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Document Lodged:	Submissions
File Number:	NSD670/2021
File Title:	CLINTON EARL MCKENZIE v COMMONWEALTH SUPERANNUATION CORPORATION
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 8/10/2021 2:59:12 PM AEDT

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## APPLICANT'S SUBMISSIONS

Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD670/2021

**CLINTON McKENZIE**

Applicant

**COMMONWEALTH SUPERANNUATION CORPORATION**

Respondent

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## The text of the DFRDB Act

1. The substantive provisions of the *Defence Force Retirement and Death Benefits Act 1973 (DFRDB Act)* commenced on 1 October 1972.<sup>1</sup> It will be necessary later to describe the Act's provenance, by reference to extrinsic materials, as a matter of context. But the interpretation of the Act begins and ends, as it must, with the text of the Act.<sup>2</sup>
2. The following is a comparison between the text of the provisions of the [DFRDB Act at commencement](#) and the [DFRDB Act as at the date of this submission](#) which determine the applicant's retirement pay entitlement and the effects of the Election. However, reference will also be made to the text of other provisions where they shed light on the intent of the text set out below. (Provisions for the indexation of benefit entitlements were added to the DFRDB Act by other Acts contemporaneous with its commencement, but do not assist in the interpretation of the retirement pay and commutation provisions. The strikethrough denotes original text that has been repealed, amended or replaced, and the underlining denotes the amended or replacement text. Minor changes due to drafting conventions - e.g. quotation marks around defined terms that were removed and the terms italicised and bolded instead, semi-colons at the end of definitions replaced with full stops, "sub-section" replaced with "subsection" - have been omitted to assist readability.)

An Act to make provision for and in relation to a Scheme for Retirement and Death Benefits for Members of the Defence Force.

...

3. (1) In this Act, unless the contrary intention appears-

...

**benefit** means pension benefit, and includes the following:

- (a) a lump sum payment under subsection 32(2) or section 48;
- (b) a refund of contributions under section 56;
- (c) a release authority lump sum paid in relation to a release authority issued to a person under Subdivision 135- A in Schedule 1 to the Taxation Administration Act 1953.

~~"benefit" means pension benefit, and includes a refund of contributions and a lump sum payment under sub-section 32 (2), a lump sum payment under section 48 and a refund of contributions under section 56.~~

...

**pension benefit** means retirement pay, invalidity pay, widow's pension, spouse pension or child's pension.

...

**recipient member**: (a) means a member of the scheme who is entitled to retirement pay or invalidity pay; ; and (b) includes a member of the scheme who,

but for the suspension of his or her invalidity pay under subsection 35(3), would be entitled to invalidity pay.

...

**retirement pay** means retirement pay payable under section 23.

...

## PART IV - RETIREMENT BENEFITS

### Entitlement to retirement pay<sup>3</sup>

23. (1) A contributing member is entitled, on the member's retirement, to retirement pay at the rate applicable to the member under this section if:

- (a) the member retires and is not entitled to invalidity benefit; and
- (b) on the member's retirement...

*[The above text was not substituted until 2015, after the applicant retired.<sup>4</sup> At the time of the applicant's retirement this text was in force:]*

~~(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 twenty years; or~~

*[The applicant's circumstances satisfied the criterion in (a)(i).]*

- ~~(ii) his total period of effective service is not less than fifteen 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, invalidity pay or pension 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 subsections (3) and (6) 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 twenty years; and *[The applicant was not an 'officer' within the meaning of that term in s23(3).]*
- (b) ...

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 ~~three per centum~~ 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.

- (4) For the purposes of subsection (3), an officer shall be deemed ...
- (5) ~~Notwithstanding anything in this section, the rate at which retirement pay is payable to a recipient member who is entitled to retirement pay by virtue only of paragraph (1)(b) shall not be less than the rate at which the cancelled retirement pay, the cancelled invalidity pay or the cancelled pension was payable to him immediately before he became an eligible member of the Defence Force. [Repealed in 2015.<sup>5</sup>]~~
- (6) If the member of the scheme makes an election under subsection 124(1), the rate at which retirement pay is payable to the member is the rate worked out by using the formula: ... [Added after the applicant retired.<sup>6</sup>]

#### **Retirement pay commutation Commutation of retirement pay<sup>7</sup>**

24. (1) ~~A recipient member may, by notice in writing given to the Authority, within a period of one year after becoming entitled to retirement pay, or within such further period as the Authority, in special circumstances, allows~~ A person who is, or about to become, entitled to retirement pay may, by notice in writing given to CSC, 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 CSC, in special circumstances, allows.

(1A) [Exclusion from the operation of (1).]

- (1B) *[Exclusion from the operation of (1A).]*
- (2) An election by a person under subsection (1) shall specify the amount ~~(not being an amount that, or an amount that, together with any amount or amounts specified in any previous election or elections by the member under this section, exceeds four times the amount per annum of the retirement pay to which the recipient member was entitled on retirement)~~ that is to be payable to him, by virtue of the commutation.
- (2A) The amount specified in an election by a person under subsection (1) shall not be an amount that ... exceeds the amount per annum of the retirement pay to which the person was or will be entitled on retirement multiplied by the maximum commutation factor.
- (2B) For the purposes of subsection (2A), the maximum commutation factor is the number calculated in accordance with the formula: *[Which produces a commutation factor somewhere between and including 4 to 5, depending on the member's date of retirement.]*
- (3) Where a recipient member person makes an election under this section-, then, subject to subsections (8) and (9):
- (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 CSC~~ or the day following the day on which the person retires, whichever is the later.
- (8) If:
- (a) a member of the scheme makes an election under this section (first election); and
- (b) the member's surcharge debt account is in debit when retirement pay becomes payable to the member; and

...  
*[Not applicable to the applicant's circumstances.]*

(9) If:

(a) a member of the scheme makes an election under this section;  
and

(b) the member's surcharge debt account is in debit when retirement  
pay becomes payable to the member; and

....  
*[Not applicable to the applicant's circumstances and not relevant to the interpretation of the key provisions.]*

### **Rate of retirement pay applicable to certain existing contributors**

25. (1) In this section- *[Not applicable to the applicant's circumstances.]*

...  
***new pension percentage of pay***, in relation to a person to whom this section applies, means the annual rate of his retirement pay (expressed as a percentage of the rate that was his annual rate of pay for the purposes of this Act immediately before his retirement) that is, or, but for an election under this section, would be, payable to him under this Act on his retirement;

***previous pension percentage of pay***, in relation to a person to whom this section applies, means the annual rate of pension (expressed as a percentage of the rate that was his annual rate of pay, for the purposes of the previous Act, on 30th September, 1972) that would have been payable to him under the previous legislation if he had retired on 30th September, 1972, otherwise than on the ground of invalidity or of physical or mental incapacity to perform his duties, and-

...  
 (3) Where the previous pension percentage of pay applicable to a person to whom this section applies is greater than the new pension percentage of pay applicable to him, he may, by notice in writing given to ~~the Authority~~ CSC within a period of ~~ninety~~ 90 days after the date of his retirement, or within such further period as the ~~Authority~~ CSC, in special circumstances, allows, elect that the rate at which retirement pay shall be payable to him shall be an amount per annum that is such percentage of his annual rate of pay for the purposes of this Act immediately before his retirement as is the same as the previous pension percentage of pay applicable to him, and, subject to sub-section (4), the election has effect accordingly.

...

*[Section 25 is the last provision in Part IV.]*



## PART V - INVALIDITY BENEFITS

### Invalidity benefits

26. Subject to *[Not applicable to the applicant's circumstances.]*

...  
...

### **32A Commutation of Class C invalidity pay**

(1) This section applies to a member of the scheme who:

(a) is, or is to be, retired after the commencement of this section; and

(b) on retirement, is, or is likely to be, classified as Class C under section 30 and entitled to invalidity pay.

...

(5) Where a member of the scheme to whom this section applies makes an election under this section, then, subject to subsections (7) and (8):

(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 invalidity 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.

...

### **Recipient member who becomes ineligible<sup>8</sup> member**

62. (1) Where a member of the scheme who is a recipient member again becomes an eligible member of the Defence Force, his retirement pay or invalidity pay, as the case may be, is, by force of this sub-section, cancelled serving under an appointment or enlistment for a period of not less than one year, his or her invalidity pay is, by force of this subsection,

cancelled (except if the rate of the invalidity pay is determined under subsection 31(3)).

...

~~(4) — Where a person to whom sub-section (1) applies commuted a portion of his retirement pay in accordance with section 24 of this Act or a person to whom sub-section (2) applies commuted a portion of a pension payable to him under the previous legislation in accordance with section 74 of the previous Act —~~

~~(a) — he shall, in respect of each day included in the period commencing at the time when his retirement pay or pension is cancelled under this section and ending at the time when he ceases to be an eligible member of the Defence Force, pay to the Commonwealth an amount equal to one three hundred and sixty-fifth of the amount by which the amount per annum of the rate of his retirement pay or his pension was, by virtue of the commutation, reduced; and~~

~~(b) — the period that, but for this sub-section, would be the total period of effective service applicable to him shall be reduced by such period as the Authority considers appropriate in the circumstances.~~

...

### **Deferred benefits**

75. (1) The deferred benefits applicable under this Division to or in respect of a person who is a member of the scheme shall, subject to this Division, be benefits of the same nature, and payable in the same circumstances, on the same conditions and, upon his death, to the same persons (if any), as the benefits that would have been payable to or in respect of the person under this Act if he had not retired from the Defence Force and had not made the election by virtue of which the deferred benefits became applicable to or in respect of him and- ...

...

(3) Where, by virtue of the operation of subsection (1), a person becomes entitled to retirement pay under section 23, then, subject to subsection (3A), the rate at which that retirement pay is payable to the person is, in lieu of the rate provided for in that section, an amount per annum ...

(3A) If:

(a) because of subsection (1), a person becomes entitled to retirement pay under section 23; and

(b) the person's surcharge deduction amount exceeds the amount of the person's productivity superannuation benefit;

the rate at which retirement pay is payable to the person is (instead of the rate provided for in section 23) an amount per annum worked out by using the formula ...

- (4) Where-
- (a) by virtue of subsection (1), a person becomes entitled to retirement pay under section 23;
  - (b) he is a person to whom paragraph 78(2)(d) applies;
  - (c) he was, immediately before his actual retirement, an officer; and
  - (d) at the time he becomes entitled to retirement pay, he had not attained the age that, having regard to his rank immediately before his actual 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 (3) of this section, reduced by ~~three per centum~~ 3% of that amount for each year included in the period equal to the difference between his age on his birthday last preceding the time when he becomes entitled to retirement pay and his notional retiring age as ascertained under Schedule 2.

...

#### **98K Variation of pension benefits**

- (1) Subject to subsection (3) but notwithstanding any other provision of this Act, where a prescribed member:
- (a) retired during the prescribed period; and
  - (b) throughout a period that ended immediately before his retirement, held an acting or temporary rank;

the rate of any pension benefit payable, after 13 May 1981, to, or in respect of, that member shall be reduced by the difference between:

- (c) the amount that, but for this section and subsections 24(3) and 32A(4), would be the amount per annum of the benefit; and
- (d) the amount that, but for this section and those subsections, would have been the amount per annum of the benefit if, immediately

before the retirement of the member, he had not held that acting or temporary rank.

(2) Subject to subsection (3) but notwithstanding any other provision of this Act, where a prescribed member:

- (a) died during the prescribed period before retirement; and
- (b) throughout a period that ended immediately before his death, held an acting or temporary rank;

the rate of any widow's pension or child's pension payable, after 13 May 1981, in respect of that member shall be reduced by the difference between:

- (c) the amount that, but for this section, would be the amount per annum of that pension; and
- (d) the amount that, but for this section, would have been the amount per annum of that pension if, immediately before the death of the member, he had not held that acting or temporary rank.

(3) Subsections (1) and (2) do not apply in relation to:

- (a) a rate of pension benefit that has been calculated by reference to another rate of pension benefit that has been reduced in accordance with either of those subsections; or
- (b) a rate of pension benefit that has been reduced in accordance with either of those subsections and increased in accordance with Part XA.

(4) In this section, pension benefit includes a deferred benefit applicable under Division 3 of Part IX.

....

#### **~~124 Exercise of jurisdiction of Commonwealth Industrial Court.~~**

~~124. (1) Subject to sub-section (2), the jurisdiction of the Commonwealth Industrial Court with respect to appeals~~

#### **124 Election relating to surcharge deduction amount**

(1) A member of the scheme whose surcharge debt ... [Not applicable to the applicant's circumstances.]

...

**125 Payments by the Commonwealth**

125. (1) Any payment of benefit under this Act shall be paid by the Commonwealth.

...

(3) All payments by the Commonwealth under this Act shall be paid out of the Consolidated Revenue Fund, which is appropriated accordingly.

...

**Schedule 1—Retirement pay expressed as a percentage of annual rate of pay**

## Section 23

Number of complete years included in total period of effective service	Percentage of annual rate of pay
15	30.00%
16	31.00%
...	...
20	35.00%
...	...

*[etc to 40 or more years of effective service. The applicant completed 20 years of effective service.]*

**Schedule 2—Notional retiring age for certain officers retiring at own request or on disciplinary grounds, or entitled to deferred benefit retirement pay**

## Sections 23 and 75

Rank			Notional Retiring Age— Years
Navy	Army	Air Force	
Admiral	General	Air Chief Marshal	55
Vice- Admiral	Lieutenant- General	Air Marshal	

*[etc through to lower ranks.]*

**Schedule 3—Commutation of retirement pay and Class C invalidity pay—  
expectation of life factor**

Sections 24 and 32A

Age (in years) on date of effect of election	Factor	
	Male	Female
30	41.12	46.49
31	40.18	45.53
...		
35	36.45	41.70
...		

*[etc through to the age of 65 at the date of effect of election. The applicant was 35 years old at the date of the Election.]*

3. As can be seen from the above, the changes to the provisions relate only to drafting conventions and structure or insert or amend or repeal provisions that do not affect the words that have always determined the applicant's retirement pay entitlement and the consequences of the Election. The text of s 32A(5) - inserted in 1979<sup>9</sup> - replicates the language of s 24(3). The text of s 75(3A) - inserted in 1997<sup>10</sup> - and s 98K - inserted in 1981<sup>11</sup> - is consistent with other provisions that expressly affect "the rate" of retirement pay. There is nothing in this history manifesting an intention that the original words spoken about the applicant's retirement pay entitlement and the effects of the Election do not always speak<sup>12</sup>.
4. At its heart, the application turns on the meaning of ss 23(2) and s 24(3) of the DFRDB Act, interpreted in context, the texts of which provisions for convenient reference, with the 'original' and 'now' differences, are, respectively:
  - 23(2) Subject to subsections (3) and (6) 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.
  - 24(3) Where a recipient member person makes an election under this section, then, subject to subsections (8) and (9):

- (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.
- 5. The respondent says that the words of s 24(3)(b) are plain on their face and, therefore according to the respondent, the words “on and after the day on which the election [to commute a portion of retirement pay] takes effect” mean that “the amount per annum of the retirement pay payable to [the person who commuted]” is reduced permanently when an election to commute takes effect. The annual reduction amount is determined by dividing the commuted portion of retirement pay, paid to the applicant in accordance with s 24(3)(a), by the expectation of life factor applicable to the applicant under Sch 3 – namely in the case of the applicant, 36.45.
- 6. By way of illustration through simple and approximate example (though the numbers are close to those in the applicant’s circumstances), if the applicant had been paid \$72,900 under s 24(3)(a) because of the Election, the respondent says that the applicant’s retirement pay was, by operation of s 24(3)(b), reduced by \$2,000 per annum – that is, \$72,900 divided by 36.45 - when the Election took effect. The respondent says that the reduction continues, even if the applicant happens to live beyond the age on which the applicable expectation of life factor in Sch 3 is based – namely 72 years (35.55 years old when the Election took effect + 36.45 years).
- 7. Again by way of illustration through simple and approximate example, if the applicant were to live to the age of 84 (which is close to his current life expectancy according to the latest Australian Bureau of Statistics 2017-2019 Life Tables) instead of the 72 years on which the applicable expectation of life factor in Sch 3 of the DFRDB Act is based, the cumulative reduction in his retirement pay will be \$96,900 rather than the \$72,900 he was (in this example) paid as a lump sum. To make the point a different way, if a relevantly identical colleague of the applicant (that is, a male colleague who has the same date of birth, joined the ADF on the same day and retired on the same day and at the same rank and rate of pay as the applicant) did *not* elect to commute any portion of his retirement pay, that colleague will in this example be paid \$24,000 more in accumulated retirement pay than received by the applicant by the time they simultaneously reach the age of 84 years.
- 8. This outcome is relevant to the interpretation of words like “commute”, “portion” and “commutation” in the DFRDB Act, taking into consideration words like “proportionately”

and “equal to” used in extrinsic materials to which reference may be made to provide the context of the Act.

9. When the DFRDB Act is interpreted:

- a. in context; and
- b. beneficially, if necessary and the interpretation is open in that context,

the outcome is that the applicant’s retirement pay is not reduced as a consequence of the Election or, if it is reduced as a consequence of the Election, reduced only until the applicant reaches the age on which the applicable expectation of life factor in Sch 3 is based.

10. There is little doubt that the DFRDB Act is properly characterised as beneficial legislation.<sup>13</sup> The implications of that characterisation, and the scope for the application of the principle of beneficial interpretation, are analysed later. However, it should be acknowledged here that “[a]lthough a provision of [beneficial or remedial legislation] must be given a liberal and beneficial construction [if that construction is open], a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural.”<sup>14</sup>

11. As to interpretation in context, in *Reynolds and Defence Force Retirement and Death Benefits Authority* the Commonwealth Administrative Appeals Tribunal (**Tribunal**) said<sup>15</sup>:

In the opinion of the Tribunal, in considering the application of the relevant law [namely ss 3, 23 and 24 of the DFRDB Act], it cannot take into account any extraneous material except that it does so pursuant to sections 15AA and 15AB of the *Acts Interpretation Act* 1901.

12. That opinion was plainly wrong. That is not to say that the ultimate conclusion of the Tribunal as to the interpretation of ss 3, 23 and 24 of the DFRDB Act was wrong. However, having approached the interpretation task in the wrong way by refusing to take into account extrinsic materials as requested by Mr Reynolds, the Tribunal’s conclusion on the issue merely begs the question the subject of the current proceedings.

13. In *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192, Allsop CJ said<sup>16</sup>:

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: see *Jayasinghe* 247 FCR at 42-44



[3]-[12]; and *CPB Contractors Pty Limited v Construction, Forestry, Maritime, Mining and Energy Union* [2019] FCAFC at [8], [50]-[60].

14. Even if the above opinion expressed by the Tribunal were correct, there is, contrary to the Tribunal's further opinion that "there is neither ambiguity nor obscurity in [ss 3, 23 and 24 of the DFRDB Act]"<sup>17</sup>, substantial obscurity arising from the interrelationship between those provisions in the context of the whole of the DFRDB Act alone.

15. In *CIC Insurance Ltd v Bankstown Football Club Ltd* - a judgment preceding the Tribunal's decision in *Reynolds* - the High Court said:

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd*, if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.<sup>18</sup> [citations omitted]

16. Subsequent judgments show that:

Context also may include time, place and any other circumstances that could rationally assist understanding of meaning and may encompass the facts and circumstances which were within the knowledge or contemplation of the legislature.<sup>19</sup> [citations omitted]

17. Even if it is assumed that Tribunal proceedings are "other adversarial proceedings" referred to by the majority of the High Court in *Tomlinson v Ramsey Food Processing Limited*<sup>20</sup>, the applicant was neither a party to the Reynolds matter in the Tribunal nor a privy in interest to Mr Reynolds in that matter, within the meaning of privy in interest discussed and propounded by the High Court in *Tomlinson*.<sup>21</sup> The decision of the Tribunal in the Reynolds matter does not, therefore, estop the applicant from raising, in these proceedings, the issue of the interpretation of the provisions considered by the Tribunal in the Reynolds matter.

18. Nor does the application for relief that gives rise to these proceedings constitute an abuse of process such that the proceedings would be unjustifiably oppressive to the respondent or bring the administration of justice into disrepute. Given that the opinion expressed by the Tribunal, in the Reynolds matter, as to the operation of ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth) was plainly wrong, it is in the interests of the administration of justice that the interpretation of the commutation provisions of the DFRDB Act be approached in accordance with the law. Until that happens there will be uncertainty as to the consequences of the Election, the resolution of which uncertainty is in the interests of the applicant and the respondent.
19. Nor does the application in effect invite the court to provide an advisory opinion in relation to an event that has yet to occur and may not occur, namely the applicant reaching the age on which the expectation of life factor in Sch 3 of the DFRDB Act applicable to him is based. The applicant seeks certainty as to his entitlements under the DFRDB Act if he were to reach that age, so the applicant may now make financial arrangements accordingly.<sup>22</sup>

### **The history and context of the DFRDB Act**

20. There is no explanatory memorandum for the Defence Force Retirement and Death Benefits Bill 1973 (the **DFRDB Bill**).

### ***The second reading speech***

21. Although “[t]he caution with which courts should approach extrinsic material as a tool in ascertaining the proper construction of a provision in a statute, especially second reading speeches, is well established”<sup>23</sup>, the second reading speech on the package of Bills, of which the DFRDB Bill was a part, sheds light on the mischief the legislation was intended to remedy and the overarching purposes of the legislation, rather than dealing with specific clauses of the Bills. During that speech, on 25 May 1973, the Minister for Defence, Minister for the Navy, Minister for the Army, Minister for Air and Minister for Supply<sup>24</sup> said, among other things:

The Bills give effect to the Government's decision announced last year to implement the recommendations of the Joint Select Committee on Defence Forces Retirement Benefits Legislation. Honourable members will recall that the report of the Committee was tabled in the Parliament on 18 May 1972.

...

[T]he measures adopted in attempts to alleviate the severe problems faced by pre-1959 entrants [to the scheme established under the Defence Forces Retirement Benefits Act 1948] in maintaining high levels of contributions have resulted in a multiplicity of contributions and benefits arrangements that are 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.

I well recall referring at some length to this very matter and to other unsatisfactory features of the scheme during the debate on a Bill to amend the Defence Forces Retirement Benefits Act in 1970 .... It was against this background that during that debate I moved for the appointment of a joint committee of senators and members of the House of Representatives to investigate and report on the DFRB scheme. The Government of the day agreed with my proposal and the Joint Select Committee on Defence Forces Retirement Benefits legislation, under the chairmanship of Mr J. D. Jess, C.D.E.. M.P., came into being on 2 September 1970. Its report recommended the introduction of a new scheme which, with some necessary modifications, is the scheme covered by the first Bill introduced [that is, the DFRDB Bill].

...

Some of the other features of the new scheme are: Commutation of retirement pay will be a right for members who retired after 1 October 1972, subject only to applications for commutation being made within one year of retirement or such longer period as may be necessary in special circumstances; ...

... Finally, let me say 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. It is a tangible application of the Government's policy to provide all volunteer forces. 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.

22. At the conclusion of the second reading debate in the House on 30 May 1973, the responsible Minister said<sup>25</sup>, among other things:

[S]ome adjustments were made to the original recommendations of the Jess Committee. Any of the amendments which were made at that time were accepted on the basis that they would improve the legislation, that they were an improvement on the recommendations in the report ... .

23. The second reading speech of the responsible Minister in the Senate, on 31 May 1973,<sup>26</sup> did not depart in any substantial way from the Minister's second reading speech in the House on 25 May.

**Report of the Treasury Committee on Superannuation, Parliamentary Paper No. 37 of 1973**

24. The Report of the Treasury Committee on Superannuation<sup>27</sup>, Parliamentary Paper No. 37 of 1973, March 1973, was presented to the House on 8 May 1973<sup>28</sup> (less than three weeks prior to the package of Bills being introduced). Although it is a report to Parliament rather than a report of a Committee of Parliament, the Committee comprised the most senior government officials with portfolio responsibility for the subject matter of the then-existing DFRB Scheme and the proposed DFRDB Scheme and the contents of the Report are among “the facts and circumstances which were within the knowledge or contemplation of the legislature” when the DFRDB Bill was being considered.
25. The Report said, at pp 24 - 25, in relation to the proposed DFRDB Scheme (with underlining added):

**RECENT DEVELOPMENTS IN PUBLIC SECTOR SUPERANNUATION SCHEMES**

3.01 Notable developments in public sector superannuation pension schemes have recently occurred in relation to the Defence Forces Retirement Benefits scheme and to ... .

...

**I The proposed Defence Forces Retirement Benefits Scheme**

...

3.02 The Government has announced it will introduce a new DFRB scheme to replace the existing Pre-1959 and Post-1959 schemes. Except for minor changes, the new scheme is that recommended by the Joint Select Committee on Defence Forces Retirement Benefits Legislation which reported to the Parliament in May 1972. The new scheme is to operate from 1 October 1972 and the legislation covering it is expected to be introduced and passed during the Autumn 1973 sittings of the Parliament. A description of the main features of the new scheme, as it is presently understood by the Committee, is set out below.

*Commutation*

3.06 Commutation of retired pay will be a right. Members may commute up to 4 years retired pay within 12 months after retirement, the reduction in retired pay being equal to the lump sum received, divided by the member's expectation of life according to the Australian Life Tables.

...

### *Comparison with the Pension Scheme*

3.09 Since the introduction of the DFRB scheme in 1948 there has been a similarity with the Pension Scheme, particularly in regard to benefits. When presenting the Joint Select Committee Report, the Chairman of the Committee, Mr John Jess, said that the Committee believed that the 'Commonwealth Superannuation Scheme' was not an appropriate foundation on which to base a retirement benefits scheme for the Defence Force. It seemed to the Joint Select Committee that circumstances relating to the retirement of servicemen were so different from those applicable to retirement from civilian employment that they required a totally different approach (Joint Select Committee Report paragraph 52).

### ***The Joint Select Committee on Defence Forces Retirement Benefits Legislation***

26. As noted above:

- a. the responsible Minister's second reading speech on the package of Bills of which the DFRDB Bill was a part, said, among other things:

The Bills give effect to the Government's decision announced last year to implement the recommendations of the Joint Select Committee on Defence Forces Retirement Benefits Legislation.

- b. the statement at para [3.02] of Treasury Committee on Superannuation Report said, among other things:

Except for minor changes, the new scheme is that recommended by the Joint Select Committee on Defence Forces Retirement Benefits Legislation which reported to the Parliament in May 1972.

27. The recommendations to which reference is made above are those of the review of military superannuation arrangements conducted between 1970 and 1972 by the Joint Select Committee on Defence Forces Retirement Benefits chaired by J. D. Jess CBE, MP, known as the **Jess Review**. The report of the Committee is [Parliamentary Paper No. 74 of 1972](#) dated May 1972. It was tabled in the House on 18 May 1972.<sup>29</sup> In speaking to the report Mr Jess said, among other things<sup>30</sup>:

The Committee's conclusions were greatly influenced by 2 considerations: Firstly, the special nature of a career in the defence forces. Very few members indeed are permitted to continue to serve until the age of 60, and the risk of death or injury, in peace as well as war, is far higher than in civilian employment. For these reasons we do not believe that the Commonwealth superannuation scheme is an appropriate foundation on which to base a retirement benefits

scheme for the defence forces. The second consideration was the need for simplicity and comprehensibility. ....

The Committee believes that retirement benefits are significant factors in both recruiting and retention, and that any scheme which is not comprehensible to the average serviceman will fail in one of its main purposes.

...

The following is an outline of the more important features of the scheme the Committee proposes. All members should contribute a flat 5i[sic] per cent of their pay. ... Both officers and other ranks should be entitled to receive a pension, which we prefer to call retired pay, when retiring after 20 years or more of effective service. Retired pay should be expressed as a percentage of final pay, on an accelerating scale, ranging from 35 per cent of final pay after 20 years service to 76.5 per cent after 40 years service. ... There should be an unfettered right to commute a portion of retired pay as a lump sum on retirement. Members should have the right to commute a maximum of 4 times the annual retired pay payable to them on retirement and this amount should not be subject to reduction either on grounds of the member's life expectancy or for any other reason. These are some of the more significant features of the scheme. The full proposals are set out in the report.

...

The Committee has been very conscious of the importance of the DFRB legislation to the recruiting and morale of the defence forces. We believe the scheme we have proposed is fair and comprehensible, and will not impose any undue financial burden on the Commonwealth.

...

28. In relation to commutation, the recommendations of the Jess Review were, among others:

#### 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.

...

29. The above context shows, among other things, that:

- a. the 'mischief' intended to be remedied by the package of Bills including the DFRDB Bill was the complexity and angst caused to members by the features of the pre-existing DFRB Scheme created by the *Defence Forces Retirement Benefits Act 1948*;

- b. the purpose of the legislature was to implement the recommendations of the Jess Review and provide a substantial inducement to become and remain a member of the ADF, because the retirement benefits of ADF members were fundamental to the morale and recruiting of members;
  - c. key recommendations of the Jess Review included that ADF members should be “entitled” to commute of a portion of retirement pay and that retired pay “proportionately” reduced in relation to commutation remain payable after commutation;
  - d. those recommendations addressed some of the angst caused to members by the pre-existing DFRB Scheme, under which:
    - i. commutation was not an entitlement<sup>31</sup>; and
    - ii. members were required to provide “such information as the [DFRB] Authority requires (including information as to his health and habits and his intention in obtaining the commutation) and ... if the Authority so directs, submit himself for personal examination by an Australian Government Medical Officer nominated by the Authority;<sup>32</sup>
  - e. the circumstances relating to the retirement of ADF members were so different from those applicable to retirement from civilian employment that they required a totally different approach than civilian superannuation schemes (a contemporary reflection of which is that the respondent, in performing its functions under the DFRDB Act, “must have regard to the unique nature of military service, as recognised by the schemes established by [*inter alia*, the DFRDB Act].<sup>33</sup>); and
  - f. to the extent, if any, that the DFRDB Bill was amended during the legislative process, the amendments were intended to be an improvement on the recommendations of the Jess Review.
30. Although reference to it would probably not be permissible, even a cursory study of the socio-political context of Australia in the early 1970s shows why there was an imperative to make a career in the ADF far more attractive through, among other steps, the implementation of the DFRDB Scheme as the replacement for the DFRB Scheme.
31. It is appropriate to pause here to note the word “proportionately” in recommendation 14(b) of the Jess Review. That word is an adverb meaning in a way “*corresponding in size or amount to something else*”<sup>34</sup>, which meaning may reasonably explain why the Treasury Committee on Superannuation understood that commutation under the proposed DFRDB scheme would result in “the reduction in retired pay being equal to the lump sum received”, divided by the applicable life expectancy. Further, this is a context in which the legislation is about dollars and cents – and even fractions of cents<sup>35</sup> – and not a context in which some broader conception of proportionality – such as proportional representation in the constitutional sense – is relevant.

32. It is also appropriate to pause to note the specificity of the statements, in the Report of the Treasury Committee on Superannuation, about the purpose and features of the proposed DFRDB Scheme. Consistent with the Treasury Committee's specific statement about its understanding of the commutation feature, and consistent with the statements of Mr Jess in the House and the recommendations of the Jess Review to which the Committee's Report expressly referred, the subsequent DFRDB Act provides, and has always made provision, for:

- a. commutation as a right (s 24(1));
- b. a requirement for the right, if the member wants to exercise it, to be exercised within 12 months after retirement (originally s 24(1) and now s 24(1AA), the latter of which permits notice to be given within the period 3 months *prior* to the entitlement arising and through the 12 months ensuing after the entitlement arises);
- c. commutation of up to a specified number of years of retirement pay – originally 4 years and now 5 (originally s 24(2) and now ss 24(2A) and (2B)); and
- d. reduction of the annual *amount* of retirement pay *payable* to a member who commutes, with the reduction calculated by dividing the commuted amount by the member's expectation of life according to the Australian Life Tables (s 24(3)(b) and Sch 3),

but, according to the respondent, the Act was not intended to reduce the annual payments only until the accumulated reduction in the member's "retired pay" is "equal to" the lump sum paid.

33. It is difficult reasonably to explain how a committee of the composition of the Treasury Committee on Superannuation could have understood that the features of the proposed DFRDB Scheme included the "reduction in retired pay" due to commutation being "equal to" the lump sum paid, divided by the applicable life expectancy, if that was not the intent of the Bill shortly thereafter to be introduced into the Parliament to create that Scheme. If the intention was that the annual amount of retirement pay would be permanently reduced by an amount calculated by dividing the lump sum by the applicable life expectancy one wonders why that was not clearly expressed in the Report. Further, it is difficult reasonably to explain why, if the Parliament's intent on this feature changed during the legislative process, there is no reference to that change in the second reading speeches or debates.



34. It cannot reasonably be supposed that the government of the day deliberately intended to give and leave ADF members and prospective ADF members with the impression that legislation was being made to give effect to the Jess Review recommendations, including that retired pay proportionately reduced in relation to commutation remain payable after commutation, on the one hand, while legislating for permanent reduction as a consequence of commutation on the other. The implication of the way in which the respondent and its predecessor have interpreted the commutation provision has only become obvious to many retired DFRDB members, including the applicant, as they approach or pass the age on which the expectation of factor in Sch 3 of the DFRDB Act applicable to them is based.

### **Analysis of the text of the DFRDB Act in context**

35. In the interests of simplicity, in this analysis:

- a. s 24(3) will be referred to as **the commutation provision**;
- b. s 24(3)(a) will be referred to as **the lump sum provision**; and
- c. s 24(3)(b) will be referred to as **the reduction provision**.

36. The following preliminary matters are notable about the text of the Act:

- a. The definition of “retirement pay” mentions only s 23.
- b. Section 23(1) - in both its original and ‘now’ terms – sets out that to which a member “is entitled”. However, the word “entitle” is not used, in any of its forms, in the commutation provision. The only uses of forms of that word in s 24 are in provisions that determine *when* an election to commute must be made, if it is to be made - (originally s 24(1) and now s 24(1AA)) - and the maximum *amount* that may be commuted - (originally s 24(2) and now ss 24(2A) and (2B)).
- c. Section 23(2) is expressed to be subject to a number of provisions, none of which is s 24 nor any provision with it. However, one of the provisions to which s 23(2) is now expressed to be subject - s 23(6) - deals with an election, but under s 124(1) rather than s 24(1).
- d. Every one of the provisions to which s 23(2) is expressed to be subject expressly affects the *rate* of the retirement pay entitlement, whereas the word “rate” does not appear in the reduction provision. In the original Act, the word “rate” appeared nowhere in s 24. The word “rate” now appears in ss 24(8) and 24(9), but those provisions deal with surcharge deductions.
- e. The only provision that in its express terms appears to have anticipated that commutation affected the *rate* of a member’s retirement pay was now-repealed s 62(4)(a).

- f. Neither the definition of “benefit”, which encompasses “pension benefit”, nor the definition of “pension benefit”, which encompasses “retirement pay”, nor the definition of “retirement pay” mentions the lump sum paid under the lump sum provision (or under s 32A(5)(a) in cases to which it applies). However, the definition of “benefit” mentions lump sums paid under other provisions (namely and originally, a lump sum payment under s 32(2) or s 48, to which was later added “a release authority lump sum paid in relation to a release authority issued to a person under Subdivision 135- A in Schedule 1 to the *Taxation Administration Act 1953*”).
  - g. In referring to Sch 1, s 23(2) speaks of the retirement pay entitlement being an amount per annum that is equal to a percentage of the annual rate of pay, which percentage “as...is ascertained under” Sch 1. In referring to Sch 2, s 23(3) also speaks of a variable that is “as ascertained under” Sch 2. However, although each of the three schedules contains only a simple variable, the reference to Sch 3 in the reduction provision speaks of the factor that “is applicable to him under” Sch 3.
  - h. Thus, two consecutive provisions – ss 23 and 24 - in their original and ‘now’ terms, contain references to the three schedules to Act, each of which contains a simple variable, yet the words used in s 23 to refer to Sch 1 and Sch 2 are different to the words used in the reduction provision to refer to Sch 3. It is also notable on this point that:
    - i. s 75(4), in its original and ‘now’ words, uses “as ascertained under” in referring Sch 2; and
    - ii. there are only two references to Sch 3 in the Act – ss 24(3)(b) and 32A(5)(b) - and they both use the words “is applicable to him under” as the reference.
  - i. The words “commute”, “commutation” and “portion” are not defined.
  - j. No provision of the Act dictates or turns upon the uses to which a member puts his or her retirement pay, commuted or otherwise.
  - k. No provision of the Act in its express terms brings a member’s retirement pay entitlement – commuted or otherwise – to an end when the member passes away. Various provisions of the Act ‘cancel’ a member’s retirement pay – for example, s 62 of the original Act cancelled the retirement pay of a member who rejoined the ADF and thereby again became an eligible member of the DFRDB Scheme – but the death of a member is not a criterion for the operation of any of those provisions.
37. It is also notable that s 24 has no operation independent of s 23, whereas s 23 can operate completely independently of s 24.

38. The interpretation task requires consideration of the following, overlapping matters, dealt with in detail below:

- a. The requirement that the DFRDB Act be read as a whole and, if the interpretation is open, beneficially.
- b. The operation of definitions in legislation and the effect of the words “unless a contrary intention appears” at the commencement of the definition provision (in this case s 3(1)).
- c. The effect of using consistent words - “as/is ascertained under” - in every reference to Sch 1 and Sch 2 compared with “is applicable to him under” in every reference to Sch 3.
- d. The effect of using consistent words - “the rate at which that retirement pay is payable” - with minor variations - in every provision to which s 23(2) is expressed to be subject and the absence of that phrase or even the word “rate” in the reduction provision.
- e. The effect of the words “subject to” in, or their absence from, the provisions in question.
- f. The questions whether ss 23 and 24 are competing provisions and, if yes, which is subordinate to the other and what are the implications of that relationship.
- g. The principle that general words will usually be given their primary and natural meaning (“ascertained”, “commute”, “commutation”, “portion” and “on and after”).

***The DFRDB Act must be read as a whole***

39. In *Project Blue Sky Inc v Australian Broadcasting Authority* the High Court said:<sup>36</sup>

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.

40. The court also cited with approval what Dixon CJ said in *Commissioner for Railways (NSW) v Agalinos*:<sup>37</sup>

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.

41. In *K & S Lake City Freighters Pty Ltd v Gordon & Goth Limited* Mason J<sup>38</sup> (as he then was) earlier affirmed the significance of a contextual approach in what Pearce describes as “trenchant terms”<sup>39</sup>:

[T]o read the section [in question] in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context [authorities omitted]. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context.

42. Nonetheless, the respondent construes the words “on and after” in the reduction provision as being clear, in isolation and, therefore according to the respondent, operate permanently to reduce the amount of retirement pay payable to a person who elects in accordance with s 24(1). The respondent adheres to that construction, notwithstanding that, even in its terms on their face, the reduction provision does not purport to alter the entitlement conferred by s 23(1) as ascertained under Sch 1 in accordance with s 23(2), but rather just reduces an “annual amount” otherwise payable.
43. In contrast, every provision to which s 23(2) is expressed to be subject - s 23(3), s 25, s 75 and now s 23(6) - expressly affects the rate of retirement pay (all underlining added):

23(3) [On satisfaction of two specified criteria....] 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 ... .

23(6) If the member of the scheme makes an election under subsection 124(1), the rate at which retirement pay is payable to the member is the rate worked out by using the formula:...

25 Rate of retirement pay applicable to certain existing contributors

...

(3) Where the previous pension percentage of pay applicable to a person to whom this section applies is greater than the new pension percentage of pay applicable to him, he may, by notice in writing given to CSC within a period of 90 days after the date of his retirement, or within such further period as CSC, in special circumstances, allows, elect that the rate at which retirement pay shall be payable to him shall be an amount per annum that is such percentage of his annual rate of pay for the purposes of this Act immediately before his retirement as is the same as the previous pension percentage of pay applicable to him, and, subject to subsection (4), the election has effect accordingly.

75 Deferred benefits

...

(3) Where, by virtue of the operation of subsection (1), a person becomes entitled to retirement pay under section 23, then, subject to subsection (3A), the rate at which that retirement pay is payable to the person is, in lieu of the rate provided for in that section, an amount per annum equal to 1.75% of ....

...

(4) Where:

...

then, subject to subsection (4A), 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 (3) of this section, reduced by 3% of ...

44. Thus, every provision to which s 23(2) is expressed to be subject expressly affects the rate of retirement pay, s 23(2) is not expressed to be subject to the reduction provision and the word “rate” does not appear in the reduction provision. If the intention had been to alter, permanently, the rate of retirement pay payable to a member who commutes, it is difficult reasonably to explain why the drafter did not add the reduction provision as one of the provisions to which s 23(2) is expressed to be subject and use the phrase “the rate at which retirement pay is payable” in the reduction provision, consistently with all the other provisions to which s 23(2) is expressed to be subject.
45. In that context alone, it would be absurd to construe the reduction provision as being intended to affect the rate of retirement pay to which a member is entitled. In that context alone, the reduction provision operates only to reduce an amount otherwise payable each year, but the entitlement that gives rise to the amount otherwise payable in the first place is unaffected. The “consistent and fair” construction is that the rate of retirement pay entitlement of relevantly identical members, one of whom commutes and the other not, is identical. Only the timing and apportionment of the amounts payable differs by operation of the commutation provision.

***The effect of definitions in legislation and the words “unless a contrary intention appears” at the commencement of the definition provision (s 3(1))***

46. Generally a definition is an aid to the construction of the substantive provisions of legislation and, if drafted properly, is not a provision which itself has substantive effect.<sup>40</sup> That general principle may be modified by a clear contrary legislative intent.<sup>41</sup>
47. As noted earlier, neither the definition of “benefit”, which encompasses “pension benefit”, nor the definition of “pension benefit”, which encompasses “retirement pay”, nor the definition of “retirement pay” mentions the lump sum paid under the lump sum provision (or the lump sum paid under s 32A(5)(a) in cases to which it applies). However, the definition of “benefit” mentions lump sums paid under other provisions (namely and originally, a lump sum paid under s 32(2) or s 48, to which was later added “a release authority lump sum paid in relation to a release authority issued to a person under Subdivision 135- A in Schedule 1 to the *Taxation Administration Act 1953*”).

48. There is no clear legislative intent that these definitions should be anything other than “simple definitions”<sup>42</sup> providing an aid to the construction of the substantive provisions of the DFRDB Act. In construing the substantive provisions with the aid of the definitions, there seems to be only one reasonable explanation for drafter’s decision not to mention the lump sum paid under the lump sum provision in any of the definitions: That the lump sum is just a portion of the applicant’s “retirement pay” as defined, with the lump sum provision operating only to alter when that portion became payable to the applicant as a consequence of the Election. The entitlement to elect to “commute a portion of his or her retirement pay” applies, inextricably, only to “retirement pay”, the entitlement to which has already been conferred by s 23.

49. In *Commissioner of Taxation v Douglas* [2020] FCAFC 220 the Full Court of the Federal Court said<sup>43</sup>:

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”.

...

Mr Douglas elected to take his retirement pay partly by way of a commutation lump sum payment (being an eligible termination payment) and partly by way of periodic payments.

50. In short, the Full Court treated the DFRDB Act as creating only two kinds of benefits payable to members – retirement pay and invalidity pay - and treated the commuted lump sum as part of rather than separate to the retirement pay entitlement created by s 23 and Sch 1. Whilst it may be that the court did not conduct a forensic analysis of the operation of and interaction between ss 23 and 24, because the subject of the proceedings was the tax treatment of payments made to Mr Douglas, it is hardly surprising that the Court characterised Part IV of the Act as providing for “retirement pay” alone because that is the only “benefit” as defined in the Act dealt with in Part IV. Although the heading to Part IV and the heading to Part V each use the word “benefits” plural, and those headings have always formed part of the Act<sup>44</sup>, that usage does not seem to assist the interpretation task in a substantial way.

51. Although all definitions of the meaning of words or phrases used in legislation are to be read either expressly or impliedly as subject to the qualification ‘unless the contrary intention appears’<sup>45</sup> – and here the qualification is express – it is difficult to identify any intention that the lump sum paid under the lump sum provision is anything other than “retirement pay”. The onus of showing a contrary intention is on the respondent, if the respondent’s position is that defined words in the DFRDB Act have other than their defined meaning.<sup>46</sup>

***Consistency in uses of words and changes in words***

52. Pearce states that<sup>47</sup>:

The courts have ... long adopted a twofold approach to interpretation of legislation that is founded on the expectation that words will be used precisely. First, the view is taken that when a word is used consistently in legislation it should be given the same meaning consistently. Second, it is held that where a legislature could have used the same word but chose to use a different word, the intention was to change the meaning.

53. Although the presumption that different words used in a piece of legislation are intended to have different meanings has been described as “a weak one”<sup>48</sup>, the words in question here have not been the subject of frequent amendment in a large Act, such that the presumptions described by Pearce would more easily be rebutted.<sup>49</sup> The words have been the same since the commencement of the DFRDB Act in 1972.

*Use of “is ascertained under” in every reference to Sch 1 or Sch 2, and “is applicable to him under” in every reference to Sch 3*

54. It cannot sensibly be supposed that the drafter:

- a. chose the words “is ascertained under” in the first reference to any schedule of the Act - s 23(2) in referring to Sch 1;
- b. then chose the same words, three times, in the next provision in which reference is made to a schedule of the Act – s 23(3) referring to Sch 2;
- c. then chose to use different words - “is applicable to him under” - in the next provision in which reference is made to a schedule of the Act – the reduction provision referring to Sch 3;
- d. then chose to change back to the words “is ascertained under” in the only (then) remaining provision containing references to a schedule of the Act – twice in s 75(4) referring to Sch 2;

- e. then later chose, when s 32A was inserted into the Act in 1979, to use the words “is applicable to him under” in s 32A(5)(b) as the second of only two references in the Act to Sch 3, replicating in s 32A(5) the words of the commutation provision,

with the intention that there be *no* change of meaning as between “is ascertained under” Sch 1 or Sch 2, on the one hand, and “is applicable to him under” Sch 3 on the other, despite all three schedules containing simple variables.

55. The “consistent and fair” construction is that the words “is ascertained under” intend Sch 1 and Sch 2 to make certain the subjects with which the provisions referring to those schedules deal, whereas the words “is applicable to him under” in the provisions referring to Sch 3 result in a different outcome in the operation of the provisions referring to that schedule. The word “ascertain” in this context is a verb meaning to *‘find [something] out for certain; make sure of’*.<sup>50</sup> The imperative language is unsurprising in provisions dealing with such an important subject matter as the retirement pay entitlements of people like the applicant who served for decades in the ADF.

*Use of “the rate at which retirement pay is payable” in every provision to which s 23(2) is expressed to be subject, and the absence of the word “rate” in any form from s 24(3)(b)*

56. Similarly, it cannot reasonably be supposed that the drafter:

- a. chose, in s 23(1), to confer the retirement pay entitlement by using the words retirement pay “at the rate applicable to the member under this section [23]”;
- b. chose, in s 23(2), to use the words “the rate at which retirement pay is payable” to a recipient member is an amount per annum ...;
- c. chose to express s 23(2) as being subject to a number of provisions, none of which is the reduction provision nor any other provision within s 24;
- d. chose to use the words “the rate at which retirement pay is payable” - with minor variations - in every one of the four provisions to which s 23(2) is expressed to be subject, which provisions alter that rate; and
- e. then chose not to use the word “rate” in the reduction provision,

with the intention that the reduction provision would operate to reduce the rate of retirement pay to which a commuting member is entitled.

57. The “consistent and fair” construction is that the commutation provision is not intended to affect the rate of retirement pay to which a commuting member is entitled, but rather when portions of the entitlement become payable. The words “the amount per annum of the retirement pay payable” in the reduction provision encapsulate the concept of “rate” in s 23(2), but the drafter deliberately chose not to use the word “rate” in or express s 23(2) to be subject to the reduction provision, because the commutation provision is intended to:



- a. make payable an amount of retirement pay – the commuted amount – earlier than it would be, but for the commutation; and
- b. reduce each annual amount of retirement pay that would otherwise be payable, but for the commutation, “on and after” (discussed below) the point at which the commutation takes effect,

but is not intended to have any effect on the rate of the already-ascertained entitlement by reference to which those amounts are necessarily calculated.

58. On that construction, if the amount per annum of the retirement pay paid to the applicant in accordance with s 23(2) continues to be reduced beyond 72 years of age (using the approximation for simplicity), he and his relevantly identical non-commuting colleague are no longer receiving the same rate of retirement pay, notwithstanding that the entitlement conferred on them by s 23 is the same.
59. If it is accepted that the commuted lump is just retirement pay, it follows that up until the point at which he reaches 72 years of age the applicant will have received a higher amount of accumulated retirement pay than his relevantly identical non-commuting colleague. (Indeed, up until that point the applicant will in fact have been paid a *higher* annual ‘rate’ – simpliciter – of retirement pay.) However, that is the outcome on whatever view is taken as to the operation of the commutation provision. Further, that outcome is the product of the individual choices of members (albeit based on their understanding – or perhaps misunderstanding – of the consequences of commuting or not).
60. It is also true that various financial models based on reasonable assumptions show that the theoretical value of an ‘up front’ lump sum amount is greater than the same amount instead paid periodically over years. However, individual DFRDB members are free to spend, save, invest, gamble, donate, gift, hide under a mattress or otherwise use retirement pay - commuted or otherwise - in whatever lawful ways the members choose, and those choices have no effect on the members’ entitlements under the DFRDB Act. The *absence* of a right to commute and use the commuted amount in whatever ways members chose was *precisely* one of the features of the DFRB Act that caused substantial angst and which the DFRDB Act was intended to address. There was an evident hypocrisy in the government scrutinising and regulating the financial intentions and decisions of ADF members on their retirement after decades of service in the defence of fundamental freedoms, which hypocrisy was not lost on members.
61. A DFRDB member could lose the entire value of a commuted lump sum on an ostensibly prudent investment that turns out bad, on the hand, and his or her relevantly identical non-commuting colleague could turn the margin of the higher fortnightly payment into a fortune through dumb luck on the other. The DFRDB Act has nothing to say or do about that or any of the other, almost endless, range of consequences of the almost endless decisions that may be made by members as to how to use retirement pay, commuted or otherwise.

62. The applicant and his relevantly identical non-commuting colleague could gamble away every cent of retirement pay as soon as it is received. There is no evident policy justification for paying the non-commuting colleague more than is paid to the applicant to gamble away after they reach 72 years of age.
63. Therefore, the theoretical value of an 'up front' lump sum payment compared with payment of the same accumulated amount over a period is of no assistance in ascertaining the meaning of the words in the commutation provision in context.

*The use of "rate" in now-repealed s 62(4)(a)*

64. In its original terms s 62 dealt with members in receipt of retirement or invalidity pay who rejoined the ADF and, therefore, again became eligible members for the purposes of the DFRDB Act. Section 62(1) 'cancelled' the retirement or invalidity pay. Section 62(4) dealt with the specific circumstances of rejoining members who had elected to commute a portion of his or her retirement pay. The intended effect of s 62(4)(a) was that the member's ADF pay would be reduced by a daily amount equivalent to the daily amount by which the member's retirement pay had effectively been reduced as a consequence of commutation. The underlying policy of these provisions was that the member should not enjoy both the commuted lump sum and 'full' ADF pay without the reduction which would otherwise have continued had the member not rejoined. Section 62 was later re-cast and provisions such as s 62(4) repealed because eventually rejoining members did not again become eligible members for the purposes of the DFRDB Act but instead automatically became members of the superseding Military Superannuation and Benefits Scheme established under the *Military Superannuation and Benefits Act 1991*.
65. Section 62(4)(a) was the only provision of the DFRDB Act that in its express terms appeared to anticipate that commutation affected the *rate* of a member's retirement pay. However, that provision was nonsensically tautological (underlining added): "[P]ay to the Commonwealth an amount equal to one three hundred and sixty-fifth of the amount by which the amount per annum of the rate of his retirement pay or his pension was, by virtue of the commutation, reduced."
66. In *Western Australian Planning Commission v Southregal Pty Ltd; Western Australian Planning Commission v Leith* Kiefel J (as she then was) and Bell J said<sup>51</sup>:

[W]hilst it must be accepted that words chosen by the legislature should be given meaning and endeavours should be made to avoid them being seen as redundant, they should not be given a strained meaning, one at odds with the scheme of the statute. Moreover, it has been recognised more than once that Parliament is sometimes guilty of "surplusage" or even "tautology". The possibility that Parliament may not have appreciated that the reference ... was not necessary, and was liable to confuse, is not a reason for giving it a literal interpretation. [citations and "in s 177(2)(b)" omitted]

67. In such cases the duty of the court is to give the words the construction ‘that produces the greatest harmony and the least inconsistency’<sup>52</sup>. The construction of s 62(4)(a) that produces the greatest harmony and least inconsistency in context was that a rejoining member’s ADF pay was reduced by an amount equivalent to the amount that the member’s retirement pay would have been reduced due to commutation, had the member not rejoined.

***The effect of the words “subject to” in, or their absence from, the provisions in question***

68. As noted earlier, s 23(2) is expressed to be subject to a number of provisions, none of which is s 24 nor any provision with it. However, one of the provisions to which s 23(2) is now expressed to be subject - s 23(6) - deals with an election, but under s 124(1) rather than s 24(1). Further, every one of the provisions to which s 23(2) is expressed to be subject expressly affects the rate of the retirement pay entitlement, whereas the word “rate” does not appear in the reduction provision. In context, the “consistent and fair” construction is that the reduction provision is not intended to affect the rate of retirement pay to which the applicant is entitled under s 23.

69. However, it must be acknowledged that “[t]he overriding idea is that an Act should be read as a whole and this has the effect of making all provisions subject to one another. The ‘notwithstanding’ formula [or the inclusion of words such as ‘subject to’] may provide a better guide as to the primacy of competing sections, but even then it is necessary to look closely at the intended interrelationship of the provisions.”<sup>53</sup> Therefore it is necessary to consider the possibility that the commutation provision is a competing provision with and has primacy over s 23, such that the reduction provision operates to alter, permanently, the rate of the applicant’s retirement pay entitlement.

***Are ss 23 and 24 competing provisions and, if yes, which is subordinate to the other and what are the implications of that relationship?***

70. In *Project Blue Sky Inc v Australian Broadcasting Authority* the High Court said:<sup>54</sup>

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court ‘to determine which is the leading provision and which is the subordinate provision, and which must give way to the other’. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme. [citations omitted]

71. Brennan J (as he then was) earlier expressed an aspect of this interpretational approach in *K & S Lake City Freighters Pty Ltd v Gordon & Goth Limited* in this way<sup>55</sup>:

In choosing between a primary, broader meaning of words in a section and a secondary, narrower meaning that corresponds with the subject matter dealt with in surrounding sections, it is relevant to consider whether the particular section has an operation independent of the operation of the surrounding sections or whether the operation of the particular section affects or is affected by the operation of the surrounding sections.

72. If there is any conflict between ss 23 and 24, there can be little doubt that s 23 is the 'leading' provision and s 24 is the 'subordinate' provision. As noted earlier, s 24 has no operation independent of s 23, whereas s 23 can operate completely independently of s 24. Section 23 is the 'horse' and s 24 is the 'cart'.

73. If the words "on and after" are given their primary and natural meaning, such that the reduction provision purports to operate so as permanently to reduce the rate of retirement pay to which a member who commutes is entitled, the outcome is a conflict with s 23 and s 24 must give way to s 23. However, that conflict can be "alleviated by adjusting" the meaning of the words "on and after", or by adopting "a secondary, narrower" available meaning of those words, to give effect to harmonious goals and maintain the unity of the DFRDB Act.

***The principle that general words will usually be given their primary and natural meaning ("commute"; "commutation"; "portion"; "on and after" in s 24(3)(b))***

74. The principle that general words in legislation will usually be given their primary and natural meaning is subject to the overriding consideration that it may be impossible to give a full and accurate meaning to every word.<sup>56</sup> The principle also creates a paradox to which Allsop CJ alluded in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192.<sup>57</sup>

Much has been written by the High Court on statutory construction over 35 years, in particular about the relationship between text and context, including purpose. That discussion in the authorities reflects the perennial debate focused on particular statutory provisions, as they arise from time to time for consideration, between so-called clarity of plain meaning (as if such can reliably exist without context) and the ascription of meaning to words in their context. Whilst there can, naturally, often be differences of opinion about the effect and influence of context, including purpose, in respect of any particular provision, there can be no doubt that words are not read in isolation as if they can have meaning without context.

75. A stark example of a word whose meaning cannot reliably exist without context is “commute”. The first meaning given to the word “commute” in, for example, the *Oxford Dictionary of English* 2nd Edition Oxford University Press is: “verb 1. *travel some distance between one’s home and place of work on a regular basis*”. It is only when the word is construed in the context of provisions containing words like “commutation” and “portion” and operating mathematically in a financial context – “the amount per annum of the retirement pay payable ... reduced by ... an amount calculated by dividing” – that the intended meaning of the word “commute” in the DFRDB Act is revealed.
76. The *Oxford Dictionary of English* 2nd Edition Oxford University Press gives “commutation” the meaning: “noun 1. *the action or process of commuting a judicial sentence - the conversion of a legal obligation or entitlement in another form e.g. the replacement of an annuity or a series of payments by a single payment*. The second meaning given to the word “commute” in that dictionary is: 2 *reduce (a judicial sentence, especially a sentence of death) to another less severe one - (commute something for/into) change one kind of payment or obligation for (another) - replace (an annuity or other series of payments) with a single payment*. That dictionary gives “portion” the meaning: noun 1. *a part of a whole*.
77. In context, there is little doubt that “commutation” and electing to “commute a portion ... of retirement pay” in the DFRDB Act results in the replacement, by payment of single amount, of only part of each of a series of annual amounts payable comprising the whole retirement pay entitlement.
78. The question therefore becomes: How many in the series of annual amounts payable are reduced by the parts comprising the single amount paid? According to the respondent: All of them. However, that would mean that not only does commuting a portion have the effect of replacing part of the whole entitlement conferred by s 23 with a single payment, it also has the effect of reducing the whole entitlement. This is merely another way of articulating the apparent conflict between ss 23 and 24.
79. The primary and natural meaning of the words “on and after” a specified day, in isolation, is an unlimited period which commences on and includes the specified day. However, irrespective of how ss 23 and 24 operate, the period on an after which retirement pay reduced as a consequence of commutation is payable cannot be unlimited unless, properly construed, the provisions operate to continue the entitlement to retirement pay beyond the member’s death.
80. No provision of the DFRDB Act, in its express terms, brings the entitlement to retirement pay - commuted or otherwise - to an end when a recipient member passes away. If the entitlement to retirement pay - commuted or otherwise - does not survive the member’s death, it must be because the duration of the entitlement is affected by at least that intervening event.

81. The cessation of the retirement pay entitlement on the member's death may be a result of an implication arising from the ordinary principles of the loss of legal capacity of an individual on and after his or her death. Or it may be the result of construing the DFRDB Act as a whole, such that the retirement pay provisions are subject to the provisions dealing with the entitlements of people in specified relationships with the member, which entitlements are conferred as a consequence of the member's death.<sup>58</sup> But in either of those events, the words "on and after" a specified day in the reduction provision do not mean an unlimited period commencing on that day.
82. The words "on and after" are not given a strained construction if they are construed as not meaning an unlimited period in the following contexts:
- a. The applicant was a member of the ADF on and after the 7th day of January 1976.
  - b. The applicant was on long service leave on and after the 1st day of July 1986.
  - c. The applicant will be at the pub on and after Unit Standdown on Friday.
83. It is evident, from the context, that the applicant did not or could not remain in any of the described circumstances for an unlimited period.
84. Although described as a 'factor', each variable in Sch 3 of the DFRDB Act is also a period of time. The reduction provision is expressly consistent with the Report of the Treasury Committee on Superannuation statement that the legislated factors are the "expectation of life [of members] according to the [then prevailing] Australian Life Tables". In contrast, the variable in Sch 1 has only one denotation – a percentage of annual rate of pay – and the variable in Sch 2 has only one denotation – a notional retiring age.
85. In the applicant's case, the expectation of life factor '36.45' is the number of years of his expected life beyond the day on which the Election took effect, for the purposes of the DFRDB Act. If proper "regard" is had to the factor "applicable" to the applicant, the number 36.45 is not only the divisor in the division of the lump sum amount to determine the reduction in annual payments but also the period of years during which that reduction operates.
86. Whether that interpretation is characterised as an "adjustment" of the meaning of the words "on and after" or as a "secondary, narrower meaning" of those words, the outcome is a reconciliation between the 'leading' provision – s 23 – and the 'subordinate' provision – s 24 – thereby giving effect to harmonious goals while maintaining the unity of the DFRDB Act. It is also an outcome consistent with the Jess Review recommendation that retired pay "proportionately" reduced in relation to commutation remain payable after commutation, which recommendation and others of the Jess Review the legislature intended to implement through the DFRDB Act. Further, it is a beneficial outcome, whether or not a beneficial interpretation is open in the circumstances.

## The implications of the characterisation of the DFRDB Act as beneficial legislation

87. The long title of the DFRDB Act, to which title reference may be made as an aid to the construction of the Act<sup>59</sup>, is: “An Act to make provision for and in relation to a Scheme for Retirement and Death Benefits for Members of the Defence Force”. The Act confers entitlement to various benefits defined in the Act on various individuals who were members of the ADF and to some individuals in various kinds of relationships with those members. In that context it should be uncontroversial to characterise the DFRDB Act as beneficial legislation.<sup>60</sup>
88. The DFRDB Act should therefore be interpreted “beneficially and as generously as the language ... allows. It should certainly not be construed in a narrow or pedantic manner.”<sup>61</sup> However, it does not follow that words in the Act that admit of only one interpretation may be interpreted to mean something else.<sup>62</sup> Further, “if apparently competing provisions can be reconciled by the standard means of interpretation, there is no room for the application of the beneficial legislation approach.”<sup>63</sup>
89. If the earlier analysis results in ss 23 and 24 being “reconciled by the standard means of interpretation”, it follows that there is no room for the application of the principle of beneficial interpretation. However, in that event the outcome can nonetheless be described as beneficial for commuting members because it results in them being entitled to retirement pay that is not reduced beyond the age upon which the applicable expectation of life factor is based, in contrast to the way in which the respondent and its predecessor have been administering the provisions.
90. If the earlier analysis does not result in ss 23 and 24 being reconciled, it still shows that the words “on and after” admit of more than one interpretation, depending on context. Limiting the duration of the period of the reduction in the annual amounts of the applicant’s retirement pay to 36.45 years, commencing on the day on which the Election took effect, does not result in an unreasonable or unnatural construction of the words “on and after”. 36.45 years is a very long period after the day on which the Election took effect.
91. The shortest factor in Sch 3 is 12.47. It applies to a male who retires from the ADF at the age of 65. 12.47 years is also a very long period for a 65 year old male whose current life expectancy is only a further 19 years to the age of 84. If he commutes \$124,700 of his retirement pay and lives to the age of 84 he will, on the respondent’s construction, have his retirement pay reduced by \$190,000 as a consequence of commutation.
92. On the “pedantic” construction of the words “on and after”, a member considering whether or not to commute is effectively required to gamble on his or her life expectancy. That is not an appropriate outcome under beneficial legislation and can hardly be supposed to be an outcome intended by the recommendations of the Jess Review and the legislature in legislating to implement them.

93. If the potential injustice to members who did not commute is relevant to the interpretational task - the potential injustice arising because those members chose not to commute on the basis of an understanding that commutation would result in a permanent reduction in the rate of retirement pay, which understanding may turn out to be wrong in law – it is notable that the period within which an election to commute may be made extends to “such further period as CSC, in special circumstances, allows”: s 24(1AA). Any potential injustice to members who would have elected to commute had they understood that, properly interpreted, the reduction provision reduces annual amounts of retirement pay only until the member reaches the age upon which the applicable factor in Sch 3 is based, could be remedied by allowing them now to commute if they choose. The administration of the commutation provision other than in accordance with its proper construction would seem to fall squarely within the scope of “special circumstances” justifying an extension of the period in which the members affected be permitted to elect.



## Authorities and Citations

<sup>1</sup> [Act No. 81 of 1973](#). Section 2(1) of the Act provides that: “Subject to sub-section (2), this Act shall come into operation on the day on which it receives the Royal Assent.” Royal Assent occurred on 19 June 1973. Section 2(2) provides that: “Sections 3 to 6 (inclusive), and Parts III to IX (inclusive), shall be deemed to have come into operation on 1st October, 1972, and, subject to this Act, contributions under section 17 of this Act are payable to the Commonwealth, and benefits under this Act are payable by the Commonwealth, on and after that date accordingly.”

<sup>2</sup> [Federal Commissioner of Taxation v Consolidated Media Holding Ltd](#) [2012] HCA 55; (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55. [SAS Trustee Corporation v Miles](#) [2018] HCA 55 per Gageler J [41] and [64]. [Hocking v Director-General of the National Archives of Australia](#) [2019] FCAFC 12 at [11]. The Full Court of the Federal Court’s judgment in *Hocking* was appealed to and allowed by the High Court, but the majority of the High Court approached the interpretation of the legislation in question – the *Archives Act 1983* – in the same way as the Full Court of the Federal Court. See, the majority of High Court’s judgment (Kiefel CJ, Bell, Gageler and Keane JJ) under the headings “The *Archives Act*” at [35] – [53] then “Legislative history” at [54] – [69]: [Hocking v Director-General of the National Archives of Australia](#) [2020] HCA 19. At [125] Nettle J adopted the majority’s reasons but disagreed with the majority’s conclusion. At [165] Gordon J agreed with the plurality that specified items of correspondence is a “Commonwealth record” within the meaning of the *Archives Act 1983* and went on to address the construction of key provisions of the Act at [167] – [190]. At [207] Edelman J referred to a review of the *Archives Act 1983* by the Australian Law Reform Commission, which review explains the evolution of the Bill which became the Act.

<sup>3</sup> The omission of the word “pay” from the original heading to s 23 appears to have been corrected by s 161 of the [Defence Force Re-organization Act 1975](#) Act No. 96 of 1975. Section 161 amended s 23 and is headed “Entitlement to retirement pay”. Headings to sections were not then part of Commonwealth legislation: s 13(3) of the [Acts Interpretation Act 1901](#) reprinted as at 19 December 1973. Headings to sections did not become part of Commonwealth legislation until 27 December 2011: s 2 and Sch 1 item 22 of the [Acts Interpretation Amendment Act 2011](#).

<sup>4</sup> [Defence Legislation Amendment \(Superannuation and ADF Cover\) Act 2015](#) Sch 1 item 14.

<sup>5</sup> *Ibid* item 15.

<sup>6</sup> [Superannuation Legislation Amendment \(Superannuation Contributions Tax\) Act 1997](#) Sch 6 item 8.

<sup>7</sup> The change in the heading from “Retirement pay commutation” to “Commutation of retirement pay” appears to have been the consequence of s 6 of the [Defence Force \(Retirement and Death Benefits Amendments\) Act \(No. 2\) 1979](#) Act No. 135 of 1979. Section 6 amended s 24 and is headed “Commutation of retirement pay”. The second reading speech of the responsible Minister on the Bill (No.2) 1979 does not shed any light on the change: see [House Hansard 11 October 1979 p 1918](#). The change may simply have been the preference of the drafter of the Bill, noting that headings to sections were not then part of Commonwealth legislation.

<sup>8</sup> The heading appears to have been corrected by s 9 of the [Defence Force Retirement and Death Benefits Amendment Act 1976](#) Act No. 33 of 1976. Section 9 amended s 62 and is headed “Recipient member who becomes an eligible member”. Note that headings to sections were not then part of Commonwealth legislation.

<sup>9</sup> [Defence Force \(Retirement and Death Benefits Amendments\) Act \(No. 2\) 1979](#) Act No. 135 of 1979 s 9.

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<sup>10</sup> [Superannuation Legislation Amendment \(Superannuation Contributions Tax\) Act 1997](#) Act No. 187 of 1997 Sch 6 item 36.

<sup>11</sup> [Defence Force Retirement and Death Benefits Amendment Act 1981](#) Act No. 144 of 1981 s 8.

<sup>12</sup> [Stingle v Clarke](#) [2006] HCA 37; (2006) 226 CLR 442 at 459; 228 ALR 229 at 239. Pearce, DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [4.14].

<sup>13</sup> Pearce, DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [9.2].

<sup>14</sup> [IW v City of Perth](#) [1997] HCA 30; (1997) 191 CLR 1 at 11; 146 ALR 696 at 702, per Brennan J and McHugh J. See also: [New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act](#) [2016] HCA 50; (2016) 260 CLR 232; 339 ALR 367, per French CJ, Kiefel, Bell and Keane JJ at [32]-[33] and Gageler J at [92].

<sup>15</sup> [Reynolds and Defence Force Retirement and Death Benefits Authority](#) [2001] AATA 599 at [14].

<sup>16</sup> [Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner \(The Bay Street Appeal\)](#) [2020] FCAFC 192 at [5]. See also Flick J at [68]-[69]. Cf White J at [120].

<sup>17</sup> [Reynolds and Defence Force Retirement and Death Benefits Authority](#) [2001] AATA 599 at [15].

<sup>18</sup> [CIC Insurance Ltd v Bankstown Football Club Ltd](#) [1997] HCA 2; (1997) 187 CLR 384 at 408; (1997) 141 ALR 618 at 634; (1997) 71 ALJR 312 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ - Gaudron J wrote her own judgment but did not dissent from the joint judgment as to the “modern approach to statutory interpretation”. [Federal Commissioner of Taxation v Consolidated Media Holding Ltd](#) [2012] HCA 55; (2012) 250 CLR 503 at 519 [39]; [2012] HCA 55. [SAS Trustee Corporation v Miles](#) [2018] HCA 55 per Gageler J [41] and [64]. [Hocking v Director-General of the National Archives of Australia](#) [2019] FCAFC 12 at [11].

<sup>19</sup> [Commissioner of State Revenue v EHL Burgess Properties Pty Ltd](#) [2015] VSCA 269; (2015) 209 LGERA 314 at [52] citing [Singh v Commonwealth](#) [2004] HCA 43; (2004) 222 CLR 322; (2004) 209 ALR 355 at [12]. Pearce, DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [2.12].

<sup>20</sup> [\[2015\] HCA 28](#), per French CJ, Bell, Gageler and Keane JJ at [21], citing *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 453; [1973] HCA 59; *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373-374 [22]; [2004] HCA 34. The Full Court (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) in the latter matter quoted, at [22], Gibbs J in the former matter: “The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties, even if it is not called a court, and its jurisdiction is derived from statute or from the submission of parties, and it only has temporary authority to decide a matter ad hoc.”

<sup>21</sup> [\[2015\] HCA 28](#), per French CJ, Bell, Gageler and Keane JJ at [28] – [44] and Nettle J at [98].

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<sup>22</sup> The applicant's circumstances are analogous to those of the plaintiffs in [Croome v Tasmania](#) [1997] HCA 5; (1997) 191 CLR 119; (1997) 142 ALR 397; (1997). The Solicitor-General for Tasmania submitted that there was no "matter" in which the High Court could assert jurisdiction. That submission was on the ground that the plaintiffs' action did not seek to establish any immediate right, duty or liability, because the executive government of Tasmania had yet to prosecute the plaintiffs for offences created by certain provisions of the Tasmanian Criminal Code, which provisions the plaintiffs claimed were invalid as a consequence of s 109 of the Constitution. That submission was rejected by the High Court. For example, Gaudron, McHugh and Gummow JJ said, at [138], that "[t]here was no suggestion [in *Federal Council of the British Medical Association v Commonwealth* (1949) 79 CLR 201] that it was necessary for the plaintiffs to show that there already had been set in motion against them the punitive provisions of the legislation. It was significant enough that the plaintiffs "faced possible prosecution". The applicant does not seek any relief on the basis of any constitutional issue or potential criminal prosecution, but rather seeks certainty as to the financial circumstances he possibly faces if he reaches the age upon which the expectation of life factor in Sch 3 of the DFRDB Act applicable to him is based.

<sup>23</sup> [Regis Aged Care Pty Ltd v Secretary, Department of Health](#) [2018] FCA 177 at [48] and the authorities there cited.

<sup>24</sup> [House Hansard 25 May 1973 pp 2707 - 2709](#).

<sup>25</sup> [House Hansard 30 May 1973 p 2894](#).

<sup>26</sup> [Senate Hansard 31 May 1973 pp 2218 - 2220](#).

<sup>27</sup> [Report of the Treasury Committee on Superannuation, Parliamentary Paper No. 37 March 1973](#) The Committee comprised the Assistant Secretary, Retirement Benefits Branch, Department of the Treasury (Chairman), the Secretary, Public Service Board, the Acting Assistant Secretary, Superannuation Project, Department of the Treasury, the Secretary, Office of the Superannuation and DFRB Boards and an Actuary from the Office of the Commonwealth Actuary.

<sup>28</sup> [House Hansard 8 May 1973 p 1754](#).

<sup>29</sup> [House Hansard 18 May 1972 p 2760](#).

<sup>30</sup> *Ibid.*

<sup>31</sup> Section 74 of the [Defence Forces Retirement Benefits Act 1948](#).

<sup>32</sup> Regulation 15 of the [Defence Forces Retirement Regulations](#).

<sup>33</sup> [Governance of Government Superannuation Schemes Act 2011](#) s 8(3).

<sup>34</sup> *Oxford Dictionary of English* 2nd Edition Oxford University Press. See also, for example, [Commissioner of Taxation v Lane](#) [2020] FCAFC 184 at [99] "... If the assets had been acquired before the commencement of the insolvency, they would not form part of the common fund of the insolvent estate in which all creditors were entitled to share equally, that is, proportionately."; *Reg. v. O'Brien* (1984) 2 NSWLR 449, Street C.J. in at p 453, cited by Brennan J in [R v Watt](#) [1988] HCA 58; (1988) 165 CLR 474: "The [NSW] Probation and Parole Regulation 1984, provides in cl 18 for an entitlement to a reduction of a non-parole period calculated on a basis proportionately equivalent to the prisoner's entitlement to remissions under the head sentence. Expressed in practical terms, if a prisoner's entitlement to remissions under the head sentence amounts to, say, two-fifths of the nominal term of the head sentence, then he will be entitled to have his non-parole period reduced by two-fifths of its specified length. ... It can be said that under the new legislation the non-parole period marches, in a proportionate sense, precisely in step with the head sentence."

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<sup>35</sup> See for example ss 19(2) and 59(3) of the DFRDB Act, dealing with ‘rounding’ of a fraction of a cent of compulsory contributions and pension benefits.

<sup>36</sup> [Project Blue Sky Inc v Australian Broadcasting Authority](#) [1998] HCA 28; 194 CLR 355; 153 ALR 490 at [69].

<sup>37</sup> *Ibid.* See also [Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner \(The Bay Street Appeal\)](#) [2020] FCAFC 192, Allsop CJ at [4].

<sup>38</sup> [K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd](#) [1985] HCA 48; (1985) 157 CLR 309 at 514.

<sup>39</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [4.2].

<sup>40</sup> [Commissioner of Taxation v Douglas](#) [2020] FCAFC 220 (Griffiths, Davies and Thawley JJ) at [92], citing [Gibb v Federal Commissioner of Taxation](#) [1966] HCA 74; 118 CLR 628 at [10]. See also [Moreton Bay Regional Council v Mekpine Pty Ltd](#) [2016] HCA 7; 256 CLR 437 at [61].

<sup>41</sup> [Commissioner of Taxation v Douglas](#) [2020] FCAFC 220 at [93], citing the plurality of the court in [Moreton Bay Regional Council v Mekpine Pty Ltd](#) [2016] HCA 7; 256 CLR 437 at [62].

<sup>42</sup> See the discussion of the court in [Commissioner of Taxation v Douglas](#) [2020] FCAFC 220 (Griffiths, Davies and Thawley JJ) at [94] – [95].

<sup>43</sup> [Commissioner of Taxation v Douglas](#) [2020] FCAFC 220 (Griffiths, Davies and Thawley JJ) at [33] and [62].

<sup>44</sup> Section 13(3) of the [Acts Interpretation Act 1901](#) reprinted as at 19 December 1973 and [as in force now](#).

<sup>45</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [6.12], citing [Hall v Jones](#) (1942) 42 SR (NSW) 203; [Transport Accident Commission v Treloar](#) [1992] 1 VR 447 at 449; [Betella v O’Leary](#) [2001] WASCA 266 at [13]; [Tjungarrayi v Western Australia](#) [2019] HCA 12 at [89].

<sup>46</sup> *Ibid.*, citing [Graovac v Minister for Immigration & Multicultural Affairs](#) (1999) 56 ALD 709 at 714 (also [1999] FCA 537 at [9]); [Anti-Doping Rule Violation Panel v XZTT](#) [2013] FCAFC 95 at [92]; (2013) 214 FCR 40; 303 ALR 406 at [92]

<sup>47</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [4.6]. In relation to giving a consistent meaning to the same words, see for example the joint judgment of the High Court (French CJ, Kiefel, Bell, Keane and Gordon JJ) in [Tabcorp Holdings Limited v Victoria](#) [2016] HCA 4 at [65]: “A consistent meaning should ordinarily be given to a particular term wherever it appears in a suite of statutory provisions.” Also the joint judgment of the New South Wales Court of Criminal Appeal (Bathurst CJ and Bell P, Johnson, Garling and Lonergan JJ) in [Orr v Cobar Management Pty Limited](#) [2020] NSWCCA 220 at [64].

<sup>48</sup> [Robert Bosch \(Australia\) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research](#) [2011] FCA 1133; (2011) 197 FCR 374 per Murphy J at [35]: “[T]o the extent there is a presumption that different words used in a piece of legislation are intended to have different meanings, it is a weak one.”

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<sup>49</sup> “The difficulty of maintaining consistency in a large and frequently amended Act will reduce the likelihood of the court feeling bound to give a word the same meaning throughout.” Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [4.9] and the cases cited there, for example [Robert Bosch \(Australia\) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research](#) [2011] FCA 1133; (2011) 197 FCR 374 at [35].

<sup>50</sup> *Oxford Dictionary of English* 2nd Edition Oxford University Press.

<sup>51</sup> [\[2017\] HCA 7](#) at [55]; (2017) 259 CLR 106.

<sup>52</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [2.43] and the cases there cited.

<sup>53</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [4.53].

<sup>54</sup> [Project Blue Sky Inc v Australian Broadcasting Authority](#) [1998] HCA 28; 194 CLR 355; 153 ALR 490 at [70].

<sup>55</sup> [K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd](#) [1985] HCA 48; (1985) 157 CLR 309 at [319].

<sup>56</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [2.43].

<sup>57</sup> [Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner \(The Bay Street Appeal\)](#) [2020] FCAFC 192 at [3].

<sup>58</sup> See: e.g. ss 39(2), 42(3) and 43(2).

<sup>59</sup> [Northern Suburbs General Cemetery Reserve Trust v Commonwealth](#) [1993] HCA 12 at [1]; (1993) 176 CLR 555 at 563.

<sup>60</sup> [Re McComb](#) [1999] 3 VR 485 at 490, where Warren J said: “The view expressed by Isaacs J in his dissenting judgment in [Bull v Attorney-General \(NSW\)](#) [1913] HCA 60; (1913) 17 CLR 370 at 384 has long been regarded as the orthodox view of the approach to be adopted in relation to the interpretation of remedial legislation: ‘In the first place, this is a remedial act, and therefore, if any ambiguity existed, like all such acts should be construed beneficially ... This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.’”

<sup>61</sup> Pearce DC *Statutory Interpretation in Australia* (9th Ed) Australia, LexisNexis Butterworths, 2019 at [9.2], citing [Nilant v Macchia](#) [2000] FCA 1528 per Weinberg J at [42]; (2000) FCR 238; 178 ALR 371.

<sup>62</sup> *Id* at [9.3], citing among other authorities [New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act](#) [2016] HCA 50; (2016) 260 CLR 232; 339 ALR 367 per French CJ, Bell and Keane JJ at [32]-[33] and Gageler J at [92].

<sup>63</sup> *Ibid*, citing [Comcare Australia v Pires](#) [2005] FCA 747 at [44]; (2005) 143 FCR 104; 86 ALD 592.

## APPLICANT'S SUBMISSIONS – ERRATA TO FOOTNOTES

- 12: Misspelt "Stingel" in the case name.
- 14: Page "11" should be "12". Brennan "J" should be "CJ".
- 18: The second "[2012] HCA 55" is redundant.
- 34: There should be "at 483" after "(1988) 165 CLR 474".
- 38: "at 514" should be "at 315".
- 57: There's a square bracket missing from the citation.
- 61: The hyperlink for the Nilant case goes to the wrong matter ([2000] FCA 1778 instead of [2000] FCA 1528).

## ORAL SUBMISSION NOTES

YOUR HONOUR, IT IS THE MONTH OF MAY.

IN THE MONTH OF MAY 1973, A PACKAGE OF BILLS INCLUDING THE DEFENCE FORCE RETIREMENT AND DEATH BENEFITS BILL WAS PASSED BY BOTH HOUSES OF THE FEDERAL PARLIAMENT. THE PURPOSE AND POLICY OF THE LEGISLATION – AND SPECIFICALLY IN RELATION TO THE COMMUTATION PROVISIONS - WERE, IN MY SUBMISSION, MADE PLAIN IN THE MINISTER'S SECOND READING SPEECH. THE MISCHIEFS INTENDED TO BE ADDRESSED BY THE LEGISLATION WERE, IN MY SUBMISSION, MADE PLAIN IN THE MINISTER'S SPEECH. I HOPE TO BE ABLE TO TAKE YOUR HONOUR TO JUST A FEW SENTENCES FROM THE MINISTER'S SPEECH, LATER.

ROYAL ASSENT OCCURRED ON 19 JUNE 1973 AND THE SUBSTANTIVE PROVISIONS OF THE DEFENCE FORCE RETIREMENT AND DEATH BENEFITS ACT 1973 CAME INTO OPERATION ON 1 OCTOBER OF THE PREVIOUS YEAR. I WILL REFER TO IT AS THE 'DFRDB ACT' OR 'THE ACT' WHEREVER CONVENIENT.

BEFORE I DEAL WITH THE DETAILED TEXT OF THE PROVISIONS OF THE ACT CENTRAL TO THESE PROCEEDINGS, I WOULD LIKE QUICKLY TO TELL MY STORY, AS IT IS A STORY REPEATED THOUSANDS OF TIMES OVER WITH SOME VARIATIONS TO A LESSER OR GREATER EXTENT. IT WILL HOPEFULLY GO SOME CONSIDERABLE WAY TO EXPLAIN WHY I AM IN YOUR HONOUR'S COURT TODAY AND WHY THERE IS SO MUCH INTEREST IN THE SUBJECT OF THESE PROCEEDINGS.

BACK IN MAY 1973 ANOTHER LESS SIGNIFICANT EVENT OCCURRED. I BECAME A TEENAGER. INDEED, THE DAY ON WHICH THE MINISTER DELIVERED HIS SECOND READING SPEECH WAS MY 13<sup>TH</sup> BIRTHDAY. AND AT THE AGE OF 13 I STARTED INQUIRING INTO HOW TO JOIN THE ROYAL AUSTRALIAN AIR FORCE.

TWO AND HALF OR SO YEARS LATER, AT THE AGE 15, I ENLISTED FOR 9 YEARS AS A RAAF RADIO APPRENTICE. HUNDREDS OF OTHERS WERE ALSO ON THE SAME JOURNEY AS OTHER TRADES IN THE RAAF AND ARMY AND NAVY. AND ON TOP OF THAT WERE THOUSANDS OF ADULT TRAINEES AND OTHERS RECRUITED EACH YEAR TO VARIOUS ROLES IN AUSTRALIA'S DEFENCE FORCE.

MY APPRENTICE PAY WAS SPARTAN. 5.5% OF WHICH TAKEN OUT OF IT, AS CONTRIBUTIONS TO A THING CALLED THE DFRDB.

AROUND 4 DECADES LATER I LEARNED THAT THIS 5.5% DEDUCTION WAS AS A CONSEQUENCE OF AND IN ACCORDANCE WITH SECTIONS 17 AND 19 OF THE DFRDB ACT AND PAID TO THE COMMONWEALTH PURSUANT TO SECTION 2 SUBSECTION 2 OF THE ACT. IT BECAME PART THE CONSOLIDATED REVENUE FUND IN ACCORDANCE WITH SECTION 81 OF THE CONSTITUTION, BECAUSE NO SEPARATE FUND WAS ESTABLISHED BY THE DFRDB ACT. THERE WERE NO EMPLOYER CONTRIBUTIONS.

FOR THOSE MEMBERS WHO'D 'BEEN AROUND A WHILE', THE SUBJECT OF THE DFRDB SCHEME WAS OFTEN ON THEIR LIPS. FROM THOSE CONVERSATIONS SOME NUMBERS WERE QUICKLY WELDED INTO MY TEENAGE BRAIN:



IF I SERVED FOR AT LEAST 20 YEARS, I WOULD BECOME ENTITLED TO RETIREMENT PAY AT 35% OF WHAT MY PAY WAS JUST BEFORE I RETIRED. IF I SERVED FOR MORE THAN 20 YEARS, THE PERCENTAGE WOULD INCREASE.

AROUND 4 DECADES LATER, I LEARNED THAT THOSE NUMBERS CAME FROM SCHEDULE 1 OF THE DFRDB ACT AND THE ENTITLEMENT WAS CREATED BY SECTION 23.

ANOTHER WORD WAS WELDED INTO MY TEENAGE BRAIN: COMMUTATION. I COULD CHOOSE TO TAKE UP TO 4 YEARS OF MY RETIREMENT PAY AS AN UP FRONT, LUMP SUM. DURING MY SERVICE, THAT CHANGED TO UP TO 5 YEARS.

AROUND 4 DECADES LATER, I LEARNED THAT THOSE NUMBERS CAME FROM SECTION 24 OF THE ACT.

BUT BACK THEN THIS WAS ALL TALK OF OLD PEOPLE. SOME OF THEM WERE OVER 40. AS A TEENAGER AT 77 SQUADRON THEN 75 SQUADRON – TWO OF AUSTRALIA'S FRONT LINE FIGHTER SQUADRONS – 20 YEARS OF SERVICE WASN'T MUCH IN MY CONTEMPLATION.

HOWEVER, THE COMMONWEALTH WAS VERY CLEVER IN THE WAY IT STRUCTURED ITS PERIODS OF SERVICE IN THE ADF. APPROACHING THE END OF MY NINE YEARS OF SERVICE, I WAS ONLY 1 YEAR AWAY FROM THE 'CARROT' OF LONG SERVICE LEAVE. BUT I COULDN'T SIGN ON FOR ONLY ONE MORE YEAR. I HAD TO SIGN ON FOR ANOTHER 6 IF I WANTED TO EAT THAT CARROT. AND THE ACHIEVEMENT OF 15 YEARS OF SERVICE WOULD BRING ABOUT AN ENTITLEMENT TO THE DEFENCE FORCE SERVICE MEDAL. I DECIDED TO SIGN ON FOR ANOTHER 6 YEARS OF SERVICE.

NEARING THE END OF 15 YEARS OF SERVICE, 20 YEARS WAS JUST OVER THE HORIZON. AND THERE, JUST OVER THE HORIZON, WAS THAT JUICY CARROT: 35% RETIREMENT PAY AND 5 YEARS OF IT UP FRONT IF I CHOSE.

IT WORKED. IT WORKED ON ME AND TENS OF THOUSANDS OF OTHERS. IT WAS DESIGNED TO WORK THAT WAY.

I SIGNED ON FOR A FURTHER PERIOD TO TAKE ME TO 20 OF SERVICE.

THAT DECISION AND OTHER IMPORTANT COMMITMENTS I MADE WERE ON THE BASIS THAT I WOULD HAVE ACCESS TO THE UP FRONT LUMP SUM OF COMMUTED RETIREMENT PAY. MY DECISION TO COMMUTE HAD ALREADY BEEN MADE, YEARS IN ADVANCE OF RETIREMENT.

**BUT AT NO POINT BEFORE ANY OF THESE FUNDAMENTALLY IMPORTANT CAREER AND FINANCIAL DECISIONS WERE MADE – AT NO POINT - DID THE COMMONWEALTH MAKE CLEAR THAT WHICH INSTEAD BECAME AN UNPLEASANT SURPRISE TO ME IN APRIL OF LAST YEAR.**



IN APRIL OF LAST YEAR, WHILE CARRYING OUT A DETAILED REVIEW OF MY FINANCIAL CIRCUMSTANCES, I DISCOVERED THAT THE PRACTICE OF THE RESPONDENT AND ITS PREDECESSOR – THE DFRDB AUTHORITY – IS TO TREAT MY ELECTION TO COMMUTE A PORTION OF MY RETIREMENT PAY AS HAVING THE EFFECT OF PERMANENTLY REDUCING THE RATE OF MY RETIREMENT PAY.

A CONSEQUENCE OF THAT IS IF – AS IS LIKELY – I LIVE TO OR BEYOND MY CURRENT LIFE EXPECTANCY, MY RETIREMENT PAY WILL BE REDUCED BY AN AMOUNT SUBSTANTIALLY MORE THAN THE COMMUTED LUMP SUM I WAS PAID. THAT IS BECAUSE THE EXPECTATION OF LIFE FACTORS IN SCHEDULE 3 OF THE ACT – WHICH ARE USED BY THE RESPONDENT TO CALCULATE THE PERMANENT REDUCTION - BEAR NO SEMBLANCE TO CONTEMPORARY REALITY AND HAVEN'T FOR DECADES. THE EXPECTATION OF LIFE FACTORS IN SCHEDULE 3 REFLECT THE 1960-62 LIFE TABLES PUBLISHED BY THE AUSTRALIAN BUREAU OF STATISTICS.

IF I'M FORTUNATE ENOUGH TO LIVE TO THE AGE TO WHICH MY DEARLY DEPARTED MATERNAL GRANDMOTHER LIVED, THE REDUCTION WILL BE CLOSE TO DOUBLE THE AMOUNT I COMMUTED.

I AM NOT ALONE IN HAVING HAD THIS UNPLEASANT SURPRISE.

I WAS NEVER TOLD THAT MY DECISION TO COMMUTE OR NOT WOULD IN EFFECT BE A GAMBLE ON MY LIFE SPAN. THE ONLY CONSISTENT PIECE OF ADVICE – OR MORE ACCURATELY – ACCEPTED WISDOM IN THE ADF – WAS THAT:

“YOU'D BE MAD NOT TO COMMUTE”. OFFICERS OF THE RESPONDENT'S PREDECESSOR SAID SO DURING RESETTLEMENT SEMINARS PRESENTED TO ADF MEMBERS.

AND I SAFELY PREDICT THAT MANY EX-ADF MEMBERS WATCHING THESE PROCEEDINGS WILL BE NODDING NOW AND SAYING TO THEMSELVES: YEP.

AND I AND MANY OTHERS HAVE COME TO REALISE THAT THE COMMONWEALTH WAS QUITE CONTENT IN THAT BEING THE ACCEPTED WISDOM AND FOR THE UNPLEASANT SURPRISE TO BE DELAYED UNTIL AFTER PEOPLE LIKE ME HAD SIGNED OUR LIVES AWAY – TO USE THE ADF VERNACULAR.

A SUBSTANTIAL PART OF THE COMMUTED AMOUNT USUALLY GOES – AND IN MY CASE DID GO - IN A GRACEFUL CIRCLE OUT OF THE CONSOLIDATED REVENUE FUND INTO THE COMMUTING MEMBER'S POCKET THEN OUT AGAIN AND BACK INTO THE CONSOLIDATED REVENUE FUND IN THE FORM OF INCOME TAX.

AND, ON THE RESPONDENT'S AND ITS PREDECESSOR'S PRACTICE, THE RETIREMENT PAY LIABILITY OF THE COMMONWEALTH IS IMMEDIATELY AND SUSTANTIALLY REDUCED FROM THAT WHICH IT WOULD OTHERWISE LIKELY HAVE BEEN, HAD THE MEMBER NOT COMMUTED.

IN CONTEMPORARY SUPERANNUATION AND RELATED EMPLOYMENT ARRANGEMENTS, THOSE KINDS OF OUTCOMES WOULD HAVE TO BE MADE CLEAR IN BOLD, UNDERLINED TEXT, IN WORDS OF ONE SYLLABLE, BEFORE ANYONE MAKES BIG DECISIONS THAT COULD TURN ON THOSE OUTCOMES.

I'VE BEEN SHOWN VARIOUS LEAFLETS AND FORMS AND GUIDES, AND THERE'S BEEN AN OMBUDSMAN'S INQUIRY AND I FOUND AN ERROR-RIDDEN TRIBUNAL DECISION, ALL TO THE EFFECT THAT COMMUTATION DOES PERMANENTLY REDUCE THE RATE OF DFRDB RETIREMENT PAY. BUT IT'S ALL JUST THE COMMONWEALTH EXECUTIVE RELYING ON ITSELF AS AUTHORITY FOR AN INTERPRETATION WHICH – INCIDENTALLY – IS TO THE COMMONWEALTH'S FINANCIAL BENEFIT.

IT ALL JUST BEGS THE QUESTION.

SO HOPEFULLY ALL OF THAT IS NOT TOO CONVOLUTED A WAY OF EXPLAINING WHY I AM IN YOUR COURT TODAY, YOUR HONOUR, AND WHY THERE IS SO MUCH INTEREST IN THE SUBJECT MATTER OF THESE PROCEEDINGS.

**TO THE DETAIL OF THE TEXT.**

THE TEXT AT THE HEART OF THIS MATTER IS CONTAINED IN PROVISIONS TO WHICH I'VE ALREADY MADE PASSING REFERENCE: SECTIONS 23 AND 24 (THOUGH, IN MY SUBMISSION, OTHER PROVISIONS OF THE ACT PROVIDE RELEVANT CONTEXT).

SECTION 23 SUBSECTION 1 CREATES AN ENTITLEMENT TO RETIREMENT PAY AT A RATE APPLICABLE TO THE MEMBER. AND I WON'T RECITE THAT PROVISION UNLESS YOUR HONOUR PREFERS THAT I DO. I WILL RECITE **SECTION 23 SUBSECTION 2**. IT SAYS:

SUBJECT TO SUBSECTIONS (3) AND (6) 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.

END QUOTE.

I WILL REFER TO SECTION 23 SUBSECTION 2 AS THE "**ENTITLEMENT PROVISION**" WHENEVER CONVENIENT.

I NOTE HERE THAT:

- THE ENTITLEMENT CREATED BY THE ENTITLEMENT PROVISION IS EXPRESSED AS AN ANNUAL RATE OF RETIREMENT PAY.
- THAT RATE IS CALCULATED BY REFERENCE TO VARIABLES ASCERTAINED UNDER SCHEDULE 1.
- THE ENTITLEMENT PROVISION IS EXPRESSED TO BE SUBJECT TO A NUMBER OF PROVISIONS, NONE OF WHICH IS SECTION 24 NOR ANY PROVISION WITHIN IT.

- WHEN ONE LOOKS AT ALL OF THE PROVISIONS TO WHICH THE ENTITLEMENT PROVISION IS EXPRESSED TO BE SUBJECT, ONE WILL SEE THAT ALL OF THEM IN THEIR TERMS PERMANENTLY CHANGE THE RATE OF THE RETIREMENT PAY THAT WOULD OTHERWISE BE PAYABLE.
- SUBSECTION 6 OF SECTION 23 DEALS WITH AN ELECTION, BUT NOT THE ELECTION TO COMMUTE UNDER SECTION 24.

**IF WE GO NOW TO SECTION 24 SUBSECTION 3, IT SAYS:**

WHERE A ~~RECIPIENT MEMBER~~ PERSON MAKES AN ELECTION UNDER THIS SECTION-, THEN, SUBJECT TO SUBSECTIONS (8) AND (9):

(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.

END QUOTE.

I WILL, WHENEVER CONVENIENT:

REFER TO SECTION 24 SUBSECTION 3 AS THE “**COMMUTATION PROVISION**”.

TO PARAGRAPH A AS THE “**LUMP SUM PROVISION**”.

TO PARAGRAPH B AS THE “**REDUCTION PROVISION**”.

I NOTE THAT:

- THE WORD “RATE” APPEARS NOWHERE IN THE COMMUTATION PROVISION.
- THE WORDS USED TO ‘LINK’ TO SCHEDULE 3 ARE DIFFERENT THAN THE ONES USED IN THE ENTITLEMENT PROVISION TO ‘LINK’ TO SCHEDULE 1 (ASCERTAINED UNDER VERSUS IS APPLICABLE UNDER)
- THE EXPECTATION OF LIFE FACTOR “APPLICABLE” TO ME UNDER SCHEDULE 3 IS 36.45.
- THE EXPECTATION OF LIFE FACTORS IN SCHEDULE 3 ARE, ALTHOUGH DESCRIBED AS ‘FACTORS’, ALSO A PERIOD OF TIME. THEY ARE THE NUMBER OF YEARS A MEMBER IS, FOR DFRDB PURPOSES, EXPECTED TO LIVE, BASED ON HIS OR HER AGE AT RETIREMENT.

## ESSENCE OF ARGUMENTS

MY POSITION IS, IN ESSENCE, THAT IF THE COMMUTATION PROVISION OPERATES TO CHANGE THE RATE OF MY RETIREMENT PAY ENTITLEMENT, THE CHANGE IS ONLY TEMPORARY. ANY CHANGE STARTS AT THE POINT MY ELECTION TO COMMUTE TOOK EFFECT AND CONTINUES ONLY UNTIL I REACH THE AGE UPON WHICH THE FACTOR APPLICABLE TO ME IN SCHEDULE 3 OF THE ACT IS BASED.

I SAY THAT THE COMMUTATION PROVISION IS INTENDED TO ALTER ONLY WHEN PORTIONS OF MY RETIREMENT PAY ENTITLEMENT ARE PAID COMPARED TO WHEN THEY WOULD HAVE BEEN PAID HAD I NOT COMMUTED, BUT IS NOT INTENDED TO ALTER THE ENTITLEMENT ITSELF.

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 REDUCTION PROVISION, ALONG WITH ALL THE OTHER PROVISIONS WHICH PERMANENTLY CHANGE THE RATE OTHERWISE PAYABLE, AND
- THE REDUCTION PROVISION WOULD HAVE USED A FORM OF WORDS INCLUDING "RATE", AS DO ALL THE OTHER PROVISIONS TO WHICH THE ENTITLEMENT PROVISION IS EXPRESSED TO BE SUBJECT.

I SAY THAT:

- THERE IS AN APPARENT CONFLICT BETWEEN SECTION 23 AND SECTION 24, IF THE REDUCTION PROVISION IS CONSTRUED AS OPERATING PERMANENTLY TO REDUCE THE RATE OF COMMUTED RETIREMENT PAY.
- SECTION 24 IS SUBORDINATE TO SECTION 23
- SECTION 24 MUST GIVE WAY TO SECTION 23
- THE APPARENT CONFLICT MAY AND SHOULD BE ALLEVIATED BY ADJUSTING THE MEANING OF THE REDUCTION PROVISION AND IN PARTICULAR THE MEANING OF THE WORD "AFTER" IN THAT PROVISION, AND
- THE WORD "AFTER" IS NOT GIVEN AN UNREASONABLE OR UNNATURAL MEANING IF IT IS INTERPRETED AS BEING CONFINED BY THE PERIOD ON WHICH THE APPLICABLE EXPECTATION OF LIFE FACTOR IN SCHEDULE 3 OF THE ACT IS BASED. TO DO SO GIVES PROPER REGARD TO THOSE FACTORS.

ADJUSTING THE MEANING OF THE WORD "AFTER" SO THAT THE OPERATION OF THE REDUCTION PROVISION IS CONFINED IN THAT WAY IS, IN MY SUBMISSION, SUPPORTED BY THE BROADER CONTEXT, PURPOSE AND POLICY OF SECTION 24. IT IS ALSO A CONSISTENT AND FAIR OUTCOME. IT RESULTS IN A PROPORTIONATE REDUCTION IN THE ANNUAL AMOUNTS OF RETIREMENT PAY AFTER COMMUTATION, RATHER THAN A DISPROPORTIONATE REDUCTION. ( I WILL HOPEFULLY BE ABLE TO SHOW, LATER, WHY THE WORD "PROPORTIONATE" IS RELEVANT TO THE INTERPRETIVE TASK.)

I WANT BRIEFLY TO TAKE YOUR HONOUR TO PARAGRAPHS [4] AND [5] OF CHIEF JUSTICE ALLSOP'S JUDGMENT IN [Channel Pastoral Holdings Pty Ltd v Commissioner of Taxation](#) [2015] FCAFC 57. A LINK TO THE JUDGMENT IS AT ITEM 2 OF MY LIST OF AUTHORITIES. I WON'T READ PARAGRAPH 4 BUT YOUR HONOUR WILL SEE THAT HIS HONOUR THE CHIEF JUSTICE THERE QUOTES 3 PARAGRAPHS FROM THE HIGH COURT JUDGMENT IN PROJECT BLUE SKY, WHICH PARAGRAPHS I WOULD SUBMIT ARE SETTLED LAW. I WOULD LIKE TO READ WHAT HIS HONOUR THE CHIEF JUSTICE DISTILS FROM THOSE PARAGRAPHS. AT 5 OF HIS JUDGMENT, HIS HONOUR THE CHIEF JUSTICE SAYS:

"4 Of central importance to the resolution of the controversy is the approach required by McHugh, Gummow, Kirby and Hayne JJ in [THE HIGH COURT'S DECISION IN] *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381-382 [69]-[71]:

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 Agalinos*, 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.

70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

71 Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume Griffith* CJ cited *R v Berchet* to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".

(Footnotes omitted)

5 THESE PASSAGES ARE IMPORTANT IN TWO RELEVANT RESPECTS: THE IMPORTANCE OF DETERMINING THE RELEVANT HIERARCHY (WHETHER EXPRESS OR IMPLIED) IN RECONCILING THE OPERATION OF THE PROVISIONS IN QUESTION; AND THE IMPORTANCE OF CONTEXT, PURPOSE AND POLICY OF A PROVISION AND ITS CONSISTENCY AND FAIRNESS AS GUIDES TO ITS MEANING."

END QUOTE.

AS BETWEEN SECTION 23 AND SECTION 24 OF THE DFRDB ACT, THERE IS IN MY SUBMISSION NO DOUBT THAT SECTION 23 IS THE LEADING PROVISION AND SECTION 24 IS THE SUBORDINATE PROVISION. SECTION 23 CAN OPERATE COMPLETELY INDEPENDENTLY OF SECTION 24, BUT SECTION 24 HAS NO OPERATION INDEPENDENT OF SECTION 23.

TO PUT THIS ANOTHER WAY, IF SECTION 24 HAD NEVER BEEN INCLUDED IN THE ACT, SECTION 23 WOULD STILL DO WHAT IT HAS ALWAYS DONE: THAT IS, DEFINE A MEMBER'S RETIREMENT PAY ENTITLEMENT.

IN CONTRAST, IF SECTION 23 HAD NEVER BEEN INCLUDED IN THE ACT, SECTION 24 WOULD HAVE NO WORK TO DO. UNLESS AND UNTIL A MEMBER'S RETIREMENT PAY ENTITLEMENT IS ASCERTAINED IN ACCORDANCE WITH SECTION 23, THERE IS NOTHING BY REFERENCE TO WHICH SECTION 24 CAN OPERATE.

THAT RELATIONSHIP OF OPERATION WAS SAID BY JUSTICE BRENNAN – AS HE THEN WAS – IN THE HIGH COURT'S DECISION IN THE K&S LAKE CITY FREIGHTERS CASE [LINKED AT ITEM 7 OF MY LIST OF AUTHORITIES] TO BE A RELEVANT CONSIDERATION IN CHOOSING BETWEEN A PRIMARY, BROADER MEANING OF WORDS IN A SECTION AND A NARROWER MEANING THAT CORRESPONDS WITH THE SUBJECT MATTER DEALT WITH IN SURROUNDING SECTIONS. I SUBMIT THAT "AFTER" IN THE REDUCTION PROVISION IS ONE SUCH WORD.

IT IS NOT AXIOMATIC THAT A SUBORDINATE PROVISION CAN NEVER HAVE ANY EFFECT ON THE OPERATION OF THE LEADING PROVISION. HOWEVER, WHEN THE LANGUAGE OF SECTION 23 AND SECTION 24 ARE ANALYSED IN THE CONTEXT OF THE WHOLE ACT, IT SHOWS THAT THE INTENTION OF THE LEGISLATURE IS THAT THE COMMUTATION PROVISION OPERATES ONLY TO ALTER WHEN PORTIONS OF A MEMBER'S COMMUTED RETIREMENT PAY ARE PAID IN FACT, COMPARED TO WHEN THEY WOULD HAVE BEEN PAID, HAD THE MEMBER NOT COMMUTED. THE COMMUTATION PROVISION JUST CHANGES THE 'WHEN' NOT THE 'WHAT' OF THE RETIREMENT PAY ENTITLEMENT.

I SAY THAT THE ENTITLEMENT PROVISION IS NOT EXPRESSED TO BE SUBJECT TO SECTION 24 NOR ANY PROVISION WITHIN IT, AND THE WORD “RATE” DOES NOT APPEAR ANYWHERE IN THE COMMUTATION PROVISION, FOR A SIMPLY STATED REASON: THE COMMUTATION PROVISION IS NOT INTENDED PERMANENTLY TO ALTER THE RATE OF A MEMBER’S RETIREMENT PAY ENTITLEMENT.

AFTER ALL, THE YEARS OF SERVICE IN THE DEFENCE FORCE AND THE ACCUMULATED AMOUNT OF CONTRIBUTIONS COMPULSORILY MADE BY RELEVANTLY IDENTICAL MEMBERS – ONE OF WHOM COMMUTES A PORTION OF RETIREMENT PAY AND THE OTHER OF WHOM DOES NOT - ARE IDENTICAL. THOSE MEMBERS JUST GET A CHOICE AS TO WHEN PORTIONS OF THAT IDENTICAL ENTITLEMENT BECOME PAYABLE IN FACT. (THE ISSUE OF FREEDOM OF CHOICE – OR MORE ACCURATELY THE LACK OF IT – UNDER THE DFRB SCHEME CREATED BY THE 1948 ACT, WAS ONE OF THE MISCHIEFS ADDRESSED BY THE DFRDB ACT.)

I WOULD HERE LIKE TO TAKE YOUR HONOUR TO PARAGRAPHS [33] AND [62] OF THE DECISION OF THE FULL COURT OF THIS COURT IN COMMISSIONER OF TAXATION AGAINST DOUGLAS [2020] FCAFC 220. (Griffiths, Davies and Thawley JJ)]. A LINK TO THE JUDGMENT IS AT ITEM 3 OF MY LIST OF AUTHORTIES.

AT [33] THE FULL COURT SAYS:

“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).

END QUOTE.

THE FULL COURT THEN GOES ON TO DESCRIBE THE SECOND OF THE TWO KINDS OF BENEFITS PAYABLE TO MEMBERS – INVALIDITY PAY - CREATED BY PROVISIONS WITHIN PART 5 OF THE ACT. I WON’T READ THAT DESCRIPTION OUT.

BUT I NOTE HERE THAT THE FULL COURT MAKES NO MENTION OF THE COMMUTED LUMP SUM AS BEING A SEPARATE BENEFIT. JUST TWO BENEFITS CREATED FOR MEMBERS: RETIREMENT PAY CREATED UNDER THE PROVISIONS OF PART 4 AND INVALIDITY PAY CREATED UNDER THE PROVISIONS OF PART 5.

AND IT IS NOT AS IF THE FULL COURT WAS NOT AWARE OF THE COMMUTATION PROVISION. THE FULL COURT WENT ON TO SAY, AT [62]:

62 Mr Douglas elected to take his retirement pay partly by way of a commutation lump sum payment (being an eligible termination payment) and partly by way of periodic payments.”

END QUOTE.

THE COMMUTED PORTION OF MR DOUGLAS'S RETIREMENT PAY WAS TREATED BY THE FULL COURT AS JUST THAT: RETIREMENT PAY. WITH RESPECT TO THE FULL COURT, THAT FINDING IS ENTIRELY CONSISTENT WITH THE TEXT AND STRUCTURE OF THE ACT. THE LUMP SUM OF COMMUTED RETIREMENT PAY IS MENTIONED NOWHERE IN THE DEFINITIONS IN THE ACT, WHEREAS OTHER KINDS OF LUMP SUMS ARE MENTIONED. THE DEFINITION OF "BENEFIT" IN THE ACT MENTIONS THREE KINDS OF LUMP SUMS, NONE OF WHICH IS THE COMMUTED LUMP SUM.

IT IS TRUE THAT THE FULL COURT IN THE DOUGLAS MATTER DID NOT NEED TO DO, AND DID NOT DO, A FORENSIC ANALYSIS - AS IT WERE - OF THE MEANING OF AND INTERACTION BETWEEN SECTION 23 AND SECTION 24. MOST OF THE COMPLEXITY DEALT WITH BY THE FULL COURT AROSE FOR MR DOUGLAS BECAUSE HE BECAME ENTITLED TO INVALIDITY PAY AFTER HE COMMUTED AND STARTED TAKING RETIREMENT PAY. HE'D - AS IT WERE - CROSSED THE BENEFIT BEAMS, AND CROSSING THE BEAMS IS BAD.

HOWEVER, THE FULL COURT'S FINDINGS THAT THE ACT CREATES ONLY TWO BENEFITS FOR MEMBERS, ONE OF WHICH IS RETIREMENT PAY, A PORTION OF WHICH CAN BE COMMUTED ON THE MEMBER'S ELECTION, ARE ENTIRELY CONSISTENT WITH THE TEXT AND STRUCTURE OF THE ACT.

[...AND THERE IS AN OSTENSIBLY STRONG ARGUMENT THAT THE LUMP SUM IS NOT RETIREMENT PAY. THE DEFINITION OF RETIREMENT PAY IS "RETIREMENT PAY PAYABLE UNDER SECTION 23". THE LUMP SUM IS PAYABLE UNDER PARAGRAPH A OF SUBSECTION 3 OF SECTION 24.

BUT I SAY THAT EVEN IF THAT ARGUMENT IS CORRECT - AND I NOTE THERE ARE CONTRARY ARGUMENTS [THE DEFINITIONS DON'T DO 'WORK' AND THE LANGUAGE OF SECTION 24 ITSELF] - IT DOES NOT ALLEVIATE THE APPARENT CONFLICT BETWEEN SECTION 23 AND SECTION 24. IT DOES NOT MAKE THE OBSCURITY AND UNREASONABLENESS TO WHICH I HAVE REFERRED, DISAPPEAR....]

IN SHORT: I SUBMIT THAT MY COMMUTED LUMP SUM WAS JUST 'ORDINARY' RETIREMENT PAY, PAID AT A DIFFERENT TIME THAN IT WOULD HAVE, BUT FOR MY ELECTION TO COMMUTE. (THAT'S CERTAINLY HOW THE TAX DEPARTMENT TREATED MY COMMUTED LUMP SUM.)

AND WHERE AND HOW IS RETIREMENT PAY DEFINED? IN SECTION 23, THROUGH SUBSECTION 2, AS A RATE BY REFERENCE TO VARIABLES ASCERTAINED UNDER SCHEDULE 1. (I WILL SHORTLY RETURN TO THAT WORD "ASCERTAINED" AND WHERE IT IS AND IS NOT USED IN REFERENCE TO SCHEDULES OF THE ACT.)

AND IS SUBSECTION 2 OF SECTION 23 EXPRESSED TO BE SUBJECT TO SECTION 24 OR ANY PROVISION WITHIN IT LIKE THE REDUCTION PROVISION? AS WE'VE SEEN: NO, BUT IT IS EXPRESSED TO BE SUBJECT TO OTHER PROVISIONS.

AND DOES THE REDUCTION PROVISION USE THE WORD "RATE"? NO.



IF THE INTENTION HAD BEEN TO ACHIEVE THE OUTCOME PRESSED BY THE RESPONDENT, SURELY:

- THE DRAFTER WOULD SIMPLY HAVE EXPRESSED THE ENTITLEMENT PROVISION TO BE SUBJECT TO THE REDUCTION PROVISION, ALONG WITH ALL THE OTHER PROVISIONS TO WHICH THE ENTITLEMENT PROVISION IS EXPRESSED TO BE SUBJECT, AND
- THE DRAFTER WOULD SIMPLY HAVE INCLUDED THE FORMULATION INCLUDING THE WORD "RATE" IN THE REDUCTION PROVISION, CONSISTENTLY WITH THE FORMULATION USED IN ALL OF THE PROVISIONS TO WHICH THE ENTITLEMENT PROVISION IS EXPRESSED TO BE SUBJECT.

I SAY THAT IN THAT CONTEXT, ALONE, IT WOULD BE ABSURD TO CONSTRUE SECTION 24 AS BEING INTENDED TO HAVE ANY EFFECT – OR AT LEAST A PERMANENT EFFECT - ON THE RATE OF THE ENTITLEMENT CREATED BY THE ENTITLEMENT PROVISION.

I SAY THAT IN THAT CONTEXT, ALONE, OBSCURITY ARISES AND, GIVEN THE FINANCIAL CONSEQUENCES FOR COMMUTING MEMBERS, UNREASONABLENESS ARISES, FROM THE INTERPRETATION PRESSED BY THE RESPONDENT.

**WHAT, THEN, DOES THE REDUCTION PROVISION – AND IN PARTICULAR THE WORD “AFTER” IN IT - DO?**

TO UNDERSTAND THE OPERATION OF THE PROVISION AND THE WORD “AFTER”, IT IS FIRST IMPORTANT TO NOTE THAT A MEMBER MAY EXERCISE THE ENTITLEMENT TO ELECT TO COMMUTE A PORTION OF HIS OR HER RETIREMENT PAY UP TO ONE YEAR AFTER RETIREMENT. THAT IS A CONSEQUENCE OF (ORIGINALLY) SECTION 24(1) (AND NOW) SECTION 24(1AA). FOR EXAMPLE, AN ELECTION CAN TAKE EFFECT ON DAY 364 OF A MEMBER’S RETIREMENT, AT WHICH POINT THE MEMBER WOULD ALREADY HAVE RECEIVED UP TO 25 FORTNIGHTS OF RETIREMENT PAY.

THE WORDS “ON AND AFTER THE DAY ON WHICH THE ELECTION TAKES EFFECT” ARE, I SUBMIT, INTENDED TO AT LEAST MAKE CLEAR – AND PERHAPS ONLY TO MAKE CLEAR - THAT THE REDUCTION PROVISION OPERATES PROSPECTIVELY AND NOT RETROSPECTIVELY SO AS TO ‘CLAW BACK’, AS IT WERE, PART OF THE RETIREMENT PAY ALREADY PAID. IN THIS EXAMPLE THE MEMBER WOULD, ON THE DATE OF EFFECT OF THE ELECTION, BE ONE YEAR OLDER THAN HE OR SHE WAS ON THE DATE OF RETIREMENT, AND THEREFORE A SMALLER FACTOR IN SCHEDULE 3 WOULD APPLY AND THE RESULTANT ANNUAL REDUCTION WOULD BE LARGER.

TO MAKE THIS POINT ANOTHER WAY, CONSIDER THE OPERATION OF THE REDUCTION PROVISION IF THE WORDS “ON AND AFTER THE DAY ON WHICH THE ELECTION TAKES EFFECT” WERE NOT INCLUDED AT ALL. IN ITS TERMS OUT OF CONTEXT, THE REDUCTION PROVISION WOULD STILL APPEAR PERMANENTLY TO REDUCE THE ANNUAL AMOUNT OF RETIREMENT PAY PAYABLE, BUT APPLY THE REDUCTION RETROSPECTIVELY AS WELL.

IT MAY THEREFORE BE THAT THE WORD "AFTER" WAS NEVER INTENDED TO HAVE ANY RELEVANCE TO THE DURATION OF THE ANNUAL REDUCTIONS IN RETIREMENT PAY BROUGHT ABOUT BY THE OPERATION OF THE REDUCTION PROVISION. NONETHELESS, THE WORD IS THERE, IT CANNOT BE IGNORED AND IT HAS ONE CONNOTATION SUPPORTING PERMANENCE OF REDUCTION. BUT THE WORD "AFTER" CAN ALSO HAVE DIFFERENT CONNOTATIONS, DEPENDING ON CONTEXT.

IF THE REDUCTION PROVISION APPEARS, IN ISOLATION, PERMANENTLY TO REDUCE THE RATE OF A COMMUTING MEMBER'S RETIREMENT PAY, THAT IS MERELY TO ARTICULATE WHAT I SAY IS THE APPARENT CONFLICT BETWEEN THE SUBORDINATE REDUCTION PROVISION AND THE LEADING ENTITLEMENT PROVISION.

I WOULD LIKE HERE TO TAKE YOUR HONOUR TO BACK PARAGRAPH 70 OF THE JUDGMENT IN PROJECT BLUE SKY QUOTED BY CHIEF JUSTICE ALLSOP IN CHANNEL PASTORAL HOLDINGS (ITEM 2 OF MY LIST OF AUTHORITIES) SAYS:

70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.

I CANNOT SEE ANY SENSIBLE AND REASONABLE WAY OF ADJUSTING THE MEANING OF THE LEADING PROVISION – THE ENTITLEMENT PROVISION – SUCH THAT THE REDUCTION PROVISION PERMANENTLY REDUCES THE RATE OF THE RETIREMENT PAY ENTITLEMENT.

THAT WOULD, IN EFFECT, RENDER THE ENTITLEMENT PROVISION SUBJECT TO THE REDUCTION PROVISION, WHEN THE WORDS ACTUALLY USED AND - MORE IMPORTANTLY, SEDULOUSLY NOT USED - MANIFEST THE OPPOSITE INTENTION. I THEREFORE SUBMIT THAT YOUR HONOUR SHOULD SEE FORMIDABLE DIFFICULTY IN COMING TO THE CONCLUSION THAT THE ENTITLEMENT PROVISION IS INTENDED TO BE SUBJECT TO OR OTHERWISE GIVE WAY TO SECTION 24 OR ANY PROVISION WITHIN IT LIKE THE REDUCTION PROVISION, SUCH THAT THE REDUCTION PROVISION PERMANENTLY REDUCES THE RATE OF COMMUTED RETIREMENT PAY ENTITLEMENT CREATED BY SECTION 23.

IN MY SUBMISSION, THE MEANING OF THE REDUCTION PROVISION MUST BE ADJUSTED SO THAT THE ANNUAL REDUCTIONS OF COMMUTED RETIREMENT PAY CONTINUE ONLY UNTIL THE MEMBER REACHES THE AGE ON WHICH THE EXPECTATION OF LIFE FACTOR APPLICABLE TO HIM OR HER IN SCHEDULE 3 OF THE ACT IS BASED.

I SAY THAT THERE IS SUPPORT IN THE TEXT OF THE ACT FOR AN ADJUSTMENT IN THE MEANING OF THE WORD "AFTER" TO ACHIEVE THAT OUTCOME.

IN MY WRITTEN SUBMISSIONS I PROVIDE VARIOUS EXAMPLES OF CONTEXTS IN WHICH THE WORD "AFTER" DOES NOT MEAN FOREVER OR INDEFINITELY OR PERMANENTLY. AS YET AN OTHER EXAMPLE, IF I WERE TO SAY THAT "ON AND AFTER THE ADJOURNMENT TODAY, I'M GOING SHOPPING", NO REASONABLE PERSON WOULD CONSTRUE THE WORD "AFTER" IN THAT CONTEXT AS MEANING I'M GOING SHOPPING PERMANENTLY.

I WOULD HERE LIKE TO EMPHASISE THE WORDS USED IN THE ACT - AND MORE IMPORTANTLY THE DIFFERENCES IN THE WORDS USED - TO REFER TO ITS 3 SCHEDULES. ALL REFERENCES TO SCHEDULES 1 AND 2 USE THE WORDS "ASCERTAINED UNDER" BUT, IN CONTRAST, ALL REFERENCES TO SCHEDULE 3 USE THE WORDS "IS APPLICABLE TO HIM UNDER".

THE WORDS "ASCERTAINED UNDER" HAVE AN IMPERATIVE CONNOTATION INDICATING THAT SCHEDULE 1 AND SCHEDULE 2 HELP DO THE WORK OF MAKING CERTAIN THE ENTITLEMENTS WITH WHICH THEY DEAL. THAT WOULD BE A REASONABLE INTERPRETATION, GIVEN THAT THOSE SUBJECTS ARE THE RATE OF A MEMBER'S ENTITLEMENTS EARNED AS A CONSEQUENCE OF DECADES OF SERVICE IN THE DEFENCE FORCE. A MEMBER SHOULD HAVE CERTAINTY AS TO HIS OR HER ENTITLEMENTS.

WHAT, THEN, IS INTENDED BY THE DIFFERENT WORDS USED IN THE REDUCTION PROVISION TO REFER TO SCHEDULE 3? THE PRECISE INTENTION IS UNCLEAR, AT LEAST TO ME. BUT IT SEEMS TO ME TO BE UNASSAILABLE TO SAY THERE IS SOME INTENDED DIFFERENCE. I ASK, RHETORICALLY: WHY ELSE WOULD THE DRAFTER HAVE USED DIFFERENT WORDS?

IT MAY SIMPLY BE BECAUSE SCHEDULE 3 DOES NOT CONFER ANY ENTITLEMENT. THE ENTITLEMENT TO ELECT TO COMMUTE AND THE MAXIMUM AMOUNT OF RETIREMENT PAY WHICH A MEMBER MAY COMMUTE ARE MATTERS DEALT WITH IN SECTION 24 ITSELF. SCHEDULE 3 MERELY PROVIDES A VARIABLE FOR A CALCULATION WHICH - IN MY SUBMISSION - IS NOT INTENDED TO HAVE ANY PERMANENT EFFECT ON ANY ENTITLEMENT.

IT IS ALSO IMPORTANT TO NOTE A KEY DIFFERENCE IN THE FEATURES OF THE VARIABLES THEMSELVES IN SCHEDULES 1 AND 2 COMPARED WITH THE VARIABLES IN SCHEDULE 3.

THE VARIABLES IN SCHEDULE 1 HAVE ONLY ONE DENOTATION: YEARS OF SERVICE CAN MEAN ONLY ONE THING: YEARS OF SERVICE. PERCENTAGES CAN MEAN ONLY ONE THING: PERCENTAGES.

THE VARIABLES IN SCHEDULE 2 ALSO HAVE ONLY ONE DENOTATION: A RANK IS RANK. A NOTIONAL RETIRING AGE IS A NOTIONAL RETIRING AGE.

HOWEVER, ALTHOUGH THE FACTORS IN SCHEDULE 3 LOOK LIKE MERE NUMBERS, THEY ARE ALSO PERIODS OF YEARS. THAT'S WHAT THE WORDS "EXPECTATION OF LIFE" MEAN IN THE REDUCTION PROVISION AND THE HEADING TO SCHEDULE 3.

I ALSO NOTE THAT THE WORDS "ON AND AFTER" APPEARED ONLY 3 TIMES IN THE 'AS MADE' ACT: IN SECTION 2 SUBSECTION 2, IN SECTION 34 SUBSECTION 2 AND, OF COURSE, IN THE REDUCTION PROVISION. HOWEVER, THE REDUCTION PROVISION IS THE ONLY ONE WHICH OPERATES EXPRESSLY BY REFERENCE TO VARIABLES THAT ARE FINITE PERIODS OF TIME.

SINCE THEN THERE HAVE BEEN NUMEROUS AMENDMENTS TO ADD PROVISIONS WHICH USE THE WORDS "ON AND AFTER". THOSE ADDED PROVISIONS INCLUDE SECTION 30 SUBSECTION 1B, WHICH – CURIOUSLY – SAYS:

"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".

ONE WONDERS WHY THE DRAFTER USED THE WORDS "AT ALL TIMES" IF THE WORDS "ON AND AFTER", ON THEIR OWN, ADMIT OF ONLY ONE POSSIBLE INTERPRETATION.

IN MY CASE, THE EXPECTATION OF LIFE PERIOD IS LITERALLY A LIFE TIME AFTER I COMMUTED – I RETIRED FROM THE DEFENCE FORCE AT THE AGE OF 35 AND THE PERIOD ON WHICH THE EXPECTATION OF LIFE FACTOR IN SCHEDULE 3 APPLICABLE TO ME IS BASED, IS MORE THAN 36 YEARS. 36 YEARS IS A VERY LONG TIME AFTER THE AGE OF 35. A LIFE TIME.

AND IF I GET TO THE AGE OF AROUND 72, THE ACCUMULATED REDUCTIONS IN MY RETIREMENT PAY AS A CONSEQUENCE OF COMMUTATION WILL EQUAL THE COMMUTED AMOUNT. I WILL, AS IT WERE, HAVE EARN'T IT BACK. I ASK, RHETORICALLY, ISN'T A LIFE TIME AFTER THE DAY I RETIRED ENOUGH?

I SAID THAT THE WORDS "ASCERTAINED UNDER" HAVE AN IMPERATIVE CONNOTATION INDICATING AN INTENTION THAT SCHEDULE 1 AND SCHEDULE 2 HELP MAKE CERTAIN THE ENTITLEMENTS WITH WHICH THEY DEAL. I ALSO SAID THAT THAT WOULD BE A REASONABLE INTERPRETATION, GIVEN THAT THOSE SUBJECTS ARE THE RATE OF A MEMBER'S ENTITLEMENTS EARNED AS A CONSEQUENCE OF DECADES OF SERVICE IN THE DEFENCE FORCE. A MEMBER SHOULD HAVE CERTAINTY AS TO HIS OR HER ENTITLEMENTS.

ON THE INTERPRETATION I'M PRESSING, THERE IS A CERTAIN ANSWER TO WHAT I WOULD SUGGEST IS AN ENTIRELY REASONABLE QUESTION FOR A PERSON WANTING TO UNDERSTAND THE REAL CONSEQUENCES OF COMMUTING:

"WHAT IS THE MAXIMUM AMOUNT OF ONGOING RETIREMENT PAY I COULD LOSE IF I COMMUTE?"

ANSWER: "THE AMOUNT YOU COMMUTED."

ON THE INTERPRETATION PRESSED BY THE RESPONDENT THE ANSWER IS: SHRUG. DUNNO, IT DEPENDS.

“COULD I LOSE MORE THAN THE COMMUTED AMOUNT?” YES, AND LIKELY MUCH MORE, BASED ON CURRENT LIFE EXPECTANCIES. YOU COULD LOSE NEARLY DOUBLE.

THAT WASN'T ON ANYONE'S LIPS WHEN I SERVED.

IN THAT CONTEXT, I SUBMIT THAT THE WORD “AFTER” IN THE REDUCTION PROVISION IS NOT GIVEN AN UNREASONABLE OR UNNATURAL MEANING IF THE PROVISION IS CONSTRUED SO AS TO CONFINE THE REDUCTION PERIOD TO THE APPLICABLE LEGISLATED EXPECTATION OF LIFE. THE OUTCOME IS THEN THAT THE ENTITLEMENT CREATED BY THE ENTITLEMENT PROVISION IS UNTOUCHED, AT LEAST NOT PERMANENTLY.

IT IS ALSO AN OUTCOME THAT, IN MY SUBMISSION, GIVES EFFECT TO THE PURPOSE AND POLICY OF THE ACT AND OF THE REDUCTION PROVISION IN PARTICULAR. IT IS ALSO, I SUBMIT, A CONSISTENT AND FAIR OUTCOME. IT PROVIDES CERTAINTY.

**[...PROVISIONS DRAFTED ON THE BASIS THAT COMMUTATION DOES AFFECT RATE**

.....BEFORE TURNING TO SOME SENTENCES IN THE EXTRINSIC MATERIALS TO WHICH I HOPE YOUR HONOUR WILL ALLOW ME TO REFER, I SHOULD QUICKLY DEAL WITH A SUBSTANTIAL ERROR IN MY WRITTEN SUBMISSIONS, BUT ONE WHICH, FOR REASONS I WILL EXPLAIN, IS NOT FATAL TO MY CASE.

AT PARAGRAPH 65 OF MY WRITTEN SUBMISSIONS, I SAY THAT NOW-REPEALED SECTION 62 SUBSECTION 4 PARAGRAPH B OF THE AS-MADE ACT WAS THE ONLY PROVISION THAT, IN ITS EXPRESS TERMS, APPEARED TO HAVE BEEN DRAFTED ON THE BASIS OF AN ASSUMPTION THAT COMMUTATION AFFECTED THE RATE OF A MEMBER'S RETIREMENT PAY. I GO ON IN MY WRITTEN SUBMISSIONS TO SAY THOSE TERMS WERE “NONSENSICALLY TAUTOLOGICAL” FOR REASONS I HAVE EXPLAINED THERE.

I IDENTIFIED THAT PROVISION, ALONE, BECAUSE I FOCUSSED ON THE PROVISIONS DEALING WITH A MEMBER'S ENTITLEMENTS. BUT THAT FOCUS WAS AN ERROR BECAUSE – AS WE KNOW – THE ACT MUST BE READ AS A WHOLE.

THE PROVISIONS DEALING WITH THE ENTITLEMENTS OF (ORIGINALY) WIDOWS (AND NOW) SPOUSES, AND CHILDREN AND ORPHANS WERE, UNAMBIGUOUSLY – AT LEAST IN MY MIND – DRAFTED ON THE BASIS OF AN ASSUMPTION THAT COMMUTATION DOES AFFECT THE RATE OF A MEMBER'S RETIREMENT PAY.

FOR EXAMPLE, IF YOUR HONOUR GOES TO SECTION 39 SUBSECTION 1 OF THE IN FORCE VERSION OF THE ACT, IT SAYS:

WHERE A MEMBER OF THE SCHEME WHO IS A RECIPIENT MEMBER DIES AND IS SURVIVED BY A SPOUSE, THEN, SUBJECT TO SECTIONS 47 AND 75, THE SPOUSE IS ENTITLED TO A PENSION AT A RATE EQUAL TO FIVE EIGHTHS OF THE RATE AT WHICH RETIREMENT PAY OR INVALIDITY PAY WAS PAYABLE TO THE DECEASED MEMBER IMMEDIATELY BEFORE THE MEMBER'S DEATH OR, IF THE MEMBER HAD COMMUTED A PORTION OF THE MEMBER'S RETIREMENT PAY UNDER SECTION 24 OR A PORTION OF THE MEMBER'S INVALIDITY PAY UNDER SECTION 32A, AT A RATE EQUAL TO FIVE EIGHTHS OF THE RATE AT WHICH RETIREMENT PAY OR INVALIDITY PAY, AS THE CASE MAY BE, WOULD HAVE BEEN PAYABLE TO THE MEMBER IMMEDIATELY BEFORE THE MEMBER'S DEATH IF THE MEMBER HAD NOT SO COMMUTED A PORTION OF THE MEMBER'S RETIREMENT PAY OR INVALIDITY PAY, AS THE CASE MAY BE.

I HAVE TO CONCEDE THAT THE TERMS OF THAT PROVISION AND THE OTHER PROVISIONS IN THE SAME TERMS - WITHIN SECTIONS 41, 42 AND 43 - WERE DRAFTED ON THE BASIS OF AN ASSUMPTION THAT COMMUTATION ALTERS THE RATE OF COMMUTED RETIREMENT PAY. FOR CONVENIENCE I'LL REFER TO THESE AS THE 'LOVED ONES PROVISIONS'.

IN MY SUBMISSION IT DOES NOT FOLLOW INEXORABLY, FROM THE TERMS OF THE LOVED ONES PROVISIONS, THAT COMMUTATION REDUCES THE RATE OF RETIREMENT PAY PERMANENTLY.

I FIRST NOTE THAT ALL OF THESE PROVISIONS ARE, LIKE SECTION 24, SUBORDINATE TO THE ENTITLEMENT PROVISION. UNLESS AND UNTIL THE MEMBER'S RATE OF RETIREMENT PAY (OR INVALIDITY PAY) IS ASCERTAINED (AND THE MEMBER PASSES AWAY), THE LOVED ONES PROVISION HAVE NO WORK TO DO.

MORE IMPORTANTLY, IF YOUR HONOUR WERE TO ACCEPT MY ARGUMENT THAT IF THE REDUCTION PROVISION OPERATES TO CHANGE THE RATE OF RETIREMENT PAY, IT ONLY DOES SO TEMPORARILY, THE EVIDENT POLICY OF THESE PROVISIONS IS STILL ACHIEVED: THE ENTITLEMENTS OF THE LOVED ONES ARE STILL DETERMINED BY REFERENCE TO THE RATE OF THE DECEASED MEMBER'S RETIREMENT PAY IMMEDIATELY PRIOR COMMUTATION TAKING EFFECT. THEIR ENTITELMENTS ARE UNDISTURBED BY THE INTERPRETATION OF THE WORD "AFTER" WHICH I AM ASKING YOUR HONOUR TO FIND. THE OUTCOME IS STILL "HARMONIOUS".

**I**ALL OF THIS RAISES WHAT IS TO ME A PERPETUALLY PERPLEXING QUESTION: WHAT DOES "RATE" MEAN IN THE ACT?

IF WE TAKE A SIMPLIFIED EXAMPLE OF TWO RELEVANTLY IDENTICAL MEMBERS WHO RETIRE AND ARE ENTITLED TO RETIREMENT PAY AT A RATE OF – SAY - \$10,000 PER ANNUM. ONE OF THE MEMBERS ELECTS TO COMMUTE FIFTY THOUSAND DOLLARS OF THAT PAY WITH EFFECT DAY 364 OF HIS FIRST YEAR OF RETIREMENT AND, AS A CONSEQUENCE, THE REDUCTION WILL THEN REDUCE THE ANNUAL AMOUNT OTHERWISE PAYABLE BY – SAY - TWO THOUSAND DOLLARS.

IN THE FIRST YEAR OF RETIREMENT, THE MEMBER WHO DID NOT COMMUTE WAS PAID \$10,000. IS THAT A RATE OF RETIREMENT PAY OF \$10,000 PER ANNUM FOR THAT YEAR? IT LOOKS LIKE IT.

IN THE FIRST YEAR OF RETIREMENT, THE MEMBER WHO DID COMMUTE WAS PAID \$60,000. IS THAT A RATE OF RETIREMENT PAY OF \$60,000 PER ANNUM FOR THAT YEAR? IT LOOKS LIKE IT. IF IT'S NOT \$60,000 PER ANNUM, WHAT WAS IT?

IN THE SECOND YEAR THE NON-COMMUTING MEMBER IS PAID \$10,000 AND THE COMMUTING MEMBER \$8,000. ARE THOSE THEIR RESPECTIVE RATES OF RETIREMENT PAY FOR THE SECOND YEAR?

ON THE INTERPRETATION I SAY IS CORRECT, THE ANSWERS TO THE ABOVE QUESTIONS DON'T REALLY MATTER TO THE LOVED ONES PROVISIONS. THE COMMUTING MEMBER MIGHT DIE ON DAY 364 WHEN HIS ANNUAL RATE OF PAY WAS APPARENTLY \$60,000. OR HE MIGHT DIE AT DAY 366 WHEN HIS ANNUAL RATE OF PAY WAS APPARENTLY \$8,000. THE LOVED ONES PROVISIONS REQUIRE, IN EFFECT, THAT YOU IGNORE ALL THAT AND GO TO THE DAY BEFORE COMMUTATION TOOK EFFECT, TO SEE WHAT THE RATE HAPPENED TO BE ON THAT DAY ALONE. NONE OF THAT IS DISTURBED BY CONFINING THE SUBSEQUENT DURATION OF ANY REDUCTION EFFECTED BY THE REDUCTION PROVISION TO THE APPLICABLE EXPECTATION OF LIFE PERIOD.

**[IS PREMATURE DEATH OF A COMMUTING MEMBER A 'WINDFALL'?**

MY REFERENCE TO THE DEATH OF A MEMBER EARLY IN HIS OR HER RETIREMENT RAISES AN ISSUE WITH WHICH I LIKE TO DEAL QUICKLY, BECAUSE IT HAS BEEN PUT TO ME OFTEN AS IF IT HAS RELEVANCE TO THE INTERPRETATION OF THE PROVISIONS IN QUESTION.

IN MY SCENARIO ABOVE, LET'S ASSUME BOTH MEMBERS PASS AWAY AT DAY 365 OF THEIR RETIREMENT. THE COMMUTING MEMBER HAS BEEN PAID \$60,000. THE RELEVANTLY IDENTICAL NON-COMMUTING COLLEAGUE HAS BEEN PAID \$10,000. I'M OFTEN ASKED: ISN'T THERE A WINDFALL TO ONE COMPARED TO THE OTHER, BECAUSE THE COMMUTING MEMBER GOT THE LUMP SUM WHICH DOES NOT HAVE TO BE 'EARNED BACK' - AS IT WERE - IN ACCUMULATED REDUCTIONS IN RETIREMENT PAY? IN RESPONSE I MAKE THESE POINTS:

FIRST, I THINK IT IS ODD TO CHARACTERISE THE RETENTION OF THE COMMUTED AMOUNT ON THE PREMATURE DEATH OF A MEMBER AS A 'WINDFALL' FOR THE DEAD MEMBER AND HIS OR HER LOVED ONES.

SECONDLY, MANY PEOPLE OVERLOOK THE FACT THAT THE DECEASED MEMBERS MADE COMPULSORY CONTRIBUTIONS, OUT OF THEIR OWN PAY, FOR AT LEAST 20 YEARS IN ORDER TO BECOME ENTITLED TO COMMUTE. WHEN 'ONE DOES THE MATHS' AS IT WERE ON THE ACCUMULATED VALUE OF THOSE CONTRIBUTIONS IF INVESTED PRUDENTLY OVER AT LEAST 20 YEARS, THE LUMP SUM HAS - AS IT WERE - ACTUALLY BEEN 'EARNED'. TO PUT THIS ANOTHER WAY, IT IS NOT AS IF THE DECEASED COMMUTING MEMBER GOT SOMETHING FOR NOTHING.

THIRDLY, ANY PERCEIVED UNFAIRNESS IS ACTUALLY A MATTER OF CHOICE. THE NON-COMMUTING MEMBER CHOSE NOT TO COMMUTE AND TAKE A CHANCE AT GETTING THE SUPPOSED 'WINDFALL'. (THOUGH I HAVE TO SAY I'M NOT AWARE OF ANYONE WHO MADE THAT CHOICE.)

FOURTHLY, FOR SOME REASON THE PEOPLE WHO PUT THE SCENARIO TO ME DO NOT CHARACTERISE AS A 'WINDFALL' - TO THE NON-COMMUTING MEMBER - THE SUBSTANTIALLY LARGER AMOUNT OF RETIREMENT PAY S/HE ACCUMULATES IF BOTH MEMBERS INSTEAD LIVE TO THE AGE OF 100.

ALL OF THIS JUST POINTS UP AGAIN THAT, IN SUBSTANCE, THE DECISION TO COMMUTE OR NOT WAS - ON THE PREVAILING INTERPRETATION - A GAMBLE ON OUR LIFE SPANS.....]

**TWO SUBSTANTIVE ISSUES TO GO, YOUR HONOUR.**

**THE PENULTIMATE ISSUE IS THE ESSENCE OF WHAT I SAY MAY BE GLEANED FROM RELEVANT EXTRINSIC MATERIALS.** I INTEND TO READ ONLY **SIX** SENTENCES FROM THOSE MATERIALS. IF YOUR HONOUR REQUIRES ME TO EXPLAIN WHY I CONSIDER REFERENCE MAY LEGITIMATELY BE MADE TO THOSE MATERIALS, I WILL OF COURSE DO SO NOW.

[...ON MY READING OF THE HIGH COURT'S DECISION IN THE MONDELEZ CASE – WHICH APPEARS ON BOTH PARTIES' LISTS OF AUTHORITIES - AND THE SUBSEQUENT FULL COURT OF THE FEDERAL COURT DECISION IN THE BAY STREET APPEAL, THE ACTS INTERPRETATION ACT IS NOT A CODIFICATION OF THE ONLY CIRCUMSTANCES IN WHICH REFERENCE MAY BE MADE TO RELEVANT EXTRINSIC MATERIALS AS PART OF THE INTERPRETIVE PROCESS. [FOR EXAMPLE, THE HIGH COURT MAJORITY AT PARA 13 OF THE MONDELEZ DECISION, AND WHAT'S CITED AT FOOTNOTE 7, AT THE LINK IN ITEM 5 OF MY LIST OF AUTHORITIES AND COPIES AT PAGE 9 OF THE RESPONDENT'S LIST.] BUT EVEN ASSUMING I AM WRONG IN THAT, I REITERATE MY SUBMISSION THAT OBSCURITY ARISES AND, GIVEN THE FINANCIAL CONSEQUENCES FOR COMMUTING MEMBERS, UNREASONABLENESS ARISES, FROM THE INTERPRETATION OF THE REDUCTION PROVISION PRESSED BY THE RESPONDENT, IN THE CONTEXT OF THE TEXT AND STRUCTURE OF THE ACT ALONE. ...]

WHAT I WILL CALL THE 'STRATEGIC' PURPOSE AND POLICY OF THE DFRDB ACT WAS MADE PLAIN IN THE MINISTER'S SECOND READING SPEECH ON THE PACKAGE OF BILLS OF WHICH THE DFRDB BILL WAS A PART. AT THE CONCLUSION OF THAT SPEECH – [AND THIS IS FROM PAGE 2709 OF HOUSE HANSARD LINKED AT ITEM 14 OF MY LIST OF AUTHORITIES AND COPIED AT PAGE 175 OF THE RESPONDENT'S LIST]

TAKEN TOGETHER WITH 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.

END QUOTE.

I SAY THAT THE WAY IN WHICH THE LEGISLATURE INTENDED TO ACHIEVE THAT STRATEGIC PURPOSE AND POLICY WAS ALSO MADE CLEAR IN THE MINISTER'S SECOND READING SPEECH. AT THE START OF THE SPEECH THE MINISTER SAID: [AND THIS IS FROM PAGE 2707 OF HOUSE HANSARD LINKED AT ITEM 14 OF MY LIST OF AUTHORITIES AND COPIED AT PAGE 173 OF THE RESPONDENT'S LIST]



THE BILLS GIVE EFFECT TO THE GOVERNMENT'S DECISION ANNOUNCED LAST YEAR TO IMPLEMENT THE RECOMMENDATIONS OF THE JOINT SELECT COMMITTEE ON DEFENCE FORCES RETIREMENT BENEFITS LEGISLATION.

END QUOTE.

AND IN RELATION TO COMMUTATION, THE RECOMMENDATIONS OF THAT COMMITTEE INCLUDED – [AND THIS IS FROM THE LINK AT ITEM 17 OF MY LIST OF AUTHORITIES AND A COPY IS UNDER THE HEADING "14 COMMUTATION" ON THE RIGHT HAND SIDE AT PAGE 182 OF THE RESPONDENT'S LIST]

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.

AND I NOTE, PARENTHETICALLY, THAT THAT IS PRECISELY WHAT THE ORIGINAL ACT PROVIDED. SINCE THEN THE PERIOD DURING WHICH THE OPTION TO COMMUTE MAY BE EXERCISED HAS BEEN EXTENDED, AND THE MAXIMUM AMOUNT WHICH MAY BE COMMUTED HAS BEEN INCREASED. THAT CAN BE SEEN IN THE 'AS MADE' AND 'IN FORCE' VERSIONS OF THE ACT.

IN HIS SPEECH THE MINISTER SPECIFICALLY MENTIONED THE RIGHT TO COMMUTE, BECAUSE THERE WAS NO RIGHT TO COMMUTE IN THE PRE-EXISTING DFRB SCHEME AND THAT, AMONG MANY OTHER FEATURES, WERE MISCHIEFS INTENDED TO BE ADDRESSED BY NEW DFRDB SCHEME.

BACK TO THE COMMITTEE RECOMMENDATIONS IN RELATION TO COMMUTATION, WHICH THE MINISTER SAID WERE GIVEN EFFECT TO IN THE BILLS. QUOTE:

THAT *RETIRED PAY* PROPORTIONATELY REDUCED IN RELATION TO COMMUTATION REMAIN PAYABLE AFTER COMMUTATION.

END QUOTE.

I SUBMIT THAT THE LATTER RECOMMENDATION *IS* THE LEGISLATURE'S POLICY OF THE REDUCTION PROVISION.

PROPORTIONATELY REDUCED.

PERMANENTLY REDUCED IS NOT PROPORTIONATELY REDUCED. THE MATHEMATICS OF CHANGING LIFE EXPECTANCIES AND LIFE SPANS COMPARED WITH THE SCHEDULE 3 LIFE EXPECTANCIES ARE UNASSAILABLE.

NOWHERE IN THE EXTRINSIC MATERIALS IS THERE ANY MENTION OF ANY INTENT TO RESILE FROM OR WATER DOWN AS IT WERE THAT RECOMMENDATION. TO THE CONTRARY, AT THE END OF THE SECOND READING DEBATE, THE MINISTER SAID: [AND THIS IS FROM PAGE 2893 OF THE HOUSE HANSARD LINKED AT ITEM 15 OF MY LIST OF AUTHORITIES]

BUT IT IS QUITE CLEAR FROM WHAT HAS BEEN SAID BY HONOURABLE MEMBERS, PARTICULARLY FROM THE GOVERNMENT SIDE THIS AFTERNOON, THAT THE BILL DOES INCORPORATE THE RECOMMENDATIONS OF THE JESS COMMITTEE [THAT'S THE JOINT COMMITTEE]. THE GOVERNMENT HAS NOT IN ANY WAY AT ALL DISHONoured THOSE RECOMMENDATIONS. INDEED, AS A RESULT OF DISCUSSIONS WHICH I HAD WITH DEPARTMENTAL OFFICIALS BACK IN JANUARY OF THIS YEAR WHEN I ISSUED INSTRUCTIONS THAT THE LEGISLATION SHOULD BE INTRODUCED IN THIS SESSION OF THE PARLIAMENT - THESE MEETINGS INVOLVED NOT ONLY OFFICIALS OF THE DEPARTMENT OF DEFENCE BUT REPRESENTATIVES OF THE CERTAIN RESPECTIVE SERVICES, THE TREASURY AND THE ATTORNEY-GENERAL'S DEPARTMENT - SOME ADJUSTMENTS WERE MADE TO THE ORIGINAL RECOMMENDATIONS OF THE JESS COMMITTEE. ANY OF THE AMENDMENTS WHICH WERE MADE AT THAT TIME WERE ACCEPTED ON THE BASIS THAT THEY WOULD IMPROVE THE LEGISLATION, THAT THEY WERE AN IMPROVEMENT ON THE RECOMMENDATIONS IN THE REPORT AND THAT, AS A RESULT OF THEIR INCORPORATION INTO THE LEGISLATION, NO ONE WOULD BE DISADVANTAGED.

END QUOTE.

THE INTERPRETATION PRESSED BY THE RESPONDENT CANNOT IN MY SUBMISSION REASONABLY BE CHARACTERISED AS AN HONOURING OF OR AN IMPROVEMENT ON THE JOINT COMMITTEE'S RECOMMENDATIONS. NOT – THAT IS - UNLESS A CHANGE AGAINST THE INTERESTS OF ADF MEMBERS IN FAVOUR OF THE COMMONWEALTH IS CHARACTERISED AS AN IMPROVEMENT.

IF THE INTERPRETATION PRESSED BY THE RESPONDENT WAS THE LEGISLATURE'S INTENT, IT IS HARDLY SURPRISING THAT IT WAS NOT MADE PLAIN AT THE TIME OR FOR A LONG TIME AFTER. EVEN SOME OF US LOWLY ADF MEMBERS COULD HAVE READ A DICTIONARY TO WORK OUT THE DIFFERENCE BETWEEN PERMANENT AND PROPORTIONATE. AND AS THE YEARS ROLLED ON AND LIFE EXPECTANCIES INCREASED, THE EXPECTATION OF LIFE FACTORS IN SCHEDULE 3 OF THE DFRDB ACT HAD AN INCREASINGLY DISADVANTAGEOUS EFFECT FOR COMMUTED RETIREMENT PAY. EVEN SOME OF US LOWLY ADF MEMBERS COULD HAVE DONE THE MATHS.

IT WOULD HAVE MADE THAT INDUCEMENT TO JOIN AND, MORE SIGNIFICANTLY, TO REMAIN A MEMBER OF THE ADF SOMEWHAT LESS ATTRACTIVE.

BEST TO LEAVE THE UNPLEASANT SURPRISE UNTIL AFTER PEOPLE HAD SIGNED THEIR LIVES AWAY IN THE DEFENCE OF THE NATION, AND PREFERABLY UNTIL AFTER THEY BECOME PRACTICALLY POWERLESS RETIREES.

**THAT BRINGS ME TO THE FINAL SUBSTANTIAL ISSUE I WANT TO RAISE, YOUR HONOUR: THAT IS THE BENEFICIAL CHARACTERISATION OF THE DFRDB ACT AND THE INTERPRETATIONAL CONSEQUENCES OF THAT CHARACTERISATION.**

I SUBMIT THAT IT SHOULD NOT BE CONTROVERSIAL THAT THE ACT BE CHARACTERISED AS BENEFICIAL LEGISLATION. THAT CAN BE GLEANED JUST FROM THE LONG TITLE OF THE ACT, REFERENCE TO WHICH TITLE MAY BE MADE AS AN AID TO THE INTERPRETATION OF THE ACT. IN MY WRITTEN SUBMISSIONS I SET OUT THE DETAIL OF MY UNDERSTANDING OF THE RELEVANT AUTHORITIES AND THEIR CONSEQUENCES FOR THE INTERPRETATION OF THE ACT.

THOSE CONSEQUENCES INCLUDE THAT YOUR HONOUR HAS – SHALL I PUT IT THIS WAY - GREATER LATITUDE TO INTERPRET THE PROVISIONS AS GENEROUSLY AS THE LANGUAGE ALLOWS. BENEFICIAL PROVISIONS SHOULD NOT BE CONSTRUED IN A NARROW OR PEDANTIC MANNER.

THE WORD “AFTER” ADMITS OF A RANGE OF MEANINGS, DEPENDING ON CONTEXT. CONFINING THE PERIOD OF REDUCTION TO THE APPLICABLE EXPECTATION OF LIFE, DOES NOT RESULT IN THE WORD HAVING AN UNREASONABLE OR UNNATURAL MEANING IN CONTEXT.

THE INTERPRETATION PRESSED BY THE RESPONDENT IS PEDANTIC , IT IS MISERLY AND IT RESULTS FROM READING THE REDUCTION PROVISION IN ISOLATION FROM THE ENACTMENT OF WHICH IT FORMS A PART. [...THAT READING IS A BREACH OF THE CARDINAL RULE ARTICULATED BY JUSTICE MASON – AS HE THEN WAS – IN THE HIGH COURT’S DECISION IN K&S LAKE CITY FREIGHTERS, A LINK TO WHICH DECISION IS AT ITEM 7 OF MY LIST OF AUTHORITIES....]

I AM ASKING YOUR HONOUR TO INTERPRET THE LEGISLATION BENEFICIALLY, INSTEAD.

IF IT PLEASE THE COURT, SUBJECT TO WHATEVER OPPORTUNITY I’M GIVEN TO RESPOND TO THE RESPONDENT’S ORAL SUBMISSIONS, I WILL END THERE AND OTHERWISE RELY ON MY WRITTEN SUBMISSIONS.



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD670/2021

**CLINTON EARL MCKENZIE**

Applicant

**COMMONWEALTH SUPERANNUATION CORPORATION**

Respondent

**ORDER**

**JUDGE:** JUSTICE PERRY

**DATE OF ORDER:** 03 May 2023

**WHERE MADE:** Sydney

**THE COURT ORDERS BY CONSENT THAT:**

1. There be no order as to costs.

Date that entry is stamped: 3 May 2023

*Sia Lagos*  
Registrar