FEDERAL COURT OF AUSTRALIA

McKenzie v Commonwealth Superannuation Corporation [2023] FCA 396

File number:	NSD 670 of 2021
Judgment of:	**PERRY J**
Date of judgment:	2 May 2023
Catchwords:	**STATUTORY INTERPRETATION** – *Defence Force Retirement and Death Benefits Act 1973* (Cth) – construction of the terms "on" and "after" in s 24(3)(b) of the *Defence Force Retirement and Death Benefits Act* – whether election for commutation has the effect of permanently reducing a member's entitlement to retirement pay or whether election results in a reduction in retirement pay only until the member has reached the age on which her or his expectation of life factor in sch 3 of the *Defence Force Retirement and Death Benefits Act* was based – discussion of approaches to statutory construction – where ordinary meaning of text is clear and supported by context – where applicant sought to rely on extrinsic materials to displace otherwise clear meaning of statutory text – whether s 24(3)(b) is subject to a requirement of proportionality – application dismissed
Legislation	*Acts Interpretation Act 1901* (Cth) s 15AA *Defence Force Retirement and Death Benefits Act 1973* (Cth) ss 23(1), 23(2), 23(3), 24(1), 24(1AA), 24(2), 24(2A), 24(2B), 24(3)(a), 24(3)(b), 25, 39(1), 41, 42(3), 43(3), 75, schs 1 and 3 *Defence Forces Retirement Benefits Act 1948* (Cth) Defence Force Retirement and Death Benefits Bill (Cth) *Interpretation Act 1987* (NSW) s 33
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378 *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 *Commissioner of Taxation v Douglas* [2020] FCAFC 220

	Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner [2020] FCAFC 192; 282 FCR 1
	Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; 250 CLR 503
	Mills v Meeking [1990] HCA 6; 169 CLR 214
	New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2016] HCA 50; 260 CLR 232
	Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355
	R v A2 [2019] HCA 35; 373 ALR 214
	SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362
	Taylor v Owners — Strata Plan No 1564 [2014] HCA 9; 253 CLR 531
	Vincentia MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority [2020] FCAFC 163; 280 FCR 397
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	69
Date of last submission/s:	22 October 2021
Date of hearing:	11 May 2022
Counsel for the Applicant	The Applicant appeared in person
Counsel for the Respondent	Mr David Robertson
Solicitor for the Respondent	Australian Government Solicitor

ORDERS

NSD 670 of 2021

BETWEEN:	**CLINTON EARL MCKENZIE** Applicant
AND:	**COMMONWEALTH SUPERANNUATION CORPORATION** Respondent

ORDER MADE BY: **PERRY J**

DATE OF ORDER: **2 MAY 2023**

THE COURT ORDERS THAT:

1. The originating application filed on 12 July 2021 is dismissed.
2. On or before 4pm on 9 May 2023, the respondent is to indicate to the Court and the applicant whether it seeks an order for costs in its favour.
3. In the event that the respondent seeks an order for costs in its favour:
   (a) on or before 4pm on 12 May 2023, the respondent is to file and serve submissions in support of an order for costs, which submissions are not to exceed 5 pages in length and are to explain in plain English the relevant principles by reference to authority with pinpoint citations;
   (b) on or before 4pm on 19 May 2023, the applicant is to file and serve any submissions in response, which submissions are not to exceed 5 pages in length;
   (c) on or before 4pm on Wednesday 24 May 2023, the respondent is to file and serve any submissions in reply, which submissions are not to exceed 3 pages in length; and
   (d) the question of costs is to be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

PERRY J:

1. INTRODUCTION

1 The applicant, Clinton Earl McKenzie, served with the Australian Defence Force (**ADF**) for over 20 years. During his time in service, Mr McKenzie was a member of, and made contributions to, the retirement benefits scheme established by the *Defence Force Retirement and Death Benefits Act 1973* (Cth) (the **DFR Act**). The DFR Act relevantly provides for the provision of retirement pay to members of the ADF (the **DFR scheme**). That scheme is administered by the respondent, the Commonwealth Superannuation **Corporation**.

2 Upon retiring from the ADF in January 1996, Mr McKenzie became entitled to retirement pay under the DFR scheme pursuant to s 23 of the DFR Act. On 6 December 1995 and within the three month period before retirement permitted by s 24(1AA) of the DFR Act, Mr McKenzie elected in writing "*to commute a portion of his or her retirement pay in accordance with*" s 24 of the DFR Act (the **election**).

3 The sole question for determination is whether, on a proper construction of ss 23 and 24 of the DFR Act, Mr McKenzie's election permanently reduced the annual amount of retirement pay to which he was entitled (as the respondent contends), or whether his retirement pay was

reduced only until he reached the age on which his expectation of life factor in sch 3 of the DFR Act was based (as Mr McKenzie submits).

4 Mr McKenzie, who appeared without legal representation, made helpful, clear, and well-prepared submissions. However, for the reasons that follow, I do not accept Mr McKenzie's construction of the DFR Act. That construction would involve reading words of temporal limitation into s 24 which Parliament has not seen fit to enact. Contrary to Mr McKenzie's submission, Parliament's intention that a member's annual retirement pay be permanently reduced following commutation is plain from the unqualified text of s 24(3)(b) in providing that "*the amount per annum of the retirement pay payable to [the member], on and after the day on which the election takes effect*" is reduced in accordance with the formula in s 24. It follows that originating application filed on 12 July 2021 must be dismissed.

2. THE DFR ACT

2.1 Legislative history

5 The DFR Act was enacted by the Commonwealth Parliament in 1973 to establish a scheme for the provision of retirement benefits, invalidity benefits, and death benefits for members of the ADF. That Act replaced the retirement benefits scheme established by the *Defence Forces Retirement Benefits Act 1948* (Cth). The earlier scheme was described by the then Minister for Defence in the **Second Reading Speech** to the Defence Force Retirement and Death Benefits Bill 1973 (**DFR Bill**) as "*so complex as to be almost incomprehensible to the great majority of members. It is therefore quite understandable that an intensity of feeling against the scheme should exist*": Hansard, House of Representatives, 25 May 1973, p 2707.

6 Mr McKenzie placed considerable weight on the extrinsic materials in support of his construction of the DFR Act. Those materials also identify circumstances relevant to the retirement of service women and men as opposed to the retirement of those in civilian employment which were fundamental to the design of the retirement benefits scheme created by the DFR Act. As such, it is convenient to give an overview of pertinent aspects of those materials before turning to the relevant legislative provisions, while not losing sight of the fact that it is the provisions of the DFR Act which fall to be construed and not the extrinsic materials. As the High Court has said, "*[h]istorical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text*": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

7 The Minister for Defence explained in the Second Reading Speech (at p 2707) that the DFR Act was intended to implement a new "*non-funded*" retirement benefits scheme for members of the Defence Force recommended by the Joint Select Committee on Defence Forces Retirement Benefits Legislation in the so-called **Jess Report** tabled in Parliament on 18 May 1972. The reference to the scheme as "*non-funded*" refers to the fact that retirement benefits under the new scheme were not tied to contributions but paid from general revenue irrespective of the amount contributed by the member. This accords with recommendation (7) of the Jess Report that:

> the *Proposed [DFR] Scheme* not be 'funded'; that members' contributions not represent a fixed proportion of the cost of the benefits provided; that the contributions of members be payable to the Commonwealth; that the Commonwealth guarantee the benefits provided and meet all costs not covered by member's contributions.

8 In making this recommendation, the Jess Committee considered that:

> Because of the shorter careers that the Defence Force can offer, many of the traditional justifications for funding as a method of financing benefits are nullified and in the Committee's view make it inherently unsuitable as a means of financing benefits for the Defence Force, given the particular circumstances which apply to them.
>
> (Jess Committee Report at [50].)

9 In this respect and in advising more broadly that a different approach from that applying to retirement benefits in the context of civilian employment was required, the Jess Report identified a number of special circumstances relating to the retirement of members of the Defence Force. These included (at [51]):

(1) lower compulsory retirement ages for defence members as compared to civilians, and the tendency for retirement to "*occur for officers at a much earlier age than is customary elsewhere in the community*";

(2) the possibility that defence retirement benefits may supplement civilian earnings post retirement from Defence;

(3) the extent to which economic conditions, including the member's capacity to attract employment opportunities at the time of retirement from Defence, may impact upon the sufficiency of defence retirement benefits as a supplement to post-service civilian earnings*;* and

(4) the different needs of defence personnel at the point of retirement from Defence as opposed to persons retiring from civilian employment, given that:

(a) many service women and men may have lacked the chance during service to establish a permanent home;

(b) retirement from the ADF *"can occur at ages when family responsibilities are high with school children at school and university*"; and

(c) it is more common for members to require retraining in order to obtain employment and to experience difficulties in obtaining work due to invalidity.

10 The Committee concluded at [52] that:

> These circumstances are so different from those applicable to retirement from civilian employment that they require a totally different approach. From the serviceman's point of view a retirement benefit scheme that does not recognise and meet these special needs is of little value. From the point of view of the Commonwealth as an employer it is essential to provide a scheme which recognises these special requirements if it is to maintain recruitment at a planned level and to maintain its quality.

11 The Committee observed that in 1948, when the original defence retirement scheme was enacted, the inclusion of a commutation provision in a superannuation scheme was unusual. However, as the Jess Committee explained (at [106]), the justification for the original provision for commutation was that "*a serviceman often had a requirement for a capital sum on his retirement, to assist in his re-settlement and re-establishment in civilian life*." However, as the Jess Committee also explained, commutation under that earlier scheme could be disallowed in the exercise of a discretion, or the amount applied for reduced where a medical examination revealed a life expectancy for the individual applicant which was less than that "*for a first class life*" (at [107]). The Jess Report found that, while commutation was regarded as an attractive feature of the old scheme, these restrictions were resented (at [108]). The Committee therefore recommended instead that retiring members of the Defence Force have an "*unfettered right*" to commute which would not be affected by the member's state of health. It further recommended that that right have certain defining features. First, the Committee recommended that a retired member should have the option of taking a portion ***only*** of her or his retired pay entitlement for the following reasons:

> The object of the proposed scheme is to provide an annuity type benefit as a supplement to civilian earnings for those retiring early and as a means of support for members in later life. The automatic adjustment of the pension ought to ensure that this will remain a viable retirement benefit. The maintenance of benefits at this level requires a large subsidy from the Government. It would appear to be unreasonable to permit members to commute in such a way that they would again become eligible for non-contributory social service benefits completely paid for out of public funds.
>
> (Jess Report at [110].)

12 Thus the Committee recommended that the portion able to be commuted be no more than four times the member's annual retired pay entitlement (which was reflected in s 24(2) of the DFR Act as originally enacted).

13 Secondly, the Committee recommended that the option to commute must be exercised within 12 months of retirement "*as the possibility would otherwise exist of member commuting after many years of drawing full retired pay or when his state of health deteriorates.*" (Jess Report at [112]). (I note however that s 24 of the DFR Act as originally enacted and as in force at the time of Mr McKenzie's retirement in fact conferred a discretion to allow a member to make an election to commute outside of this period.)

2.2 Legislative provisions

14 As the Full Court of the Federal Court explained in *Commissioner of Taxation v Douglas* [2020] FCAFC 220 (at [33]):

> The DFRDB Act creates two kinds of benefits payable to members:
>
> (1) Part IV of the DFRDB Act, comprising ss 23 to 25, is entitled "retirement benefits" and provides for "retirement pay". Retirement pay is calculated by reference to a member's annual rate of pay, rank and completed years of effective service: s 23 of the DFRDB Act and Sch 1 to that Act. A member is not entitled to "retirement pay" if the member is entitled to "invalidity benefit": s 23(1).
>
> (2) Part V of the DFRDB Act, comprising ss 26 to 37, is entitled "invalidity benefits" and provides for "invalidity pay". Under s 30 of the DFRDB Act, invalidity benefits are calculated by reference to the "percentage of incapacity [of a member] in relation to civil employment".

15 The present proceeding concerns only the proper construction of ss 23 and 24 of Part IV of the DFR Act as at the time that Mr McKenzie retired from the ADF and became eligible for retirement pay.

16 Section 23 relevantly provided as follows:

> **23 Entitlement to retirement pay**
>
> (1) Where a contributing member retires and is not entitled to invalidity benefit and:
>
> (a) on his retirement:
>
> (i) his total period of effective service is not less than 20 years; or
>
> (ii) his total period of effective service is not less than 15 years and he has attained the retiring age for the rank held by him immediately before his retirement; or

(b) he had previously become entitled to retirement pay under this Act or pension, other than invalidity benefit, under the previous legislation that was cancelled under section 62 upon his becoming an eligible member of the Defence Force,

he is entitled, on his retirement, to retirement pay at the rate applicable to him in accordance with this section.

(2) Subject to subsection (3) and to sections 25 and 75, the rate at which retirement pay is payable to a recipient member is an amount per annum that is equal to such percentage of the annual rate of pay applicable to him immediately before his retirement as, having regard to the number of complete years included in his total period of effective service, is ascertained under Schedule 1.

(3) Where:

(a) the total period of effective service of a member of the scheme who is an officer is not less than 20 years; and

(b) he is retired at his own request, or on disciplinary grounds, before attaining the age that, having regard to his rank immediately before his retirement, is his notional retiring age as ascertained under Schedule 2;

the rate at which retirement pay is payable to him is the amount per annum that, but for this subsection, would be payable under subsection (2) reduced by 3% of that amount for each year included in the period equal to the difference between the age of the officer on his birthday last preceding his retirement and his notional retiring age as ascertained under Schedule 2.

…

17 Section 24 in turn relevantly provided that:

24 Commutation of retirement pay

(1) A person who is, or is about to become, entitled to retirement pay may, by notice in writing given to the Authority, elect to commute a portion of his or her retirement pay in accordance with this section.

(1AA) A notice under subsection (1) shall be given not earlier than 3 months before becoming entitled to retirement pay and not later than one year after becoming so entitled or such further period as the Authority, in special circumstances, allows.

…

(2) An election by a person under subsection (1) shall specify the amount that is to be payable to him by virtue of the commutation.

…

(3) Where a person makes an election under this section:

(a) there shall be paid to him by the Commonwealth an amount equal to the amount specified in the election as the amount that is to be payable to him by virtue of the commutation; and

(b) the amount per annum of the retirement pay payable to him, ***on and***

> ***after the day on which the election takes effect*****,** is the amount per annum that, but for this paragraph and subsection 98K(1), would be payable reduced by an amount calculated by dividing the amount referred to in paragraph (a) by the expectation of life factor that, having regard to the age and sex of the person on the day on which the election takes effect, is applicable to him under Schedule 3.
>
> (4) For the purposes of this section, an election shall be deemed to have been made, and shall take effect, on the day on which the notice of election is received by the Authority or the day following the day on which the person retires, whichever is the later.
>
> (Emphasis added.)

18 As I explain below, argument in the present case focused upon the meaning of the words emphasised in s 24(3)(b).

19 Schedule 1 of the DFR Act, to which s 23(2) makes reference, sets out a table of a member's retirement pay based on a percentage of annual rate of pay. The percentage of annual rate of pay increases for every additional number of completed years of effective service.

20 Schedule 3 of the DFR Act, to which s 24(3)(b) makes reference, relates to an expectation of life factor. That expectation of life factor is based on the age (in years) of the member on the date of their election for commutation.

3. FACTUAL BACKGROUND

21 The factual background in this matter is agreed and is summarised by the parties in the statement of agreed issues and facts filed on 1 October 2021.

22 The general administration of the DFR Act was entrusted to the Defence Force Retirement and Death Benefits Authority (**DFR Authority**) until 30 June 2011. From 1 July 2011, Part II of the DFR Act was repealed, the DFR Authority was abolished, and the functions of the DFR Authority were assumed by the respondent.

23 Mr McKenzie served as a member of the ADF for a period which slightly exceeded 20 years, from January 1976 to January 1996, at which time he retired from the ADF. During his time in service with the ADF, Mr McKenzie was a member of, and made contributions to, the scheme established by the DFR Act for the provision of, among other benefits, retirement pay to ADF members.

24 As at the date of his retirement from the ADF, Mr McKenzie was 35 years of age and had an annual salary of $44,666. Accordingly, pursuant to s 23(2) and sch 1 of the DFR Act, on and

from January 1996 Mr McKenzie would ordinarily have been entitled to an annual retirement pay of $15,633.10, being 35% of his annual salary of $44,666.

25 However, before he retired, Mr McKenzie completed an "*Election for Commutation*" form dated 6 December 1995, applying to commute the maximum entitlement of his retirement pay pursuant to s 24 of the DFR Act. A copy of the completed election form appears at annexure B to the affidavit of Matthew Jianwen Tan affirmed on 5 November 2021. I note that there was no evidence before me which indicated that Mr McKenzie had been directed to read any explanatory materials before signing that form. Nor had Mr McKenzie, in his completed election form, ticked the box indicating that he had "*read the explanatory notes*" related to his election for commutation. Furthermore, on 27 May 2021, the respondent notified Mr McKenzie that it was "*extremely regrettable*" that the nature of his commutation election "*was not made clearer to you, upon retirement from the Australian Defence Force*". It therefore appears that Mr McKenzie was unfortunately not informed about the consequences of his commutation decision as to the value of his annual retirement benefit. However, no issue relating to whether Mr McKenzie was properly informed about the consequences of his commutation decision was raised in the present proceeding.

26 As at the time of his election and retirement, the maximum amount of retirement pay which a member could commute was determined by ss 24(2A) and (2B) of the DFR Act. Pursuant to the formula specified in s 24(2B) of the DFR Act, Mr McKenzie was authorised to elect to commute up to 4.65 times his annual amount of retirement pay. As the applicant's annual amount of retirement pay was $15,633.10, Mr McKenzie was therefore entitled to and applied for a lump sum payment of $72,693.92 on the day on which the election took place: ss 24(1) and 24(3)(a) of the DFR Act.

27 With respect to the administration of the retirement benefit scheme generally, the parties agreed that:

> The practice of the [DFR] Authority was, and the practice of the [Commonwealth Superannuation Corporation] continues to be, to administer the scheme established by the DFR Act on the basis that a member's election to commute a portion of his or her retirement pay pursuant to s 24 of the [DFR] Act has the effect of reducing, ***permanently***, the amount of annual retirement pay payable to the member under the [DFR] Act. That practice was and is based on the [DFR] Authority's and [Commonwealth Superannuation Corporation]'s interpretation of s 24(3)(b) of the [DFR] Act.
>
> (Statement of Agreed Issues and Facts at [7]; emphasis added.)

28 The parties also agreed that the DFR Authority, and subsequently the respondent, administered Mr McKenzie's retirement pay in accordance with this practice and therefore on the basis that:

> … as a consequence of the Election:
>
> (a) the applicant became entitled to a lump-sum payment on the day on which the Election took effect, which was paid to him on about the day after the Election took effect, pursuant to s 24 of the [DFR] Act; and
>
> (b) the amount of retirement pay per annum payable to the applicant was reduced ***permanently*** on and after the day on which the Election took effect, pursuant to s 24(3)(b) and Schedule 3 of the [DFR] Act.
>
> (Statement of Agreed Issues and Facts at [8]; emphasis added.)

29 Based upon its construction of ss 23 and 24 of the DFR Act, the respondent therefore submitted that, in order to calculate the amount of Mr McKenzie's retirement pay per annum payable pursuant to s 24(3)(b) and sch 3 of the Act, it was necessary to:

> (1) Start with the amount per annum that "but for this paragraph … would be payable to the applicant", that is, the amount of $15,633.10;
>
> (2) Then, calculate the reduced amount by "dividing the amount referred to in paragraph (a)", that is, $72,693.92, by the "expectation of life factor" in Schedule 3 which was applicable to the applicant on the day on which the election takes effect, that is, 36.45, which is an amount of $1,994.35, and deducting that amount from the amount of $15,633.10;
>
> (3) Therefore, the amount per annum payable to the applicant was the amount of $13,638.75.

30 Mr McKenzie was concerned that the respondent's calculation of his retirement payments was based on an erroneous construction of the DFR Act, and that he was therefore not being paid the amount of retirement pay per annum to which he was entitled. On 15 April 2021, Mr McKenzie wrote to the Corporation requesting a reconsideration of the decision as to the annual rate of retirement pay that he has been and continues to be paid on the following grounds:

> The annual rate of retirement pay to which I am entitled is determined by section 23(2) of the DFRDB Act, and the provisions to which that section is expressed to be subject, alone. Section 23(2) is not, and never has been, expressed to be subject to section 24 or any provision within section 24.
>
> However, the DFRDB Authority/CSC has been paying me retirement pay at an annual rate reduced as if my entitlement in section 23 is subject to section 24. My understanding, from the discussions with erstwhile ADF colleagues, is that the practice of the DFRDB Authority/CSC was and continues to be to pay members on that basis, permanently. That practice is based on a misconstruction of the DFRDB Act.
>
> I therefore request that I be paid my entitlement to an annual rate of retirement pay in accordance with section 23(2) of the DFRDB Act.

31 By a letter dated 27 May 2021, the Corporation notified Mr McKenzie that it would not reassess or recalculate his annual rate of retirement pay. In this letter, the Corporation stated that:

> When a DFRDB member retires, and they are entitled to retirement pay, they can elect to commute (that is, exchange) a portion of that retirement pay for a lump sum. This lump sum is also known as a 'commutation'.
>
> Please note that an election to receive a commutation results in a permanent reduction in your pension, even if you attain or exceed your life expectancy. This means that your decision to receive a commutation cannot be changed and the commutation amount cannot be "paid back" to receive higher retirement pay.

32 Subsequently, on 5 July 2021, the applicant commenced these proceedings challenging the Corporation's decision made on 27 May 2021.

4. CONSIDERATION

4.1 The issues

33 By a statement of agreed issues and facts, the parties identified two issues in dispute. The first was whether an election for commutation had any effect at all on the annual amount of retirement pay to which a person was otherwise entitled under s 23 of the DFR Act. However, Mr McKenzie ultimately did not press this issue at trial, rightly conceding that, by virtue of s 24 of the DFR Act, an election for commutation had the effect of reducing a proportion of a member's retirement pay to which they were otherwise entitled.

34 The second and sole remaining issue is whether, on a proper construction of s 24(3)(b) of the DFR Act, the reduction in annual amounts of retirement pay payable to a commuting member is permanent, or ceases when she or he reaches the age on which the applicable expectation of life factor in sch 3 of the DFR Act is based.

4.2 The parties' submissions

35 As earlier set out, s 24(3)(b) of the DFR Act provides that, following a commutation election, a recipient member's retirement pay is reduced "*on and after the day on which the election takes effect*".

36 In essence, Mr McKenzie submitted that the words "*on and after*" in ss 23 and 24 of the DFR Act should be construed as having an implied temporal constraint, so as to not apply once a member has lived beyond the applicable expectation of life factor in sch 3 of the DFR Act. In other words, according to Mr McKenzie, s 24(3)(b) of the DFR Act reduces a member's

retirement pay only until they reach their expectation of life factor, at which point the member's retirement pay should restore to its full amount.

37 This construction, in Mr McKenzie's submission, would best give effect to the purpose of the DFR Act. Referring to a range of extrinsic materials, Mr McKenzie submitted that the primary purpose of the DFR Act was to act as "*beneficial*" legislation: that is, to establish a retirement scheme which created a "*substantial inducement to become and remain a member of the ADF*". Any construction of the DFR Act which allowed for the permanent reduction of a member's retirement pay following a commutation election was, in Mr McKenzie's submission, inconsistent with this purpose. Instead, he argued that his interpretation of the DFR Act, in which the reduction in a commuting member's annual retirement pay is made only until the member reaches the age on which their expectation of life factor is based, harmonises the language of s 24(3)(b) of the DFR Act with the broader context, purpose and policy of the legislation.

38 The respondent, however, submitted that ss 23 and 24 provide, in clear and unambiguous terms, that an election to commute has the effect of permanently reducing the member's retirement pay, irrespective of whether the member lives beyond the age upon which the expectation of life factor applicable to her or him is based. In the respondent's submission, neither the text of the DFR Act nor contextual considerations, including purpose, support the applicant's construction of s 24(3)(b) of the Act. Rather the respondent contends that Mr McKenzie's arguments ultimately reduce to a complaint about the alleged unfairness of the DFR Scheme itself which this Court has no power to amend. In the respondent's submission, the means of addressing any such unfairness lies exclusively with the Parliament.

4.3 Relevant principles of statutory interpretation

39 The relevant principles of statutory construction are well-established. These were summarised by Perry and Stewart JJ in ***Vincentia*** *MC Pharmacy Pty Ltd v Australian Community Pharmacy Authority* [2020] FCAFC 163; 280 FCR 397 at [46]-[48]:

> In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*), McHugh, Gummow, Kirby and Hayne JJ explained that:
>
> > 69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos* [(1955) 92 CLR 390 at 397], Dixon CJ pointed out that 'the context, the

> general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

The importance of starting with the statutory context and text was recently emphasised by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 in the following passage:

> 14. The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose [citing *Project Blue Sky* with approval]. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected."

Context "*in its widest sense*", as referred to in this passage, includes "*such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy*": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (cited with approach [sic] in *SZTAL* at [14]). To have regard to context in this sense, as integral to the process of statutory construction irrespective of whether ambiguity or inconsistency exists in the literal text, accords with the mandate in s 15AA of the Acts Interpretation Act that the interpretation which best gives effect to the legislative purpose ***must*** be preferred to any other interpretation: *Mills v Meeking* (1990) 169 CLR 214 at 235 (Dawson J). As a result, as Dawson J also explained with respect to Victoria's equivalent to s 15AA, the approach required by interpretive provisions of this kind "*allows a court to consider the purposes of an Act in determining whether there is more than one possible construction*" (ibid); see also the discussion in Pearce D, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) … at [2.17]-[2.20]; Herzfeld P and Prince T, *Interpretation* (2nd ed, LawBook, 2020) … at [7.20]-[7.30]. That said, it must also be borne steadily in mind that, as Hayne, Heydon, Crennan and Kiefel JJ cautioned in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, "[h]istorical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention".

(Emphasis in original.)

40 In ***Certain Lloyd's Underwriters*** *v Cross* [2012] HCA 56; 248 CLR 378 (at [25]) French CJ and Hayne J elaborated upon the process by which the statutory purpose is ascertained, emphasising the objective nature of that inquiry:

> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. ***The purpose of a statute resides in its text and structure***. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect,

> as in others, to recognise that to speak of legislative "intention" is to use a metaphor. Use of that metaphor must not mislead. "[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have". And as the plurality went on to say in *Project Blue Sky*:
>
> > Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.
>
> (Citations omitted; emphasis added.)

41 Accordingly, in ascribing meaning to text, a Court must have regard to the context and purpose of that provision, including having regard, where appropriate, to legitimate secondary material. As Allsop CJ explained in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192; 282 FCR 1 at [4]-[5]:

> … The principle is clear: Meaning is to be ascribed to the text of the statute, read in its context. The context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision. The purpose and policy of the provisions are to be deduced and understood from the text and structure of the Act and legitimate and relevant considerations of context, including secondary material. [Citations omitted]
>
> There can be no doubt that the search for principle in the High Court reveals a settled approach of some clarity: *R v A2* [2019] HCA 35; 373 ALR 214 at 223-225 [31]-[37]. The notion that context and legitimate secondary material such as a second reading speech or an Explanatory Memorandum cannot be looked at until some ambiguity is drawn out of the text itself cannot withstand the weight and clarity of High Court authority since 1985.
>
> (Citations omitted.)

4.4 Construction of s 24(3)(b) of the DFR Act

42 In my view, properly construed, an election to commute does result in a permanent reduction in the annual amount of retirement pay to which that member is owed as the respondent contends. Mr McKenzie's construction of s 24(3)(b) of the DFR Act cannot be accepted.

43 ***First***, applying the principles explained above, the task of construction must commence and end with a consideration of the statutory text: see also *Federal Commissioner of Taxation v* ***Consolidated Media Holdings*** *Ltd* [2012] HCA 55; 250 CLR 503 at [39] (the Court). In this case, the respondent's construction accords with the ordinary and natural meaning of the words of s 24(3)(b) of the DFR Act. The text of s 24(3)(b) is unqualified, providing simply that where a member elects to commute, the amount "*per annum*" of retirement pay is reduced "*on and*

after" the date on which the election takes place. In its ordinary meaning, the term "*after*" means simply *"later in time than*" (Macquarie Dictionary, online edition, at 1 May 2023). Thus, as the respondent submits, the plain text of s 24(3)(b) is clear and unambiguous. No temporal limitation on the reduction in retirement pay is discernible from the text of s 24(3)(b).

44 While Mr McKenzie accepts that the ordinary meaning of the words "*on and after*" refers to an unlimited period, he submits that the ordinary meaning cannot apply with respect to s 24(3)(b) of the DFR Act, because those words must be subject to at least some form of implied temporal limitation. By way of illustration, Mr McKenzie observed that the entitlement to reduced retirement pay clearly ceases in circumstances where a commuting member has died, even though that constraint is not specified in the text of s 24(3)(b) itself.

45 However, while it is correct that the member's retirement pay under the DFR Act ceases upon their death, that loss of pay does not arise because of an implication sourced within s 24 of the DFR Act. If the member has died, it is simply no longer possible to speak of the member being "*entitled … to retirement pay*" for the purposes of s 23 or s 24. The member no longer exists and has no need of a retirement benefit. Instead, the DFR Act makes separate provision for a surviving spouse and children. For example, s 39(1) provides for a pension to be paid to a surviving spouse which is calculated by reference relevantly to the rate at which retirement pay "*was payable to the deceased member immediately before the member's death*".

46 More fundamentally, Mr McKenzie's construction requires additional words to be written into s 24(3)(b), such that the provision would read that a commuting member's retirement pay is reduced "*on and after the day on which the election takes effect unless and until the member reaches the age on which the applicable expectation of life factor in sch 3 of the DFR Act is based* ". So understood, this is not a case where the applicant has identified the existence of a true constructional choice between different meanings of particular words in the Act. Rather, with respect, the applicant asks the Court to "*make an insertion which is 'too big, or too much at variance with the language in fact used by the legislature'*": *Taylor v Owners — Strata Plan No 1564* [2014] HCA 9; 253 CLR 531 at [38] (French CJ, Crennan and Bell JJ). As the respondent submits, had Parliament intended to impose such a limitation, it would have been a simple matter for it to have provided so expressly.

47 ***Secondly***, while ss 39, 41, 42 and 43 of the DFR Act refer to the commutation provisions in s 24 of the DFR Act, none of those provisions refer to any temporal constraint on the reduction in a member's retirement pay following commutation.

48 For example, as the respondent submits, s 39(1) assumes that a commutation decision will reduce a member's retirement pay until their death, irrespective of whether or not they exceed their expectation of life factor specified in sch 3 of the DFR Act. So much is apparent from the wording of s 39(1), which provides that, in circumstances where the member had commuted a portion of her or his retirement pay under s 24(1), the spouse's pension is calculated "*at a rate equal to five-eighths of the rate at which retirement pay … would have been payable to the member immediately before the member's death if the member had not commuted a portion of the member's retirement pay* …" As such, s 39(1) proceeds on the assumption that the member's retirement pay will have been reduced as a consequence of their election to commute a portion of their retirement pay in ***all*** cases where the member has made such an election. Section 39(1) of the DFR Act, and the similarly worded provisions in ss 42(3) and 43(3) concerning children's pensions, are therefore consistent with the respondent's construction and inconsistent with that for which Mr McKenzie contends.

49 ***Thirdly***, I am unable to accept Mr McKenzie's contention that his construction of s 24(3)(b) is supported by the express wording of s 23(2) of the DFR Act.

50 As noted above, s 23 of the DFR Act sets out the general principles relating to a member's entitlement to retirement pay. Relevantly, s 23(2) provides:

> ***Subject to subsection (3) and to sections 25 and 75***, the rate at which retirement pay is payable to a recipient member is an amount per annum that is equal to such percentage of the annual rate of pay applicable to him immediately before his retirement as … is ascertained under Schedule 1.
>
> (Emphasis added.)

51 As is apparent from the express words of the provision, the operation of s 23(2) is subject to ss 23(3), 25 and 75 of the DFR Act. Each of these provisions modifies the rate of retirement pay in certain circumstances, namely: where the member has served 20 or more years and retires at their own request or on disciplinary grounds before their notional retiring age (s 23(3)); an officer in respect of whom certain provisions of the previous legislation would have applied but for the DFR Act (s 25); and persons who had retired from the ADF and made an election by virtue of which deferred benefits became applicable (s 75). In Mr McKenzie's submission, the contrasting absence of any express reference in s 23(2) to s 24 indicates that Parliament did not intend that an election under s 24(3)(b) of the DFR Act would permanently reduce a member's applicable retirement pay. In other words, in Mr McKenzie's submission "*if the legislative intent had been permanently to reduce the rate of retirement pay as a*

consequence of commutation, the entitlement provision would have been expressed to be subject to the commutation provision … along with all the other provisions that expressly change the rate of retirement pay".

52 With respect, that submission cannot be maintained. Although s 24 is not expressly listed in the list of exceptions in s 23(2) of the DFR Act, that does not justify reading words of temporal limitation into s 24(3)(b) which simply do not appear in the plain text of that provision. In any case, the central question in this case was not whether the retirement pay provisions in s 23 were subject to an exception in s 24 of the DFR Act. The applicant conceded, correctly, that a commutation election reduces the member's applicable retirement pay. Rather, the question is whether an election for commutation under s 24 of the DFR Act results in a permanent, or only temporary, reduction in one's applicable retirement pay. That question is not answered by observing that commutation is not listed as one of the specified exceptions under s 23(2) of the DFR Act.

53 Mr McKenzie also placed considerable emphasis on the purpose of the DFR Act as a basis for his preferred construction. With respect, I do not consider those arguments persuasive.

54 ***First***, Mr McKenzie submitted that s 24(3)(b) must be construed by reference to the *"consistency*" and "*fairness*" of the provision. As I have noted above, a core tenet of Mr McKenzie's submission is that the DFR must be construed as "*beneficial legislation*", in the sense that the legislation was said to confer benefits "*on various individuals who were members of the ADF*". Mr McKenzie then submitted that the respondent's proposed reading of the DFR Act is incompatible with that beneficial purpose. Specifically in his submission, the respondent's construction of the DFR Act would have the effect of rendering an ADF member who elected to commute their retirement pay, and who lived longer than their expectation of life factor in sch 3, worse off than a "*relevantly identical colleague*" who did not elect to commute any portion of their retirement pay. Mr McKenzie submits that this interpretation of the DFR Act cannot be maintained, because a "*consistent and fair*" construction of the Act would require that "*the rate of retirement pay of relevantly identical members, one of whom commutes and the other not, is identical*".

55 I accept that the DFR can be described broadly as "*beneficial*" legislation, in the sense that it was intended both to create a simpler and more comprehensible system of retirement benefits, and to ensure that the retirement benefit scheme addressed the particular needs of service women and men. So much is apparent from the Parliament's intention to implement the

recommendations of the Jess Report. However, as the Jess Report also emphasised (at [52] in a passage I have earlier quoted), reform of the defence force retirement scheme was also desirable because "*[f]rom the point of view of the Commonwealth as an employer it is essential to provide a scheme which recognises these special requirements if it is to maintain recruitment at a planned level and to maintain its quality*". Similarly, the then Minster for Defence explained in the Second Reading Speech (p 2708) with respect to the DFR Bill and related bills, that:

> … the scheme encompassed by these Bills reflects not only the needs expressed by the Services themselves for the provision of a modern retirement benefits structure that takes account of their particular career patterns, but also it is one that is comprehensible to them. … Taken together with the series of other measures we have introduced in the area of financial conditions of service generally, there is clearly substantial inducement to become and remain a member of the armed forces.

56 In other words, the DFR Act was intended both to benefit ADF servicewomen and men, and to benefit Defence, by providing an incentive for citizens to join and remain in service. Introducing provision for members to elect to commute a portion of their pension was plainly one of the measures intended to provide that incentive. However, as was alluded to in the Jess Report (at [110]) in referring to the extent that the Commonwealth must subsidise the retirement benefit scheme, there was also a need to ensure the sustainability of the retirement benefit scheme overall. In this regard, it will be recalled that the scheme is non-funded in the sense earlier explained, and that it provides for service women and men to receive a pension for the duration of their lifetimes, as well as providing a pension on their death for surviving spouses and children. Providing for a permanent reduction in a member's pension where such an election for commutation is made can therefore be seen to strike a balance between affording members the right to commute a portion of their retirement benefits on the one hand and, on the other hand, protecting the viability of the scheme as a whole.

57 It is true that, on the respondent's construction, where a member has outlived their expectation of life factor in sch 3 of the DFR Act, a decision to commute their retirement pay will leave that person worse off than a member who has chosen not to commute, from the perspective of their ongoing pension entitlements. Nonetheless, it does not necessarily follow that, even in such a case, the member will be financially worse off overall by reason of having made the election. That will depend upon other factors, including how they have applied those monies such as through investment or debt reduction. Moreover if a commuting member passes away before they reach their expectation of life factor in sch 3, cumulatively that member will have received a greater amount in retirement benefits before their death than a person in the same

circumstances who had not elected to commute under s 24(1). On its proper construction, therefore, it is thus not possible to interpret s 24(3)(b) in a manner that ensures equally fair and consistent outcomes for all members.

58 Given these considerations, any unfairness or inconsistency in outcomes for individual members following an election for commutation does not suggest that the ordinary meaning of s 24(3)(b) must be departed from in order to best give effect to Parliament's intention in enacting the DFR Act.

59 In any event, the fact that legislation might be considered remedial or beneficial does not mean that the Court is at liberty to depart from the text and structure of the legislation. Rather, as Gageler J observed in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; 260 CLR 232 at [92]:

> The principle that beneficial legislation is to be construed beneficially is a manifestation of the more general principle that all legislation is to be construed purposively. Application of that more general principle to New South Wales legislation is mandated by the requirement of s 33 of the Interpretation Act 1987 (NSW) that a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not. Neither in its general application nor in its particular manifestation can that principle be applied other than on the understanding that legislation "rarely pursues a single purpose at all costs" and that "[u]ltimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling".
>
> (Citations omitted.)

(I note that s 33 of the *Interpretation Act 1987* (NSW) to which Gageler J refers is in substantially similar terms to s 15AA of the *Acts Interpretation Act 1901* (Cth) outlined above.)

60 For the reasons already given, there is no foothold in the text or structure of the Act to read into s 24(3)(b) the temporal limitation for which Mr McKenzie contends. The fact that the legislation has a beneficial purpose overall does not mean that additional words can be read into the DFR Act to limit the consequences of making a commutation election, where Parliament has already prescribed those consequences in plain terms.

61 ***Secondly***, I do not agree with Mr McKenzie's submission that the legislative history of the provision requires the adoption of his preferred construction of s 24(3)(b) of the DFR Act.

62 As I have outlined above, the DFR Act was enacted with the intention of giving effect to the recommendations of the Jess Committee Report. Relevantly those recommendations included the following:

> 14 COMMUTATION
>
> (a) That provided that the option is exercised within twelve months from date of retirement a recipient member should be entitled to commute an amount not exceeding four times the amount of the annual retired pay entitlement payable to him in the first year of his retirement.
>
> (b) That retired pay ***proportionately reduced in relation to commutation*** remain payable after commutation.
>
> …
>
> (Emphasis added.)

63 In Mr McKenzie's submission, the Jess Committee's recommendation that a member's retirement pay be "*proportionately reduced*" following commutation indicated that Parliament's intent in enacting s 24(3)(b) was to reduce a member's retirement pay *only* until that person reached the age on which their expectation of life factor in sch 3 is based. According to Mr McKenzie, if s 24(3)(b) was read as permanently reducing a member's retirement pay, that provision would authorise a *disproportionate* reduction in pay — that is, a member who had elected for commutation and outlived their expectation of life factor would have a disproportionate reduction in their annual retirement benefits, as compared to an equivalent member who did not elect for commutation.

64 While the recommendation may be read in the way for which Mr McKenzie contends, ultimately that does not assist his construction of the relevant provisions of the DFR Act. As I have previously explained, it is not possible to construe s 24(3)(b) in a manner that ensures proportionate outcomes overall for all members. More fundamentally, however, this submission seeks impermissibly to use extrinsic materials to displace the otherwise clear meaning of the statutory text. Whilst a Court construing a statute must consider the context in which a provision was enacted and may have regard in so doing to extrinsic materials, those materials are relevant only insofar as they shed light on the text itself. As the High Court unanimously held in *Consolidated Media Holdings* (at [39]):

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text" [quoting *Alcan* at [47]]. So must the task of statutory construction end. The statutory provision must be considered in its context. That context includes legislative history and extrinsic material. ***Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself***.
>
> (Emphasis added.)

65 Accordingly, it is not to the point that the respondent's construction may not align with a recommendation in the Jess Committee Report. Nor is it to the point to construe the Jess Committee Report as an end in itself in interpreting s 24(3)(b). Rather, the question is whether the Jess Committee Report can shed light on s 24(3)(b) of the DFR Act.

66 For the reasons already given, construed according to its ordinary meaning, s 24(3)(b) provides that an election for commutation has the effect of permanently reducing that member's applicable retirement pay. That ordinary meaning is consistent with the language and structure of the Act viewed as a whole which, applying established principles, is the surest guide to legislative intent. By contrast, the temporal limitation which the applicant seeks to write into s 24(3)(b) has no foothold in the language and structure of the DFR Act. Even if, therefore, the authors of the Jess Report had some other consequence in mind with respect to an election to commute, their recommendations cannot overcome those otherwise clear textual and contextual considerations. To reiterate the words of French CJ and Hayne J in *Certain Lloyd's Underwriters* at [25] in the passage earlier quoted**,** "*[t]he purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted.*"

5. CONCLUSION AND COSTS

67 As I have earlier observed, the circumstances surrounding Mr McKenzie's application before this Court are unfortunate in that it does not appear that Mr McKenzie was properly informed about the consequences of his election for commutation. Rather, upon his retirement, Mr McKenzie appears to have believed that his election for commutation would have no, or at least no permanent, effect upon his annual retirement benefits.

68 However, the task before this Court is limited to the question of statutory construction. For the reasons given above, the respondent's construction of the DFR Act plainly accords with the text and structure of the Act. The remedy for any unfairness in the scheme of the kind identified by Mr McKenzie lies in the hands of the Parliament. The originating application is therefore dismissed.

69 Finally, I note that the respondent sought an order for costs in this proceeding. Mr McKenzie's written submissions did not address that question. At this stage, I will reserve the question of costs in order to allow the parties, if necessary, to file submissions with respect to their respective positions. However, the fact that this case apparently raises a matter of public

importance which potentially affects a large number matters of veterans may well be a significant factor in determining the appropriate order as to costs.

I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Perry.

Associate: 

Dated: 2 May 2023