

Chapter 4

Other issues

Introduction

4.1 The committee received evidence on three related issues: the transfer of liability between the Commonwealth and the Australian Capital Territory (ACT) Government and other bodies; the access to documents by parties joined with the Commonwealth in litigation; and the issue of surviving spouse claims.

Transfer of liability between the Commonwealth and the ACT Government and other bodies

4.2 The Department of Finance and Deregulation (Finance) noted that since 1942 when temporary employees became eligible to join the CSS many statutory authorities and companies have been sold or transferred to other entities, or to the ACT Government.¹

Commonwealth statutory authorities

4.3 Snedden Hall & Gallop submitted that the Commonwealth has taken the approach that it is not responsible for the actions of statutory authorities and that as a consequence, 'some people may not get the entitlements that they are entitled to'.²

4.4 However, Snedden Hall & Gallop submitted that while the Commonwealth is now of the view that 'the employees of Commonwealth statutory authorities are or were not Commonwealth employees', in creating the statutory authorities, the Commonwealth:

...did not advert, or advert directly to the superannuation entitlements of temporary exempt employees of such authorities. The employees of such bodies thought that they were Commonwealth employees, and made decisions regarding their employment of [sic] that basis.³

4.5 Finance noted that in some cases, plaintiffs allege Crown agency and dual employment which further complicates the issue of ultimate responsibility for a claim:

These are allegations by which the plaintiffs assert that the Commonwealth is responsible for claims (even if the employer of the representor was a separate legal entity whose liabilities have been transferred). That is because the usual effect of these allegations is, if successful, that the legal liabilities would always have been – and would remain with – the

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

2 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 4.

3 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 4.

Commonwealth. Where alleged, the Commonwealth has denied the allegations of Crown agency and dual employment.⁴

4.6 Snedden Hall & Gallop observed that there may be issues regarding the Commonwealth and the statutory bodies or the bodies which have since inherited their liabilities, but submitted that it is essential that the Commonwealth facilitate an early resolution of this technical issue.⁵ Mr Richard Faulks, Snedden Hall & Gallop, commented:

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.⁶

4.7 The committee also received evidence that the confusion about liability has placed claimants and their legal representatives in an 'awkward position' as legal representatives have had to protect their clients' position, 'by alleging a liability against potential defendants, and no apparent readiness for them to come to some agreement about contribution'.⁷

4.8 Finance clearly articulated that in their view, 'these successor entities have, in many cases, acquired the legal liabilities of the former entity. This has occurred through contractual terms or express statements in legislation'. Further, as noted previously, in accordance with its obligations under the *Legal Services Directions 2005* (LSDs), the Commonwealth cannot compromise claims in which it is not likely to be ultimately responsible.⁸

4.9 However Finance noted that to assist as far as possible, in considering unlitigated issues, if the Commonwealth:

...forms the opinion that the former entity was legally liable and that there has been transfer of liability, the Commonwealth notifies the successor entity as to the likelihood that it, rather than the Commonwealth, is responsible for the claim and liaises with the successor entity as to claim management. The Commonwealth also informs the claimant of its position,

4 Department of Finance and Deregulation, *Submission 9*, Attachment D, p. 3.

5 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 4.

6 Mr Richard Faulks, Managing Director, Snedden Hall and Gallop, *Committee Hansard*, 5 May 2011, p. 25.

7 Mr Richard Faulks, Managing Director, Snedden Hall and Gallop, *Committee Hansard*, 5 May 2011, p. 18.

8 Department of Finance and Deregulation, *Submission 9*, Attachment D, p. 3.

so that the claimant can consider the issue, take legal advice if they wish and pursue the proper respondent.⁹

ACT Government

4.10 Prior to self government, statutory authorities were created for the ACT by the Commonwealth in its capacity as the local government for the ACT at the time. In 1978, there were 93 authorities including the ACT Schools Authority, Capital Territory Health Commission and ACT Electricity Authority (ACTEA). These authorities were staffed by Commonwealth Public Service employees. Some 18,000 employees were transferred to the ACT Government following self-government.¹⁰

4.11 The ACT Government's potential liability arises from affected former Commonwealth employees transferred to the ACT Government service following self-government under the *Australian Capital Territory (Self-Government) Act 1988*. The ACT Government stated that it was concerned that it may be held liable for, or be expected to contribute to, 'liabilities that arise as a result of the Commonwealth's acts and omissions at a time when the ACT did not exist'. It went on to note that the issue of liability, if it arises, is 'problematic and complex'.¹¹

4.12 The ACT is currently (April 2011) a defendant, together with the Commonwealth, in three separate proceedings in the ACT Supreme Court regarding alleged unpaid superannuation. In addition, the ACT Government was previously joined as a party as result of Commonwealth employee's acts or omissions in relation to former Commonwealth public service employees. These cases were settled or the plaintiff withdrew the actions.¹²

4.13 Mrs Sue Lebish, ACT Department of Treasury, explained to the committee that 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'. She further noted that issues surrounding the employment arrangements and conditions for staff of these entities remain unresolved due to difficulties in locating and accessing records in relation to these arrangements. In summary Mrs Lebish stated that the ACT is reviewing all claims on a case-by-case basis. Mrs Lebish went on to comment:

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

9 Department of Finance and Deregulation, *Submission 9*, Attachment D, pp 3–4.

10 ACT Government, *Submission 16*, pp 1–2.

11 ACT Government, *Submission 16*, pp 1–2.

12 ACT Government, *Submission 16*, p. 2.

superannuation claims in relation to former Commonwealth employees; a question which would depend upon the facts of each case.¹³

4.14 The ACT Government concluded:

Due to the vast number of employees transferred to the ACT in 1994, there are potentially large consequences for the ACT should the legislative transfer of employees and consequential transfer of 'rights' and 'liabilities' be held to be effective at transferring liability for what would ordinarily be viewed as Commonwealth responsibility prior to the establishment of the ACT Government.¹⁴

4.15 The committee further attempted to ascertain whether any specific funding arrangements regarding the superannuation liabilities inherited by the ACT Government from the Commonwealth, were entered into by the Commonwealth and the ACT Government at the time of self-government. Mrs Lebish noted that 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'.¹⁵

4.16 Finance explained that under financial arrangements agreed between the Commonwealth and the ACT Government in June 1990, the ACT Government pays the superannuation costs of their employees who are members of the Commonwealth defined benefit superannuation scheme:

The ACT Government pays on an emerging cost basis. That is, the ACT Government pays the Commonwealth an amount representing the actuarially determined estimate of benefit payments that will be made to former ACT employees in a particular financial year. Actuarial reviews are completed for the ACT triennially, and updated annually.¹⁶

ACTEW Corporation

4.17 ACTEW Corporation Limited (ACTEW) noted that it has been affected by claims by former employees of the ACT Electricity Authority (ACTEA) which was established as a Commonwealth statutory authority in 1963, and existed until 1988, when a new Commonwealth authority was established, the Australian Capital Territory Electricity and Water Authority (ACTEWA). In 1995, ACTEWA was

13 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 6.

14 ACT Government, *Submission 16*, p. 3.

15 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, pp 9–10.

16 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 19.

corporatised by the ACT Government and its functions were assumed by ACTEW, as a public unlisted company owned by the ACT Government.¹⁷

4.18 Mr Mark Sullivan, Managing Director, ACTEW, explained to the committee:

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.¹⁸

4.19 ACTEW noted that former employees of ACTEA have lodged legal proceedings against ACTEW and the Commonwealth alleging that they were provided 'incorrect information or advice' in relation to their eligibility to join the CSS. However, in ACTEW's view, this is 'a situation which ACTEW had no role or involvement in but has inherited through a chain of historical events relating to its structure'.¹⁹

4.20 Mr Sullivan noted that in relation to claims, ACTEW had a view to settle cases. As to any contribution from the Commonwealth, Mr Sullivan commented that, in his understanding, the Commonwealth's attitude in respect of claims against ACTEW is that the Commonwealth has no liability, rather that liability has been effectively transferred to ACTEW through self-government and then corporatisation. Mr Sullivan added that this is not necessarily ACTEW's view.²⁰ He summarised the differing points of view as follows:

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

17 ACTEW Corporation Limited, *Submission 7*, p. 1.

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

19 ACTEW Corporation Limited, *Submission 7*, p. 1.

20 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 2.

envisaged, and we are talking about the actions of Commonwealth officers in Commonwealth agencies from which these claims arise.²¹

4.21 The committee ascertained that in relation to ACTEW employees who were ultimately inherited from the Commonwealth, the understanding was that ACTEW would be responsible for funding the employer contribution of the superannuation of those employees. Mr Sullivan confirmed that this was indeed the case, however, he argued that this is not the basis of the contention. In ACTEW's view, the issues are twofold: first, whether they accept that they have legally inherited liability, and secondly, if the issue had been inherited, the process of settlement.²²

4.22 In relation to the first issue, Mr Sullivan commented:

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.²³

Committee comment

4.23 The committee notes that contention exists regarding liability in cases in which statutory authorities or companies have been sold or transferred to other entities or to the ACT Government. The committee acknowledges that, under the LSDs, the Commonwealth is unable to compromise claims in which it is not responsible. The committee agrees that these issues are matters for determination by the Court, and makes no further comment.

Access to records by parties joined to the Commonwealth

4.24 As noted above, the ACT Government has been joined with the Commonwealth in a number of cases. The ACT Government commented that many records were transferred to the ACT Government, however, many records remain in the custody of the Commonwealth. Mrs Lebish stated that the 'balance of information to date is in the Commonwealth's favour' as opposed to the ACT Government and other parties. Mrs Lebish went on to state:

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

21 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, pp 2–3.

22 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, pp 2–4.

23 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited, *Committee Hansard*, 5 May 2011, p. 4.

what documents have remained in the possession and control of the Commonwealth...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.²⁴

4.25 Further, it was noted that as the discovery process has not been completed in three of the cases involving the ACT Government, the ACT is unable to access certain records until 'they are put into the court and discovery is then open'. Mrs Lebish elaborated:

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...In one 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.²⁵

4.26 Finance commented that the Commonwealth shares relevant information about specific claims with the ACT Government through formal and informal discovery processes including voluntary provision of copies of personnel and ComSuper files at the ACT's request when it comes within the possession of the Department.²⁶

4.27 However, Finance noted that there are restraints on the Commonwealth in terms of what documents it can provide to the ACT. These include:

- implied undertakings limiting the use of documents obtained in the course of legal proceedings, which prevent a party from using those documents for anything other than the legal proceedings in which they were obtained;
- confidentiality provisions in Mediation Agreements between the Commonwealth and certain individual plaintiffs and the mediator, which prevent disclosure of documents exchanged for the purposes of the mediation;
- privacy restrictions, which prevent the disclosure of information (without appropriate permission) that individuals have provided to the Commonwealth (when claims are lodged through the Department's website);
- model litigant obligations, duties to the Court and the possibility of adverse costs orders that require the Commonwealth to only provide the other parties with relevant documents; and

24 Mrs Sue Lebish, Senior Manager, Legal and Insurance Policy, ACT Department of Treasury, *Committee Hansard*, 5 May 2011, p. 6.

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

26 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) p. 16.

- other documents not relevant to the case at hand. For example, other persons' personnel files.²⁷

Committee comment

4.28 The committee notes that the Commonwealth works cooperatively to share pertinent information within the relevant constraints, and despite difficulties in accessing documents in the discovery phase, the ACT Government acknowledges that the Commonwealth has been working collaboratively with them.

Surviving spouse

4.29 A further issue raised by Snedden Hall & Gallop related to claims following the death of a claimant. Snedden Hall & Gallop noted that the superannuation legislation provides for payment to surviving spouses of deceased employees or former employees. However, in the case of a claim arising out of the misleading or incorrect advice given to employees or former employees, now deceased, about their superannuation eligibility, the Commonwealth has denied that a surviving spouse has any right to make such a claim. Snedden Hall & Gallop stated that it had received instruction in such cases and 'in many cases such surviving spouses have been denied entitlements to a reversionary pension that would otherwise have been payable, had the employee been a part of the Scheme and not been misled'.²⁸

4.30 It was noted that the Commonwealth has asserted it owes no duty of care to such a spouse. Snedden Hall & Gallop submitted that 'such spouses should be entitled to recover in circumstances where, simply because of the death of the former Commonwealth employee, the Commonwealth seeks to escape liability for its acts and omissions'.²⁹

4.31 The Commonwealth's position was confirmed by Mr Phillip Smith, Finance. Mr Smith stated:

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.³⁰

4.32 The Commonwealth's position is based on legal advice.³¹

27 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) pp 16–17.

28 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 5.

29 Snedden Hall & Gallop Lawyers, *Submission 14*, p. 5.

30 Mr Phillip Smith, Branch Manager, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 40.

31 Mr Phillip Smith, Branch Manager, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 40.

Committee comment

4.33 The committee notes that while the Commonwealth asserts it has no duty of care to spouses, it assesses claims brought by a widow on behalf of a deceased estate and therefore the committee makes no further comment.

Senator Mitch Fifield
Chair