



ACT
Government

Chief Minister, Treasury and
Economic Development

Mr Michael Willcock
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Commonwealth Grants Commission
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Michael
Dear Mr. Willcock

Further ACT Response to New Issues for the 2018 Update

I am pleased to forward to you further advice regarding the ACT's request for a reinstatement of the GST distribution adjustment for the Commonwealth Superannuation Scheme (CSS) and expansion of it to include the Public Sector Superannuation Scheme (PSS), in the context of the 2018 Update.

I understand as a follow-up to the receipt of the ACT submission, your officers approached the Treasury seeking a copy of the Australian Industrial Relations Commission (AIRC) decision of 29 June 1999 as referenced in the submission.

As you may recall, the ACT Government argued in the submission that it did not have policy control over whether to close employee access to the PSS as it was directed by the AIRC to cease attempts to close access to the PSS, at the request of a number of labour unions, most notably the Australian Nurses Federation (ANF):

- This argument was made on the basis of a rereading of submissions that the ACT Government had made to the Commonwealth Grants Commission (CGC) as part of its *2004 Review of GST Revenue Sharing Relativities (2004 Review)*, which posited that the ACT Government had been directed by the AIRC on 29 June 1999 to continue to allow members of the ACT Public Service to access the PSS as a result of industrial action taken by labour unions.

Although this issue was ostensibly dealt with by the CGC's decision in the 2004 Review to not include an adjustment for the PSS, the CGC's decision was premised primarily on the materiality of such an adjustment; the AIRC decision was not further scrutinised in the CGC's deliberations during the 2004 Review and the issue of whether the ACT Government had policy choice on whether to continue to allow its employees to access the PSS was peripheral compared to materiality considerations in the CGC's final decision.

In compiling the 2018 submission, current ACT Treasury officers had no reason to sight the documentation and thus included the AIRC decision as one of several arguments in the 2018 CSS/PSS submission, with the understanding that relevant documentation already rested with the CGC itself, or could be located *post hoc* and made available on demand by any party.

As you would expect, the officers that were responsible for the authoring of the 2004 Review submissions have largely left the ACT Public Service.

ACT Treasury officers have subsequently liaised with ACT industrial relations officers for advice. This included acquiring records from Fair Work Australia.

- Parties then reviewed the files connected with a number of cases brought to the AIRC regarding the ACT Government's attempts, initiated in 1997, to change the superannuation arrangements for the ACT Public Service.
- The case files illustrate that the ANF (on behalf of other unions as well as themselves) and the ACT Government settled the dispute and that the ACT Government agreed to not pursue an exclusion from the PSS scheme. (See attached documents).

The ACT industrial relations officers have indicated that parties to a dispute reaching a settlement is in line with how the AIRC operated and how parties approached hearings with the AIRC; preferring to avoid the AIRC issuing directions and instead, coming to ostensibly mutual agreement in circumstances where it is clear that directions will be issued if a given condition is not met. This in effect constitutes the decision of the AIRC.

The wording of the transcript of the hearing by the AIRC between the ACT Government and the ANF on 29 June 1999 suggests that the ACT had its hand forced:

- *The transcript indicates that the ANF was seeking orders from the AIRC with respect to superannuation preventing the ACT Government from seeking to remove access to the PSS (C 90223, p. 13, paras 5, 10.) and moreover, that the hearing had to, at minimum, deliver an interim order with respect to nurses and the ACT Government's Health portfolio.*
- *The transcript goes on further to state that after the ANF wrote to the ACT alerting it of ANF's intent to pursue AIRC orders at the 28 June hearing, negotiations had occurred between the ANF and Health portfolio on the subject of the quantum of employer contribution in any future default fund if choice of fund were implemented.*
- *After these negotiations had taken place (but, according to the transcript, before they had been finalised), the ACT Government proceeded to announce (on "Friday" i.e. 25 June 1999) it would no longer be seeking to close access to the PSS for members of the ACT Public Service.*

Of most importance, what the transcript did indicate was that the ACT Government and ANF were intending to continue further negotiations after the 29 June hearing on *"whether we could come to agreement on orders that [the ANF] could come to the [AIRC] with in the event that the [ACT] Government activated its request to the Commonwealth [to be excluded from the PSS] while the current enterprise bargaining agreements were in place"* (C 90223, p. 16, paras 5, 10.):

- The interpretation of this transcript is that it stands to reason that the rapid turnaround between negotiations with the ANF and announcement of the ACT ceasing to seek an exclusion from the PSS was driven by a credible belief that had the ACT Government not agreed to cease seeking changes to superannuation, the AIRC would have issued at minimum an interim direction to the ACT Government to do so.

Therefore, with regard to the CSS and PSS adjustment submission, it stands that the ACT did not have policy choice in maintaining access to the PSS, due to the ACT Government pre-emptively acting in anticipation of a direction.

I trust this information will assist the CGC in its further deliberations on this important issue for the ACT Government.

The circumstances prevailing at the time of the ACT's transition to self-government, including creating and bedding down a separate public service while transitioning to full fiscal equalisation, was fraught with difficulties, and changing government employee superannuation entitlements a step too far for the times. At the end of the day the ACT is seeking that the Commission also apply a degree of broad judgement to its claim.

Yours sincerely



David Nicol
Under Treasurer

10 November 2017

