There is but one thing of real value – to cultivate truth and justice, and to live without anger in the midst of lying and unjust men".

Marcus Aurelius

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12 June 2023

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Chartered Practising Accountants Association Australia Association
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Dear Sir/Ma'am,

Exposure Draft - Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Military Superannuation Benefits

References:
A. The Douglas Case – A Enduring Legal Case That Demands Fairness and Equity For All Medically Retired Veterans and Commonwealth Officers – updated 4 May 2023 (https://bit.ly/3IDyx3s)
B. Combined Senate Submission – Thornton/Campbell – dated 6 Dec 2022 (https://bit.ly/43jGwKH)
C. Formal obligation to produce a Regulatory Impact Analysis and Financial Impact Statement, (https://bit.ly/43io19q)
D. Bills Digest – Schedule 9 Treasury Laws Amendments (No 4 2022) Bill 2022 (https://bit.ly/3Mvj2vh)
E. 'Meaning of a Pension – Sub-Section 3(1) of the Act' – Reg 3F Occupational Superannuation Standards Regulations, 1987 (https://bit.ly/3Wu1DYx)
F. 'Meaning of a Pension (Act, s10)' - Reg 1.06 Superannuation Industry (Supervision) Regulations 1994 - (https://bit.ly/3pY3RDk)

G. 'Vesting Standards' - Reg 8(1A) Occupational Superannuation Standards Regulations, 1987 (https://bit.ly/3WxshzM)
H. Ministerial Statement – 'Personnel Wastage Of The Defence Force' – Minster for Defence Science and Personnel – The Hon Mr David Simmons MP – dated 11 May 1989 (https://bit.ly/42s9PtY)
I. Cole Review – Insurance & Compensation Statement – June 1990 (https://bit.ly/3qmj5lN)
K. Cole Report – Actual and Prospective Service – June 1990 (https://bit.ly/3WRxa77)
L. Omnibus Bill – (containing: Commonwealth Employees' Rehab & Compensation Amendment Bill / Tax Laws Amendment (Superannuation) Bill) – 24 Nov 1992 (https://bit.ly/3MHJOB1)

INTRODUCTION

1. Thank you for the opportunity to contribute to this public consultation, and for your kind considerations in providing a time extension due to the Author's personal circumstances. This was greatly appreciated!

2. At the outset, and for all the reasons provided in Refs A & B., this submission does not at all support or endorse the validity of this proposed Exposure Draft Regulation, or indeed, the unfounded nature of the draft Bill that underpins it, that being - *Schedule 9 - Treasury Laws Amendment (2022 Measures No. 4) Bill 2022.*

3. The Government's actions to undermine a 30-40-year policy intent of the superannuation system is antithesis to the robust architecture and broad legislative framework introduced by the Hawke/Keating Governments, but for which now, the Albanese Government attempts to dismantle. Notwithstanding the massive error in public administration that dwarfs the Robo-debt scandal, the Government now attempts to retrospectively change and deny the already accumulated rights of approximately 32,000 severely disabled Military and Commonwealth Officers (10,000 of whom are Veterans). If this proposed change goes ahead, then it will surely breach the Constitutional rights of every retiree, because an acquisition of property on unjust terms is now contemplated.

4. In addition, the proposed change serves to deny the prospective rights of every current contributor to Military and Commonwealth superannuation schemes, where if in the unfortunate future event any of those contributors fall prey to employment-ending disability, then they too would be significantly disadvantaged.

5. Critically, Schedule 9 serves to eliminate the tax-free compensatory element of superannuation for public sector employees (including Veterans), which for decades has been a main stay in the Australian superannuation system. Sadly, it seems Treasury officials, themselves contributors to public sector superannuation, have not worked out that they are blindly conspiring against their own future prospective entitlement where current law conveys a tax-free compensatory element that is integral to their superannuation.

6. Given the magnitude of what is being contemplated here by Parliament, then it is totally unacceptable that a detailed Regulatory Impact Analysis and a detailed Financial Impact Statement has not been forthcoming from Treasury for public scrutiny. Both the Chairman of the Australian Council of Public Sector Retiree Organisations (ACPSRO), and likewise this

Author, have constantly petitioned the Government for these documents, but to no avail. Instead, we read one-line dismissive statements that such analysis is not required. The very fact that this analysis has not been undertaken and formally provided in accordance with Ref C (page 14 refers)., suggests that there is something very serious to hide.

7. In response to this consultation, what follows is a brief history that clearly illustrates and proves what the Parliament's original policy intent was, with respect to "death and disability", in the context to superannuation. In turn, it then reveals the ineptitude and malfeasance of the Retirement Benefits Office, now Commonwealth Superannuation Corporation (CSC), and the Commissioner of Taxation (ATO), who for decades have failed in their compliance and regulatory responsibilities with respect to the Superannuation Industry (Supervisory) Act 1993 (SISA) and the Income Tax Assessment Act 1997 (ITAA1997), and that of the preceding Occupational Superannuation Standards Act of 1987 (OSSA) and the Income Tax Assessment of 1936 (ITAA 1936).

8. In addition, the Author will briefly attempt to provide appropriate remedies to the ITAA 1997 (i.e., for the "Proportioning Rule" and the 10% Tax Offset") that should be immediately implemented to address current identified deficiencies for the superannuation accounts of approximately 12,000 Douglas Case recipients. In doing so, these structural amendments then achieve fairness and equity for not only Douglas Case recipients, but for all 32,000 other recipients (in addition to Douglas) who are affected by this issue also.

GENERAL

History Proves The Inconvenient Truth

9. In what can only be seen as a desperate attempt to cover up decades of what is arguably Australia's largest error in public administration (i.e., in financial liability terms), Treasury & Finance have perpetuated the false and fictitious narrative that it was always "the policy intent" that Public Sector Superannuation Invalidity Benefits were to be income streams / pensions. This fictional discourse is repeated at least 10 times within the Bills Digest (please see Ref D), which in turn, has increasingly permeated the political mindset that is it a fact, when in fact, history clearly shows otherwise.

10. Notwithstanding the disclaimer provided by the Parliamentary Library that the Bills Digest was a best effort, the caveat that the Digest couldn't be relied upon was shrewd, because any modicum of historical research clearly proves that such notions of the supposed "policy intent" are highly misleading and false. Why? Because on the 11 May 1989, in response to the Parliamentary Joint FADT Committee (JPCFADT) Cook Review, which reported back to Parliament in Nov 1988 on the significant 'Defence Force Personnel Wastage' issues at the time, The Hon. David Simmons MP - Minister for Defence Science and Personnel – provided a Ministerial Statement that was read in both Houses of Parliament. That statement reinforced the Government's clear and unequivocal intent that there would be no exclusions from the Government's new egalitarian Superannuation System, where the Minister stated in part:

> ***'All public sector superannuation schemes, including DFRDB, are required to conform to the Government's occupational superannuation standards. With regard to the DFRDB scheme, the only significant change which may affect benefits relates to the reasonable benefit limits which are to be set by the Insurance and Superannuation Commission. These limits relate to the***

> ***size of lump sums and pensions on retirement, relative to the level of salary at retirement. While these limits are yet to be set for the DFRDB scheme, they are likely to affect only a very few senior officers. I will make an announcement on the effect of the reasonable benefits limits when they are decided.'***

AND … further with respect to the JPCFADT's review

> ***'The Committee said that any review of the DFRDB scheme must be on the basis of no detriment to current contributors. I agree. Let me be quite clear about this. Subject to the effect of the superannuation standards I have just mentioned, the Government gives an ironclad guarantee to those presently in service that the benefits of the existing DFRDB scheme for which they are contributing will remain available to be taken up when they leave the Services.'***

11. On 29 August 1989, the Minister again reinforced the Government's clear policy stance that there was to be strict observance of the prescribed standards within the Regulations of the OSSA when he commissioned the Cole Review concerning the review of the Defence Force Retirement & Death Benefits Scheme (DFRDB). The Terms of Reference of that Review stated in part:

> ***'The Review Board is to have regard to the particular nature of Defence Force employment, the extent to which the arrangements can be readily understood and to the costs of any proposed arrangements, including administrative costs, as well as to the Government's decision that all public sector superannuation and retirement benefit schemes must comply with the occupational superannuation standards, including the reasonable benefit limits.' (underline emphasis added)***

12. In June 1990, the Cole Review delivered its report, where it clearly articulated the well understood principles of 'occupational superannuation insurance' and 'compensation' for invalidity benefits that were already apparent from 1987, not only for the 1973 DFRDB Scheme (please see excerpt at Appendix 1 Annex B, at Ref B), but for superannuation more broadly. The report stated in part, on page 4, with respect to the new proposed and devised Military Superannuation Benefits Scheme (MSBS), that:

> ***'… Finally, it would provide insurance against invalidity and death with the amount of benefit payable providing compensation for the retirement benefit foregone because of premature termination of service.'*** *(emphasis added)*

AND on page 24 of the same report, and on the back of the Government's clear policy intent:

> ***'The Insurance and Superannuation Commission (ISC) has advised that it is prepared to regard the DFRDB Scheme as a "complying scheme", despite the fact that, on a stand-alone basis, its design does not comply with the Occupational Superannuation Standards (OSS), provided members have the option to transfer to a new scheme, which fully complies with the Standards.'***

13. On the 24 Nov 1992, the Government then introduced an Omnibus Bill that in part concerned a change in the name and nature of the then *Commonwealth Employees Rehabilitation and Compensation Act 1988* (CERCA), now known as the *Safety Rehabilitation and Compensation Act 1988* (SRCA). It also implemented a transition (in part) of superannuation regulatory responsibilities from the ISC to the ATO; particularly that of administering Reasonable Benefit Limits for superannuation purposes. Importantly, it identified and closed loopholes where "abuse" in superannuation provisions had occurred. In doing so, it made significant changes to the ITAA 1936 surrounding the tax-free compensatory nature of Invalidity benefits, where, as seen at Ref L., the First Reading Speech stated in part:

> ***'… The Bill will also exempt the whole of an invalidity payment from taxation. However, invalidity payments will continue to form part an ETP and will be able to be rolled over.'***
>
> ***'The Bill also requires the disability of the recipient of an invalidity payment to be verified by two legally qualified medical practitioners. This measure will prevent the treatment of redundancy and early retirement scheme payments from being abused, while accommodating the vast majority of genuine arrangements.'***
>
> ***'The proposed amendments apply to payments made on or after 1 July 1994.'***

14. Importantly, the policy intent as reflected by the amendments cited in Para 13 above stated that 'Invalidity Payments' would be enshrined in tax legislation at Sect 27G of ITAA 1936; a section of law that not only served as a precursor of the current definition of a "Disability Superannuation Benefit", as found in the definitions at s10 of the ITAA1997, but served to provide a specific formula that leveraged the very principles of "actual and prospective service" for invalidity compensation purposes.

15. These definitional concepts of insurance/compensation requiring at least two doctors' certificates find their origins from the 1970s. Indeed, the Commonwealth Superannuation Act 1976 had always required at least two (2) doctor's certificates to certify that severely disabled officers (including war Veterans who served in the Public Service) must be "Totally & Permanently Incapacitated' before they are medically retired. The Cole Review reinforced this requirement for DFRDB, and since 1 July 1990 this specific criterion permeates all other contemporary complying schemes of the CSS, PSS, MSBS, PSSap, and ADF Super/Cover also.

16. In addition, the Commonwealth architected a new legislative framework where compensatory elements of superannuation invalidity benefits were to be offset against compensation provided under the CERCA/SRCA, and where a disabled recipient was required to continue to contribute 5-10% to their Superannuation account, even though recipients were no longer members of their respective schemes. By way of example, here is an extract (in part) of s20 of CERCA 1988:

> ***'(2) Comcare is liable to pay compensation to the employee, in respect of the injury, in accordance with this section for each week after the date of the retirement during which the employee is incapacitated.***
>
> ***' (3) The amount of compensation is an amount calculated under the formula:***

AC - (SA + SC)

where:

'AC is the amount of compensation that would have been payable to the employee for a week if:

(a) section 19, other than subsection 19 (6), had applied to the employee; and

(b) the week were a week referred to in subsection 19 (3);

SA is the superannuation amount; and

SC is the amount of superannuation contributions that would have been required to be paid by the employee in that week if he or she were still contributing to the superannuation scheme.

17. Critically, the prescribed standards underpinning the "Meaning of a Pension" again fail with respect to all public sector superannuation schemes (including DFRDB and MSBS), because as seen at Ref F (i.e., Reg 1.06(1)(a)(ii) of the SIS Regulations 1994), it clearly states in part that: ***the capital supporting a pension cannot be added to by way of a contribution***.

18. As per the Author's long held contention; a contention at law that sadly awaits further adjudication before a Juridical Authority (i.e., the AAT), "death and disability" are explicitly excluded as "defined benefit interests", both in the ITAA1997 and the SIS Regs (i.e., s291-175(2) and Reg 1.03AA(2) respectively).

19. Invalidity Benefits also fail to qualify as "***capped defined benefit income streams***", as seen at Item 1 to the Table found at s294-130 of ITAA1997, because once again, 'Lifetime Pensions' must meet the strict requirements of the prescribed standards as set out in Reg 1.06(2) of the SIS Regs 1994.

20. **Treasury appears to concede this very fact within Item 3 of the Exposure Draft, where it clearly states that, by strict definition, an invalidity benefit can be nothing other than a "Superannuation Lump Sum". However, various sections within Treasury mustn't be speaking with each other, because the ATO continues to subject the Author and other severely disabled Veterans / Commonwealth Officers to frivolous and unwarranted litigation. On balance, the ATO continues to breach its Model Litigant Obligations, and particularly so, where it denied Test Case Funding for the Author's case (not least), even though the Author clearly presents a significant contention at law, and where for the benefit of 32,000 current disabled retirees and thousands of public sector contributors, it is in the public interest.**

21. The original policy intent surrounding invalidity benefits/payments could not be any clearer, where exclusions across the fabric of the law exist and where the failure to meet the prescribed standards in the 'Meaning of a Pension', as set out in the OSS and SIS Regulations, clearly delineates and differentiates Invalidity Payments / Benefits from that of normal non-reviewable lifetime Retirement, Redundancy and Reversionary pensions/income streams.

22. With history and all the facts place firmly on the table, then with the greatest of respect, but in deference to past judgements, medically retired Veterans and Commonwealth Officers can not possibly meet the strict definition of a Pension, as defined at s10 of the ITAA1997. As such, the definition of a Pension is an irrelevant consideration with respect to disability purposes, and as a direct consequence, the arbitrary date of the 20th of September 2007 is nothing more than a legal fiction that dematerialises to leave the correct date for consideration – being 1 July 2007.

23. Why is the date of 1 July 2007 important? Because, in addition to 27G of the ITAA 1936 (now repealed), it is the proper date upon which modifications for disability at s307-145, and the treatment of the untaxed element at s307-150, now operate. These contemporary modifications in law are in line with the Parliament's original intent from the 1980s, where "actual and prospective service" were to be key concepts in the provision of disability benefit policies (see Ref K). **Once again, Treasury explicitly reveals the truth of this implied fact pertaining to these sections at law, by the inclusion of a footnote found at the bottom of Part 1 of the Exposure Draft that is now under consideration.**

24. From inception, the policy architecture and broad legislative framework of the superannuation and tax system clearly intended that "Invalidity Payments" would confer a tax-free compensatory element to a superannuation invalidity benefit. The Commonwealth Superannuation Corporation and its predecessors, aided and abetted by the Commissioner of Taxation, have failed in their understanding, observance and compliance of the prescribed standards, as clearly set out for well over 30 years in the Regulations of the OSSA and SISA. As a consequence, this has resulted in the unlawful classification and excessive withholding of taxation against invalidity benefits for all public sector invalidity recipients since at least 1 July 1990.

Amendments To The Income Tax Administration Act 1997

25. With Reference A and B as a solid backdrop, the foregoing commentary puts a nail in the coffin of any suggestion that the current law needs to be changed to the detriment of all those not covered by the Douglas Case.

26. Notwithstanding the Legislative Instrument that is currently in place, the Author acknowledges that circumstances surrounding the Douglas Case do demand some structural adjustments to the applicable law itself (i.e., via amendments to the main Act of ITAA 1997 / 1936), so as to address some clear deficiencies at hand. These are (not least):

a. **10% Tax Offset**. The Author is of the firm opinion that the additional proposed "non-refundable tax offset" is not appropriate for the deficiency at hand. The primary reason is that by definition, this type of offset only operates where a tax liability exists. Therefore, the offset does not account for the possible forfeiture of the compensatory element of a member who (without a tax liability) ceases to receive their compensation incrementally as they approach their Compulsory Retiring Age (CRA). This has the adverse effect of denying a disabled member their compensatory element in superannuation that in all probability is being subject to offsetting under the CERCA/SRCA/DRCA, as discussed above. Given the compensatory nature of an invalidity benefit, then a refundable tax-offset is paramount. In addition, and without exception, all Doulgas Case recipients should be entitled to the current 10% tax-offset (i.e., as applied to the balance of their taxable component that is subject to full marginal tax). Why? Because other than for equity purposes with those in receipt of normal defined benefit

retirement pensions, then other members of the general community, who are in receipt of tax-free invalidity benefits, receive the total balance of their taxable component tax-free from age 60. **As such, amendments to s301.100 and Sub-division 303-A of the ITAA1997 (and other ITAA 1936 sections as appropriate) should be facilitated to include the net balance of the taxable component of a Superannuation Lump Sum also. To not do so would be inequitable!**

b. **Proportioning Rule**. The Author is uncertain as to why policy sought to treat superannuation lump sums differently to that of superannuation income streams for proportioning rule purposes. Irrespective, it seems clear that in order to maintain the correct proportionality of invalidity benefits in perpetuity, then Sect 307-125(3)(b) of the ITAA 1997 should be amended to omit "just before the benefit is paid", with the substitute clause "from initial commencement in perpetuity" (or words to this effect). This serves to ensure that the tax-free compensatory element is calculated and applied only once from inception, thereafter being maintained in perpetuity.

27. Whilst the Author recognises that there are other deficiencies and treatments identified within the Exposure Draft (i.e., certain Caps), unfortunately time and diminished circumstances are not conducive for further commentary.

28. Notwithstanding some of the amendments to the ITAA 1997/1936 that are identified and required, it must be reinforced, that on balance, Schedule 9 and these proposed Regulations are egregious and should be immediately withdrawn from the main Bill.

CONCLUSION

29. In conclusion, and in addition to the evidence provided in Refs A & B., the forgoing commentary clearly reveals the Parliament's original "policy intent". It also serves as a salutary reminder that rushed changes to legislation that attempt to cover up errors can have far reaching and unintended consequences. Mr Tony Negline of the Chartered Accountants of Australia and New Zealand Association and other witnesses rightly opined such critical views in testimony before the Senate Economics Legislation Committee. However, as history attests, such testimony together with other forthright representations of the Author and that of Mr. Campbell, and other representations offering an alternate view also, were all totally ignored.

30. As a former senior Commonwealth Officer, the Author once again calls upon the Government / Parliament to take the moral high ground and just accept that a massive error in public administration has occurred. In doing so, the Government should instruct the Commissioner of Taxation to immediately withdraw from litigation, and to facilitate the timely remediation of all rightful and lawful claims for all 32,000 recipients that are peripheral to the Douglas Case; recipients that through no fault of their own have not been afforded their rights at law where the Commonwealth has for over 30-40yeras acquired property on unjust terms through the mechanism of excessive taxation.

31. Whilst the estimated cost of 10 Billion dollars for lawful restitution might seem high, at less than half of 1% , it is but a mere rounding error in an economy of 2.3 Trillion Dollars.

32. The Author recommends that the now 250-Billion-dollar Future Fund be used specifically as per its original legislative intent - to pay for and ameliorate the near on 40-year

error in public administration for all concerned. The alternate cost for the Commonwealth's non-compliance with the Constitution, and/or with superannuation laws, is intuitive, as is the additional cost of an already adverse public perception that high risk service in the Military and Commonwealth is just not worth it.

33. The Author once again thanks the Tax and Compliance Unit for the extension of time to provide this submission. Together with Veterans' Advocate Mr Bradley Campbell, the Author remains at the immediate disposal of addressees if further information is required.

Yours sincerely

Peter Thornton

About the Author

Peter Thornton is a medically retired member of the Defence Force & Commonwealth. Peter, a former senior Commonwealth Officer, was forced into early retirement in 2007 after 27 years of collective service. In retirement, Peter tries to provide independent analysis on matters relating to Commonwealth & Military Superannuation, and Veterans' compensation issues also. Peter's research and commentary has helped underpin some of the advocacy and representational activities of national peak bodies and individuals alike.

Acknowledgements:

Veteran Mr. Bradley Campbell – *Mr Campbell is a Veteran's Advocate of formidable mind and presence. The Author and the Veteran community owe Mr. Campbell a huge debt of gratitude for his tireless work and advocacy over many years.*

Members of the Ex-Service Round Table (ESORT), Young Veterans Forum (YVF), and Australian Council of Public Sector Retiree Organisations (ACSPRO). *To numerous to name individually, the Author acknowledges with considerable thanks the various efforts of ESORT, YVF and ACSPRO for their individual and collective representations surrounding this very complex issue. There is no doubt that for many it remains a difficult issue to grapple with. In doing so, they too have tried to "cultivate truth and justice" in what can only be described as a political and bureaucratic quagmire of misleading statements and fictious narratives.*

For Further Reading:

http://bit.ly/2nwOXk4 - *'Why are Invalided Veterans Being Denied Due Process & Nature Justice?' – Bradley Campbell 2018*