

## ***McKenzie v Commonwealth Superannuation Corporation [2023] FCA 396***

The succinct summary is that Justice Perry found that the word ‘after’ was unbounded and the construction which I submitted should be preferred by the Court involved reading words of temporal limitation into the legislation. There is legion authority for that being impermissible, even in beneficial legislation.

I did my best to try to make clear that I was not asking for words that are not there to be read into the legislation, but rather that the word “after” itself should be construed in context, because there are plenty of examples of the use of the word “after” which – at least in my mind – include a temporal limitation when read in context. I also note that s 30(1B) of the DFRDB Act says, with italics added by me: “Where a deceased member of the scheme is classified under this section, the classification is taken to have effect at all times on and after his retirement.” I do not understand why the words “at all times” were included in that provision if the words “on and after” in themselves have no temporal limitation. Interpreting words in legislation as having no operation is also a ‘no no’.

The Court (and the CSC) linked the permanent reduction in commuted retirement pay to the “protection” of the “viability” of the DFRDB Scheme as a whole. I am intrigued and confused by the concept of the viability – presumably the financial viability – of an unfunded benefits scheme. I may be misguided, but I thought that unfunded benefits schemes are, by definition, not financially viable. They cost more than they accumulate and, in the case of the DFRDB, member contributions were not even invested. On my understanding, the lack of financial viability of unfunded benefits schemes is the very reason for, or one of the primary reasons for, the creation of the Future Fund.

More fundamentally, it seems to me to follow inexorably that the ‘viability’ of the DFRDB Scheme would not have been ‘protected’ if no one had elected to commute. The Commonwealth would have been deprived of the tax levied at the higher marginal rate into which many of us were temporarily ‘pushed’ as a consequence of the receipt of the lump sum (which is why the commutable amount changed from 4 years to 5 years of retirement pay) and the Commonwealth’s long-term liability would have been higher as a consequence of the higher rate of retirement pay payable to members whose actual life expectancy extended well beyond their ‘DFRDB life expectancy’.

I am disappointed that I evidently did not adequately answer the often-stated argument that the premature death of a commuting member is some kind of ‘windfall’ compared with a non-commuting member. As I tried to explain during the hearing, any perceived unfairness is actually a matter of choice. And only one person gets a windfall on the premature death of a DFRDB member, commuted or otherwise: The Commonwealth. Its liability is thereafter permanently reduced because the member’s surviving spouse or eligible dependents – if any – only get a reduced percentage of what would otherwise have been paid had the member not died before their ‘DFRDB life expectancy’.

However, my thoughts on these and other issues are now of no consequence. The Court's interpretation is the statement of the law. I am very thankful to live in country with an independent judiciary which operates without fear or favour, and I respect without reservation the decision of the Court."

***Clinton McKenzie***