

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

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 managers 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

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

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

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,

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

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

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

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:

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

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.