## 1. LEGISLATIVE CHANGES TO FACILITATE THE JUST DETERMINATION OF LEGAL CLAIMS FOR LOST SUPERANNUATION BENEFITS

**Introduction:**

Senator Hon. Nick Xenophon has invited suggestions about options for legislative changes following the recent Senate Inquiry.

**Background:**

The changes are required to overcome difficulties encountered by former APS employees (and employees of Australian government agencies) and their dependents in recovering compensation for loss of Commonwealth superannuation benefits.

In summary it involves large numbers of present and former "temporary" employees of the Australian Public Service and various Statutory Authorities[1] who have been unable to participate, or had significantly reduced participation, in Commonwealth superannuation because:

(a) they were never informed of their eligibility to participate when they first became eligible to do so; or

(b) they were told by superiors, wages and personnel staff that they were ineligible.

As a result many of these employees did not apply to join Commonwealth superannuation when they were first eligible, resulting in varying periods of lost superannuation membership (sometimes for over 2 decades). Others never discovered they were eligible, and as a result never joined Commonwealth superannuation at all.

In 2007 the High Court of Australia decided a case involving loss of Commonwealth superannuation entitlements as a result of reliance on negligent advice.[2] There the majority of the Court (6-1) found that:

(a) the limitation period did not begin to run until the damage had first accrued; and

(b) damage did not accrue until the plaintiff would have first accessed his/her superannuation benefits (in short, the benefits remained contingent until all of the statutory criteria for their recognition were met, and that only occurred at the point of redundancy, retirement, death etc under the relevant Act).

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1 Some of these authorities were partially staffed under the *Public Service Ac 1922* (as amended). Others were fully staffed under the PSA, such as teachers and teacher assistants in the ACT Schools Authority. In other instances none of the staff were employed directly under the PSA, but were employed on generally similar terms to those applicable to PSA employees.

2 *Commonwealth v Cornwell* (2007) 229 CLR 519.

Unfortunately, this decision does not assist those employees who, even if they were aware of the *Cornwell* decision, were already statute barred at the time the decision was delivered. Nor does it assist (except as to the statute of limitations) those who *even now* are not aware that they (or their deceased spouses) were eligible to join Commonwealth superannuation because they were never told that they were eligible, or (as is often the case) were told that they were not eligible when in fact they were.

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

In many cases Commonwealth superannuation membership potentially provided benefits to dependent spouses and children of the affected employees. These "reversionary" benefits, like the underlying benefits of the employee, have also been greatly diminished by delayed membership in Commonwealth superannuation.

The reversionary beneficiaries however have been further affected because of the nature of their benefits and the uncertain state of the common law in relation to their claims. These claims all involve *pure economic loss*, a form of loss that negligence law only remediates in restricted circumstances. These reversionary beneficiaries are caught in a Catch-22 scenario because:

(a) Their claims are *contingent* upon the employee predeceasing them and leaving them as dependants (as a result, their claims cannot be litigated *before the death* of the employee as in negligence law a cause of action does not arise until damage is first suffered); but

(b) Their claims probably cannot be pursued *after the death* of the employee as they were not personally the recipients of any negligent advice (the negligent advice was communicated to the deceased employee, not them) and therefore they cannot show that they *personally relied on the advice to their detriment*).

At present the common law does not clearly recognise a claim for damages of the type suffered by reversionary beneficiaries, and the Commonwealth has consistently denied there is any entitlement for such beneficiaries.

While it is possible that future decisions will clarify their position, no guarantee exists that it will occur in a manner that is consistent with their needs. Nor is there any reasonable prospect that the law will be clarified soon, accordingly, even if the common law does develop sufficiently to accommodate their claims, many more will be statute barred by then.

**Suggested Amendments:**

We put forward the following options for amendments:

## 1. Reliance on Limitation Acts:

Each of the States and Territories have legislated time limits (limitation periods) for commencing specific types of action. These are called *Limitation Acts.* While their methodology sometimes differs, they all currently require proceedings for damages in tort for pure economic loss to be commenced within 6 years of when the cause of action arises.

There are two options for legislating, or otherwise acting to limit the reliance currently being placed upon Limitation periods in these cases:

### (a) *Amending the Legal Services Directives:*

The Commonwealth has implemented *Legal Services Directives* to regulate the way in which litigation is conducted by all agencies regulated under the *Financial Management & Accountability Act 1997 (Cth)* (FMA). An amendment to the *Legal Services Directives* can easily and quickly be made by the Attorney General under s. 55ZF(1) and (2).

At present the *Legal Services Directions*[3] of the Attorney General provide:

> **8. Reliance on limitation periods**
>
> *Agencies are to get approval before waiving or agreeing to extend limitation periods*
>
> 8.1 A defence based on the expiry of an applicable limitation period is to be pleaded by an FMA agency, unless approval not to do so is given by the Attorney-General. Approval will normally be given only in exceptional circumstances, for example, *where the Commonwealth has through its own conduct contributed to the delay in the plaintiff bringing the claim.*

The words in italics suggest that the AG clearly contemplates a waiver of limitation periods by the Commonwealth where the Commonwealth has "...contributed to the delay in the plaintiff bringing he claim". That said, the Commonwealth has continued to rely on limitation periods as a defence in every case where it is arguably open to the Commonwealth to do so.

This is likely because the Directives require the Commonwealth's solicitors to do so in all cases unless approval is first given by the AG not to.

We suggest that one option would be to modify the directive to produce a limitation holiday and thereafter to reverse the onus, so to speak, on the approval issue.

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[3] Made under s. 55ZF of the *Judiciary Act 1903.*

We suggest the following modification to the existing *Directive*:

> *8.1A A defence based on the expiry of an applicable limitation period is not to be pleaded or maintained by an FMA agency where the claim:*
>
> *(a) is made by a former Commonwealth employee or any dependent of that employee for damages for lost Commonwealth superannuation benefits; and*
>
> *(b) the claim alleges the employee failed to join Commonwealth superannuation because*
>
> *(i) the employee was not given timely advice about his or her eligibility to join; or*
>
> *(ii) the employee was given advice that the employee was not eligible to join when in fact he or she was so eligible;*
>
> *(c) the claim is or was commenced within 6 years of the delivery by the High Court of Australia of the decision in Commonwealth of Australia v Cornwell [2007] HCA 16 (20 April 2007).*
>
> *8.1.B A defence based on the expiry of an applicable limitation period is not to be pleaded by an FMA agency in any claim of a type referred to in 8.1A(a)-(b) that is to commenced after the expiration of the period referred to in 8.1A(c), unless approval to do so is given by the Attorney-General. That approval will not normally be given where there is evidence available to the Commonwealth that it has through its own conduct contributed to the delay in the plaintiff bringing the claim.*

Because the Directives only apply to Commonwealth agencies regulated under the FMA, it does not apply to those prior statutory authorities or departmental agencies that have ceased to exist (unless they have been taken over by existing agencies) or have been corporatised or transferred to other bodies politic, such as the ACT. That said, the existing Directives do still apply to the majority of cases in which the Commonwealth is a potential defendant.

While the *Directives* have force of law, in the sense that they are binding on all persons performing "Commonwealth legal work",[4] they are not readily enforceable by a plaintiff.[5] That said, it is unlikely any provider of Commonwealth legal work would knowingly fail to follow any directive once issued.

For this reason a simple change in the *Directives* is likely to have a significant beneficial effect on the current limitation problem.

(b) <u>*Amendments to State & Territory Limitation Acts:*</u>

Uniform amendments to the various *Limitation Acts* would entirely cover the field of potential defendants (such as the ACT and corporatised former Commonwealth agencies, such as the TAA, ACTEW, etc).

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4 As defined in s. 55ZF(3).

5 See s. 55ZG(2)-(3).

We do not suggest this as an alternative to amendments to the LSD, but as a supplement to it (recognising that this would be more difficult to achieve in the short term given that it would require the co-operation of the States and Territories and involve delays associated with legislative timetables etc.

An amendment of the following nature (with necessary changes according to the structure of the relevant Act) would suffice:

**Special Limitation Period for claims for Loss of Commonwealth Superannuation Benefits:**

(1) *Notwithstanding any provision to the contrary in this Act or any other written law, a defence based on the expiry of any applicable limitation period is not to be pleaded or maintained where the claim:*

*(a) is made by a former Commonwealth employee or any dependent of that employee for damages for lost Commonwealth superannuation benefits; and*

*(b) the claim alleges the employee failed to join Commonwealth superannuation because*

*(i) the employee was not given timely advice about his or her eligibility to join; or*

*(ii) the employee was given advice that the employee was not eligible to join when in fact he or she was so eligible; and*

*(c) the claim is or was commenced on or before the latest of the following:*

*(i) 2 April 2013; or*

*(ii) six years from the date when cause of action first arose; or*[6]

*(iii) if the period referred to in (ii) above has already expired, three years from when the claimant first discovered or ought reasonably have discovered the following material facts of a decisive character in relation to the claim:*[7]

*(A) that the claimant has a cause of action based on circumstances referred to in (b)(i) or (b)(ii) above; and,*

*(B) the identity of the defendant against whom the cause of action is maintainable; and,*

*(C) the fact and magnitude of loss sustained by the claimant as a consequence of the circumstances referred to in (b)(i) or (ii) above. .*

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6 This provision makes explicit that the limitation period in (i) is not intended to be exclusive. Some potential claimants have not as yet retired from the workforce and accordingly their cause of action has not as yet accrued. In this regard see the decision in *Comwell's Case* referred to previously.

7 This provision is suggested given the way in which these claimants have been denied access to a remedy in the past, namely through ignorance of their rights caused by the actions of their employer. While many potential claimants may have become aware of the issue in the ACT by reason of local coverage of the Senate Inquiry, the media coverage has been much less in other States and Territories. Accordingly, it is likely that large numbers of potential claimants are still unaware that they have lost benefits as a result of their former employer's conduct.

An amendment such as this would not impede any other defence available to a defendant, but would provide an immediate but limited time to enable claimants to bring proceedings in circumstances where they have already become statute barred by reason of ignorance about their rights where that ignorance is attributable to the defendant's breach of duty.

## 2. Resolution of Uncertainty Regarding Status of Reversionary Spouse/Dependent Claims:

The right of a dependent to claim damages for loss of reversionary superannuation benefits is roughly analogous to the situation where a dependent may now seek damages for loss of support in a wrongful death case.

Prior to the introduction of the *Fatal Accidents Act 1846* (UK),[8] and the more recent analogues of this Act in Australia, dependents had no remedy where a breadwinner died as a result of the wrongful action of another. This was because a wrongful death was considered, at common law, to cause only pure economic loss to dependents and that type of loss was not considered recoverable.

The legislature stepped into the breach and created a special right of dependents to recover compensation for loss of support. A similar initiative is required here, otherwise there is a real risk that dependents, whom Commonwealth superannuation was clearly designed to benefit, will be left without a remedy.

Each of the *Superannuation Acts* provides, in certain cases, for benefits to be paid to a spouse or children on the death of a member[9] of the fund.[10] Where a member dies leaving *both* a spouse and dependent children the benefits increase according to formula in the Acts, though the benefits are generally payable to the spouse.[11] Where the member dies leaving dependents not all living together then the 1990 Act provides for different payments to each.[12] Similarly, separate benefits are payable to orphans.[13]

The majority of current claimants are married males in or approaching retirement age that are statistically likely to be survived by their spouses. Few still have dependent children. That said, the permutations of the possible categories of claimant (when one factors in children) do need to be considered in the drafting stage.

Further, differences in structure and language between the various Acts will have to be taken into account in finalising any amendments. What follows therefore is a suggested model for legislative amendment, rather than a definitive amendment that can immediately be adopted "as is".

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8 Often called *Lord Campbell's Act*.

9 In keeping with the language of the times, a member is called a "pensioner" in the 1922 Act, and "eligible employee" in the 1976 Act and a "person" a "member" or a "retirement pensioner" etc in the 1990 Act, depending on the context.

10 See for example s. 46-48 *Superannuation Act 1922* (1973 compilation); Part VI of the *Superannuation Act 1976*; and Part 5 of the *Rules for the Administration of the Superannuation Scheme* made under the *Superannuation Act 1976*.

11 See Part VI Division 3A of the 1976 Act.

12 See for example Rule 5.1.6.

13 See Section 48 of the 1922 Act; Part VI Division 4 of the 1976 Act; and the Rules 5.1.4-5 of the scheme Rules to the 1990 Act.

We suggest that a provision be inserted into each of the Superannuation Acts[14] to explicitly recognise a right of action analogous to that found in the various State and Territorial "wrongful death" dependency provisions.

The suggested model for amendment is as follows:

**Right of a Dependent to Claim Damages for Loss of Reversionary Benefits in Certain Circumstances:**

(1) A dependent of a deceased employee who was eligible to apply to join Commonwealth superannuation under this Act may take action to recover damages for financial loss of reversionary superannuation benefits that would otherwise have been received by that dependent where that loss would not have arisen but for:

(a) the employer providing advice to the employee that he or she was not eligible to apply to join Commonwealth superannuation when in fact he or she was so eligible; and

(b) where the employee placed reasonable reliance on that advice and did not join or delayed joining Commonwealth superannuation for the benefit of the employee and his or her dependents;

as if the dependent were the employee and notwithstanding that the dependent was not personally aware of the advice that was provided to the employee and did not personally place reliance on the advice.

(2) Every action in (1) shall be for the benefit of all dependents presently eligible to benefit or who would, at the time of the claim, have been presently eligible to benefit but for the matters in (1)(a) and 1(b) above, and shall be brought in the name of the executor or administrator of the deceased employee for the benefit of all parties then eligible to benefit (if more than one) and divided between the parties in such shares as the court apportions.

(3) If no action is brought by an executor or administrator within six months after the death of the employee then the action shall be commenced in the names of all persons who would have been presently eligible to benefit but for the matters in (1)(a) and 1(b).

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[14] *Superannuation Act 1922*, *Superannuation Act 1976*, and the *Superannuation Act 1990*. Other Superannuation Acts have been introduced but they are not likely to be of relevance at this stage.

## 2. PROPOSED EXPEDITED PROCESSES FOR DEALING WITH CLAIMS THROUGH THE COURTS AND BY UTILISING ALTERNATIVE DISPUTE RESOLUTION PROCESSES.

In terms of expediting resolution of claims for Commonwealth superannuation benefits lost or diminished as a consequence of negligence, negligent misrepresentation or breach of a statutory duty, the suggestions that we make are;

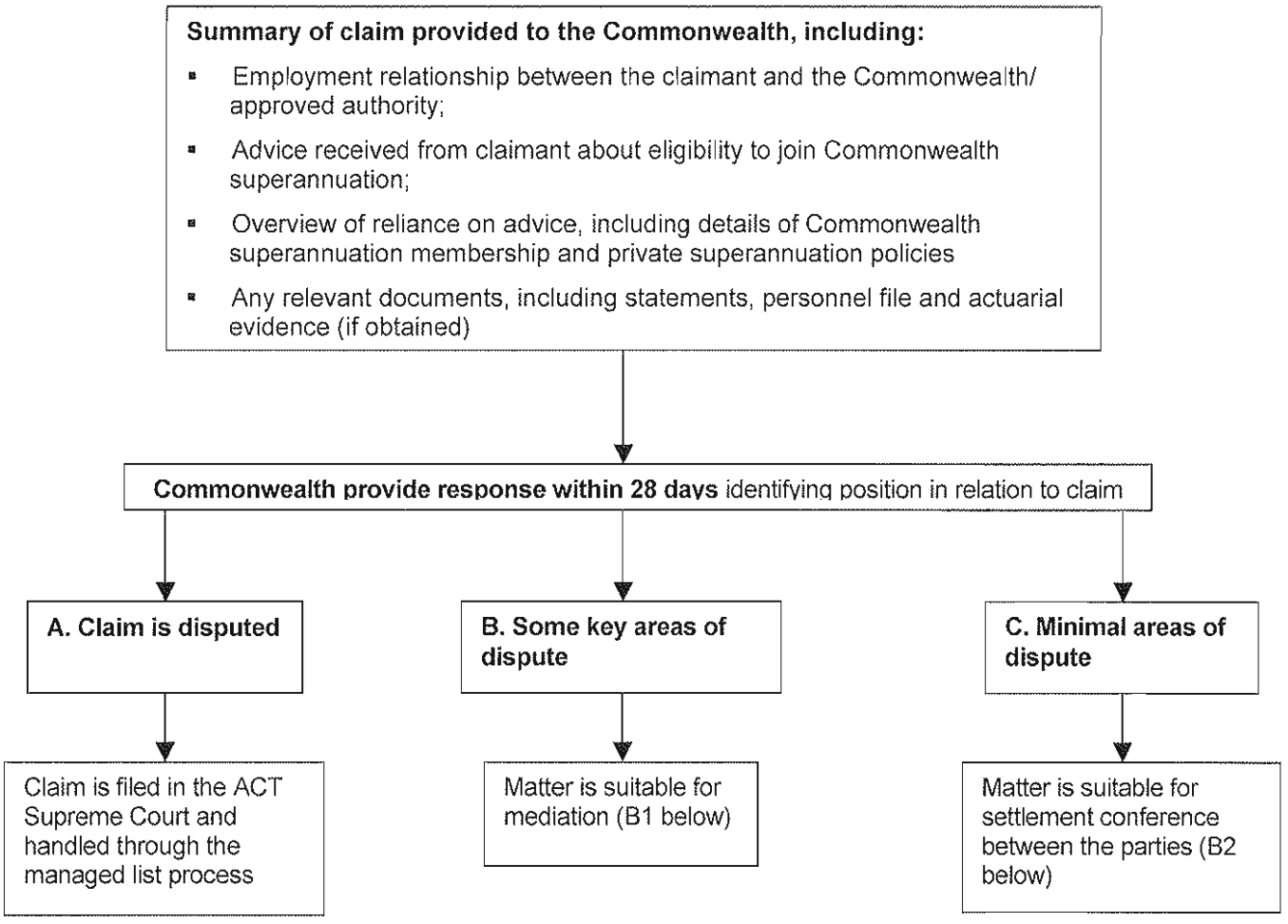
1. Locate or appoint a Federal Court judge in the ACT with a docket clear for 18 months designated to deal with Commonwealth superannuation claims as a managed list. We attach a suggested pro forma form of directions as 'A' below;

2. Set up an alternative dispute resolution process involving a mediation process similar to that which has already been successful in resolving some existing claims. The steps contemplated in such a process are attached as 'B'.

### 'A' – pro forma directions for claims dealt with in the managed list

1. The applicant file and serve a statement of Claim within 14 days;
2. Defendant(s) file and serve Defence(s) within a further 30 days;
3. Any Reply and/or request for further and better particulars of any pleading be filed and served within 28 days of the service of a Defence;
4. Any further and better particulars requested be filed and served by (further 28 days);
5. All parties file and serve an affidavit verifying list of documents on or before (further 28 days);
6. Any Interrogatories for the examination of any party be filed and served by (further 35 days);
7. Answers to any interrogatories rendered be filed and served by (further 45 days);
8. Applicant file and serve witness statements by (further 28 days);
9. Copies of expert reports, including actuarial reports upon which any party shall rely be served on or before ( further 30 days);
10. The plaintiff deliver a schedule of differences between consulting actuarial reports on or before (further 14 days);
11. Consulting actuaries meet to attempt to resolve differences before (further 30 days)
12. A mediation be held on or before (within further 30 days);
13. This summons be adjourned to (7 days after mediation);
14. There be liberty to apply;
15. Costs be costs in the proceeding.

## 'B' – administrative process



## B1 - Mediation timetable

1. The Defendant(s) has 21 days to undertake initial investigations and request any further details of the claim.

2. The claimant has 21 days to provide any requested details, including actuarial report if not already provided.

3. The parties have 28 days to serve any further relevant documents.

4. The claimant must serve any witness statements within 21 days.

5. The defendant(s) must serve any witness statements within a further 14 days.

6. Mediator to be selected and briefed within 21 days.

7. Pre-mediation conference within 14 days.

8. Position papers exchanged within 7 days.

9. Mediation.

## B2 – Settlement conference timetable

1. The Defendant(s) has 21 days to undertake initial investigations, serve any relevant documents and request any further details of the claim.

2. The claimant has 21 days to provide any requested details, and serve any further relevant documents (including actuarial report).

3. Settlement conference must be arranged for a time no longer than 28 days from the information in step 2 being provided, or if no additional information is provided within 28 days of step 1.

4. Settlement conference.