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Member Reference: **A342934DF**

DFRDB Complaints Officer
GPO Box 2252
CANBERRA ACT 2601

27 January 2021

Dear Sir/Madam,

On 17 January 1983, I retired from the Australian Defence Force after completing 20 years of service. I am a beneficiary under the Defence Force Retirement and Death Benefits (DFRDB) scheme and am subject to *Defence Force Retirement and Death Benefits Act 1973* (the Act).

The Act entitled me to receive *retirement pay* at a rate of \$9,310 per annum, commencing on the date of my retirement. And it entitled me to commute, that is, to receive four times that amount as a lump sum pre-payment to assist with my resettlement into civilian life.

Since the date of my retirement, the Act entitled my spouse to a *pension* equal to five-eighths of the retirement pay rate, which would be payable to me immediately before my death, had I not commuted a portion of my *retirement pay*.

Defence Force (Retirement and Death Benefits Amendments) Act 1977 amended the Act to automatically adjust those benefits periodically to compensate for the increased cost of living.

I submit that:

- (1) By the end of June 2021, through the incorporation of future benefit reduction mechanisms in the construction of the Act:
 - a. My total *retirement pay* will have been **wrongfully reduced by \$261,686**, and will continue to be further reduced until my death; and
 - b. My spouse's *pension entitlement* will have been **wrongfully reduced by \$10,710 per annum** and will continue to be further reduced until her death.
- (2) ***The construction of the Act is unconstitutional*** because the ordinary meaning of the text of the provisions in the Act results in the ***acquisition of property on other than just terms, within the meaning of section 51(xxvi) of the Constitution.***

The Act¹ provides the following fundamental entitlements:

1. Retirement Pay

Section 23² entitles me to *retirement pay* at a rate, determined from Schedule 1, as 35% of my final annual rate of pay of \$26,600, based on 20 completed years of effective service, resulting in:

$$\textit{Retirement Pay Entitlement} = \$26,600 \times 0.35 = \mathbf{\$9,310.00 \text{ per annum}}$$

2. Commutation

Sub-sections 24(1) and 24(2)³, in force at the time of my retirement, entitled me to receive as a lump sum payment, four times my initial *retirement pay entitlement*, resulting in:

$$\textit{Commutation Lump Sum} = \$9,310.00 \times 4 = \mathbf{\$37,240.00.}$$

Sub-section 24(3)(b) permanently reduced my *retirement pay entitlement* by an amount calculated by dividing the amount of my *commutation lump sum* by the *expectation of life factor* determined under Schedule 3, by my age of 36 when my election to commute took effect, resulting in:

$$\textit{Retirement Pay Reduction} = \$37,240.00 \div 35.51 = \mathbf{\$1,048.73 \text{ per annum}}$$

and

$$\textit{Residual Retirement Pay} = \$9,310.00 - \$1,048.73 = \mathbf{\$8,261.27 \text{ per annum}}$$

Note: The *expectation of life factors* in Schedule 3 are taken from the 1960-1962 Life Expectancy tables published by the Australian Bureau of Statistics. Those *expectation of life factors* were 21 years out of date, on 17 January 1983, when my election to commute took effect.

3. Spouse's Pension Entitlement

From the date of my retirement, Section 39⁴ entitles my spouse to a reversionary *pension*, equal to five-eighths of the *retirement pay* I would be entitled to, immediately before my death, had I not commuted to the maximum extent under sections 24, resulting in:

$$\textit{Spouse's Pension Entitlement} = \$9,310.00 \times 0.625 = \mathbf{\$5,818.75 \text{ per annum}}$$

¹ [Defence Force Retirement and Death Benefits Act 1973](#)

² [Ibid, s.23](#)

³ [Ibid, s.24](#)

⁴ [Ibid, s.39](#)

Adjustment of my *Retirement Pay* and my Spouse's *Pension Entitlement*

*Defence Force (Retirement and Death Benefits Amendments) Act 1977*⁵ incorporated the *Increase in Certain Pensions* (indexation) provisions in section 98B⁶ of the Act.

From the date of my retirement, section 98B applied positive increases in the Consumer Price Index (CPI) to my *residual retirement pay*, and it applies the increase in my *residual retirement pay* to my *retirement pay entitlement* to produce a *notional rate of retirement pay* on which my spouse's *pension entitlement* is based. A result of this adjustment method is that 11.26% of the *notional rate of retirement pay*, determined by my *expectation of life factor* (i.e., $4 \div 35.51$), is excluded from adjustment. As it is proportional to the *notional rate of retirement pay*, that same percentage of my spouse's *pension entitlement* is excluded from adjustment.

From 10 October 1986, *Superannuation and Other Benefits Legislation Amendment Act 1986*⁷ discounted the effect of CPI increases by 2%, and from 20 October 1989, *Superannuation and Other Benefits Legislation Amendment Act 1989*⁸ removed that discount and restored the indexation baseline but did not restore the benefits deducted over those three years.

From July 2014, *Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Act 2014*⁹ altered section 98B to apply increases determined by the more favourable of positive movements in the CPI and the Pensioner and Beneficiary Living Cost Index (LCI), with an adjustment if needed to ensure that benefits are increased by at least the percentage required to maintain a hypothetical pension at 27.7% of Male Total Average Weekly Earnings (MTAWE).

With this adjustment method, *Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Act 2014* established the increase in MTAWE as the *baseline* for *fair indexation*.

The Effect of Adjustments on my *Retirement Pay Entitlement*

Figure 1 shows the effect of section 98B on my *retirement pay*. It also relates that effect to a *fair indexation baseline* established from the MTAWE increases, shown in *Annex A*, from the date of my retirement until 30 June 2014. The *fair indexation baseline* is what my retirement pay rate would be if it were adjusted to compensate for the increased cost of living.

Figures 2 and 3 show the effective reduction of the rate and cumulative total of my *retirement pay entitlement* and *residual retirement pay*, relative to the *fair indexation baseline*. Figure 4 illustrates the acquittal of my *commutation lump sum* by deducting the cumulative *retirement pay reduction* from the *commutation lump sum*.

⁵ [Defence Force \(Retirement and Death Benefits Amendments\) Act 1977](#)

⁶ [Defence Force Retirement and Death Benefits Act 1973, s.98B](#)

⁷ [Superannuation and Other Benefits Legislation Amendment Act 1986](#)

⁸ [Superannuation and Other Benefits Legislation Amendment Act 1989](#)

⁹ [Defence Force Retirement Benefits Legislation Amendment \(Fair Indexation\) Act 2014](#)

FIGURE 1 - EFFECT OF INDEXATION ON RETIREMENT PAY ENTITLEMENT

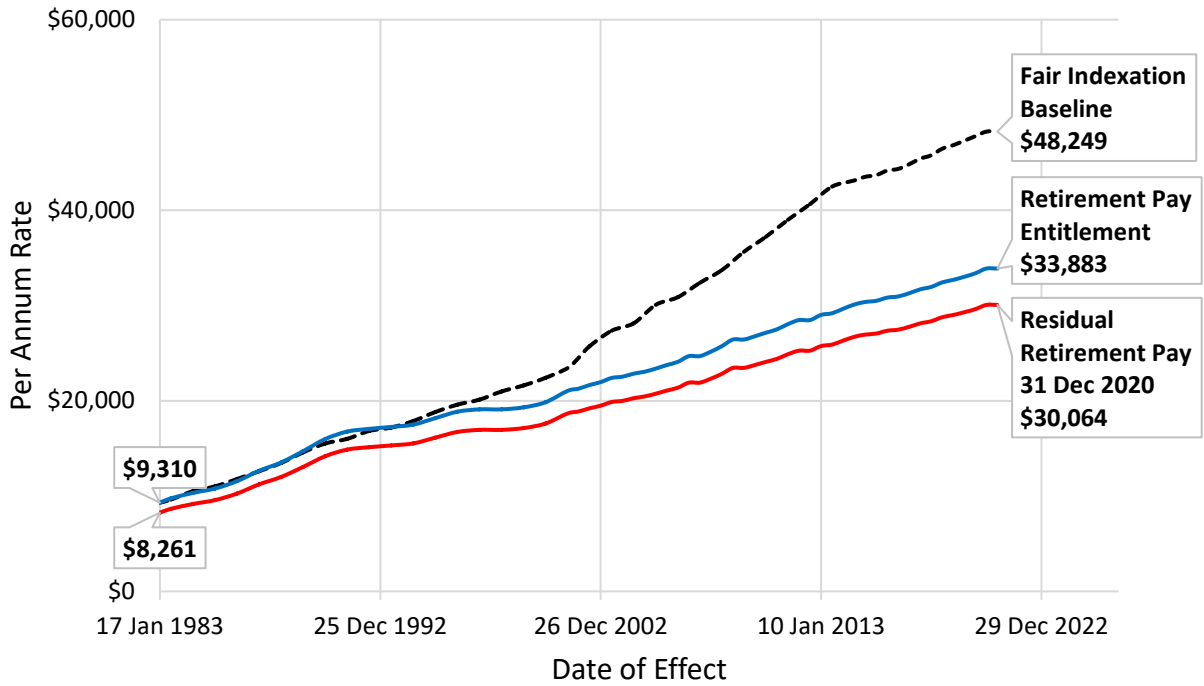
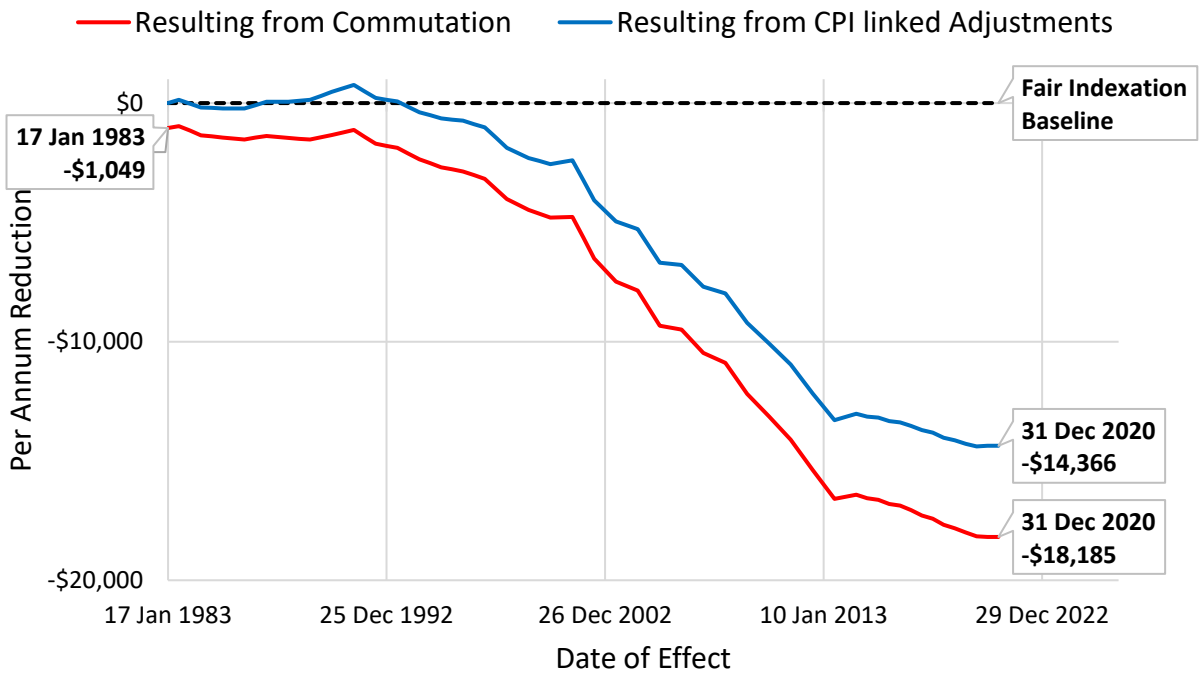
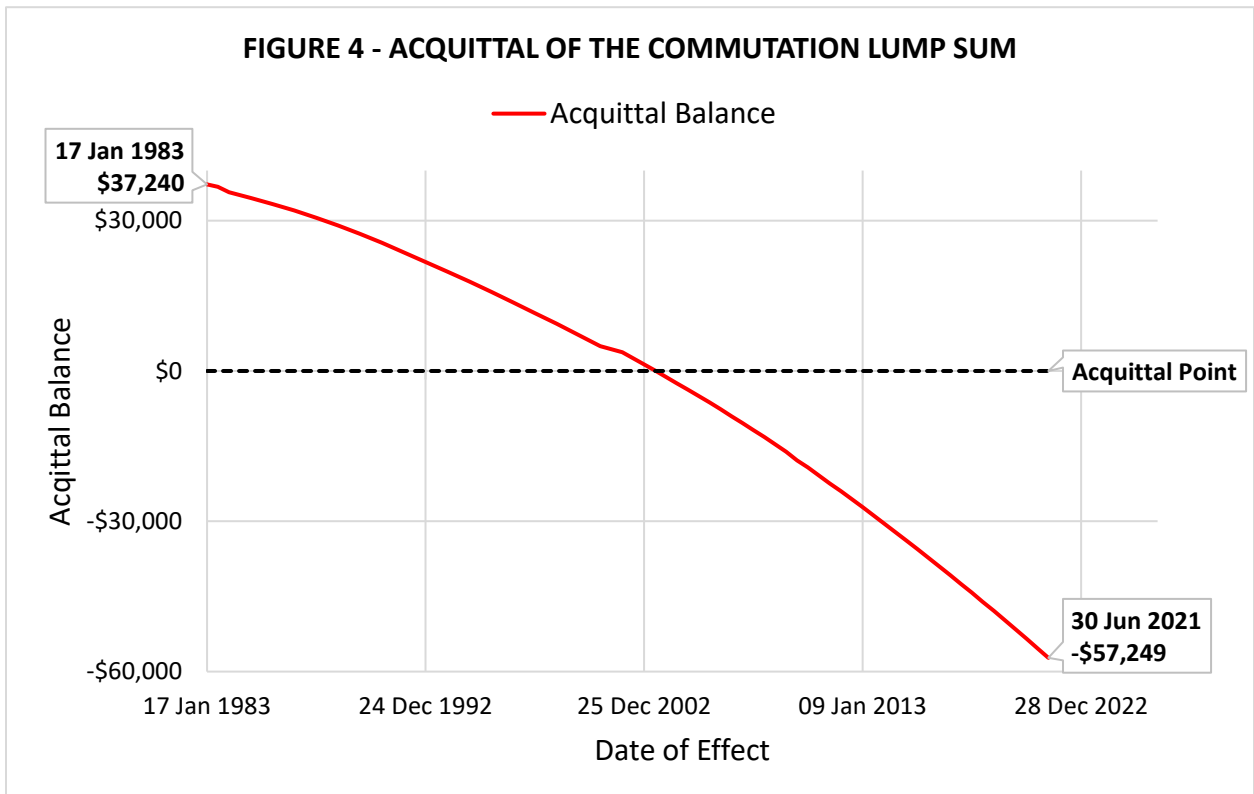
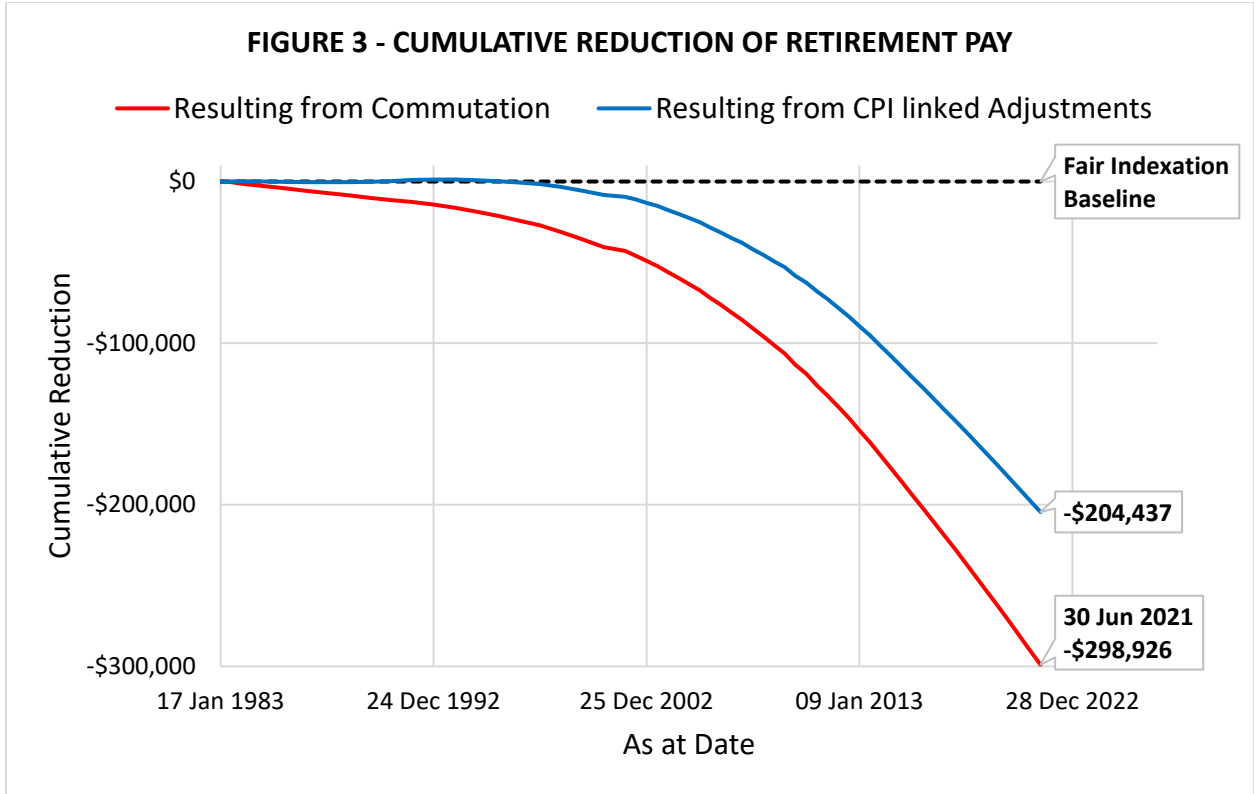


FIGURE 2 - REDUCTION OF RETIREMENT PAY





Aside from the \$204,437 reduction of my *retirement pay entitlement*, relative to the *fair indexation baseline*, Figures 2, 3 and 4 show that by the end of June 2021:

- a. The per annum rate of my *retirement pay reduction* after commutation will have increased from \$1,049 in 1983 to \$3,819 (\$18,185 - \$14,366); and
- b. The \$94,489 (\$298,926 - \$204,437) cumulative reduction of my *retirement pay* will exceed the amount I commuted by \$57,249 (\$94,489 - \$37,240).

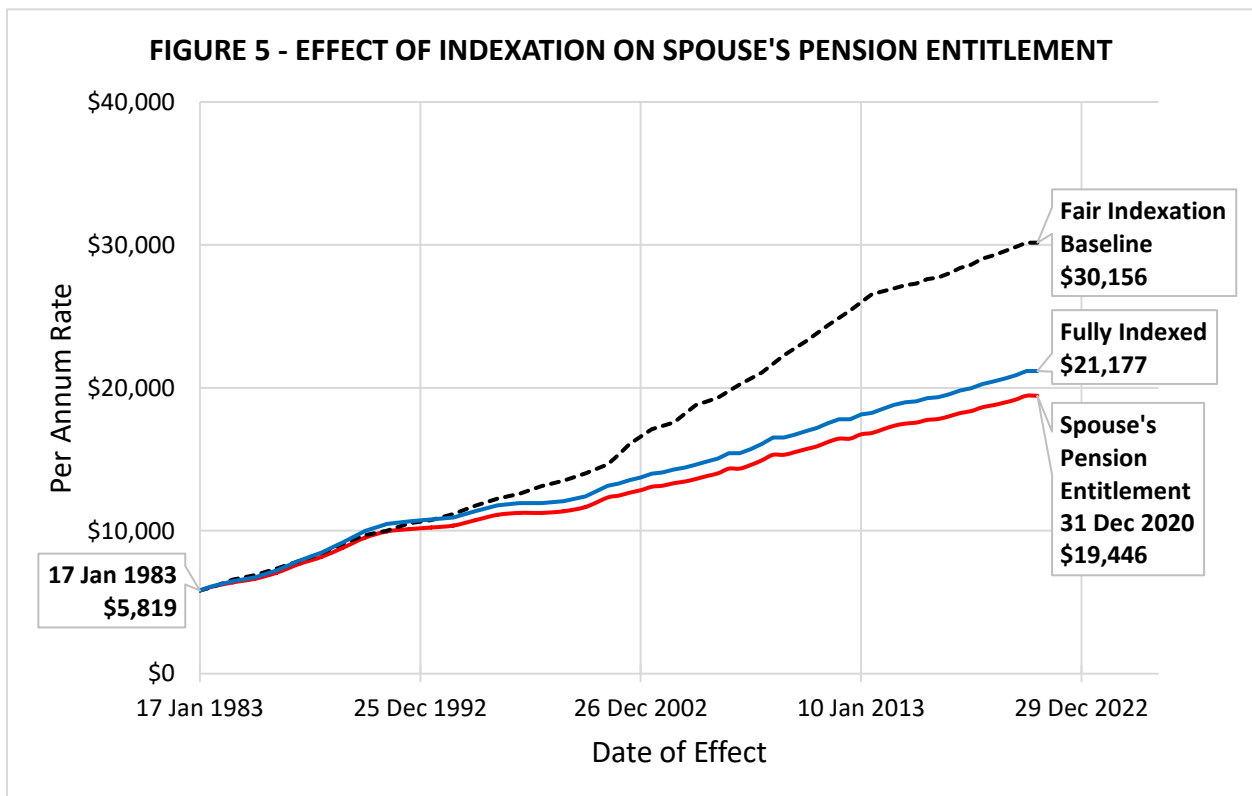
It is also evident in Figures 2 and 3 that the 2014 *fair indexation* amendment has not halted my retirement pay reduction, which has resulted from the CPI linked indexation.

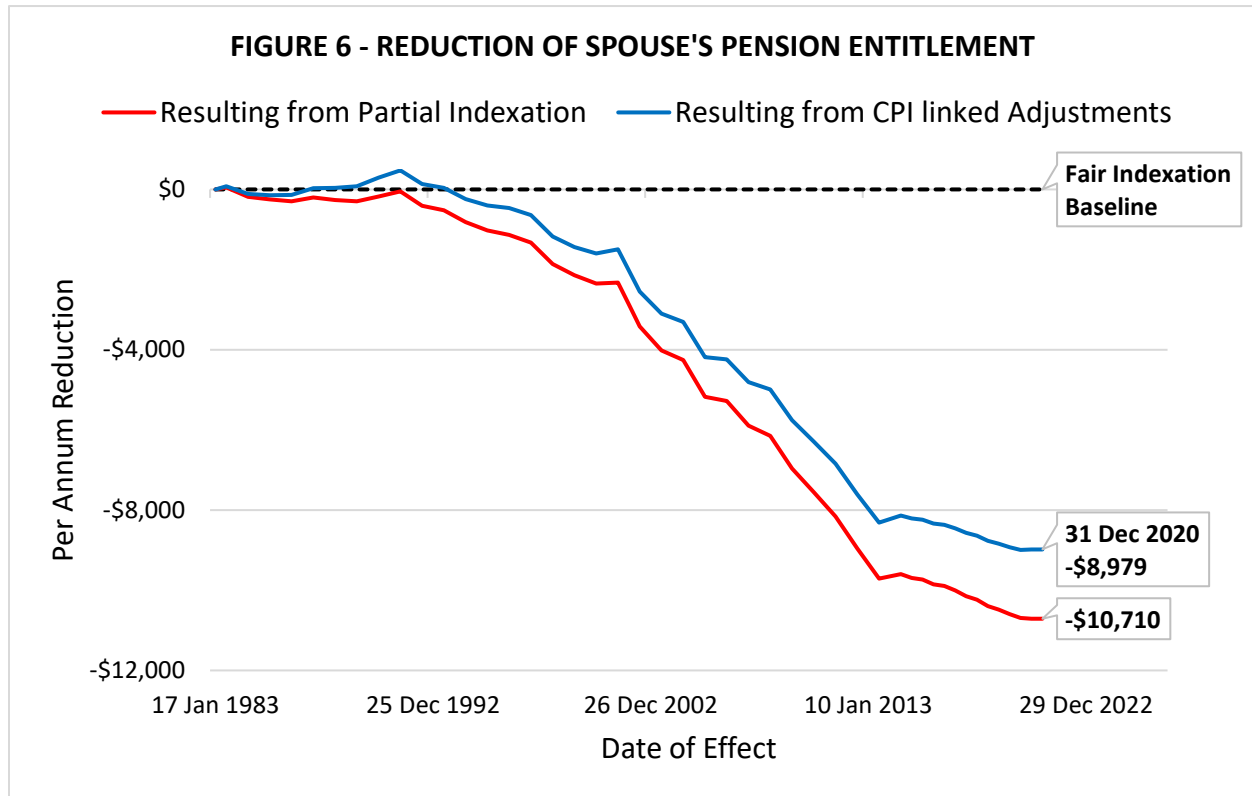
The Effect of Adjustments on my Spouse's *Pension Entitlement*

Figure 5 shows the effect of section 98B on my spouse's *pension entitlement*, which is based on a partially adjusted *notional* rate of *retirement pay*, that would be payable to me had I elected not to commute four times my retirement pay entitlement.

Figure 5 also establishes a *fair indexation baseline* at five-eighths of the *fair indexation baseline* shown in Figure 1.

Figure 6 shows the reduction of my spouse's *pension entitlement* rate, relative to the *fair indexation baseline*.





Aside from the \$8,979 reduction of my spouse's *pension entitlement*, relative to the *fair indexation baseline*, Figures 5 and 6 show that as at 31 December 2020, the per annum rate of her *pension entitlement* will have been reduced by an additional \$1,731 (\$10,710 - \$8,979) due to the partial adjustment of the *notional* rate of *retirement pay* on which her *pension entitlement* is based.

Future Discounting

The provisions in Sections 24 and 98B in the Act incorporate *future discounting* mechanisms which reduce benefits over time. That is, the construction of those provisions:

- a. Uses outdated *expectation of life* factors to maximise the reduction of my *retirement pay* after *commutation*;
- b. Failed to cease the reduction of my *retirement pay* when my total *retirement pay reduction* equated to my *commutation lump sum*.
- c. Until 1 July 2014, linked the adjustment of my *retirement pay entitlement* directly to the CPI, already known for its failure to maintain parity with the cost of living; and
- d. Excludes from adjustment, a portion of the *notional* rate of *retirement pay* on which my spouse's *pension entitlement* is based, thereby reducing that *pension entitlement*.

Conclusion

By the end of Jun 2021, *future discounting* will have reduced my *retirement pay entitlement* by \$204,437, relative to the *fair indexation baseline*, and an additional \$57,249 more than the amount I commuted, a total of \$261,686. And as is evident in Figures 3 and 4, my *retirement pay entitlement* will continue to be further reduced until my death.

As it is proportional to a *notional* rate of *retirement pay*, my spouse's *pension entitlement* will have been reduced by \$8,979 per annum, relative to the *fair indexation baseline*, and a further \$1,731 per annum because a part of the *notional* rate of *retirement pay* is excluded from indexation, a total of \$10,710. And as is evident in Figures 6, my spouse's *pension entitlement* will continue to be further reduced until her death.

I submit that the reduction of my *retirement pay entitlement*, using *future discounting*, is ***acquisition of property on other than just terms, within the meaning of section 51(xxxi) of the Constitution.***

DFRDB is an *Exempt Public Sector Scheme* for the purposes of the *Superannuation Industry (Supervision) Act 1993*, and therefore, is a complying *fund* under the *Income Tax Assessment Act and Superannuation Guarantee (Administration) Act*¹⁰.

As the DFRDB scheme administrator and the *trustee* of the *fund*, Commonwealth Superannuation Corporation must bring this matter to the Minister's attention for rectification.

Yours sincerely,



(H. F. Ellerbock)

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¹⁰ [Annual Report of the DFRDB Authority 1999-2000, pp 5-6, and see discussion of Heads of Government Agreement in relation to Exemptions in Chapter 3](#)

Period of Effect		MTAWE			DFRDB Increase
From	To	Amount	As at	Increase	
24/06/1982	22/06/1983	\$352.10	15/05/1982		
23/06/1983	20/06/1984	\$380.50	15/05/1983	8.07%	11.40%
21/06/1984	19/06/1985	\$415.70	15/05/1984	9.25%	5.90%
20/06/1985	18/06/1986	\$435.50	15/05/1985	4.76%	4.40%
19/06/1986	8/10/1986	\$465.90	15/05/1986	6.98%	9.20%
9/10/1986	17/06/1987				- 1.831502%
18/06/1987	29/06/1988	\$498.20	15/05/1987	6.93%	9.40%
30/06/1988	28/06/1989	\$532.40	15/05/1988	6.86%	6.90%
29/06/1989	18/10/1989	\$576.60	15/05/1989	8.30%	6.80%
19/10/1989	27/06/1990				1.865672%
28/06/1990	26/06/1991	\$613.30	15/05/1990	6.36%	8.60%
27/06/1991	24/06/1992	\$632.70	15/05/1991	3.16%	4.90%
25/06/1992	23/06/1993	\$665.50	15/05/1992	5.18%	1.70%
24/06/1993	22/06/1994	\$679.60	15/05/1993	2.12%	1.20%
23/06/1994	21/06/1995	\$706.80	15/05/1994	4.00%	1.40%
22/06/1995	19/06/1996	\$744.00	15/05/1995	5.26%	3.90%
20/06/1996	18/06/1997	\$774.50	15/05/1996	4.10%	3.70%
19/06/1997	17/06/1998	\$795.30	15/05/1997	2.69%	1.30%
18/06/1998	16/06/1999	\$829.10	15/05/1998	4.25%	0.00%
17/06/1999	28/06/2000	\$854.20	15/05/1999	3.03%	1.10%
29/06/2000	27/06/2001	\$885.90	15/05/2000	3.71%	2.80%
28/06/2001	26/12/2001	\$926.40	15/05/2001	4.57%	6.00%
27/12/2001	26/06/2002				1.10%
27/06/2002	25/12/2002	\$972.50	15/05/2002	4.98%	1.80%
26/12/2002	25/06/2003				1.40%
26/06/2003	24/12/2003	\$1,033.90	15/05/2003	6.31%	2.00%
25/12/2003	23/06/2004				0.60%
24/06/2004	22/12/2004	\$1,063.50	15/05/2004	2.86%	1.40%
23/12/2004	22/06/2005				0.90%
23/06/2005	21/12/2005	\$1,136.70	15/05/2005	6.88%	1.40%
22/12/2005	21/06/2006				1.60%
22/06/2006	20/12/2006	\$1,166.80	15/05/2006	2.65%	1.40%

Period of Effect		MTAWE			DFRDB Increase
From	To	Amount	As at	Increase	
21/12/2006	20/06/2007				2.50%
21/06/2007	19/12/2007	\$1,224.00	15/05/2007	4.90%	0.00%
20/12/2007	18/06/2008				1.90%
19/06/2008	17/12/2008	\$1,274.40	15/05/2008	4.12%	2.30%
18/12/2008	17/06/2009				2.70%
18/06/2009	13/01/2010	\$1,346.90	15/05/2009	5.69%	0.00%
14/01/2010	30/06/2010				1.30%
1/07/2010	12/01/2011	\$1,406.70	15/05/2010	4.44%	1.40%
13/01/2011	13/07/2011				1.30%
14/07/2011	11/01/2012	\$1,474.10	15/05/2011	4.79%	2.00%
12/01/2012	11/07/2012				1.50%
12/07/2012	9/01/2013	\$1,536.10	15/05/2012	4.21%	0.00%
10/01/2013	10/07/2013				1.90%
11/07/2013	8/01/2014	\$1,605.60	15/05/2013	4.52%	0.60%
9/01/2014	9/07/2014				1.60%
10/07/2014	7/01/2015	\$1,649.20	15/05/2014	2.72%	1.50%
8/01/2015	8/07/2015				0.90%
9/07/2015	6/01/2016				0.40%
7/01/2016	6/07/2016				1.10%
7/07/2016	4/01/2017				0.40%
5/01/2017	5/07/2017				1.10%
6/07/2017	3/01/2018				1.30%
4/01/2018	4/07/2018				0.80%
5/07/2018	2/01/2019				1.50%
3/01/2019	3/07/2019				0.80%
4/07/2019	1/01/2020				1.00%
2/01/2020	1/07/2020				1.10%
2/07/2020	30/12/2020				1.50%
31/12/2020	30/06/2021				0.00%