Chapter 3

The handling of superannuation claims

Introduction

3.1 A number of former temporary employees of the Commonwealth and Commonwealth statutory authorities have registered claims with the Department of Finance and Deregulation (Finance) claiming that they received incorrect advice or no advice regarding their eligibility to join a Commonwealth superannuation fund. Finance noted that claimants have generally sought compensation for alleged misstatement by the Commonwealth to them regarding their eligibility to join Commonwealth superannuation schemes under the 1922 Act, the 1976 Act and/or the 1990 Act.

3.2 Finance provided the following information about the claims received as at 28 March 2011:

- 823 Cornwell-type claims had been received since the High Court's decision in 2007;
- 62 per cent have been settled, declined or withdrawn;
- of the claims dealt with, 4 per cent were settled, 85 per cent were unsuccessful and 11 per cent were statute-barred;
- 97 unsuccessful act of grace claims have been made; and
- 309 claims remain current.[1]

3.3 As at 25 May 2011, Finance advised that a total of $5 176 674.48 has been spent in on-going legal costs for litigated and non-litigated claims.[2]

3.4 Finance advised the committee that the Commonwealth has received claims from proponents in each state and territory across Australia, who were employed in over 80 different departments and agencies (including each of the 17 listed in the terms of reference for this inquiry), however only a proportion of these claims have been assessed as valid.[3]

Handling of claims by Finance

3.5 Finance provided evidence on the processes for handling claims and stated that:

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1 See Department of Finance and Deregulation, *Submission 9*, p. 8, for full breakdown of claims.

2 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 4.

3 Department of Finance and Deregulation, *Submission 9*, p. 7.

> In accordance with policy and statutory requirements in the *Financial Management and Accountability Act 1997* [FMA Act] 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.[4]

3.6 Finance noted that litigation is rare and a last resort. Where this does occur, the Commonwealth acts as a model litigant. For claimants whose legal cause of action is statute-barred, discretionary compensation is considered.[5]

3.7 Finance indicated that due to the insurance arrangements which are in place, claims are being handled by Comcover and Finance – agencies like the Australian Broadcasting Corporation (ABC) do not control the administration of claims.[6] As negligent misstatement is an insurable risk, claims for compensation have been managed and funded by the Commonwealth's self-insurance fund, Comcover:

> Claims arising from a negligent misstatement are actually funded from the Comcover special account and there is adequate provision...the pool of funds that we require is assessed on an annual basis following an actuarial assessment of future liabilities.[7]

3.8 Mr John Edge, Finance, concluded that:

> ...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.[8]

3.9 Finance noted that claimants have a right to review, and 'can contest the decisions through litigation or, in relation to decisions under the FMA Act, request a review by the Ombudsman'.[9]

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4 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 33.

5 Department of Finance and Deregulation, *Submission 9*, p. 3.

6 Mr Phillip Smith, Branch Manager, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, pp 44–45; Australian Broadcasting Corporation, *Answer to question on notice No. 28*, Senate Environment, Communications and the Arts Legislation Committee, Budget Estimates, May 2010.

7 Mr Phillip Smith, Branch Manager, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, pp 44–45.

8 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, pp 33–34 and 38.

9 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 34.

3.10 The committee was told that Finance deals with all claims in accordance with the *Legal Services Directions 2005* (LSDs), as required under section 44 of the FMA Act, which states that 'a Chief Executive must manage the affairs of the agency in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible'. In relation to litigated claims, Finance explained that these are managed in accordance with 'Court rules, processes and directions'.[10]

3.11 Under the LSDs, claims against the Commonwealth:

- are to be handled in accordance with legal principle and practice, taking into account the legal rights of the Commonwealth;
- are to be handled in accordance with the Commonwealth's obligation to behave as a model litigant; and
- require the existence of at least a meaningful prospect of liability being established before a matter can be considered for settlement.[11]

3.12 Finance submitted that there can be complex issues of fact and legal liability in Cornwell claims, and as indicated above, under the LSDs, before considering a monetary settlement, the Commonwealth is obliged to 'form a view regarding whether there is a meaningful prospect of legal liability being established in relation to the negligence which caused the loss'.[12]

The basis of claims

3.13 Finance submitted that, in general, a claimant's primary allegation is negligent misstatement, that is, employees received misinformation about their superannuation entitlements. Other claims relate to negligence with respect to an alleged general duty on employers to inform employees of their entitlements; and/or breach of statutory duty.[13] Claimants have also raised other legal issues in relation to their claims for compensation. These include vicarious liability, contributory negligence and failure of a claimant to mitigate their loss.[14]

3.14 There have also been claims that employees were denied entry into the Commonwealth Superannuation Scheme (CSS). The committee heard that very few of these claims are lodged, as more often than not, those who applied to join the scheme after receiving the correct information were accepted. Generally, only 3–4 per cent of

10 Department of Finance and Deregulation, *Submission 9,* p. 10.

11 Department of Finance and Deregulation, *Submission 9,* p. 10.

12 Department of Finance and Deregulation, *Submission 9,* p. 10.

13 Department of Finance and Deregulation, *Submission 9,* p. 11.

14 Department of Finance and Deregulation, *Submission 9,* Attachment D, p. 1.

superannuation applications were 'rejected on the basis of future employment grounds'.[15]

3.15 The Cornwell case was based on a claim of negligent misstatement. Finance noted that the elements of this type of claim, and whether it can result in damages for pure economic loss, are well established. The Community and Public Sector Union (CPSU) submitted that cases in which employees were provided incorrect, misleading or incomplete information fall 'comfortably within the case law settled in Cornwell'.[16]

3.16 Claims have also been made by individuals arguing that employers had breached of duty of care and acted with negligence with respect to an alleged general duty on employers to inform employees of their entitlements. For example, it was argued that there were cases where the employer had correctly provided advice that at the time of the enquiry regarding superannuation eligibility, the employee was not eligible but the employer did not suggest to the employee that they reapply at the end of the qualifying period. Mr John Gordon, Snedden Hall & Gallop commented '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"'.[17] The CPSU argued that 'the failure by the employer to further clarify the advice by stating that after a qualifying period they would be eligible to apply amounts to misleading and incorrect advice'.[18]

3.17 The Commonwealth has not accepted arguments in relation to breach of duty of care. Finance noted that where a claimant was told they were ineligible during the first three years of employment (the qualifying period), they may in fact have been ineligible. In addition, 'individuals were responsible for seeking information about superannuation, and making a personal decision in that matter'.[19]

3.18 Maurice Blackburn Lawyers also observed the view of the Commonwealth is that they did not have a positive duty to inform employees about their eligibility for superannuation. Drawing on case law, Maurice Blackburn Lawyers submitted that:

> ...the issue of whether an employer has a positive obligation to notify employees about eligibility for superannuation has not yet been settled, and there is certainly compelling authority that such a duty does exist.[20]

3.19 Similarly, the Media, Entertainment and Arts Alliance (MEAA) noted that Finance's website states that the Commonwealth owes no statutory or general duty to

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15 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, pp 19-20.

16 Community and Public Sector Union, *Submission 23*, p. 2.

17 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 19.

18 Community and Public Sector Union, *Submission 23*, p. 2.

19 Department of Finance and Deregulation, *Submission 9*, p. 14.

20 Maurice Blackburn Lawyers, *Submission 17*, pp 2–3.

advise temporary employees of their superannuation options and entitlements. However, MEAA submitted that this appears to be contrary to advice issued in 1949 by the Department of the Treasury (Treasury) in relation to how temporary employees may join Commonwealth superannuation. The advice stated that 'in future every temporary employee who is under 55 years of age on completion of five years' continuous service' be advised about certain provisions of the Superannuation Act. The provisions related to directions given by the Treasurer that such a person be deemed to be an employee who may contribute to the Superannuation Fund for pension in accordance with the provisions of the Superannuation Act.[21]

3.20 Mr Gordon, Snedden Hall & Gallop, observed that the Cornwell judgement noted the 1949 Treasury advice, and explained that the direction that departments notify temporary employees of their right to superannuation, issued by 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'.[22] In addition, Snedden Hall & Gallop commented that while there has been case law on general duty of care issues in certain circumstances, which do not necessarily parallel the sorts of claims in this area, the decision of the High Court in the *Perre v Apand* case expanded the categories of loss and 'defined the criteria to be applied in determining whether there is a duty beyond simple foreseeability and proximity'.[23]

3.21 Other submitters also supported claims alleging breach of duty of care. The CPSU submitted that the 'apparent failure of the ABC to apply that advice to its employees is viewed as creating a liability on the employer to provide compensation'.[24] The MEAA further submitted that the Government's position that they do not hold a duty of care in this regard is also contrary to its obligation to ensure consistency and equity in the impact of Government activities, which is referred to on Finance's website in reference to act of grace payments.[25]

3.22 Mr Trevor Nock of the Superannuated Commonwealth Officers' Association (SCOA), also noted that while there has not been a specific decision as to whether an employer has a duty of care to positively inform employees of their superannuation entitlements, in his view there should have been an obligation on the employer to inform employees that they were entitled to join the CSS.[26]

3.23 Finance advised the committee that the Commonwealth has taken the position it does not have a duty to inform employees of their entitlements, that is, the

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21 Media, Entertainment and Arts Alliance, *Submission 15*, Attachment 1, p. 2.

22 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 17.

23 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 22.

24 Community and Public Sector Union, *Submission 23*, p. 2.

25 Media, Entertainment and Arts Alliance, *Submission 15*, p. 5.

26 Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers Association, *Committee Hansard*, 5 May 2011, p. 13.'

Commonwealth does not have a duty to bring general financial matters such as superannuation to the attention of employees. Finance further noted that this issue is currently the subject of litigation, and accordingly, speculation is inappropriate. Finance concluded:

> 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.[27]

3.24 A further matter raised in evidence was the deliberate concealment of information or provision of misinformation. The MEAA noted that while there may have been a financial incentive for the ABC to have staff who were not eligible for the CSS, they were of the view that the ABC was not deliberately concealing information from temporary employees; rather, it was unaware of the rights of those journalists.[28]

3.25 The CPSU took a different view noting that the 1996 Glenn Review:

> ...established a pattern of behaviour at the ABC of deliberate misinformation directed at minimising superannuation costs. While it is not clear whether these were the same managers responsible for providing incorrect advice to the ABC Trainers and ABC Personnel staff, it points to a management culture of avoidance of superannuation responsibilities.[29]

3.26 In terms of any potential financial incentive for agencies to ignore the fact that some of their employees may have been eligible to join the CSS, Finance noted that:

> Since 1942, approved authorities have been required to reimburse the Commonwealth for the employer cost of providing superannuation benefits to their employees who were members of the Commonwealth defined benefit superannuation schemes, unless they were exempt from doing so.
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> The ABC became an approved authority in 1942, but was exempt from the requirement to reimburse the Commonwealth for the employer cost of providing superannuation cover in the Commonwealth superannuation scheme until 1981.[30]

3.27 The committee also heard that while Finance has not 'made any direct inquiry with Departments and Agencies as to whether they withheld information relating to

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27 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 33. See also Department of Finance and Deregulation, *Submission 9*, Attachment D, p. 2.

28 Media, Entertainment and Arts Alliance, *Submission 15*, p. 5.

29 Community and Public Sector Union, *Submission 23*, p. 3.

30 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) pp 20–21.

superannuation entitlements from employees or in any way concealed such information', Finance is not aware of any instances in which an agency has attempted to conceal or withhold evidence from employees:[31]

> Finance has received and assessed hundreds of personnel files and records of employing Commonwealth agencies. Our analysis is that there is no evidence of systemic misstatement or concealment across the Commonwealth.[32]

3.28 Further, the High Court has not made any clear findings indicating deliberate concealment:

> The issue of deliberate concealment was considered by the ACT Supreme Court and later the High Court in the matter of Cornwell. The High Court found that the primary judge made no clear findings in relation to deliberate concealment, and certainly no findings that would support a finding of deliberate concealment.[33]

Committee comment

3.29 As matters relating to claims other than negligent misstatement are currently before the ACT Supreme Court, the committee does not make any further comment on this issue.

Assessment of claims

3.30 For those wishing to make a claim, a claim must be lodged by completing the questionnaire provided on the Finance website. Claims are registered, assessed and comprehensively investigated. All information provided by claimants is considered, checked and either verified or disputed. Relevant files are obtained where available, and statements from former colleagues of the claimant may be provided or obtained.[34]

3.31 Claims are categorised as either insurable claims which come under the Comcover guidelines or statute-barred claims. Valid insurable claims are then settled either through alternative dispute resolution (ADR), and/or through litigation.[35]

3.32 Where a claim is litigated, additional steps are taken to locate and interview witnesses, prepare statements and affidavits, and obtain and serve expert actuarial evidence in accordance with Court rules. Documents may be required to be disclosed

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31 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 37.

32 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 9.

33 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 9.

34 Department of Finance and Deregulation, *Submission 9*, pp 9–10.

35 Department of Finance and Deregulation, *Submission 9*, pp 6 and 9.

by both parties by way of discovery and additional information may be requested. At each stage of the investigation, Finance and its legal representatives reassess whether ADR would be appropriate in relation to the claim under consideration.[36]

3.33 Finance reiterated that all Cornwell claims are considered in accordance with the ADR requirements under the LSDs, including those claims which are litigated:

> The Commonwealth seeks to work cooperatively with claimants and, where represented, with their solicitors, to resolve claims through the use of ADR processes. For example, the Commonwealth has agreed to some claims being handled by legally represented claimants without litigation. Some claims have been settled at formal mediation and others have been resolved at settlement conferences. The use of a common actuarial expert has also been trialled.[37]

3.34 As noted above, the Commonwealth is of the view that 'claims based on negligence and breach of statutory duty are not supported by the current law'. Therefore, when assessing non-litigated claims, assessment takes places on the basis of whether there is 'a meaningful prospect of liability being established against the Commonwealth for negligent misstatement'. Compensation is paid in cases in which the Commonwealth is satisfied that negligent misstatement has occurred and has caused a loss.[38]

3.35 However, Finance also noted that:

> If it is found in the reserved decisions above that there in fact is such a positive duty on the Commonwealth to inform employees about eligibility for superannuation, this will be influential in any handling of claims.[39]

3.36 Mr Nock noted that to his knowledge, SCOA have not received complaints about Finance's review process.[40] However, Mr Gordon noted:

> 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.[41]

3.37 While Mr Gordon explained that the Commonwealth has not caused any unnecessary delay in dealing with claims, some concern was also raised that the model

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36 Department of Finance and Deregulation, *Submission 9*, p. 10.

37 Department of Finance and Deregulation, *Submission 9*, pp 10–11.

38 Department of Finance and Deregulation, *Submission 9*, pp 11–12.

39 Department of Finance and Deregulation, *Submission 9*, p. 12.

40 Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, p. 15.

41 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 20.

litigants code may not be being complied with, in particular subclause (2)(d), which refers to the obligation to consider alternative dispute resolution processes before proceeding to legal proceedings:

> 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.[42]

3.38 However Finance's recollection of discussions with Snedden Hall & Gallop differed:

> Following the settlement of Mr Cornwell's claim in 2007, the Commonwealth engaged in various discussions with Snedden Hall & Gallop in relation to efficient management of claims. The discussions covered topics such as what threshold material needed to be provided by the claimant and considered by the legal representatives to the Department of Finance and Deregulation (Finance) in order to assess a claim for negligent misstatement.[43]

3.39 Finance further countered these claims, noting that while no single overarching expedited process is in place to deal with claims, Finance seeks to resolve issues through ADR where possible, and litigation is a last resort. Each claim is assessed on its merits and, where appropriate under the Legal Services Directions, resolution outside of the courts is sought, including through ADR:

> Whether statute-barred or not, Finance's preferred approach to management of these claims is to deal with them on an administrative, rather than on a litigated, basis. Approximately 93 per cent of the current open claims being managed by Finance are being assessed without litigation.[44]

3.40 Finance noted the forms of ADR used in relation to Cornwell claims include mediation, solicitors conferences, exchange of letters and formal offers of settlement, in accordance with model litigant obligations under the LSDs.[45]

3.41 Finance further explained that litigation should only be used 'to determine novel areas of law, such as breach of statutory duty and the general duty of care', and

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42 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 2; Mr Richard Faulks, Managing Director, and Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, pp 21 and 23.

43 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 15.

44 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, pp 33–34; Department of Finance and Deregulation, *Submission 9*, pp 6–7.

45 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 15.

that in the rare cases in which litigation does take place, the Commonwealth acts as a 'model litigant'.[46]

Potential claims

3.42 Mr Richard Teague submitted that following the Cornwell decision, he registered a claim with Finance, however he was informed that any claim could only be considered after he had retired.[47] Mr Richard Faulks, Snedden Hall & Gallop, explained that this is because:

> 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.[48]

Statute-barred claims

3.43 Finance commented that some claims have not been successful as they are statute-barred. Finance noted that there are legislated time limits for lodging a claim in each jurisdiction and all claims are subject to the relevant jurisdiction's legislated time limits for commencing a claim. For example, in the Australian Capital Territory (ACT) the *Limitation Act 1985* sets a six year limitation period.[49]

3.44 The High Court decision in May 2007 regarding the Cornwell case clarified that the statute of limitations does not apply until an actual loss is suffered, that is, 'at the time when there was a relevant trigger event under the Superannuation legislation such as retirement or access to superannuation'.[50]

3.45 Snedden Hall & Gallop noted that there were still many people who fell outside the six year period after the Cornwell case had been decided. This was illustrated by evidence received by the committee that a number of former Commonwealth employees have registered their claims with Comcover, but their claims have been denied, 'on the grounds that more than 6 years has passed since the

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46 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 15; Department of Finance and Deregulation, *Submission 9*, p. 3.

47 Mr Richard Teague, *Submission 11*, p. 2.

48 Mr Richard Faulks, Managing Director, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 19.

49 Department of Finance and Deregulation, *Submission 9*, pp 6 and 12.

50 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 1.

time when they retired from Commonwealth employment and/or accessed their Commonwealth superannuation'.[51]

3.46 Snedden Hall & Gallop commented that in the ACT no extension can be granted on the six year limitation, 'unless there has been deliberate concealment by the party asserting the statute, in which case time is suspended for the duration of that concealment'.[52]

3.47 Snedden Hall & Gallop raised the issue of claimants who are out of time to bring a claim under the statute of limitations due to a lack of knowledge about their rights, at least in part because of the failure of the Commonwealth to alert such potential claimants of their potential rights. Mr Faulks noted that the Commonwealth is applying the limitation period quite strictly, even in relation to those people who were not aware of their superannuation rights before the limitation period had expired. In Snedden Hall & Gallop's view, the Commonwealth should accept claims where employees acted reasonably to notify the Commonwealth of their claims following the Cornwell decision. It was noted that a precedent exists for such action for asbestos related disease for such entitlement.[53]

3.48 The MEAA echoed this view, recommending that all claims subsequently made by retiree claimants, claimants who have resigned and claimants currently employed by the Commonwealth not be barred from seeking a remedy due to the operation of any statute of limitations which may apply.[54]

3.49 However, Finance submitted that the 'LSDs mandate the Commonwealth's reliance on the statute of limitations as a defence, unless the Attorney-General advises otherwise'. Where appropriate, the Office of Legal Services Coordination has agreed to a 'standstill agreement' allowing the continuation of settlement negotiations beyond the expiry of a claimant's limitation period.[55] Mr Bruce Brown, Finance, explained:

> 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

51 Snedden Hall & Gallop Lawyers, *Submission 14*, pp 3–4; Mr Richard Faulks, Managing Director, Snedden Hall &Gallop, *Committee Hansard,* 5 May 2011, p. 18.

52 Mr Richard Faulks, Managing Director, and Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 21.

53 Snedden Hall & Gallop Lawyers, *Submission 14*, pp 3–4; Mr Richard Faulks, Managing Director, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, pp 17–18.

54 Media, Entertainment and Arts Alliance, *Submission 15*, p. 3.

55 Department of Finance and Deregulation, *Submission 9,* p. 10.

> some interaction with the Attorney-General and his department in relation to the statute of limitations.[56]

3.50 Comcover declines any claims which are statute-barred. Finance noted that 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 FMA Act.[57]

Act of grace payments

3.51 Under section 33 of the FMA Act, the Finance Minister or a delegate may authorise act of grace payments to individuals or entities in special circumstances, in accordance with specific guidelines. The provision for act of grace payments is intended to 'ensure consistency and equity in the impact of government activities where other legislative and administrative provisions do not take sufficient account of the unique circumstances of individual cases'.[58]

3.52 Finance explained that act of grace payments are separate from ex gratia payments, as the latter are made under section 61 of the Constitution. There is no entitlement to an act of grace payment, as these payments are made entirely at the discretion of the decision maker.[59] The act of grace power is not meant to be used as an alternative to other avenues of financial redress but rather as a remedy that may only be applied in special cases to ensure consistency and equity in the impact of Government activities. The act of grace power is a mechanism of last resort and each case is assessed on its own merits.[60]

3.53 Finance submitted that where a claim was assessed as statute-barred, the claimant was advised that a further option for their claim may be an application for an act of grace payment.[61] As at March 2011, 101 claims have been received, 97 have been declined and four were still under consideration. Claimants whose claims have been declined may contest the decision through a review.[62]

3.54 Snedden Hall & Gallop commented that it had assisted over 40 clients in applying for an act of grace payment. However, it was reiterated that to date, all 97 claims for act of grace payments so far determined have been rejected, with the

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56 Mr Bruce Brown, Special Counsel, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 41.

57 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 33; Department of Finance and Deregulation, *Submission 9*, pp 6–7.

58 Department of Finance and Deregulation, *Submission 9*, pp 12–13.

59 Department of Finance and Deregulation, *Submission 9*, pp 12–13.

60 Department of Finance and Deregulation, *Submission 9*, pp 12–15.

61 Department of Finance and Deregulation, *Submission 9*, p. 14.

62 Department of Finance and Deregulation, *Submission 9*, pp 13–14.

exception of the four which are still under consideration. Mr Gordon, Snedden Hall & Gallop, commented:

> 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.[63]

3.55 The committee heard that act of grace payments have been rejected on three grounds:

- on the basis of the six year time limitation;
- on the basis that the claimant did not seek advice on their superannuation and was therefore not given a misrepresentation; and
- on the basis that the advice given by the officer at the time was correct advice if the employee was in that initial qualifying period and not entitled to join the CSS at that particular point in time.[64]

3.56 Snedden Hall & Gallop commented that it had concerns about the refusal of act of grace claims.[65] Mr Faulks elaborated:

> 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.[66]

3.57 In relation to an act of grace claim by a former ABC employee, the committee was informed that this claim was declined on the basis that the claimant joined the CSS within the qualifying period for temporary employees.[67]

3.58 Snedden Hall & Gallop argued that the 40 cases for act of grace payments that it had dealt with all had merit 'on a justice basis' and 'meaningful prospects of legal

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63 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 19.

64 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 19.

65 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 19.

66 Mr Richard Faulks, Managing Director, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 24.

67 Department of Finance and Deregulation, *Answer to Question on Notice No F99*, Senate Finance and Public Administration Legislation Committee, Supplementary Estimates, October 2010.

liability' as in each case there 'was evidence of representation, there was evidence of a loss, and that they were rejected purely on a time limit issue'. Snedden Hall & Gallop stated that 'it is inconceivable that none had merit and it is submitted that the committee should seek an explanation relating to the rejection of all such applications'.[68]

3.59 Maurice Blackburn Lawyers similarly submitted that a number of affected employees are now statute-barred from making a claim, and while many of these employees applied for an act of grace payment, all such applications were declined. The reason for the unsuccessful applications for act of grace payments were principally that Finance had determined 'there was insufficient evidence to establish that the relevant Commonwealth employer made a negligent misstatement in respect of the employee's superannuation rights'. Further, in support of its determination, Finance 'asserted that failure by the Commonwealth employer to inform employees of their rights does not of itself give rise to an entitlement to compensation for the losses that flow from such an omission'.[69]

3.60 Maurice Blackburn Lawyers submitted that act of grace payments should be granted in circumstances where a failure to inform, leading to loss, can be sufficiently established.[70]

3.61 Finance explained that it investigates claims for act of grace payments before providing details to the Finance Minister (or delegate) for decision, and assesses alleged negligent misstatements against the criteria outlined by the High Court. Dr Guy Verney, Finance, explained that a rigorous process involving significant resources is undertaken to assess act of grace claims:

> 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...had a questionnaire which enabled us to drill further into particulars if we could...[71]

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68 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 4; Mr Richard Faulks, Managing Director, and Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, pp 17–19.

69 Maurice Blackburn Lawyers, *Submission 17*, pp 1–2.

70 Maurice Blackburn Lawyers, *Submission 17*, p. 4.

71 Dr Guy Verney, Assistant Secretary, Special Claims and Land Policy Branch, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 35.

3.62 Dr Verney further explained that each decision letter attaches options for review should claimants wish to pursue that path. Out of the 97 act of grace claims considered, three have been referred to the Ombudsman. One case is still under review. However Dr Verney stated that 'of those two that were considered by the Ombudsman's office, we were not asked to reconsider what we had done'.[72]

3.63 Finance maintained that in cases where the claimant was informed that they were ineligible for the commonwealth superannuation fund in the first three years of employment, they may have actually been ineligible – the onus to follow up on superannuation eligibility in future years lay with the individuals concerned:

> Individuals were responsible for seeking information about superannuation, and making a personal decision in that matter. Based on the information provided by claimants in the completed questionnaire provided with their claim, many of the enquiries were made in the first year of employment and then no further queries were made. Some claimants apparently made no enquiry about superannuation following the enactment of the 1976 Act, despite public reporting of the significant changes it introduced at the time.[73]

3.64 Finance reiterated that all act of grace claims have been assessed in accordance with the relevant procedures, and explained that while the statute of limitations does not preclude act of grace claims, 'timeliness of claims is an important and relevant consideration'. Under the LSDs, the Commonwealth is required to 'rely on relevant statutes of limitations where claims are out of time, unless the Attorney-General approves otherwise'.[74]

Difficulties in establishing and assessing claims

3.65 The committee heard that all parties have experienced difficulties in establishing the merit of claims due to the passing of time, and have faced challenges in identifying, locating and accessing records and witnesses. This has been a particular issue in circumstances in which employees have been transferred employment from the Commonwealth to the ACT Government after self-government, or to other bodies.

3.66 Mr Nock, SCOA, noted that employees are required to provide substantial detail in order to establish a successful claim, which 'would be ideal in an ideal world, but the problem is that most of those details have disappeared. We do not know what happened'.[75]

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72 Dr Guy Verney, Assistant Secretary, Special Claims and Land Policy Branch, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, pp 35–36.

73 Department of Finance and Deregulation, *Submission 9*, p. 14.

74 Department of Finance and Deregulation, *Submission 9*, p. 14.

75 Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, p. 14.

3.67 Finance submitted that due to the length of time between the alleged event occurring and the loss becoming apparent to the claimant and for the claimant to report this loss and/or seek compensation, investigation of these matters can be 'complex, time-consuming and challenging'.[76] Mr Edge commented that it is difficult to gather definitive evidence, as in some instances, personnel files cannot be found, records may be inconclusive, or the records are actually no longer available. Further, in some cases, 'witnesses may have little recollection of precise events and some of the people involved are infirm and some people have subsequently deceased'.[77]

3.68 Finance commented on the evolving nature of the Commonwealth, noting that there have been successive changes to the Administrative Arrangement Orders (AAOs) since temporary employees became eligible to join the CSS in 1942. Following each change to the AAOs, agencies have been restructured, and files and employees have moved as a result.[78]

3.69 The issue of locating records was also raised by ACTEW Corporation Limited (ACTEW), which noted that, as a result, the discovery process has proven to be difficult for all parties:[79]

> 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.[80]

3.70 The ACT Government noted that while it has been working cooperatively with the Commonwealth to locate and exchange personnel records, locating these records has proven to be quite challenging and resource intensive, particularly due to the age of the records. As a result they have a dedicated team in place and three staff members are occupied with locating relevant information.[81]

3.71 Finance also noted the records of employees in the Australian Public Service are of 'varying thoroughness' and locating files can be difficult due to the move from

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76 Department of Finance and Deregulation, *Submission 9*, p. 3.

77 Department of Finance and Deregulation, *Submission 9*, p. 15; Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 34.

78 Department of Finance and Deregulation, *Submission 9*, p. 17.

79 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 1.

80 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 3.

81 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 10; ACT Government, *Submission 16*, pp 2–3.

paper records and older record management systems such as card indexes to electronic records, and the transfer of files with the movement of personnel.[82]

3.72 The ACT Government also commented that an additional problem in locating the relevant information is the state of the historical records:

> 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...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.[83]

3.73 It was noted that under the National Archives of Australia Records Disposal Authorities some relevant personnel files were legally destroyed. Finance indicated that the National Archives of Australia, at the request of Finance, has issued a disposal freeze on selected personnel, superannuation, workplace and policy records to avoid the loss of crucial evidence 'regardless of whether the evidence is favourable to, or adverse to, the Commonwealth'.[84]

3.74 Maurice Blackburn Lawyers noted that in some cases Finance has rejected claims on the basis of insufficient evidence that the claimant was given incorrect advice about their entitlement to join the CSS was submitted. In their view this is:

> ...an unreasonably onerous requirement in these circumstances where the employees' ability to present evidence of specific details relating to the negligent misstatements that occurred decades prior is prejudiced by the passage of time caused largely (if not wholly) by the Commonwealth's own inaction.[85]

3.75 This view was supported by the MEAA:

> 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

82 Department of Finance and Deregulation, *Submission 9*, p. 15.

83 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 10.

84 Department of Finance and Deregulation, *Submission 9*, p. 15.

85 Maurice Blackburn Lawyers, *Submission 17*, pp 3–4.

> any of my employment records from the seventies or eighties; I struggle to have the ones from last year, really.[86]

3.76 The committee received evidence that departments do not maintain a central repository of information pertaining to advice issued to temporary employees regarding their eligibility to join a superannuation scheme.[87]

Suggestions to improve the system of assessing claims

3.77 The committee received suggestions for improving the way in which claims relating to Commonwealth superannuation are dealt with. These suggestions included the establishment of a specialist tribunal to allow a retrospective period of contributory service in the CSS.

3.78 SCOA and other submitters concluded that these temporary employees have been treated unfairly and recommended that they should be granted, retrospectively, a period of contributory service in the CSS from the date that they would have been eligible.[88] Mr Nock commented:

> 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.[89]

3.79 This remedy was also supported by the CPSU.[90] SCOA was of the opinion that the Australian Reward Investment Alliance (ARIA) Board of Trustees should be given the authority to resolve these disputes:

> ...concerning whether or not a person should have been a member of the Commonwealth Superannuation Scheme (CSS) from a date earlier than the current commencement date of the persons membership of the CSS.

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86 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 29.

87 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 11.

88 Superannuated Commonwealth Officers' Association, *Submission 3*, pp 2–3.

89 Mr Trevor Nock, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, p. 12.

90 Community and Public Sector Union, *Submission 23*, pp 2–3. See also Mr Tony Melville, *Submission 4*, p. 3.

> Appeals from any decisions by ARIA could then be directed to the Superannuation Complaints Tribunal. This is the normal way disputes relating to superannuation entitlements are decided.[91]

3.80 Snedden Hall & Gallop and a series of other submitters noted that due to the volume of claims, the cost and length of proceedings once a matter goes to court, and the age and health of many potential claimants, it is 'essential that the process be streamlined'.[92] The MEAA also argued for a less litigation-based approach, noting that if an administrative approach is taken, then the statute of limitations should not apply:

> 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.[93]

3.81 ACTEW expressed similar hopes that a process outside of the courts might be established, suggesting that that the committee 'may consider making recommendations regarding more efficient methods for resolving the claims, including alternative dispute resolution or referral to a specialist tribunal'.[94] The ACT Government observed that while ACTEW's proposal for a dedicated tribunal would require further consideration, it appears 'a sensible conduit to consider the merits of potential claimants'.[95]

3.82 The MEAA was of a similar view, recommending that a Cornwell Superannuation Panel be created 'to establish fair and equitable principles to guide future claims processes, having regard to the Government's obligation to ensure consistency and equity in the impact of Government activities'. Further, the MEAA recommended that the Panel 'assess or cause to be assessed, the potential cost impacts of claims received to enable the Government to make provision for the necessary funds to meet such claims'.[96]

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91 Superannuated Commonwealth Officers' Association, *Answer to question on notice*, 5 May 2011 (received 29 May 2011) p. 1.

92 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 2; Mr Richard Faulks, Managing Director, and Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 23. See also Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 1; ACTEW Corporation Limited, *Submission 7*, pp 1–2; Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 7; Media, Entertainment and Arts Alliance, *Submission 15*, pp 3–4.

93 Media, Entertainment and Arts Alliance, *Submission 15*, p. 2; Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 29.

94 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 1; ACTEW Corporation Limited, *Submission 7*, pp 1–2.

95 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 7.

96 Media, Entertainment and Arts Alliance, *Submission 15*, pp 3–4.

3.83 In a similar vein, Snedden Hall & Gallop explained to the committee that in their view, once the initial test cases have been resolved, claims might be expeditiously dealt with by appointing a Federal Court Judge to specifically sit and consider superannuation claims:

> 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.[97]

3.84 The CPSU made a similar suggestion for claims to be dealt with through 'administrative action by an independent person of high standing to determine claims above a certain threshold', as in their view the courts are not an effective means of resolution and should be an avenue of last resort. The CPSU further suggested that a model of resolution similar to that adopted for the determination of asbestos related claims in NSW be adopted.[98]

3.85 Maurice Blackburn Lawyers noted the example of Totalcare Industries Limited and suggested that Commonwealth employers should take a similar approach, but ensure that adequate protections be implemented to ensure that employees are not disadvantaged in anyway. In that particular case, employees were not aware of their right to join the Public Sector Superannuation Scheme (PSS), and therefore joined the Australian Government Employees Superannuation Trust (AGEST) instead. The employer took action as follows:

> ...the employer contacted its affected employees to advise them of its error and provided a Deed that authorised it to recover the money that it paid into AGEST "by mistake" and thereafter pay that sum, and the difference owing into the PSS on the employee's behalf, thereby compensating employees for their losses. The employer also paid interest on the unpaid PSS contributions.[99]

3.86 Mrs Sue Lebish, ACT Treasury, commented on the Totalcare Industries matter and stated:

> 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

97 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 23.

98 Community and Public Sector Union, *Submission 23*, p. 4.

99 Maurice Blackburn Lawyers, *Submission 17*, p. 4.

> 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.[100]

3.87 In response to calls for establishing a more streamlined and expedited process, Finance stated:

> Finance is committed to working cooperatively with all stakeholders to resolve Cornwell-type claims, as far as practical, at the administrative level through the use of Alternative Dispute Resolution (ADR) processes.
>
> ADR models are employed in Finance, in accordance with its model litigant obligation under the Legal Services Directions 2005. The forms of ADR used by Finance in relation to Cornwell-type claims include mediation, solicitors conferences, exchange of letters (for example, in relation to refining the legal issues in dispute) and formal offers of settlement.
>
> To date, all claims that have been settled in the claimant's favour have been through ADR processes. Finance's position is that litigation is only used to determine novel areas of law, such as breach of statutory duty and the general duty of care.[101]

Conclusion

3.88 The committee considers that the Department of Finance and Deregulation has established an appropriate claims handling process for individuals who believe that they were incorrectly advised about their eligibility for Commonwealth superannuation. The process is fair and equitable. The committee finds no evidence that Finance does not take into account all matters when coming to a decision in relation to claims, and considers Finance has demonstrated the extent to which it undertakes searches for records and collaborating information when assessing claims. The evidence shows that finding these records is extremely difficult, complex and time consuming. Many of the relevant records are over 40 years old and with changes to the Administrative Arrangements Orders, have passed through the hands of a number of agencies and indeed, to another government in the case of employees transferred to the ACT public sector after self-government. The committee notes that Finance has requested the National Archives of Australia to issue a freeze on destruction of records to avoid the loss of crucial evidence. The committee welcomes this initiative.

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100 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, pp 6–7.

101 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 15.

3.89 While the committee acknowledges its support for those individuals who may consider that they have a valid basis of claim for reinstatement of superannuation entitlements, Finance, as an agency of the Commonwealth, is required to work within legislative requirements. As in the case of all claims against the Commonwealth, Legal Services Directions and model litigant requirements direct the way in which claims are handled. The Australian public expects that Commonwealth funds are disbursed in an appropriate manner and only on the basis of proven claims. The committee notes that where claims have been found to be valid, settlement with the claimant has been reached.

3.90 The committee notes the comments about other grounds for superannuation claims. The grounds, other than negligent misstatement, are currently before the courts. As such the committee makes no further comment. However, the committee notes that Finance has stated that any further rulings may affect the way in which claims are assessed.

3.91 In relation to act of grace payments, some submitters were critical of Finance for not accepting particular grounds for claims. The committee reiterates that Finance has acted within its legislative obligations. These are clearly set out in the Financial Management and Accountability Act. In addition, there are well-established appeal mechanisms for those dissatisfied with decisions.

3.92 The committee was provided with suggestions for improving the claims handling process. One suggestion was to amend the Superannuation Acts to grant temporary employees who were eligible for Commonwealth superannuation a period of contributory service from the date they would have been eligible to become members of the Commonwealth Superannuation Scheme. The committee does not support this suggestion as it may be open to abuse. The committee considers that it is important to ensure that there is a valid basis for any claim.

3.93 It was also suggested that a special panel or tribunal be established. Although the committee notes the costs of establishing and defending a claim can be significant, the committee considers that there are appropriate administrative processes, including alternative dispute resolution, in place to facilitate settlements. The committee further notes that there are still matters before the courts, so to recommend the establishment of a tribunal or special panel at this stage would be premature.