Dissenting Report by Independent Senator Nick Xenophon

1.1 There is no question that there are a considerable number of people who have lost significant portions of their retirement income because they were misinformed or unaware of their eligibility to join the Commonwealth Superannuation Scheme (CSS), prior to the introduction of compulsory superannuation in 1992.

1.2 South Australia, known as the defence state, was home to a number of agencies employing 'temporary' staff prior to 1992, who were wrongfully denied access to superannuation.

1.3 There is no question that the number of potential claimants is vast. The MEAA alone suggests that between $20 million and $30 million could be owed to current and former ABC journalists,[1] who were either misinformed or not informed at all about their superannuation entitlements.

1.4 The Department of Finance and Deregulation argues that 'the precise number of employees impacted by possible misstatement cannot be determined for a number of reasons'.[2] However, given the number of 'temporary' staff employed by the Australian Public Service (APS) rose to 17,130 by 1970,[3] it is not unfair to speculate that this figure could be sizeable.

1.5 There is no question that the potential liability of the Commonwealth could be considerable, particularly depending on the outcome of current litigation before the ACT Supreme Court.

1.6 However, while the Committee suggests that the Department of Finance has acted within its current legislative obligations, there is no question that there has been an ethical failing to those superannuants who have lost sizeable parts of their retirement income through no fault of their own.

1.7 This has caused, or will cause in the future, significant financial harm to a number of superannuants. Ms Annette Holden, who was a full time journalist at the ABC between 1985 and 1989, suggests that the denial of superannuation has adversely affected her retirement income.

> I strongly believe that the denial of four years of superannuation contributions some 25 years ago has a significant impact on my future

---

1 Chris Warren, MEAA, Senate Finance and Public Administration References Committee, Proof Committee Hansard, 5 May 2011, pg 30.

2 Department of Finance and Deregulation, Submission 9, pg 17.

3 Department of Finance and Deregulation, Submission 9, pg 16.

> financial position and without any doubt I was incorrectly advised by Human Resources (ABC) personnel on at least four occasions.[4]

1.8 These sentiments are echoed by Mr Peter Gifford, also a former ABC journalist:

> I have suffered considerable financial loss through what I consider at the least the ABC's negligence in not informing me of my right to join the super scheme[5]

1.9 Mr Gifford continues:

> I will turn 60 in May, and now have limited superannuation savings. I was diagnosed with type 2 diabetes 11 years ago, which has impaired my earning capacity to some extent, and being excluded from the ABC super scheme for 15 years has exacerbated this situation[6]

1.10 Further, as a result of incorrectly being denied access to superannuation, a number of submitters took out superannuation accounts at their own expense. As Mr Peter Muirhead, a former ABC journalist, explains in his submission to the Inquiry:

> I suppose I can state the obvious here that if I'd been allowed into the CSS (the particularly lucrative scheme which was operating at the time I was taken on by the ABC) I would never have taken out the policy with MLC.[7]

1.11 Mr Muirhead describes this policy as a 'high fee product and one which only began to perform better in more recent years'.[8]

1.12 This example highlights that for many the issue extends beyond the monetary amount of superannuation not paid, but also to the amount paid to maintain superannuation accounts that would otherwise not be required.

1.13 This matter also extends beyond those who have made formal submissions to the Inquiry, or are being formally represented by Maurice Blackburn Lawyers or Snedden Hall and Gallop among others.

1.14 Shortly after the Committee Hearing in Canberra on Thursday, May 5, 2011, *The Advertiser* ran a topical story featuring prominent Adelaide journalist Ric Teague,[9] the author of submission 11. Following the article's publication on May 14,

---

4 Annette Holden, submission 2.

5 Peter Gifford, submission 5, pg 2.

6 Peter Gifford, submission 5, pg 2.

7 Peter Muirhead, submission 8, pg 3.

8 Peter Muirhead, submission 8, pg 3.

9 Miles Kemp, 'Claims ABC staff duped over super', *The Advertiser*, May 14, 2011 http://www.adelaidenow.com.au/claims-abc-staff-duped-over-super/story-e6frea6u-1226055600057, accessed June 27, 2011.

a number of constituents suggested that they were unaware of the existence of the Inquiry, but were also confident they had been denied access to superannuation as a result of misinformation.

1.15 Many of these constituents felt they had insufficient time to make a submission to the inquiry, however, advised they would await the Committee's findings with interest.

1.16 Given the scope and interest in this Inquiry, it is clear that a fair and just solution must be found as a matter of urgency.

Notification of Claimants

1.17 While the Department of Finance contacted Commonwealth agencies regarding the *Commonwealth v Cornwell* judgement and the subsequent claims process, a number of potential claimants still remain unaware of their ability to submit a claim.

1.18 As discussed in the majority report, Snedden Hall and Gallop suggest that this is widespread, and that 'there are still many current and former employees of the Commonwealth or Commonwealth bodies who were given incorrect information about the eligibility to join Commonwealth superannuation, and are not aware either that that information was incorrect, or that they may be entitled to compensation for the loss suffered as a result of reliance on that information'.[10] As Snedden, Hall and Gallop conclude:

> There has been some publicity given to the Cornwell judgement, but the Commonwealth, at no time, sought in a systematic way to inform potential claimants that they may have a right to bring such a claim.[11]

1.19 Further, as the MEAA discusses, while the Department of Finance may have contacted Commonwealth agencies in light of the Cornwell decision, these agencies were not committed to distributing this information to current and former employees:

> To the best of our knowledge, the Alliance is not aware that Commonwealth Agencies have been pro-active in providing advice to staff about the impacts of the Cornwell decision.[12]

1.20 Mr Stephen Ordish, author of submission 18, indicated that he was not aware of his eligibility to make a claim until reading Miles Kemp's article in The Advertiser on May 14:

---

10 Snedden Hall and Gallop, submission 14, pg 2.

11 Snedden Hall and Gallop, submission 14a, pg 2.

12 MEAA, submission 15, pg 6.

> I only found out by reading of the ABC staff case in The Advertiser on 14 May 2011. The department at no time informed me there had been incorrect information given by supervisors at DSTO…[13]

1.21 Mr Ordish continued:

> As I previously mentioned, at no time have I been informed by any government agency or office.[14]

1.22 While the Department of Finance did also establish a website providing information on the Cornwell decision and the subsequent process of making a claim, it is unclear how many individuals have accessed this website, and indeed how many potential claimants are aware of its existence.

1.23 Further, notification via a website is not an appropriate mechanism, particularly given the age of some of the claimants.

1.24 While the Department of Finance argues that a more comprehensive campaign to contact potential claimants would be 'neither practical nor an effective use of public money',[15] it is not fair and reasonable for the Department to take the position that the Commonwealth has no positive obligation to notify former and current 'temporary' employees about their potential to claim lost superannuation.

1.25 The Commonwealth has an ethical responsibility to actively seek out and notify potential claimants, particularly given the strict time limit on a person's ability to lodge a claim.

Act of Grace Process

1.26 Under Section 33 of the *Financial Management and Accountability Act 1997*, the Finance Minister or a delegate can authorise a discretionary payment to an individual in extenuating circumstances even though such a payment would not have otherwise been authorised by law or required to meet a legal liability.[16]

1.27 As discussed in the majority report, currently 97 Act of Grace claims have been made by claimants seeking reimbursement for losses as a direct result of being misinformed or unaware of their legal right to receive superannuation payments while employed in the public service. To date, each of these claims has been rejected.

1.28 In light of the appearance of Mr John Edge of the Department Finance and Deregulation before committee, it is reasonable to infer that despite being

---

13 Mr Stephen Ordish, submission 19, pg 1.

14 Mr Stephen Ordish, submission 19, pg 1.

15 John Edge, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 34.

16 Financial Management and Accountability Act 1997, Division 4, Sect 33, Part 1-3.

'sympathetic to former and current employees of the APS who were misinformed about the superannuation entitlements',[17] the Department rejected these claims because it felt they lacked merit:

> **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.

1.29 However, in his appearance before the committee, Mr Richard Faulks of Snedden Hall and Gallop suggested the firm was of the opinion that it is impossible that each of the 97 claims did not have enough merit to warrant an Act of Grace payment. As Mr Faulks argued:

> 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.[18]

1.30 Mr Faulks continued, speculating further on a number of reasons such applications for Act of Grace payments were rejected:

> 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

17 John Edge, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 33.

18 Richard Faulks, Snedden Hall and Gallop, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 20.

> administrative decision but the cost implications of doing that are huge, so they are really faced with no option.[19]

1.31 Finance refutes the notion that a number of Act of Grace claims were unsuccessful on the basis that they were not eligible under the statute of limitations, with Dr Guy Verney of the Department suggesting that '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.'[20]

1.32 If this is the case, it is probable that a number of claims have been rejected as a result of Finance's difficulty in handling claims because of the 'time between the alleged misstatement and the claim for compensation', and the subsequent difficulty with locating records and compiling evidence.[21]

1.33 While the fact that some relevant records are 40 years old does pose difficulties, it should not be an excuse to prevent a just outcome for potential claimants.

1.34 Further, as Mr Edge also suggests '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.'[22]

1.35 Given the vast and onerous criteria listed above, and the current 100 per cent rejection rate for applications, it seems that applications for an Act of Grace payment are ultimately destined to fail.

1.36 Accordingly, it is overwhelmingly apparent that the Act of Grace mechanism is not a practical or fair way for claimants to seek reimbursement for losses.

Statute of Limitation

1.37 A number of submitters expressed their concern at being bound by the statute of limitations following the Cornwell decision in 2007.

1.38 In his submission to the Inquiry, journalist Richard (Ric) Teague indicated that he was not in a position to be able to pursue a claim as he was already statute barred at the time the Cornwell decision was delivered:

---

19 Richard Faulks, Snedden Hall and Gallop, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 24.

20 Guy Verney, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 35.

21 John Edge, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 34.

22 John Edge, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 34.

> The Cornwell case in principle would support my claim. However it is my understanding because of the time lapse involved since my resignation form the ABC, my claim and those of many others fall outside the parameters of ruling.[23]

1.39 Given that many affected employees had resigned from their positions well before the Cornwell decision, it is not just for them to be statute barred. However, the Department of Finance has not to this date sought adequate advice from the Attorney-General in relation to waiving the time limitations of such claims:

> **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.[24]

---

23 Richard Teague, submission 11, pg 2.

24 John Edge, Bruce Brown, Department of Finance and Deregulation, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 41.

1.40 As indicated by Mr Edge, those who have been statute barred can apply for discretionary payments through the Act of Grace mechanism. However, as discussed previously, this mechanism has a 100 per cent rejection rate and does not appear to be an appropriate mechanism for assessing such claims.

1.41 Given that the Commonwealth failed to recognise the failure of its conduct until the Cornwell case, potential claimants should not be prejudiced by this inaction as a matter of principle.

Cost of Litigation

1.42 As indicated by the Department of Finance in the answers to its questions on notice, the Cornwell case alone cost the Commonwealth $1,111,631.80 in legal fees.[25] The total cost to the taxpayer for ongoing legal costs for both litigated and non-litigated case is $5,176,674.48.[26]

1.43 Submitters have expressed concern that should they not win their case, they could be liable to reimburse the Commonwealth a similar amount. As stated by Mr Peter Murihead in his submission to the Inquiry:

> Unfortunately I have not been in a financial position to proceed with this as I would face Commonwealth costs if the case was lost and feel I could not expose my family to this risk.[27]

1.44 This notion is supported in a statement provided as part of the MEAA's submission to the Inquiry:

> I have been pursuing my case for over 4 years. Comcover has denied my claim. In the absence of the Government taking further action regarding this matter, I would need to pursue the matter legally. I believe I may need to do this by the end of the year, otherwise I might be prevented by the Statute of Limitations. Obviously such an undertaking would prove expensive in many respects and I don't believe this would be viable for me and my family members.[28]

1.45 It is clear that for those current and former employees who are not statute barred, the potential cost of litigation should their case be rejected is a major deterrent for them in pursuing their right to superannuation.

---

25 Department of Finance, Answers to Questions on Notice, Senate Finance and Public Administration References Committee, pg 3.

26 Department of Finance, Answers to Questions on Notice, Senate Finance and Public Administration References Committee, pg 4.

27 Peter Muirhead, submission 8, pg 4.

28 MEAA, submission 15, pg 11.

Alternative Dispute Resolution Mechanism

1.46 It is clear from the abovementioned factors that the current process for identifying, processing and approving claims is fundamentally flawed.

1.47 Implementing an expedited, overarching streamlined administrative process has considerable merit and is a notion supported by Snedden Hall and Gallop:

> **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.[29]

1.48 As Mr Faulks of Snedden Hall and Gallop continued:

> …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.

1.49 The idea of implementing an effective, administrative mechanism for resolving disputes is one supported by the MEAA. In his appearance before committee, Federal Secretary Mr Chris Warren indicated the MEAA's concerns with the current process:

> **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.[30]

1.50 Given the cost currently incurred by taxpayers in litigation and the potential significant increase in costs should the Commonwealth's liability expand, it is clear a different approach is required.

---

29 John Gordon, Snedden Hall and Gallop, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 20.

30 Chris Warren, MEAA, Senate Finance and Public Administration References Committee, *Proof Committee Hansard*, 5 May 2011, pg 29.

1.51 The proposal of a specialist tribunal as discussed in Snedden Hall and Gallop's supplementary submission has considerable merit.

Recommendations

Recommendation 1

The Department of Finance engage in a widespread media and departmental campaign, with a view to notifying all potential claimants of their rights. Such a campaign should take into account the concerns expressed by the MEAA and others, and before the commencement of such a campaign there should be consultation with such stakeholders to maximise its effectiveness.

Recommendation 2

The Department of Finance liaise with the Attorney-General's Department with a view to waiving the statute of limitations for Cornwell-type cases.

Recommendation 3

A specialist tribunal is established to consider such claims in a cost-effective, streamlined and equitable manner. The model suggested by Snedden, Hall and Gallop should be considered as a template for such a tribunal.

NICK XENOPHON
Independent Senator for South Australia