision, as I mentioned in the opening statement, finance did write to all agencies, advising them of the Cornwell decision and seeking their cooperation in terms of providing relevant records and personnel files for potential claimants to access—

Senator XENOPHON: It is not quite the same as the question I asked, but I cede to Senator Bishop.

CHAIR: Senator Bishop.

Senator MARK BISHOP: Just a few brief issues and, I apologise, I do have to leave a little bit early. Mr Edge, finance is acting as agent in this matter for all Commonwealth agencies.

Mr Edge: That is correct.

Senator MARK BISHOP: Was that decision was made by finance or IDC, or what? What is the authority for you to act as agent for all of the other agencies?

Mr Edge: It really derives from finance and, more specifically, the Commonwealth's general insurance scheme, known as Comcover. The negligent misstatement is an insurable risk and so the agencies that are covered by the Comcover scheme, which is all of the FMA agencies in the Commonwealth and some other Commonwealth entities, are covered by the Comcover scheme. If there is a claim against the agency, where the claim is based on negligent misstatement, it falls to the Comcover scheme to manage that.

Senator MARK BISHOP: I understand your authority. Secondly, in terms of the strategic approach that you have outlined in your submission and today in evidence, and you have been carrying out in terms of your negotiations for the last X number of years, is that the subject only of an internal finance decision or has that been to cabinet for sign-off and authority?

Mr Edge: Can I just clarify your question? You mean the process overall for handling the claim?

Senator MARK BISHOP: Yes. You have outlined in some detail enormous problems with back information, accessing employees, non-availability of detail. You have then outlined, in both your submission and your evidence, certain approaches you are pursuing in terms of negotiations. I am wondering if the approach that finance is pursuing, in the totality, has been the subject of approval by cabinet, or is it really being handled at a departmental level?

Mr Edge: The approach that has been adopted is one that really is a product of the insurance arrangements which are in place. Those various processes that I outlined in terms of how the claims are handled are being handled by Comcover and the department.

Senator MARK BISHOP: That is what I want to know. Is this matter the subject of regular updates or briefings to the relevant Minister for Finance from time to time or is it just handled on an ad hoc basis?

Mr Edge: I am not really in a position to advise on—

Senator MARK BISHOP: I am not asking you for the detail of what you might advise the Minister for Finance from time to time. I am asking you whether, his office, when Mr Tanner was the minister, and her office, now that Senator Wong is the minister, is he or she the subject of regular briefings, or briefings at all, by finance on the progress of this matter?

Mr Edge: Finance provides briefing for the responsible ministers on a range of issues and, clearly, ministers are kept appraised of what is the—

Senator MARK BISHOP: I know that answer. I can give that answer too. Has the minister been regularly briefed on the detail and process of this matter, apart from in the way you just outlined?

Mr Edge: I would need to take your question on notice in terms of regular briefing. I could certainly confirm that ministers have been briefed on the matter and the progress of the matter.

Senator MARK BISHOP: If you could take on notice whether relevant ministers have been briefed regularly, how often they have been briefed and if you could give me a summary of the briefing that has been provided to them, consistent with the policy rules that apply. Take that on notice?

Mr Edge: We will take that on notice.

Senator MARK BISHOP: Thank you. Your submission outlines the considerable problems that you might experience in accessing information that goes right back to the sixties, from a whole range of departments, some of which no longer exist, and prima facie I accepted that. Upon further thought, I have a couple of questions. Has finance written to or requested that each of the relevant departments carry out a thorough investigation of the number of temporary employees who were employed by the department during the period under discussion and asked those departments whether they will carry out an internal investigation as to any documentation, notes,

minutes, records that go to issues of what line managers may or may not have informed temporary employees of at relevant times?

Mr Edge: Finance has written to other departments setting out, as I mentioned earlier—

Senator MARK BISHOP: The Cornwell case.

Mr Edge: the Cornwell case and the implications and asking former departments to cooperate in terms of provision of records and so on. The department has not asked agencies to go through those records and identify potential claimants, temporary employees—

Senator MARK BISHOP: No, I did not ask about potential—

Mr Edge: To investigate the records. I think your question was to identify people who may have been employed on a temporary basis.

Senator MARK BISHOP: It was, and, secondly, whether line managers gave out any information to employees as to their rights to access superannuation at the relevant times.

Mr Edge: No, we have not asked for that. Reiterating some of the comments in my opening statements, that is a very considerable task; it is very resource-intensive—

Senator MARK BISHOP: It is. That is okay. I just wanted to know if you had. I have read your submission and I do understand the point you are making. The reason I ask it is this: in submission L in your attachments, you have kindly provided the number of permanent and temporary employees in 1960, 1970, 1980 and 1990 for every relevant line department. When you analyse each of the tables, as I have just done very briefly, so I am speaking briefly here and generally, something like 50 to 70 per cent of all temporary employees, according to your documentation, in 1950, 1960, 1970, 1980 and 1990 were employed in only six departments. They were: defence and its predecessors, army and air, but defence; veterans' affairs; treasury; foreign affairs and trade; social security; and what was latterly known as admin services, but supply. Only six departments covered 50 to 70 per cent of all temporary employees. Would you consider writing to each of those six departments, asking them to carry out an investigation as to whether their line managers at the relevant time issued any memos, notes, instructions, whatever the words are, to temporary employees employed in that department at that time, as to their rights or otherwise to join the appropriate superannuation scheme? That is not such a large job as hundreds of Commonwealth departments or agencies. Can you take that on notice?

Mr Edge: We can take that on notice. I think the issue with that approach would be that it would still be very resource intensive for the agencies involved.

Senator MARK BISHOP: It is, but you can take my word for it that I have had defence and veterans' affairs do some pretty mammoth backhaul inquiries over the last 20 years and they have always been able to come up with the information because they had detailed archives. What I am putting to you is that up to 70 per cent of temporary employees were employed in six departments over a 50-year period, sometimes as low as 45 or 50. That being the case, if their line managers were indeed responsible for dissemination of misleading or incorrect information, why should they not now be asked to investigate and take the appropriate action to remedy those shortcomings, apart from the fact that it is going to cost money? Of course it is going to cost money.

Mr Edge: We will take that on notice. The other consideration is, because some of these events go back several decades, the records and certainly the individuals will no longer be there.

Senator MARK BISHOP: Of course. I know that some of the records in old army and supply are all over the shop; that is not the point. If you take that on notice. I would ask you to also advise the minister formally that I have asked for that work to be done, so that she is aware of it.

Mr Edge: Could I just add one thing. Where there has been a claim in relation to one of those agencies, we have obviously gone in and undertaken investigations of practices in that agency.

Senator MARK BISHOP: Yes. I am not here beating you up; I am just trying to—

Mr Edge: Sure.

Senator MARK BISHOP: In the same vein, ComSuper and its predecessors, in whatever title, would also have detailed records of both permanent and temporary employees and when they joined the appropriate superannuation scheme. Has a similar request been made of them?

Mr Edge: I would have to take that on notice. I guess the point there would be that ComSuper would only have records of people that actually have joined the schemes.

Senator MARK BISHOP: Correct. That is right.

Mr Edge: They would not have records that would cover the—

Senator MARK BISHOP: That is correct. If there are no employees who joined ComSuper or its predecessors, in whatever form, in 1960, 1970 and 1980, and there were heaps of people employed in the six departments I outlined, that does lead necessarily to some conclusions, so I would ask you do that as well.

Finally, the legal firm that was here before made some comments in their submission about wives and partners. Correct me if I am wrong, because I had a brief discussion with Senator O'Brien, spouses and partners who survive an officer who is in receipt of superannuation entitlements have a reversionary benefit. Is it still five-eighths or something like that?

Mr Edge: I am not certain of the answer to that question, someone at the table may be.

Senator MARK BISHOP: A wife or spouse whose husband or wife predeceases gets some sort of reversionary benefit for the remainder of his or her life.

Dr Verney: That is correct. You might recall that the superannuation legislation now permits that and I think it is the time period in relation to that that was the issue. Because it took a long time for that legislation amendment to go through, the act of grace mechanism was used to deal with the reversionary spouse benefit claims.

Senator MARK BISHOP: That has always been the case. My grandfather died in the very early seventies and his wife, my grandmother, received a superannuation payment until she died some years ago, and he was a postmaster; so there had always been a reversionary benefit to spouses of permanent public servants. Is that not the case?

Dr Verney: Yes.

Senator MARK BISHOP: That is right; it was the case and it is the case. Wives and partners who survive a former temporary public servant who did not apply to join or was given misleading information as to his or her rights; what is the department's attitude to applications for payment on the part of those surviving spouse and partners?

Mr Smith: Phil Smith, Comcover. Our position is that where a claim is brought by the deceased estate, they are assessed on their merits, but we do not believe that we owe a duty of care to the spouse as an individual.

Senator MARK BISHOP: Why is that?

Mr Smith: I would have to go back and revisit the legal advice.

Senator MARK BISHOP: If the temporary employee had joined the fund and had a benefit paid to him upon retirement and he died, his wife or spouse would receive the standard reversionary benefit for the remainder of his or her life. That is clear. Why do you assert, in the case of a temporary employee who did not join because he or she received misleading information, that the wife or spouse does not have any legal right?

Mr Smith: I would have to take that on notice because it is the subject of legal advice but our position is that, certainly with a deceased estate, we do assess those on its merits.

Senator MARK BISHOP: I am not so sure I am talking about a deceased estate. Could I ask you to take—

Senator O'BRIEN: It would be if the former public servant, temporary, had pre-deceased the claim. That is what you are talking about, is it?

Senator MARK BISHOP: No. If a public servant had a wife and he had a superannuation payment to post-retirement and he died, it has been my understanding that the wife always automatically received the four-eighths or five-eighths, whatever the benefit was, that that was not a matter of the rights of the estate, it was a right in the trust deed that gave benefits to the wife. Is that incorrect?

Mr Smith: I think we would have to take that on notice.

Senator MARK BISHOP: Can you take that on notice? I would also ask you to table, on notice, that legal advice arising from that point. I take that upon consideration.

Mr Smith: Yes.

Senator MARK BISHOP: Thank you.

CHAIR: Senator Xenophon.

Senator XENOPHON: I have three or four more questions, if I can just go through those.

CHAIR: Sure.

Senator XENOPHON: Mr Edge, have you sought instructions or has consideration been made for the Limitation of Actions Act to be weighed in considering these claims?

Mr Edge: No, we have not.

Senator XENOPHON: Why not?

Mr Edge: A decision to waive the limitations is, as I understand it, only taken in exceptional circumstances; it would be a decision that would be taken by the Attorney-General. From the department's perspective the recourse that the claimants have to the discretionary compensation, mechanisms for effectively statute-barred claims, means that there is a path by which they can forward their claims through that process.

Senator XENOPHON: Have you given any advice to the Attorney-General about waiving limitation of actions in this matter?

Mr Edge: Not that I could comment on or that I am aware of. Mr Brown might want to add to that.

Mr Brown: Bruce Brown, Special Counsel, Department of Finance and Deregulation. Just one addition, however, to what Mr John Edge has outlined. There have been a number of occasions when claims have been made by persons who were probably very close to the end of the six-year time period for the making of their claim. There have been a number of arrangements that Comcover has made with the approval of the Attorney-General's delegate to give what we call a standstill so that Comcover will not take the point; because of the time it takes to process the claim and make a decision, that they will not find themselves out of time. To that extent there has been some interaction with the Attorney-General and his department in relation to the statute of limitations.

Senator XENOPHON: As in, say, the Voyager case or anything like that, there has been no proposal to waive that?

Mr Brown: No.

Senator XENOPHON: Mr Edge, has the department received any representations from the lawyers for claimants, that would, I suppose, principally include Snedden, Hall and Gallop, for an expedited administrative process to be considered for these claims?

Mr Edge: I am not certain but Mr Smith may be able to answer that.

Mr Smith: It is fair to say that there is general dialogue, we are in fairly constant dialogue with Snedden, Hall and Gallop and we try to expedite matters as fast and possible and certainly they have raised on occasions that the quicker we process claims the better. I guess the answer is yes.

Senator XENOPHON: They have invited you to have discussions about an expedited administrative process that could reduce costs and to try and resolve these matters?

Mr Smith: We, in assessing all claims, always, consistent with the Legal Services Direction, try to resolve matters either administratively or through an alternative dispute resolution process.

Senator XENOPHON: I have the model litigant's guidelines here. Have you got an alternative dispute resolution process in place with such claims?

Mr Smith: Alternative dispute resolution, in terms of the Commonwealth claims, is dealt with individually. Some are done through mediation, some are done through a conference, some are done through an exchange of letters.

Senator XENOPHON: But there is no overarching process to expedite the claims?

Mr Smith: There is no one process. The reason we do that is because some claimants are not represented and some are.

Senator XENOPHON: Have you been invited to look at a framework for an expedited claim process, an administrative claims process that could obviate the need for lengthy and expensive litigation?

Mr Smith: I would have to double check exactly what the formal use of words was but there certainly has been discussions about how we can process the claims in a more expedited manner.

Senator XENOPHON: Perhaps you could take that on notice and provide further information; I would be grateful. In relation to the duty of care issues, Mr Edge, you have said that there is no legal obligation for duty of care. That is the case in the Mulcahy case, isn't it? You rely on a Federal Court precedent for that?

Mr Edge: That is correct.

Senator XENOPHON: That may change, depending on what the ACT Supreme Court and the appeal process. You rely on the law as it stands. Further to that, if I can go to a circular that Mr Gordon referred to in his evidence of 20 June 1949 from Mr J Brophy, the Assistant Secretary of the Department of the Treasury, who said in terms of instructions that:

> The temporary employee is not so protected and receives no official advice that he may apply to his permanent head for consideration of whether he may have contributed under the Act.

That is superannuation, but then this circular concluded with a direction from the Treasurer to all departments that:

> In future, every temporary employee who is under 55 years of age, on completion of five years continuous service, be advised in the following terms of the provisions of the Superannuation Act—

and it goes into those details, and says, further:

> Will you please take action accordingly as far as temporary employees in your department are concerned.

I presume you are familiar with that document?

Mr Edge: We are aware of that document, yes.

Senator XENOPHON: Has that been followed in these cases? Have you checked to see whether it has been followed in these cases?

Mr Smith: It is probably fair to say that the matters before the Supreme Court will determine—

Senator XENOPHON: No, that is not the question. This has been around since 1949. It hasn't been revoked, has it? It is still a standing directive?

Mr Edge: We could not possibly comment on whether a document of that vintage has been revoked or its standing in any way, shape or form.

Senator XENOPHON: You will not even take that on notice?

Mr Edge: I do not see how we could answer it.

Senator XENOPHON: Not even on notice?

Mr Edge: A circular from 1949, as to what its current status would be, I think that is a very difficult thing to respond to.

Senator XENOPHON: Let me put it to you another way. The document is fairly clear. You are familiar with the document. Do you think that was a good practice back then and do you think it would be a good practice now?

Mr Edge: I really would have a lot of difficulty commenting on what was good practice in that era; I just really could not comment on that.

Senator XENOPHON: It is about people's entitlements to superannuation. It is about letting temporary employees know about the provisions of the Superannuation Act; in other words, what their entitlements would be under the act as it stood and, presumably, as it would stand now. In other words, it is about informing people of what their entitlements would be. Do you have a view as to that?

Mr Edge: I think it goes to the issue of the general duty that has been discussed at various points in the course of the hearing. That is a matter that is currently before the court so I would prefer not to comment or speculate on the outcome of that process.

Senator XENOPHON: If I can just refer to the ACT government's evidence earlier today and, in particular, from Ms Sue Lebish, the senior manager of legal and insurance for the ACT government. I think her evidence was, and I wrote it down, that there ought to be less restraints in sharing some information; that the Commonwealth would share information in terms of personnel and other records, once a discovery process commenced, as you are obliged to. Why can't the Commonwealth voluntarily give these documents to the ACT before litigation commences, when it is aware that there may be a claim, given the resources issues for the ACT government and given that there is a live issue if they have been notified of a potential claim?

Mr Edge: Mr Smith may be able to expand on my answer. I am certainly aware of discussions that have taken place between the Commonwealth and the ACT. In terms of the process for exchanging documents and arrangements that have been put in place, Mr Smith may be able to clarify that.

Mr Smith: Where possible we try to work cooperatively with the ACT and I think Ms Sue Lebish pointed that out, and we readily exchange information where it is appropriate.

Senator XENOPHON: What does that mean, 'where it is appropriate'?

Mr Smith: For instance, if they request a personnel file but do not necessarily have the appropriate documentation, we obviously cannot exchange that. There may be some matters that we do not think are relevant for the ACT. In matters where we think it is relevant for the ACT—if we believe the documents have already transferred, we highlight that where possible.

Senator XENOPHON: If the ACT thinks it is relevant but you do not, tough luck for the ACT?

Mr Smith: No, we have a general dialogue around matters, and we have got a fairly open dialogue; I think Sue pointed to that as well. In relation to the matters she was particularly answering, there are some discovery

processes in place which are, I think, due to close later this month. Depending on the breadth of that discovery, the Commonwealth's position is that we will be meeting that deadline, and on some of those we have already provided informal discovery, so they have had access to some—

Senator XENOPHON: Finally, on this, if the ACT has requested documents of you, in broad terms, why can't you hand them over, short of it being as part of a court process of discovery? Why can't you just voluntarily hand it over and save time and expense for the ACT government?

Mr Smith: There are certainly rules around that that we need to make sure we bear in mind. If we are not in breach of any rules, then we do provide documentation.

Senator XENOPHON: Perhaps on notice you would provide me with what those rules are. I would be grateful.

Mr Smith: Sure.

Senator XENOPHON: Thank you.

CHAIR: Senator O'Brien.

Senator O'BRIEN: While we are on the subject of the ACT, could you tell me whether there were any specific funding arrangements entered into between the Commonwealth and the ACT regarding the superannuation liabilities inherited by the ACT from the Commonwealth when those employees passed between the two governments?

Mr Smith: I think we will have to take that one on notice.

Senator O'BRIEN: You do not know?

Mr Smith: Self-government was quite a while ago. We are dealing with the claims that arose from negligent misstatement, not necessarily the transfer of all liabilities—

Senator O'BRIEN: That is a matter between you—the Commonwealth government, that is—and the ACT in court proceedings that are waiting judgment.

Mr Smith: Are you talking about funding arrangements or specific transfer of liability?

Senator O'BRIEN: The transfer of liability arrangements. Were there specific arrangements? That is what I want to know. Was this something that happened by the fact that they took the employees that were handed over or were there specific arrangements entered into? Surely you know that.

Mr Edge: We have another finance officer at the table, Mr Greenslade, who may be able to help you.

Senator O'BRIEN: I wondered why the man was at the table. Now I know. Thanks.

Mr Greenslade: Alan Greenslade, first assistant secretary, funds and superannuation division. The simple answer is, yes, there is an arrangement with the ACT government by which the liability for ACT government members is met on an emerging cost basis. As those pensions are paid, there is a transfer from the ACT government.

Senator O'BRIEN: If I understand what 'emerging cost' means, it means that, for someone whose employment passes between the Commonwealth and the territory, there is a share of the cost. Is that how it works?

Mr Greenslade: If they are now an ACT government member, the ACT government pays the Commonwealth for the pension costs as they are paid by ComSuper, essentially.

Senator O'BRIEN: So they pay it all?

Mr Greenslade: Yes.

Senator O'BRIEN: Even if the employee was inherited with a long period of service with the Commonwealth?

Mr Greenslade: Yes.

Senator O'BRIEN: That is the arrangement between the ACT and the Commonwealth following the creation of the territory?

Mr Greenslade: Yes. I can take on notice, if you like, more detail of that arrangement.

Senator O'BRIEN: Yes. I would appreciate if we had that detail because, clearly, these sorts of arguments between governments are potentially expensive outcomes and everyone is keen that someone else pays the cost. It would be interesting to have that. It follows that, in relation to a class of employees inherited, there may be a

substantial overhang in costs if there is found to be a liability which will fall on the territory, not the Commonwealth, for those employees. The actual employees are what I am thinking about.

Mr Greenslade: As I understand the question, I think the simple answer is yes, but, again, we will try and cover it in a broader answer.

Senator O'BRIEN: Okay. The ACT has not agreed with that proposition, clearly, given their evidence here today?

Mr Greenslade: Yes.

Senator O'BRIEN: You are not aware of that?

Mr Greenslade: I am afraid I missed their evidence. I will check their evidence, if you like, and deal with that on—

Senator O'BRIEN: No. I would have thought you would know whether the ACT was happy to pay the cost or not, but perhaps I am wrong.

Responsibility for making contributions towards emerging cost of superannuation entitlement of Commonwealth employees: does that fall on the Department of Finance or does that go back to agencies? Is there a recovery of those costs arrangements between the Department of Finance and other departments and agencies for those costs as they emerge?

Mr Greenslade: Again, I might take that answer. There is essentially an arrangement by which pensions are funded out of consolidated revenue. These are unfunded schemes. When a pension becomes payable, there is a transfer of amounts into consolidated revenue and then they are paid on an ongoing basis, as costs emerge.

Senator O'BRIEN: Does it come out of an agency budget or does it come out of finance? That is what I want to know.

Mr Greenslade: It comes out of the an agency budget. There are contributions made and money files through. They are met from a consolidated revenue.

Senator O'BRIEN: Yes, but they come out of the agency's budget?

Mr Greenslade: Agencies make contributions and payments come out of consolidated revenue.

Senator O'BRIEN: The agency would make a contribution equal to the notional Commonwealth employer contribution rates that are revised from time to time?

Mr Greenslade: Yes.

Senator O'BRIEN: —I am told, back at June 30, 1999, for CSS it was 21.9 per cent and for PSS it was 14.2 per cent.

Mr Greenslade: Sorry, what was the CSS number?

Senator O'BRIEN: 14.2. That is a document I have been given which I believe is accurate. Do you know if that has historically been the case, going back over the history of the CSS, that there has been a requirement that agencies make contributions?

Mr Greenslade: The CSS has always been an unfunded scheme, so it has to be met from consolidated revenue; that has been the basic arrangement. The accounting treatments change with accrual accounting so the basic principle of the way that the costs of pension payments are met is the same.

Senator O'BRIEN: Do you know what the situation would have been, say, in the sixties?

Mr Greenslade: I think I would have to take that on notice.

Senator O'BRIEN: That is fair enough. I asked if you knew, but—

Mr Greenslade: If I take it on notice, I can give you a pattern of how arrangements have changed over time.

Senator O'BRIEN: The reason I am interested, let me be very clear, is: was there an incentive in some agencies that had a high number of temporary employees to ignore the fact that they may have been eligible to join CSS because there was a cost to their budget?

Mr Greenslade: I think the simple answer to that is no, but I will deal with that in my answer.

Senator O'BRIEN: I appreciate that. Are you able to tell me whether there is provision in the contingency fund for payments arising from these claims and also how long such provisions have been made?

Mr Smith: Claims arising from a negligent misstatement are actually funded from the Comcover special account and there is adequate provision.

Senator O'BRIEN: How long has that provision been made?

Mr Smith: The pool of funds that we require is assessed on an annual basis following an actuarial assessment of future liabilities.

Senator O'BRIEN: Sure, but this is a liability that obviously is potentially quite significant so my presumption is that specific consideration would have been given to this from time to time as soon as there was thought that there might be a liability. Is that right?

Mr Smith: The actuaries certainly take into account Cornwell-type claims in coming up with their assessment.

Senator O'BRIEN: When was there consideration given and provision made for these sorts of claims in that fund?

Mr Smith: They would have first provided for it when the Cornwell claim occurred.

Senator O'BRIEN: Not before?

Mr Smith: Probably not before. And every year they reassess that amount.

Senator O'BRIEN: Dr Verney, you gave some evidence—potentially, I guess, in anticipation that I might ask questions about differences between act of grace under these sorts of claims and other defective administration claims. Is there any difference?

Dr Verney: Yes, there is.

Senator O'BRIEN: Could you tell us what the salient differences are?

Dr Verney: Yes. The differences are the decision-making process that is in the defective administration scheme, it is a permissive scheme, and the decision-maker—a person in the department can be authorised—is the relevant portfolio minister. That is about defective administration. Act of grace relates to the FMA Act and to the Minister for Finance and Deregulation's authority and powers, and that relates, as I said at the outset, to decisions which are of a discretionary kind where the minister considers that there are special circumstances and where it is appropriate to make a payment. The defective administration scheme is focused on defective administration. It is also where there is no legal liability in the organisations and the finance minister has policy responsibility for that, and the departments operate and implement that.

Senator O'BRIEN: With these act of grace payments, is there a requirement that there be no legal liability?

Dr Verney: Yes, that is correct.

Senator O'BRIEN: Does a person who makes that claim effectively waive their rights?

Dr Verney: No, they do not waive their rights in the sense that the mechanism is used as a mechanism of last resort, after all other avenues have been explored or exercised.

Senator O'BRIEN: They have to go to court?

Dr Verney: No, they do not.

Senator O'BRIEN: That was the implication of your answer so I thought I would ask you that question.

Dr Verney: Somebody could do that if they wished but we have accepted these claims that have been statute barred so that they can be examined and assessed. As I said, there are rights of review in relation to those processes.

Senator O'BRIEN: You are telling us that it is not the case that every claim made under these provisions, in relation to this matter, has been rejected because of the statute of limitations?

Dr Verney: The statute of limitations. No. They have been unsuccessful. In this process what we do have is a provision where, if there was new information, or particular matters that might weigh, we can reconsider a matter.

Senator O'BRIEN: Attachment N to your submission gives three examples of how claims for loss, I think in this area, might be treated, which, as I understand it, involve a consideration of if the employee concerned had saved the money, what they would have paid as a contribution and invested it, what they would have earned on it, as against what they might have lost over the period of the scheme. Do I understand that correctly?

Mr Smith: Yes, that seems right.

Senator O'BRIEN: You have three examples there with greatly varying outcomes. Can you explain that a bit more to me so I understand it? It is on an unnumbered, second-last page of that attachment.

Mr Smith: This is where the benefit of an actuary comes in for us. Depending on what assumptions are made—average salary, contribution rate, duration, earnings that they might have got, all those types of things—you can end up with vastly different numbers. The reason we use an actuary is so that they can develop models

that come up with the most plausible option and, where we believe there is a meaningful prospect of liability, we can then make offers based on some form of reasonable quantum. I think the Australian Government Actuary was just trying to highlight that, depending on the assumptions you put in, you can end up with different answers for the same person.

Senator O'BRIEN: The claimant loss estimate is different in the three examples, so I was assuming they were three different matters, not the same one.

Mr Smith: That example is where the Australian Government Actuary has done a calculation and, say, the claimant may have had a different actuary come up using different assumptions for the same thing.

Senator O'BRIEN: It is all based on the one claim, is it, those nine numbers?

Mr Smith: They are based on, roughly, the one claim, yes. It shows an added level of complexity when you are trying to work out how you would put them back into the position they would have been but for the negligent misstatement.

Senator O'BRIEN: But it would certainly be the department's view that there ought to be a calculation of this sort in any such claim. Has that been accepted by those representing claimants?

Mr Smith: I know they are sitting behind me, so I am sure they will correct me if I am wrong here. The general practice is that either we or, in the case of the litigated claimants, Snedden, Hall and Gallop will go off and get expert advice on a quantum. Where we disagree on quantum, we may discuss those. If we agree on quantum, then we can settle the matter there. Certainly both parties use experts to try to come up with what they believe is a reasonable sum.

CHAIR: We are getting close to the time.

Senator O'BRIEN: Thank you, Chair. I am cognisant of the time. I can happily work through if the committee is happy to.

CHAIR: We do have a couple of minutes. I am just drawing the attention of the committee to the time in case there are any final matters that should be canvassed.

Senator O'BRIEN: Specifically in relation to Mr Greenslade, when you consider answering the question about the past obligation of agencies and departments and what contribution they would have had to have made, can you let us know what the ABC's historical position has been with regard to making contributions for employees who are contributors to the CSS?

Mr Greenslade: Yes.

Senator O'BRIEN: I think, Mr Edge, you said that Cornwell did not disclose any systemic weaknesses. I am not sure how to understand that because Cornwell was a case about one person so, clearly, it did not go to a variety of circumstances. Is that why you make that statement—

Mr Edge: Yes.

Senator O'BRIEN: even though the behaviour might warrant an investigation about whether there were more circumstances where, for example, an employee made inquiries, matters were sent to his manager and they remained on the file and were never given to him, which is the evidence, I understand, that arose in the Cornwell case?

Mr Edge: I think it was very much about the individual circumstances of that matter is really what that comment was intended to mean.

Senator O'BRIEN: How would we go about determining whether there was or was not a pattern of such behaviour?

Mr Smith: What we have seen from the claims we have been assessing is that—and it may be the types of claims that are being brought forward at the moment—generally there is not a lot of misleading statements made to individuals. The personnel files that we have recovered do not demonstrate that. It is also fair to say, because of the fact that we have obviously paid some claims, there has been some evidence but, as our stats show in the claims that we have assessed, that is not the majority; it is only a small minority.

Senator O'BRIEN: In the ABC case we have some evidence which indicates that even the union involved was under a misapprehension as to entitlement, which surprised me but, nevertheless, that is the evidence. If I also understand the evidence we have received, it is not the view of the agency that simple lack of knowledge is sufficient for a claim to succeed. Is that right?

Mr Edge: That is correct, yes.

Senator O'BRIEN: If the person was never informed, lack of information is their problem and not the Commonwealth's?

Mr Smith: Correct. They are the matters that are currently before the ACT Supreme Court in terms of resolving that general duty or positive duty to inform.

Senator O'BRIEN: he determination of that matter may determine the position the Commonwealth takes in relation to ongoing matters?

Mr Edge: Correct.

CHAIR: I thank officers from the Department of Finance and Deregulation for their attendance today. I thank the secretariat staff and the DPS staff. This public hearing stands adjourned.

Committee adjourned at 17:02