The Senate

# Finance and Public Administration References Committee

## Superannuation claims of former and current Commonwealth Public Service employees

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## 43rd Parliament

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| Senator Kerry O'Brien | ALP, Tasmania |
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| Senator Nick Xenophon | IND, South Australia |

# TABLE OF CONTENTS

# ABBREVIATIONS

| | |
|---|---|
| 1922 Act | *Superannuation Act 1922* |
| 1976 Act | *Superannuation Act 1976* |
| 1990 Act | *Superannuation Act 1990* |
| AAOs | Administrative Arrangement Orders |
| ABC | Australian Broadcasting Corporation |
| ACTEA | Australian Capital Territory Electricity Authority |
| ACTEW | Australian Capital Territory Electricity and Water |
| ACTEWA | Australian Capital Territory Electricity and Water Authority |
| ADR | Alternative Dispute Resolution |
| AGA | Australian Government Actuary |
| AGEST | Australian Government Employees Superannuation Trust |
| APS | Australian Public Service |
| ARIA | Australian Reward Investment Alliance |
| CPSU | Community and Public Sector Union |
| CSS | Commonwealth Superannuation Scheme |
| FMA Act | *Financial Management and Accountability Act 1997* |
| LSDs | Legal Services Directions 2005 |
| MEAA | Media, Entertainment and Arts Alliance |
| PSS | Public Sector Superannuation Scheme |
| SCOA | Superannuated Commonwealth Officers' Association |
| TAA | Trans Australian Airlines |

# Chapter 1

# Introduction

## Terms of reference

1.1 On 1 March 2011, the Senate referred the following matter to the Finance and Public Administration Committee for inquiry and report by 30 June 2011:

> The superannuation claims of former and current Commonwealth Public Service employees employed on a full-time, part-time or temporary basis prior to the introduction of compulsory superannuation in 1992, who were either not aware or correctly advised of their eligibility for Commonwealth superannuation (the Commonwealth Superannuation Scheme), with particular reference to:
>
> (a) the number of employees in the Commonwealth Public Service impacted, because they were not aware or correctly advised of their eligibility to Commonwealth superannuation prior to the introduction of compulsory superannuation in 1992, including, but not limited to, employees of the following Commonwealth departments and statutory authorities:
>
> (i) Department of the Interior (which included Transport, Forestry and Conservation, and Agriculture),
>
> (ii) Department of Works (later renamed the Department of Housing and Construction, and then the Department of Construction) in the Australian Capital Territory and New South Wales,
>
> (iii) Department of Administrative Services in the Australian Capital Territory and Western Australia,
>
> (iv) Department of Education in the Australian Capital Territory,
>
> (v) Department of Supply in South Australia and the Australian Capital Territory,
>
> (vi) Post-Master General's Department in the Australian Capital Territory and New South Wales,
>
> (vii) Australian Government Printing Office in the Australian Capital Territory and New South Wales,
>
> (viii) Defence – Research Weapons Establishment in South Australia,
>
> (ix) Defence – Defence Science and Technology Organisation in South Australia,
>
> (x) Defence – Defence Research Centre in South Australia,
>
> (xi) Australian Broadcasting Commission in South Australia, Tasmania, the Northern Territory and New South Wales,

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

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

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

(xv) Australian Antarctic Division in Tasmania,

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

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

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

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

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

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

(f) any other related matters.

## Conduct of the inquiry

1.2 The inquiry was advertised in the newspaper *The Australian* and through the internet. The committee invited submissions from interested organisations and relevant Commonwealth and Australian Capital Territory (ACT) Government departments and agencies.

1.3 The committee received 23 public submissions. A list of individuals and organisations which made public submissions to the inquiry, together with other information authorised for publication by the committee, is at appendix 1. The committee held one public hearing in Canberra on 5 May 2011. A list of the witnesses who gave evidence at the public hearing is available at appendix 2. Submissions, additional information and the Hansard transcript of evidence may be accessed through the committee's website at http://www.aph.gov.au/Senate/committee/fapa_ctte/index.htm

1.4 Some submissions from individuals contained details of particular cases. The committee noted the circumstances of these cases and used them to inform its view on the matters before it. However, the committee is unable to recommend remedies for any particular person.

## Acknowledgement

1.5 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

## Note on references

1.6 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

## Background to the inquiry

### *The Cornwell case*

1.7 Mr John Cornwell was a temporary employee of the Department of the Interior from May 1962 until his employment was transferred to the ACT Government in about 1994. He retired on 31 December 1994. Until appointed to a permanent position in 1987, Mr Cornwell did not contribute to Commonwealth superannuation. He transferred to the Public Sector Superannuation Scheme (PSS) in 1990.[1]

1.8 In 1999, Mr Cornwell commenced proceedings against the Commonwealth in the ACT Supreme Court alleging that in 1965, whilst a temporary employee, he received incorrect information or advice about his eligibility to apply to join Commonwealth superannuation. In 1965, after three years as a temporary employee, he would have become eligible to join the fund. If he had joined the fund in 1965, on retirement after 29 years' contribution, he would have been entitled to a pension of 44.1 per cent of his final salary. By joining in 1987, he had seven years' contributions which entitled him to a pension of only 12.6 per cent of his salary. Mr Cornwell brought his claim on the basis of negligent misstatement, negligence in general and/or breach of statutory duty.[2]

1.9 In 2006, the ACT Supreme Court held that Mr Cornwell was incorrectly advised about his eligibility to apply to join Commonwealth superannuation. The Court was satisfied that Mr Cornwell would have joined Commonwealth superannuation earlier than 1987 if he had been correctly informed in 1965. The Court also held that Mr Cornwell was entitled to damages for his loss. The Department of Finance and Deregulation (Finance) noted that:

> Although the Court was not required to determine the loss (which was subsequently agreed between the parties) the loss was, in essence, the difference between the Commonwealth superannuation benefit which

1 Department of Finance and Deregulation, *Submission 9*, p. 4.

2 Department of Finance and Deregulation, *Submission 9*, p. 4.

> Mr Cornwell did in fact receive and the amount he would have received if he had joined Commonwealth superannuation at an earlier date.[3]

1.10 The Commonwealth appealed the decision to the High Court arguing that Mr Cornwell had suffered his loss many years before his retirement and that the statutory limitation period had expired. The Commonwealth lost its appeal on the limitation issue. The High Court agreed with Mr Cornwell that the cause of action for superannuation claims based on negligent misstatement accrues when the employee becomes statutorily entitled to their superannuation benefits, that is, on retirement. Finance noted:

> The High Court explained that in a claim where the plaintiff allegedly received incorrect information about his or her eligibility to apply to join Commonwealth superannuation, the cause of action first accrues when the plaintiff retires from the workforce and satisfies the statutory criteria for the payment of a benefit in the relevant scheme.[4]

1.11 Finance also commented on a factual issue dealt with in the Cornwell case and commented:

> A factual issue dealt with in the Cornwell case is whether there was a misconception in the 1960s and 1970s, in that workplace, that temporary employees were not able to contribute to the Commonwealth superannuation schemes, when in fact they could choose to join if they met certain prerequisites. It is this alleged misconception that is the background for the negligent misstatement claims which have been made.[5]

1.12 Mr Cornwell and the Commonwealth reached an agreement and his claim for compensation was settled.

### *Response to the Cornwell case*

1.13 As a consequence of the case brought by Mr Cornwell, the issue of eligibility of temporary employees during the 1960s and 1970s to join Commonwealth superannuation was reported in the media. In addition to the media coverage, the then Minister for Finance and Administration issued a media release and the Secretary of Finance wrote to all department heads to alert them to the implications of the Cornwell case. Finance also created a page on its website to provide information for those affected regarding the process for seeking compensation.[6]

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

4 Department of Finance and Deregulation, *Submission 9*, pp 4–5.

5 Department of Finance and Deregulation, *Submission 9*, p. 4.

6 Department of Finance and Deregulation, *Information Regarding Cornwell-Type Claims*, 21 July 2009, http://www.finance.gov.au/comcover/cornwell.html (accessed 1 March 2011).

# Chapter 2

# Commonwealth superannuation arrangements

## Introduction

2.1 The following discussion provides a brief overview of superannuation arrangements for temporary employees, as well as details on the number of potential superannuation claimants, and measures taken to notify these potential claimants of their ability to claim. It also covers the impact on retirement incomes of employees who were given misleading information about their eligibility for Commonwealth superannuation and therefore did not join.

## Commonwealth superannuation arrangements

2.2 Commonwealth employees have been entitled to contribute to superannuation since 1922 when the *Superannuation Act 1922* (the 1922 Act) was enacted. The Superannuation Fund Management Board (later the Superannuation Board) managed the fund. In 1976, the Commonwealth Superannuation Scheme (CSS) was established by the *Superannuation Act 1976* (the 1976 Act). It is noted on the ComSuper website that 'the CSS also extended membership to all government statutory officers and improved joining opportunities for temporary employees'.[1]

2.3 The 1922 Act and 1976 Act provided for the discretionary admission of temporary employees to the 1922 Act scheme and/or the CSS. Specifically, under the both the 1922 Act and 1976 Act temporary employees had to apply to join Commonwealth superannuation. Part of this application process required the employee to obtain (amongst other things) a certificate indicating that their employment would continue for a specified period (at least seven years for the 1922 Act). This condition changed over the years so that by 1990, when the CSS closed, temporary employees only had to be an employee for one year with a certificate by the employer that they would be employed for a further three years. However, it was at the employer's discretion as to whether the certificate would be provided and not all temporary employees were able to obtain a certificate of further employment.[2]

2.4 In 1990, the CSS was closed to new members and the Public Sector Superannuation Scheme (PSS) was established by the *Superannuation Act 1990* (the 1990 Act). The 1990 Act provided, for the first time, that temporary employees could

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1 ComSuper, *A history of Commonwealth Superannuation*, 12 January 2011, www.comsuper.gov.au/about_comsuper/history.html (accessed 8 June 2011).

2 Department of Finance and Deregulation, *Submission 9*, p. 6; Superannuated Commonwealth Officers' Association, *Submission 3*, p. 2; Media, Entertainment and Arts Alliance, *Submission 15a*, p. 2.

join Commonwealth superannuation if they elected to do so. Eligibility for membership of the PSS also extended to casual employees.[3]

## Classification of temporary employees

2.5 The number of temporary employees in the Australian Public Service fluctuated from a high during the war years to 1950, to a much lower level by 1980.[4] Some organisations employed more temporary employees than others. For example, in 1960 the Department of Supply employed 3,050 temporary staff while the next largest employer of temporary staff was the Department of Works with 1,526 temporary employees.[5]

2.6 A number of agencies also employed temporary employees in particular areas. Mr Chris Warren, Media, Entertainment and Arts Alliance (MEAA), commented on classification of journalists as temporary employees in the Australian Broadcasting Corporation (ABC). He noted that 'small J journalists' employed as public affairs officers, working on public affairs programs in radio or television were classed as permanent employees and were eligible to join the CSS. Other journalists employed by the ABC, the 'capital J journalists' who worked in the newsroom were classified as temporary employees. Mr Warren noted that newsroom mangers were classified as permanent employees and were entitled to join the CSS, and there were other 'anomalies' in terms of who was granted access to the superannuation scheme:

> ...if you did your training at the ABC, obviously you were a permanent employee for superannuation purposes, or because they had spent a period in ABC management, or...because they withstood the culture and the orthodoxy of the newsroom, which is that you did not get superannuation and pushed themselves forward. I do not know the historical reason about why journalists were always temporary employees, but that was the fact.[6]

2.7 Representatives of the MEAA noted that they could only speculate on why journalists were classified as temporary employees, noting that it may have been due to the nature of their work being based on a 24 hour roster unlike their colleagues who worked in public affairs. Further, under this roster they were not entitled to receive penalty pay until the mid-1970s. There was also a difference in how journalists and other ABC employees were employed: where journalists in the newsroom were

3 See also Department of Finance and Deregulation, *Submission 9*, Attachment B.

4 For further detail see discussion under 'Number of potential claimants' later in this chapter, beginning at paragraph 2.30.

5 Department of Finance and Deregulation, *Submission 9*, Attachment L.

6 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 28.

employed on a skills basis and based on a grading scheme, other ABC employees were employed in a set position as public servants.[7]

2.8 Mr Warren went on to comment that there was no basis on which to surmise that journalists would not remain employed with the ABC – in fact it would have been 'assumed that anybody who was working at the ABC was there for the duration' as working for the ABC was viewed as a career, and a career structure was in place:

> The ABC was what they call in the industry an employer of destination. It was a place where people went to the ABC and then tended to stay at the ABC, which is why you then tended to have this pool of people who had worked elsewhere in the ABC, doing similar work, and then coming back to the newsroom.[8]

2.9 Mr Don Cumming, MEAA, concluded:

> ...there were many others who were classified as temporary but who were in fact for all intents and purposes full-time employees, that is, full-time employees with all the responsibilities of full-time employment, yet they were denied their superannuation rights.[9]

2.10 Submitters also informed the committee that while classified as temporary employees, they were able to access entitlements such as long service leave, and indeed transfer these entitlements between departments. Further, these entitlements (other than superannuation) were defined to include their period of employment as temporary employees.[10] Dr Peter Gifford commented:

> ...the 'temporary' status of journalists seemed spurious, as we qualified for annual, sick and long service leave and the other entitlements of 'permanent' staff. Like permanent staff we signed staff regulations 24 and 59 swearing allegiance to the Queen and declaring secrecy. As 'temporary' employees, most news journalists made long-term careers at the ABC.[11]

2.11 Ms Annette Holden advised the committee that despite her employment as a full-time employee of the ABC, and her service being 'counted towards Commonwealth entitlements (other than superannuation)' in her subsequent employment with other Government departments, as a journalist she was classified as

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7 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 31.

8 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 31.

9 Mr Don Cumming, ACT Branch President, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 27.

10 Mr Tony Melville, *Submission 4*, pp 1–2; Ms Annette Holden, *Submission 2*, p. 1; Mr Peter Baker, *Submission 6*, p. 1.

11 Dr Peter Gifford, *Submission 5*, p. 2.

a temporary employee, and was informed that she was ineligible to apply for, or contribute to, Commonwealth superannuation.[12]

## Employers' reluctance to certify

2.12 The Superannuated Commonwealth Officers' Association (SCOA) submitted that the stringent requirements for temporary employees to become eligible for the CSS eased over the years, from the requirement in 1942 for these employees to have completed five years continuous service, and receive certification of likely employment until retirement, to the 1990 requirement for one year of continuous service and certification of three years of further employment. However, despite this, many employers were not willing to provide the certification of future employment for temporary employees, and consequently few temporary employees became members of the CSS.[13]

2.13 Mr Trevor Nock, SCOA, noted that, in his recollection, during the 1960s and 1970s some employers were reluctant to certify that temporary employees who had completed the required qualifying period of employment would be employed for a fixed number of years. He suggested that in all likelihood this was because they did not consider that the employee would be employed for that amount of time and therefore 'it was not appropriate for them to join the CSS'.[14]

2.14 Despite this, a number of temporary employees continued to work in their roles for a number of years, without obtaining certification from their employer, as the employer was under no obligation to provide certification of future employment.[15] The Department of Finance and Deregulation (Finance) explained that it was 'a discretionary decision as to whether a certificate would be provided and not all temporary employees were able to obtain a certificate'.[16]

2.15 SCOA further advised that while there was an avenue for appeal if an employer did not certify continuing employment, SCOA's understanding is that employees were not informed about their appeal rights unless they 'made representations as to why they were refused membership of the CSS'.[17]

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12 Ms Annette Holden, *Submission 2*, p. 1.

13 Superannuated Commonwealth Officers' Association, *Submission 3*, p. 2; see also Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, p. 12.

14 Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, pp 12–13.

15 Mr Trevor Nock, Superannuation Advisor, Superannuated Commonwealth Officers' Association, *Committee Hansard*, 5 May 2011, pp 12–13.

16 Department of Finance and Deregulation, *Submission 9*, p. 6.

17 Superannuated Commonwealth Officers' Association, *Submission 3*, p. 2.

2.16 However Mr Nock acknowledged that not all temporary employees experienced the same treatment:

> It is a generalisation. It did not occur in every case. It depended on the employer. Some employers were keen to sign up people to the CSS.[18]

2.17 The MEAA also noted that the issue of certification is not a significant one for their members.[19]

***Committee comment***

2.18 The committee notes that provision of certification of future employment was a discretionary decision, and employers were not obliged to provide such certification. Further the committee understands that lack of certification does not appear to be a widespread issue, and that an appeal mechanism was available to those who were unable to obtain such certification.

## Provision of advice concerning superannuation entitlements

2.19 The committee received submissions from a number of individuals noting that they had been incorrectly advised regarding their eligibility to contribute to Commonwealth superannuation, in some cases on numerous occasions.[20] This was supported by case histories provided by the MEAA, which pointed to inconsistencies in the approach taken by the ABC regarding the ability of staff to access Commonwealth superannuation: some staff were told that as temporary employees they were not eligible for Commonwealth superannuation while others were never advised of their ability to join.[21]

2.20 Snedden Hall & Gallop explained to the committee that misrepresentation appears to have occurred more frequently in certain departments or areas:

> We say there is a clear pattern of particular departments or areas of departments where a larger number of employees have been misled or given incorrect information. In some cases there has been acceptance by the Commonwealth, at least in negotiation, that they accept there may have been misrepresentations made. In the six matters that went to litigation

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

19 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, pp 29 and 31–32.

20 See for example, Ms Annette Holden, *Submission 2*, p. 1; Mr Tony Melville, *Submission 4*, pp 1–2; Dr Peter Gifford, *Submission 5*, p. 1; Mr Peter Baker, *Submission 6*, pp 1–2; Mr Peter Muirhead, *Submission 8*, pp 1–3; Name Withheld, *Submission 10*, p. 1; Mr Richard Teague, *Submission 11*, p. 1; Name Withheld, *Submission 12*, pp 1–2; Mr Stephen Ordish, *Submission 18*, p. 1; Mr Ernest Hendy, *Submission 19*, p. 1; Mr Austen Evans, *Submission 20*, p. 1; Name Withheld, *Submission 21*, p. 1.

21 Media, Entertainment and Arts Alliance, *Submission 15*, p. 7. See also Maurice Blackburn Lawyers, *Submission 17*.

> there was an absolute denial that there were any misrepresentations made. The distinguishing features of those were that the representors, if I can put it that way, were still alive and had given information to the Commonwealth about what they had said or not said.[22]

2.21 The committee heard about the basis upon which misrepresentations to employees seem to have occurred:

> The apprehension appears to have been abroad in the senior levels of the Commonwealth government, or the middle and senior levels of the Commonwealth government in the sixties, seventies and eighties that temporary industrial employees were not eligible for super, that it was a scheme for public servants or only for permanents.[23]

2.22 Finance submitted that it first became aware that incorrect advice regarding superannuation entitlements may have possibly been given to employees 'in or about August 1998 when proceedings were commenced in the ACT Supreme Court' by a former Commonwealth employee. However it does not appear that negligent misstatement was a systemic issue:

> Rather, Finance is aware that there are some instances where incorrect information or advice was provided to temporary employees. However, the documents suggest that this was workplace and/or individual specific, and occurred mainly in the 1960s and 1970s.
>
> Further documentary and witness evidence is available that demonstrates that the Commonwealth took reasonable steps to disseminate accurate information on superannuation entitlements.[24]

2.23 Finance concluded:

> To date, the investigations completed by Finance and its legal advisors do not suggest that there was a systemic problem within the Commonwealth whereby incorrect information or advice was generally being provided to temporary employees about their eligibility to apply to join Commonwealth superannuation.[25]

2.24 The MEAA noted that despite Finance's claim that there does not seem to be systemic negligent misstatement, this is not the experience of Community and Public Sector Union (CPSU) or MEAA members.[26]

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

23 Mr John Gordon, Barrister, Snedden Hall & Gallop, *Committee Hansard*, 5 May 2011, p. 25.

24 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) pp 5–7.

25 Department of Finance and Deregulation, *Answer to question on notice*, 5 May 2011 (received 2 June 2011) pp 5–7.

26 Media, Entertainment and Arts Alliance, *Submission 15a*, p. 2.

2.25 SCOA submitted that in their view, temporary employees were 'disadvantaged because they were not advised of their rights in relation to joining the CSS, especially after they had completed the qualifying period to become a member'. SCOA maintained that had these employees been aware that they were eligible to apply for the CSS they would have done so:

> Once these employees became aware that they could join the CSS they applied and were accepted as members of the CSS. Other temporary employees became permanent officers and automatically became members from the date of their permanent appointment.[27]

2.26 Finance informed the committee that according to information gathered by the Commonwealth, at least some former temporary employees were not particularly receptive to voluntarily contributing to superannuation:

> ...interviews conducted by the Commonwealth's legal representatives with a number of former temporary employees indicated that there was a view held by *some* temporary employees that, prior to the introduction of the compulsory scheme in 1992, individuals were not inclined to voluntarily contribute to a superannuation scheme.[28]

2.27 Further, Finance noted that whether an employee was provided with incorrect information or advice as to their eligibility depended on the individual's specific circumstances. Finance added that the Commonwealth is aware of specific instances where incorrect information or advice has been received by a temporary employee regarding their eligibility to apply to join Commonwealth superannuation. However, in other instances temporary employees (from the same workplaces from which claims originate) were provided with correct advice and successfully applied to join Commonwealth superannuation.[29]

2.28 The Commonwealth took steps to advise temporary employees about their eligibility to join Commonwealth superannuation. Finance noted that with the introduction of the CSS in 1976, superannuation information sessions were conducted by ComSuper employees at various Commonwealth department work sites all around Australia.[30]

### *Committee comment*

2.29 The committee notes that advice concerning superannuation provided to employees appears to have varied between individual cases. While in some particular circumstances incorrect advice was given, as established in the Cornwell-type cases,

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27 Superannuated Commonwealth Officers' Association, *Submission 3*, p. 2. See also Dr Peter Gifford, *Submission 5*, pp 1–2; Mr Richard Teague, *Submission 11*, pp 1–2; Mr Peter Muirhead, *Submission 8*, p. 4; Name Withheld, *Submission 12*, pp 1–2.

28 Department of Finance and Deregulation, *Submission 9*, p. 6.

29 Department of Finance and Deregulation, *Submission 9*, p. 16.

30 Department of Finance and Deregulation, *Submission 9*, p. 16.

equally, other employees received the appropriate advice regarding their eligibility to join Commonwealth superannuation. The committee notes that the validity of claims by employees that they were given incorrect advice regarding their superannuation entitlements is determined on a case by case basis through the relevant claim handling processes.

## Number of potential claimants

2.30 The terms of reference cover the number of employees in the Commonwealth public service who were not aware, or were not correctly advised, of their eligibility for Commonwealth superannuation prior to the introduction of compulsory superannuation in 1992. Evidence from Finance and others pointed to the difficulties in establishing the number of employees who may have been affected.

2.31 Finance stated that the precise number of former and current Commonwealth employees 'with a mere potential to have been affected is open to considerable speculation'. Finance provided the committee with an indication of the number of temporary staff in the Australian Public Service (APS): in 1939 there were 14,614 temporary staff, growing to 26,038 by 1950. The cessation of exceptional wartime circumstances saw the number of temporary employees fall to 15,674 in 1960 then rising slightly to 17,318 in 1970. By 1980, the number of temporary staff had fallen significantly on account of the easing of permanent employment provisions.[31]

2.32 Finance went on to note that the total number of temporary employees listed in its submission may in fact underestimate the number of potential claimants because of the departure and arrival of new staff during the relevant decade. In addition, the quality of available records since 1942 'would then inject more uncertainty into the calculations'. This figure would only then provide a list of temporary employees rather than those who may have been misrepresented to and who would also have joined a superannuation scheme.[32] Finance concluded:

> ...the precise number of employees impacted by possible misstatement cannot reasonably be determined for a number of reasons. For example, the individual circumstances of an employee may be that they in fact made a conscious decision not join a Commonwealth superannuation fund. Further, the particular definition of 'Commonwealth' (e.g. excluding or including statutory authorities) and categorisation of 'temporary employee' can change the quantity determined'.[33]

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31 Department of Finance and Deregulation, *Submission 9*, pp 16–17. For further details on temporary and permanent staff numbers see Department of Finance and Deregulation, *Submission 9*, Attachments L and M.

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

33 Department of Finance and Deregulation, *Submission 9*, pp 17–18.

2.33 The ABC also commented on the difficulties in establishing the number of employees affected and stated 'it is not known at this stage how many potential claims there could be from ABC staff'. The ABC went on to note that some 15 ABC employees have lodged Cornwell claims with Finance. While journalists were affected, the ABC noted that the issue may also apply to non-journalists who were employed as temporary staff during the period 1970 to 1993.[34]

2.34 The MEAA estimated that between 1975 to 1991, anywhere between 500 to 1000 employees 'would have passed through the [ABC] newsroom in a non-superannuated capacity'.[35] The CPSU also commented on the number of ABC employees who may have been affected and noted that the ABC made extensive use of exempt and temporary employment in a range of trainee positions. At the satisfactory conclusion of their traineeships, staff were made permanent. However, during the training period, staff were told that they were not eligible for Commonwealth superannuation. Therefore, former trainees may have a claim.[36]

2.35 The committee received no other precise information in relation to the number of potential claimants. However, Mr John Gordon, Snedden Hall & Gallop, stated that 'by the time that temporary employees in the 1990s were entitled as of right to superannuation there were many thousands who had not been informed of their right to be in the Commonwealth Super Scheme, or had been misinformed of their rights upon enquiry'.[37]

### *Committee comment*

2.36 The committee observes the substantial difficulty inherent in attempting to determine the number of potential claimants. The committee notes that calculating an accurate total number of individuals employed on a temporary basis during the period is fraught, and that further uncertainty is encountered in trying to determine whether employees received the wrong information about their superannuation entitlements, as this must be assessed on the circumstances of each individual case.

## Notification of potential claimants

2.37 As previously noted, following the 2007 High Court judgement, Finance wrote to all Commonwealth agencies informing them of the High Court's decision and the consequent claim handling process. Finance also provided a dedicated webpage on its internet site to provide information to those wishing to pursue a Cornwell-type claim. The ABC advised the committee that, following a request from the MEAA in October 2010, the ABC undertook to cooperate with Finance and the MEAA to

34 Australian Broadcasting Corporation, *Submission 1*, p. 1.

35 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, pp 28 and 30.

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

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

inform staff regarding potential superannuation claims arising as a result of the Cornwell decision. In line with this, on 25 February 2011, the ABC sent an all staff advice alerting employees to the Cornwell decision, and advising any potentially affected staff to go to the Finance website.[38]

2.38 The MEAA noted that in response to the ABC's all staff advice, approximately 100 staff from the ABC contacted the MEAA regarding their circumstances. However, the MEAA noted that this 'does not include the many retired ABC staff that may simply not be aware of this issue'.[39] The MEAA recommended that 'the Government actively publicise the issue, including by public media in all states and territories, including identifying that current and former Commonwealth employees may pursue a claim for Commonwealth superannuation entitlements'.[40]

2.39 Mr Mark Sullivan, Managing Director, ACTEW Corporation Limited (ACTEW), stated that all members of ACTEW's staff are currently covered by superannuation, and former ACT Electricity Authority (ACTEA) employees would certainly be aware of the current issues regarding superannuation claims:

> I do not think there is any doubt that either former members of ACTEA who became ACTEW employees, or those existing members of ACTEW who were former ACTEA members, are fully aware of the cases that are being run by other people.[41]

2.40 However, submitters argued that, while the Finance website had been established and there had been media coverage of the issue, many potential claimants were still unaware of the potential to make a claim. Snedden Hall & Gallop, for example, commented that:

> Our contact with claimants, and information gathered in the matters of which we have carriage, indicates that this problem is wide spread across Australia, and that there are still many current or former employees of the Commonwealth or Commonwealth bodies who were given incorrect information about their 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.[42]

38 Australian Broadcasting Corporation, *Submission 1*, p. 1.

39 Media, Entertainment and Arts Alliance, *Submission 15*, p. 8.

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

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

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

2.41 Individual submitters to the inquiry also noted that they only became aware of their ability to make a claim for superannuation entitlements after the Cornwell decision, or through hearing about other employees who were similarly affected.[43]

2.42 Both Snedden, Hall & Gallop and the MEAA argued that there is a need for general dissemination of information regarding the issue amongst employees and former employees of the Commonwealth and Commonwealth statutory authorities. Snedden Hall & Gallop maintained that 'there has been no attempt to actively identify potential claimants and notify them of their rights, even though the identity of such former Commonwealth government employees lies solely within the government's knowledge'.[44] Snedden Hall & Gallop also noted that if claimants remain unaware of their ability to claim, their claims will become statute-barred as time passes and concluded that:

> It is therefore submitted that it is essential that as many former Commonwealth employees as possible are made aware of their rights either accruing or to accrue and the time limits that apply to potential claims, and their need to get advice about such a claim. Further, it is suggested that it would be appropriate for the Commonwealth to pass legislation or otherwise agree that it will not enforce a Statute of Limitations time limit in these matters bearing in mind the circumstances as set out above.[45]

2.43 The MEAA submitted that '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'. Therefore, the MEAA argued that it is 'unlikely that all current and former Commonwealth employees would be aware of the Department of Finance's website, which advises on the Cornwell Decision and the role of Comcover in processing these claims'.[46]

2.44 The MEAA provided the committee with details of their efforts to identify affected employees in the ABC:

> ...in 1995–96 there was a negotiated process between ourselves and the ABC that rectified everyone's superannuation at that time. Two things happened: the introduction of the PSS scheme in 1991; and then, in 1991, the distinction between temporary and permanent employees at the ABC was abolished and all employees became continuing employees. So there was an acceptance that they were eligible for that so that in the mid-nineties there was a general clarification of everyone's superannuation and everyone who was then an employee of the ABC had their superannuation in the PSS rectified back to about 1991 or their commencement date, if it was after that date. That reduces the list although there are still people in that category—

43 Mr Stephen Ordish, *Submission 18*, p. 1; Dr Peter Gifford, *Submission 5*, p. 1; Mr Peter Muirhead, *Submission 8*, p. 2; Name Withheld, *Submission 12*, p. 1.

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

45 Snedden Hall & Gallop Lawyers, *Submission 14*, pp 2–3.

46 Media, Entertainment and Arts Alliance, *Submission 15*, p. 6.

> in fact, some who are still employed at the ABC—who still have a period prior to 1990, or some earlier date if they joined the scheme, where they were not admitted into the CSS and so they have a claim. It is going through a long process trying to identify all these people. Those people are relatively easy. People who have left the ABC are obviously a bit more problematic. We have been publicising it in our material and our regular ebulletins to members, encouraging people at the ABC to talk to people who they know who used to work at the ABC.[47]

2.45 In response to arguments that the onus should be on the Commonwealth to actively identify and seek out potential claimants, Mr John Edge, Acting Deputy Secretary, Finance, commented that 'this is neither practical nor an effective use of public money'. In addition, Mr Edge stated:

> To seek out potential claimants would require extensive examination of every single personnel file from the past four decades from every single agency, including past iterations of an agency.[48]

2.46 Mr Edge pointed to the actions taken by Finance since the 2007 High Court judgment. He also commented that Finance has relied on dissemination of information about how to lodge a claim through the Finance website and noted that extensive information has been available in the media and has been provided by unions. In addition, law firms have also conducted seminars directed at potential claimants. Mr Edge concluded:

> This reflects the balance between an ideal world of examining every single employee's file for information and the more effective approach of inviting applicants to come forward and affording those applicants an appropriately extensive, indeed, forensic, examination.[49]

### *Committee comment*

2.47 The committee acknowledges concerns about former and current Commonwealth public service employees who may still be unaware that they may have a claim in relation to access to Commonwealth superannuation. However, the committee is mindful of the evidence provided by Finance on the amount of resources that would be required to identify all potential claimants through examination of personnel files. The committee therefore does not support the use of Commonwealth resources for this task.

2.48 In relation to calls for more extensive publicity aimed at potential claimants, the committee suggests that Finance give consideration to a targeted information

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47 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, p. 30.

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

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

campaign through national media and in the form of an all staff advice, similar to that disseminated through the ABC, to be distributed throughout those departments and agencies where a claim of negligent misstatement has been established or is considered likely to be established.

**Recommendation 1**

**2.49 The committee recommends that the Department of Finance and Deregulation give consideration to a targeted information campaign through the national media and by issuing an all staff advice across the Australian Public Service, including agencies, to advise potential claimants of the process for handling claims.**

## Impact on retirement incomes

2.50 The impact on retirement incomes of employees who were incorrectly advised of their eligibility to Commonwealth superannuation depends on the circumstances of each individual. However, Mr Gordon, Snedden Hall & Gallop, stated that a 'grave injustice' was suffered by these employees:

> Many persons who were entitled, who had given a lifetime of service to the Commonwealth, were not able to retire when they wished to or, when they retired, lived in impecunious circumstances and without the entitlements in retirement to which they should have been entitled.[50]

2.51 Individuals who provided submissions also commented on the impact on their retirement incomes. Individuals noted that as they were unaware of, or misinformed about, their eligibility to contribute to Commonwealth superannuation they did not commence contributing to Commonwealth superannuation for periods of time varying from four years in some cases, to eighteen years in others.[51] For example, one submitter stated:

> I have suffered considerable financial loss through what is at the least the ABC's negligence in not informing me of my right to join the super scheme.
>
> I consider I have lost at least 16 years of superannuation benefits and subsequent accruals from what was well known as a generous super scheme for employees and a scheme which I would have certainly joined if I had known I was eligible...At the age of 60 I now have limited superannuation savings...[52]

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

51 See for example, Ms Annette Holden, *Submission 2*, p. 1; Mr Tony Melville, *Submission 4*, p. 2; Dr Peter Gifford, *Submission 5*, p. 2; Mr Peter Baker, *Submission 6*, p. 2; Mr Peter Muirhead, *Submission 8*, p. 4; Name Withheld, *Submission 10*, p. 1; Mr Richard Teague, *Submission 11*, p. 1; Name Withheld, *Submission 12*, pp 1–2; Mr Stephen Ordish, *Submission 18*, p. 1; Mr Austen Evans, *Submission 20*, p. 1; Name Withheld, *Submission 21*, p. 1.

52 Name Withheld, *Submission 12*, p. 2.

2.52 SCOA pointed to the importance of length of membership to the pension payable under the CSS: pensions are principally based on the length of an individual's membership of the scheme, therefore, the 'longer the person is a member, the higher their superannuation will be'. Any delay in commencing membership of the scheme will reduce the superannuation pension the person will be entitled to receive.[53] Consequently:

> As these employees had served a considerable period of Commonwealth employment before becoming members of the CSS they lost many years of contributory CSS membership. This meant that their retirement benefits from the CSS or PSS (if they transferred from the CSS to the PSS) were much less than if they had become members from the time that they were eligible to join the CSS.[54]

2.53 Maurice Blackburn Lawyers also submitted that when assessing the impact on retirement incomes, the impact of belonging to another scheme which had lesser benefits than the CSS should be considered. Maurice Blackburn Lawyers stated:

> Finally, we emphasise that in assessing the impact on retirement incomes of Commonwealth employees regarding their eligibility to the CSS, due regard must be given to the disadvantages inherent in belonging to an alternative superannuation scheme such as AGEST or the PSS.
>
> We are aware of Commonwealth employees that joined such alternative funds to their disadvantage owing to the differences in benefits offered to members under alternative schemes. For example, we understand that PSS members are not entitled to receive their retirement pension where they intend to supplement their pension with work on a less than full-time basis upon retirement. That is in contrast to the position of CSS members, who may engage in paid work after receiving their retirement pension.[55]

2.54 In relation to estimates of the cost of meeting claims, the ABC stated that the number of potential claims possibly arising from ABC staff is unknown, however, the 'potential financial impact for staff who are able to substantiate a claim would be significant'.[56] The MEAA estimated the financial impact of the potential claimants from the ABC as anywhere between $20 to $30 million.[57]

2.55 ACTEW also commented on legal costs and stated that:

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

54 Superannuated Commonwealth Officers' Association, *Submission 3*, p. 2.

55 Maurice Blackburn Lawyers, *Submission 17*, p. 5.

56 Australian Broadcasting Corporation, *Submission 1*, p. 1.

57 Mr Chris Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 5 May 2011, pp 28 and 30.

> ...if a large number of superannuation claims proceed against ACTEW and/or the Commonwealth in the ACT Supreme Court or any other jurisdiction, significant legal costs will be incurred by all parties involved.[58]

2.56 Mr Sullivan, ACTEW, explained to the committee that the cost of liability varies significantly from case to case:

> The claims vary. We have seven matters before the court with varying claims from, I think it would be fair to say, tens of thousands of dollars into hundreds of thousands of dollars. If you take the extreme of someone who may have been able to be in the Commonwealth Superannuation Fund for 40 years with an exit salary of, say, $60,000 or $70,000 they would have been looking at an eligibility for a pension of about $30,000 for life plus the return of their contributions and earnings which, in an instance like that from my knowledge, would probably be about a quarter of a million dollars in accumulated contributions.
>
> That is not all of our cases by any means. We have a mixture of people who are still employed by us and are now covered by superannuation of various schemes. We have people as they move from the trades area into other areas of the statutory authority who are then accepted into the super scheme. It is a question of their late acceptance into the super scheme. We have got a variety. It would be very hard to put a limit of liability at the moment. We are, in terms of our own accounting practice, attempting to put a contingency on this matter, but we have not yet.[59]

2.57 Finance provided evidence to the committee on quantifying claims. Finance noted that, in broad terms, the calculation of loss determines the amount necessary to restore the claimant to the financial position they would have been in but for the negligent advice. In the Cornwell case, Finance noted that:

> Although the Court was not required to determine the loss (which was subsequently agreed between the parties) the loss was, in essence, the difference between the Commonwealth superannuation benefit which Mr Cornwell did in fact receive and the amount he would have received if he had joined Commonwealth superannuation at an earlier date.[60]

2.58 The Commonwealth has sought the assistance of actuaries, including the Australian Government Actuary (AGA), to assess the quantum of particular claims, particularly those that have been litigated.[61] Finance also provided details of the methodology used in quantifying claims. It was noted that it is possible to arrive at very different estimates of loss, even when starting with the same basic facts and even

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58 ACTEW Corporation Limited, *Submission 7*, p. 2.

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

60 Department of Finance and Deregulation, *Submission 9*, p. 4.

61 Department of Finance and Deregulation, *Submission 9*, p. 18.

when following the same broad approach. The main sources of uncertainty included assumptions around:

- the scheme at exit (CSS or PSS);
- the benefit structure (pension or lump sum); and
- the rate of interest to apply to saved member contributions.

Other items, including the treatment of reversionary pensions, also may make a difference to the estimate of potential loss.[62]

2.59 Finance provided the following example of different estimates of loss even when starting with the same basic information.

**Table 2.1: Estimates of loss**

| Matter Number | AGA loss estimate (preferred) | AGA loss estimate (comparator) | Claimant loss estimate |
|---|---|---|---|
| 1 | $428,912 | $417,849 | $522,829 |
| 2 | $94,087 | $458,927 | $1,196,590 |
| 3 | $165,613 | $238,881 | $295,5564 |

*Source:* Department of Finance and Deregulation, *Submission 9,* Attachment N, p. 5.

2.60 Finance stated that 'almost invariably, the claimant's loss estimates will be higher than AGA's loss estimates, sometimes significantly higher'.[63] Mr Edge commented:

> Depending on what assumptions are made—average salary, contribution rate, duration, earnings that they might have got, all those types of things—you can end up with vastly different numbers. The reason we use an actuary is so that they can develop models that come up with the most plausible option and, where we believe there is a meaningful prospect of liability, we can then make offers based on some form of reasonable quantum. I think the Australian Government Actuary was just trying to highlight that, depending on the assumptions you put in, you can end up with different answers for the same person.

2.61 Mr Edge went on to state that the general practice is that either the Commonwealth or, in the case of the litigated claimants, the lawyers representing the claimant, will seek expert advice on a quantum. If there is a disagreement on quantum, 'we may discuss those. If we agree on quantum, then we can settle the matter there.

62 Department of Finance and Deregulation, *Submission 9,* Attachment N, p. 4.

63 Department of Finance and Deregulation, *Submission 9,* Attachment N, p. 5.

Certainly both parties use experts to try to come up with what they believe is a reasonable sum.'[64]

***Committee comment***

2.62 The committee notes that the retirement incomes of employees who were not members of Commonwealth superannuation or joined Commonwealth superannuation sometime after they were actually eligible, are substantially affected in terms of the benefits now available to those employees. The committee understands that in respect of superannuation claims which are assessed as valid, the quantum of the loss may be considerable, although it varies in each case depending on the circumstances. The committee considers that these matters are best considered during settlement negotiations.

64 Mr John Edge, Acting Deputy Secretary, Asset Management and Parliamentary Services Group, Department of Finance and Deregulation, *Committee Hansard*, 5 May 2011, p. 46.

# 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.
>
> 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.

# 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

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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,

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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

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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

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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

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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

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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]

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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**

# 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

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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,

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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:

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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

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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:

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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]

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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.

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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.

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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**

# APPENDIX 1

## Submissions and additional information received by the committee

### Submissions

1 Australian Broadcasting Corporation
2 Ms Annette Holden
3 Superannuated Commonwealth Officers' Association (SCOA)
4 Mr Tony Melville
5 Dr Peter Gifford
6 Mr Peter Baker
7 ACTEW Corporation Limited
8 Mr Peter Muirhead
9 The Department of Finance and Deregulation, with 14 attachments
10 Name Withheld
11 Mr Richard Teague
12 Name Withheld
13 Mr Dave Allen
14 Snedden Hall & Gallop Lawyers
14a Supplementary Submission from Snedden Hall & Gallop Lawyers
15 Media, Entertainment and Arts Alliance
15a Supplementary Submission from the Media, Entertainment and Arts Alliance
16 ACT Government
17 Maurice Blackburn Lawyers
18 Mr Stephen Ordish
19 Mr Neil Hendy
20 Mr Austen Evans
21 Name Withheld
22 Mr Frank Coghlan
23 Community and Public Sector Union (CPSU)

## Additional information

1 The Hon Mr Ben Chifley, Treasurer, *House of Representatives Hansard*, 18 September 1942, Second Reading, Superannuation Bill 1942, pp 532–536, tabled by Mr Richard Faulks, Snedden Hall & Gallop Lawyers, at the public hearing on 5 May 2011.

2 Senator the Hon Ken Wriedt, Minister for Agriculture, *Senate Hansard*, Second Reading Speech, Superannuation Act Amendment Bill 1975, 3 June 1975, pp 12–13, tabled by Mr Richard Faulks, Snedden Hall & Gallop Lawyers, at the public hearing on 5 May 2011.

3 Department of the Treasury, Circular to all departments, 'Superannuation Act, section 4(5) – Temporary Employees', 20 June 1949, tabled by Mr Richard Faulks, Snedden Hall & Gallop Lawyers at the public hearing on 5 May 2011.

4 Letter from P Forster, to the Secretary, dated 22 September 1972, tabled by Mr Richard Faulks, Snedden Hall & Gallop Lawyers at the public hearing on 5 May 2011.

5 Letter and attachment from Mr Simon Lewis, Department of Finance and Administration, to Dr Ken Henry, Secretary of the Treasury, dated 13 July 2007, tabled by the Department of Finance and Deregulation at the public hearing on 5 May 2011.

6 Clarification to evidence given at the public hearing on 5 May 2011, by Mr Alan Greenslade, Department of Finance and Deregulation, provided on 24 May 2011.

## Answers to questions on notice

1 Superannuated Commonwealth Officers' Association, taken at the public hearing on 5 May 2011, provided on 29 May 2011.

2 Answers to 14 questions by the Department of Finance and Deregulation, taken at the public hearing on 5 May 2011, provided on 2 June 2011.

# APPENDIX 2

## Public hearing and witnesses

***Thursday, 5 May 2011***
***Committee Room 2S1, Parliament House, Canberra***

### Witnesses

**ACTEW Corporation Ltd**
Mr Mark Sullivan, Managing Director

**ACT Government**
Mrs Sue Lebish, Senior Manager, Legal & Insurance Policy Branch, ACT Department of Treasury

**Superannuated Commonwealth Officers' Association**
Mr Trevor Nock, Superannuation Advisor

**Snedden, Hall & Gallop Lawyers**
Mr Richard Faulks, Managing Director
Mr John Gordon, Barrister

**Media, Entertainment and Arts Alliance**
Mr Chris Warren, Federal Secretary
Ms Debra Hannan, National Claims Officer
Mr Don Cumming, ACT Branch President

**Department of Finance and Deregulation**
Mr John Edge, Acting Deputy Secretary, Asset Management & Parliamentary Services Group
Mr Alan Greenslade, First Assistant Secretary, Funds & Superannuation Division, Financial Management Group
Mr Philip Smith, Branch Manager, Asset Management and Parliamentary Services Group
Mr Guy Verney, Assistant Secretary, Special Claims & Land Policy Branch, Asset Management & Parliamentary Services Group
Mr Bruce Brown, Special Counsel