

To:  
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Treasury  
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I am writing to make comment about the proposed *Income Tax Assessment Act 1997 Superannuation Industry (Supervision) Act 1993 Treasury Laws Amendment (Measures for Consultation) Regulations 2023*.

The regulations above, are written to complement Schedule 9 of the *Treasury Laws Amendment (2022 Measures No. 4) Bill 2022* (the Bill) that sits before Parliament currently.

Submissions have been made by various entities to the above Bill, however the respondents missed some vital information that is pertinent to the reasons why the Douglas case won their day in court.

## Issues

An invalidity benefit is not a lifetime pension and is only paid on the grounds of early retirement due to invalidity (Mental and physical ailments that preclude the member from being able to continue in paid employment for which they are suitably qualified by training, education or experience.) The purpose of such a benefit is different to that of a retirement benefit. It is not an automatic entitlement one gets by reaching retirement age.

The invalidity benefit is reviewable and can cease and is not (despite the official position it is) a lifetime pension. This was confirmed in Douglas.  
A lengthy process of assessment and medical certification of invalidity conditions must be undertaken to become entitled to the benefit.  
Many defined benefit funds have statutory provisions that the benefit can be reviewed and cease. Through the court process it was identified by The Hon. J A Logan RFD, SC Federal Court Judge, that the taxation treatment of Invalidity benefits was akin to jamming a square peg in a round hole. Invalidity benefits have been lumped in with guaranteed lifetime retirement benefits when that is not their true nature, form and characteristic. It could be said that Schedule 9 and the relevant Regulations are attempting to shave a little more off the peg to make it fit.

During the Senate Economic Committee hearing, Tony Negline CA, Superannuation Leader, Advocacy and Professional Standing, Chartered Accountants Australia and New Zealand, cautioned the government on Schedule 9, insisting that this is another band aid approach. There are issues with the way these benefits are treated and he asked the Government to pause Schedule 9. Bradley Campbell the Author, has requested Treasury and Government take a step back and look at what these benefits actually are and what the design of the funds entail. Those requests went unheard.

Superannuation tax laws were drafted with Occupational Superannuation (OSS) in mind. Defined benefit funds have been excluded from the same treatment of other OSS for what reason is unknown. It is suspected as suggested, such benefits have just been lumped together with other Defined benefit 'pensions', when in reality they are not the same.

Defined Benefit members, particularly those in Defence, have no choice of Income protection Insurance. It is thrust upon them and part of their entitlements upon joining defence. Other members of society can obtain Income protection either within their super or outside.

A civilian who is injured at work, could receive a lump sum paid at once with a tax free component in recognition of the compensation aspect.

Veterans' are forced to receive a fortnightly amount that is reviewable, but taxed as though it is a guaranteed lifetime pension.

They are penalised for receiving their retirement benefit before retirement age, when the benefit is not an ordinary retirement benefit.

It is a mess that desperately needs considered action rather than band aid fixes.

Submissions to the Senate Economics committee were ignored. Rather a process of confirmation bias was undertaken and the report did not reflect the concerns of interested parties. Those with opposing views were not invited to talk to the committee.

This link shows the process and the unashamed direction of witnesses and their responses. <https://www.youtube.com/watch?v=117ogQDYWeU>

Schedule 9 (parts of) seeks to turn other Defined Benefit invalidity benefits back into Superannuation income streams. Particularly those not explicitly covered by the Douglas decision (MSBS and DFRDB post 20th Sept 2007).

## Rule of LAW

The issue we have faced is the lack of regulation of current laws by agencies tasked with such authority.

The ATO has not enforced the application of the law as decided by the Full Bench of the Federal Court in Douglas.

The Commonwealth Superannuation Corporation has not complied with its obligations as a regulated fund to abide by all rules and regulations that govern it.

ASIC, AFCA, APPRA and Members of Parliament have all ignored calls by veterans to enforce the law as it stands.

Now we have a retrospective piece of legislation artificially turning benefits back into Superannuation Income streams when they don't meet the legislated requirements to be treated as such.

To be a Superannuation Income Stream, the benefit or pension must meet the definition of a pension as defined in the SUPERANNUATION INDUSTRY (SUPERVISION) REGULATIONS 1994 - REG 1.06 Meaning of pension (Act, s 10) (SISR, 1.06)

One such requirement as found in Douglas is:

*(9A) Rules for the provision of a benefit (the **pension**) meet the standards of this subregulation if the rules ensure that payment of the pension is made at least annually, and also ensure that:*

Other defined benefit invalidity benefits fail to meet the same standard.

The principle I am talking about has been acknowledged in the EM (part 2) listed on your website:

*Before the Douglas decision these funds or schemes may have self-assessed and reported many of these pensions as a CDBIS, most likely as lifetime pensions covered in item 1 in the table of subsection 294-130(1) of the ITAA 1997. Applying the common law principles of the Douglas decision, many of the permanent incapacity defined benefit pensions are to be considered superannuation lump sum benefits. Consequently, those affected pensions would not have been superannuation income streams that could satisfy requirements as a CDBIS, potentially since 1 July*

*2017 when managing funds could first assess the pension as a CDBIS following the introduction of the framework in Division 294 of the ITAA 1997.*

It is evident policy makers acknowledge that funds have self assessed many of these benefits as Capped Define Benefit Income Streams, purporting the benefit is a lifetime pension.

This is not the case. Douglas found such benefits are not lifetime pensions and not a pension as defined in the SISR.

CDBIS pensions are taxed under the defined benefit income tax regime.

This regime deals with guaranteed lifetime pension such as retirement benefits.

Currently, reviewable invalidity benefits do not meet the criteria set by the regulations, yet the laws are applied regardless.

It is evident the law has been ignored since the 4th January 2021, when the Douglas decision was not appealed.

The ATO has only very recently started to write to affected veterans under the Douglas decision. Up until now, those veterans have had their Invalidity benefits taxed as Superannuation Income Streams rather than Superannuation Lump Sums as construed in Douglas.

### **ADF Cover**

ADF cover is a scheme with a similar construct as MSBS and DFRDB.

Members who are in receipt of an invalidity benefit are subject to reviews and the benefit can be cancelled.

ADF cover is the insurance component (TPD) of the members superannuation, yet is taxed as though it is not.

It is reported that this cover is provided as it is difficult to obtain your

own. <https://www.csc.gov.au/Members/Funds-and-products/ADF-Super/ADF-Cover>

### **Conclusion**

These regulations plainly seek to cement the inequity in taxation of Injured ex members of our defence Force.

The EM confirms the common law application of Douglas to schemes such as ADF cover, yet the Government of the day has failed to respect the Separation of Powers and ensure the ATO applies the law currently in effect.

Parliament has failed in it's duty to ensure the legislation being drafted is fair and has failed to undertake thorough consultation with affected parties.

This is an issue that affects the most disabled veterans that have served their country.

To be taxed on the compensation paid for TPD is not consistent with civilian TPD taxation treatment.

The legislation and its effects would make the decision to join the Defence Force a much harder one when armed with the facts of how you will be treated and taxed if you are injured.

I am open to further discussions on this subject.

Kind regards,

Bradley Campbell



Veteran advocate