



AUSTRALIAN DEFENCE FORCE RETIREES ASSOCIATION

We act on behalf of Defence Force Retirees and their Military Superannuation grievances

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REDRESS OF DFRDB PENSION INJUSTICE FOR FORMER ADF PERSONNEL

EXECUTIVE SUMMARY

PURPOSE

1. DFRDB Pensioners and their spouses exceed 50,000; many are old and domiciled in nursing homes. They have been subjected to harsh and unconscionable treatment by the Commonwealth Government. Their vulnerability, limited bargaining power, trust and lack of representation has been exploited.
2. In 2014, the Government agreed that the method of indexation was wrong and legislated a correction that it should be the “better of the CPI, PBLI and MTAW”. But this correction failed to adjust the pension base line of each pensioner to what it would have been had fair and reasonable indexation been applied to ensure relative purchasing power of pensions from each Pensioner’s date of pension commencement (i.e. discharge).
3. The purpose of this paper is to present the case for redress of the losses and detriment to DFRDB Pensioners caused by decisions and policy by Government in its administration of the DFRDB Scheme.

Aim

4. To gain all stakeholders endorsement to pursue the following action:
 - a. All DFRDB pensions be re-baselined to what they should have been set to in 2014 when the indexation was changed, including removal of discrimination through “unfair and inequitable” indexation for recipients aged under 55;
 - b. Indexation to be applied to each individual’s entire future pension stream (not the partial amount determined by members’ 1962 life expectancy, as at present);
 - c. The Commonwealth to immediately stop deduction of repayment of lump sum advances from the moment the original commuted amount has been repaid; and
 - d. Each pensioner be refunded, any deduction in excess of their individual commuted amount.

INDEXATION

5. Relativity of pensions is a fundamental right established under the original 1973 legislation¹ and carried over from the old DFRB Scheme. As such it is a fundamental and pre-existing right and in the absence of an express intention in the new legislation to deny it, the statutory interpretation rule of presumption established in *Coco v The Queen* (1994)² applies i.e. that the Parliament will not remove a fundamental right unless by express statement in the legislation. It provides conclusive evidence of the Government’s intention to retain relativity. The presumption is supported by the Government’s express intention to maintain relativity in the subsequent Military Superannuation scheme as documented in its 2011 advice to prospective DFRDB Pensioners.³

¹ *Defence Force Retirement And Death Benefits Act 1973*.

² *Coco v The Queen* (1994) 179 CLR 427.

³ *MilSuper Handbook* (Commonwealth) 2011, 5, sub-para 4.

6. In 2014 the Abbott government acknowledged that the indexation system then in use was inequitable, unfair and the source of a justified long-standing grievance. The legislated change which emerged failed to redress this grievance.⁴
7. Relativity requires translation of current NOMINAL dollars to REAL dollars baselined to the time a member's pension begins.⁵
8. The magnitude of this legislative failure is revealed in Annex A which demonstrates how CPI indexed pensions have lost 25.5% of relative value since 1991 – i.e., lost every year for life.⁶

OVER REPAYMENT OF COMMUTATION

9. Commutation is defined as a one-time lump-sum advance payment of a portion of accrued future superannuation entitlements.⁷
10. There is no statutory basis to suggest that Commutation implies an agreement to surrender all future rights to pension beyond an amount equivalent to the repayment of the lump sum advance. It is contrary to all principles of "Equity" and fairness that commutation ever implied an agreement to forego the relevant portion of the pension and a similar portion of any likely pension increase. Such practice breaches the government's fiduciary obligations to make decisions in accordance with its obligation of primary loyalty to Pensioners, without any conflict of interest and without any budgetary or other gain.
11. All Pensioners, as the objects of the Trust, have the right to a reasonable expectation of fair, reasonable and conscionable conduct in the demands of government for repayment of the advances against their accrued entitlements.⁸ The reverse has occurred. The government has used its' dominant power and position of trust to the detriment of Pensioners for government gain and done so with a clear conflict of interest.
12. It has also breached its mandatory and very prescriptive obligations for full and frank disclosure at the time the commutation decision was made by each Pensioner. It has denied Pensioners the information necessary to make an informed decision. The limitation period for claim to redress this deficiency is the time each Pensioner was/is informed or becomes aware of the deficient information. And the onus is on the party with the obligation to disclose to prove on the balance of probabilities that those obligations were met; not the reverse.
13. The interpretation of the meaning and methodology of commutation in the *ComSuper* policy handbook is repugnant to, and inconsistent with the legislation. The policy ensures that pensioners who die beyond their notional life expectancy date (NLE) subsidise or offset the rebates due from those who don't. They suffer discrimination because they live longer. Further, the method of indexation applied to commutation pay-back deductions is not supported by the legislation, is unreasonable and ensures excessive amounts are rebated to Government. The Government has gained by transferring the liability of Pensioners who die prior to their NLE to those who don't and gained again by not having to pay out on the pension they would have received had they achieved their NLE.
14. Commutation over payments should cease forthwith with all over payments returned to Veterans.

⁴ Robert, Stuart MP "Second reading Speech "Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Bill 2014.

⁵ The purpose of indexation is to maintain pension relativity; for example, the present pension value (or purchasing power) in 2019 should be the same as it was when a pensioner first drew his/her first fortnightly pension payment.

⁶ Annex A. Australian Bureau of Statistics Figure 2. Erosion of CPI against MTAWC commences 1991.

⁷ *Macquarie Concise Dictionary* Macquarie Dictionary Publishers Pty Ltd Sydney Australia 5th edit 253.

INTRODUCTION

1. The Australian Defence Force Retirees Association (ADFRA), seeks redress of the detriment and injustice caused by the Government's policy and decisions in the administration of Veterans entitlements under the Defence Force Retirement and Death Benefits (DFRDB) Act (Commonwealth) of 1973). The rights of over 50,000 surviving pensioners of the DFRDB Scheme (the Scheme) have been ignored. They seek redress of the detriment and gross injustice caused by a succession of flawed Government policy and decisions in the administration of the scheme.
2. The genesis of the ADFRA claim is the Government's failure to apply fair and reasonable relativity indexation increases to DFRDB pensions; and deducting from the fortnightly pension entitlements of those who commuted, considerably more than the amount advanced, thereby breaching the Government's fiduciary obligations. The failure and breach are valid grievances which can and must be redressed.
3. The paper is submitted without prejudice to any future course of action.

AIM

4. To gain all stakeholders endorsement to pursue the following action:
 - a. All DFRDB pensions be re-baselined to what they should have been set to in 2014 when the indexation was changed, including removal of discrimination through "unfair and inequitable" indexation for recipients aged under 55;
 - b. Indexation to be applied to each individual's entire future pension stream (not the partial amount determined by members' 1962 life expectancy, as at present);
 - c. The Commonwealth to immediately stop deduction of repayment of lump sum advances from the moment the original commuted amount has been repaid; and
 - d. Each Pensioner to be refunded, any deduction in excess of their individual commuted amount.

KEY STAKEHOLDERS

5. Specific stakeholders whose agreement and support are crucial include:
 - a. All DFRDB pensioners;
 - b. MPs and Senators of the Australian Parliament, and
 - c. Ex-Service organisations (ESOs) that represent DFRDB pensioners including spouses and other eligible dependents of deceased DFRDB pensioners.

SCOPE

6. The paper addresses the prime causes of grievance as:
 - a. Ambiguity and confusion over accountability for protecting Pensioners' entitlements;
 - b. Ambiguity and confusion over the right to relativity through indexation;
 - c. Government administrative policy and decisions in applying indexation and commutation in a fashion that provides gain and profit to Government to the detriment to DFRDB Veterans - unconscionable conduct;
 - d. Quantifying Pensioner's losses to support a course of action;
 - e. The way ahead for all stakeholders; and a
 - f. Conclusion.

ACCOUNTABILITY

7. Departmental responsibility for preservation of DFRDB rights and entitlements under the *Veteran Entitlements Act* between the Secretary of the various Defence Departments as they once separately existed and the Secretary of the Department of Veterans Affairs is ambiguous and uncertain. The *Veterans' Entitlements Act* (1986) clearly states that the Secretary is responsible;

*"to provide for the payment of pensions and other benefits to, and to provide medical and other treatment for, veterans and certain other persons, and for other purposes".*⁹
8. However *Administrative Arrangements Order - 1/9/2016* states that the Minister for Defence is responsible for the *Defence Force Retirement and Death Benefits Act 1973*. Some are of the view that the Department of Finance is the Trustee of the DFRDB Fund, a premise that ADFRA contends to be wrong on the grounds of conflicted interest.
9. Adding to the confusion, it would appear that the Commonwealth Superannuation Scheme (*ComSuper*) shares responsibility with others for administration and *ipso facto* deficient administrative decisions and policy. Whilst pensions clearly affect the health, wellbeing and entitlements of Veterans (as alluded in the *Veterans Entitlements Act*) the Department of Veterans Affairs has advised that it does not have anything to do with DFRDB pensions.¹⁰ Further confusion is added when at least two recent Lower House Petitions have been rejected by the Hon Darren Chester MP, Minister for Veterans' Affairs, and Minister for Defence Personnel on the premise they were beyond his charter to resolve.
10. The DFRDB Scheme is a Trust which attracts the accountability and responsibilities of the Trustees as fiduciaries.¹¹ In *Paramasivam v Flynn*¹² the Court ruled fiduciaries are a person or persons who hold a legal or ethical relationship of trust with one or more other parties. It established the principles that a fiduciary prudently takes care of money or other asset for another person with a fiduciary duty to uphold the highest standard of care at either equity or common law, not have any conflict of duty and must not profit from the fiduciaries position. All such duties have been breached here by the Commonwealth through Commonwealth appointed agencies.
11. *Barclays v Quistclose*¹³ is perhaps more relevant in that it held that where funds are advanced for a specific purpose the recipient of the funds holds the funds as a trustee and must comply with fiduciary obligations to use the funds for the purpose for which they were intended.

⁹ Part I Preliminary, 1.

¹⁰ Brendan Robertson Client Contact Victoria / Client Channels DVA Email RE: DFWA-MEDIA RELEASE OF AUSTRALIAN MILITARY COVENANT dated Monday, 4 March 2019 11:03 AM vide Department of Veterans' Affairs.

¹¹ *Paramasivam V Flynn* [1998] FCA 1711: and *Bristol & West V Mothew* [1998] Ch 1, Court of Appeal, duties of a fiduciary are: no conflict of interest + no personal profit + must act honestly + must act in the interests of the beneficiaries + must disclose all personal interests + duty to account + must exercise discretion in favour of most needy+ with the care and skill of an ordinary, prudent investor. *Grimaldi V Chameleon Mining NI (No 2)* defined a fiduciary as a person who holds a legal or ethical relationship of trust with one or more other party" is expected to be extremely loyal to their "principal"; must have no conflict of duty; demands the highest standard of care at either equity or law, and binds a fiduciary not to profit from their position. *Galambos V Perez* [2009] "a fiduciary relationship attracts an expectation of a reasonable entitlement by the dependant, vulnerable party that the fiduciary will act in that other's interest to the exclusion of his or her own or a third party's interest". *Hospital Products Ltd V United States Surgical Corporation Mason J* [1984]. held that the mere existence of the relationship was not enough in that "there exists" a reasonable expectation that the fiduciary will act in the dependents interest to the "exclusion of his or her own or a third party's interest.....stressed the "fiduciary's exercise of a power or discretion, affecting the interests of the other person in a legal or practical sense".

¹² (1998) 90FCR 489, 503 per Justices Miles, Weinberg and Lehane.

¹³ HL 31 Oct 1968

12. Under the DFRDB Scheme beneficiaries placed their contributions in the hands of the Commonwealth and its agents for a specific purpose to purchase accrued entitlements. Whilst their contributions disappeared into the Governments Consolidated Revenue Fund (CRF) the entitlements so purchased were entrusted to Commonwealth in good faith to be administered under a Trust arrangement. The arrangement satisfies the criteria of what constitutes a (Constructive) Trust in that:
 - a. The DFRDB Scheme is a properly constituted trust under legislation;
 - b. For a specific legal purpose; and
 - c. It satisfies the three certainties of:
 - (i) Intention to form a Trust (this is very clear – refer the board of trustees etc.);
 - (ii) Subject (the assets) of the Trust (the accrued entitlement); and
 - (iii) Objects (the list of Pensioners) is certain.
13. The Commonwealth is the settler of the trust, the Board of Trustees act as the Commonwealth's appointed Trustees with fiduciary obligations to the objects of the trust (the members as beneficiaries) to manage their accrued entitlements (the subject of the trust) in the members best interest without Commonwealth conflicts of interests or gains in doing so.
14. Whilst there is some contemporary debate about the extent of damages available for breach of fiduciary duties there is a consistent view that a fiduciary must make good a loss in fact suffered by the beneficiaries, where evidence shows **that but for the breach** the loss would not have occurred.¹⁴ Two criteria apply: first, the defendant's wrongful act must cause the damage complained of. Second, the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation":

FIDUCIARY RESPONSIBILITIES

15. The Government has breached its fiduciary obligations for the accrued entitlements of Pensioners in that it has:¹⁵
 - a. Not provided single minded loyalty to beneficiaries;
 - b. Not avoided conflicts of interests between its own budgetary objectives and Pensioners' interests; and
 - c. Has derived government gain from its decisions and priorities by meeting its own budgetary objectives to the detriment of Pensioner's benefits under the DFRDB scheme.
16. A fiduciary relationship attracts an expectation of a reasonable entitlement by the dependant, vulnerable party (here the Pensioners of the scheme) that the fiduciary will act in that other's interest to the exclusion of his or her (government's) own interest".¹⁶ The expectations of beneficiaries under the DFRDB Scheme satisfy the test as "reasonably founded"¹⁷ and include an expectation that the Government, in deducting their contributions from their pay each fortnight, will meet its' fiduciary obligations to ensure pension entitlements are preserved: i.e., at their REAL value not their NOMINAL value.

RIGHT TO RELATIVITY

17. The right to relativity is implied in the original DFRDB legislation and is a pre-existing fundamental right carried over from the DFRB legislation it replaced. The Jess Committee

¹⁴ *Target Holdings Ltd v Redfern* [1995] UKHL 10 an English trusts law case, *Confirmed By Lord Millett's Judgment In Tang Ying Ip V Tang Ying Loi* [2017] 20 HKCFAR 53.

¹⁵ *Bristol & West Building Society v Mothew* EWCA Civ 533 [1998] *Chan V Zacharia* (1984) 154 CLR 178. *Keech v Sandford* [1726] Ewhc J76 (Ch); *Glavanics V Brunninghausen* (1996) 19 ACSR 204

¹⁶ *Galambos V Perez* 3 SCR 247 [2009].

¹⁷ *Hospital Products Ltd V United States Surgical Corporation* (1984) 156 CLR 41.

noted "the new scheme should be indexed annually to maintain relativity with weekly earnings".¹⁸ And the Whitlam Government adopted all of the Jess recommendations although it adopted the CPI over the better of CPI and MTAW when it came to indexation.

18. The rationale for indexation is, and always was, to adjust the nominal value of each pension to the real (present) value from the time the pension commenced – i.e. the date of discharge. The purpose was to ensure that purchasing power of pensions was preserved. There is no other reason for indexation. The debate is not about whether to adjust nominal values to reflect real values over time, but about which method of indexation to apply to best achieve the relativity objective.
19. There is no evidence in the legislation of any intention by the Whitlam government to remove this right as it existed at the time. The extrinsic material and history to the legislation supports the presumption that the Government did not intend to interfere with, or remove a right of Pensioners to relativity.¹⁹ Those who might claim the Government intended to remove a pre-existing right are obliged to displace the presumption by providing factual, legally sustainable evidence of the Government's express intention to do so because there is no such intention expressed in the legislation or extrinsic material to it. Where a pre-existing right is to be removed by legislation the legislation MUST state an express intention to remove the right.²⁰
20. Relativity was central to the Jess Committee's recommendations and consistent wage fixing policy during this period. Relativity and the Government's intent is evident in the relativity increases that followed implementation of the DFRDB Act. A relativity index was applied for that express purpose, from the start of the Scheme and reinforced by the "Killen legislation" of the Fraser government which introduced the Consumer Price Index (CPI) in 1977.
21. This was confirmed again when the Abbott government introduced the 2014 legislation in response to the Australian Defence Services Organisation (ADSO) "Fair Go" campaign. In introducing the legislation, the Government echoed the claim of the ADSO, and the central premise to this paper that the whole purpose of indexation is to maintain a pensioner's purchasing power (relativity). It was acknowledged as a long-held condition of employment.²¹
22. Another possible explanation for the source of an apparent flaw in the administration of the Scheme lies in a line of text in the Scheme Administrator's Handbook which references the Government "ensuring that \$1 in 2011 will be equivalent to \$1 in 2028."²²
23. Introducing the DFRB/DFRDB Fair Indexation Bill, on 27 March 2014, the Government acknowledged what it described as "a long-standing grievance of the Pensioner and ex-service community about differing—and inequitable—indexation arrangements that apply to DFRB and DFRDB pensions".²³ In response to queries about the DFRB/DFRDB Fair Indexation Bill, on 27 March 2014, Senator Ronaldson stated:²⁴

"It has long been to me and my colleagues in the Coalition, verging on the scandalous that defence retirees do not enjoy the same indexation arrangements as other people who have retired."

¹⁸Trevor Matthews. "Report on the 2008 Review of Pensions Indexation Arrangements in Australian Civilian and Military Superannuation Schemes" chapter 3 [3.2].

¹⁹*Coco v The Queen* (1994) 179 CLR 427: Authority for rule of interpretation: "presumption that Parliament does not interfere with fundamental rights". Fundamental rights are normally human rights as was the case in *Coco* but it creates a basis to argue that the beneficiary's right to protection under fiduciary obligations of contract and equity are fundamental rights under the DFRDB Scheme.

²⁰Ibid.

²¹Pollard Report March 1973, 1.2 (2)). 2.6. Ch IV, and R.4

²²COMSUPER staff guidance (not released to public) in Military Superannuation Handbook (Commonwealth) 2011, 5, sub-para 4.

²³Robert, Stuart MP Assistant Minister for defence in the Abbott Government "Second reading Speech "Defence Force Retirement Benefits Legislation Amendment (Fair Indexation) Bill 2014. Second Reading

²⁴Ibid

The Government has long recognised the unique nature of all military service. As we have also previously acknowledged, the fair indexation of DFRB and DFRDB pensions is an important first step [my emphasis] in addressing a long-standing grievance of the veteran and ex-service community and the Government remains committed to considering contiguous matters within the context of the current fiscal environment”.

24. The Minister then called for adjustment of current pensions to the “new fairer indexation methodology” by first calculating the pension that would result if it were increased in line with the better of the Consumer Price Index (CPI) and the Pensioner and Beneficiary Living Cost Index (PBLCI), then adjusting the pension accordingly where the resultant pension is less than the floor percentage of MTAW. The comparison of pension under the old and new methodology is depicted in Annex A. Until about 1990 the CPI was a valid index by which to achieve this and thereafter replaced by MTAW.²⁵ Since then, DFRDB pensions have eroded by 25.5%.
25. The intent of the relativity entitlement is to ensure that a member who retired in an earlier period, say 1999, gets the same pension in REAL terms in 2019 by adjusting his or her 2019 pension in nominal dollars to the same real dollars expressed in 1999 value. Annex A demonstrates that CPI indexed pensions have lost 25.5% of relative value since 1991 – i.e. lost every year for life.

RIGHT TO EQUITY

26. Loss of relativity means that member’s pensions are eroded to the extent they receive significantly less than the entitlements defined in the Act. Some Pensioners are receiving less than 50% of their original entitlement. It is a breach of the Government’s fiduciary obligations and is wrong; both in Contract Law and in Equity.
27. Pensioners contribute to their future pension by way of deductions from their pay. It is their “proprietary asset” not the Government’s. The Government then consigns those contributions into the Consolidated Revenue Fund (CRF). Unlike similar schemes such as the Commonwealth Superannuation Scheme (CSS) or Military Service Benefits Scheme (MSBS) the DFRDB is not self-funding and contributions are untraceable once they enter the CRF – they are no longer accounted for as a distinct asset of the DFRDB Scheme. As the contributions are no longer accounted for or managed like fund assets as in other Commonwealth Superannuation Schemes, no interest or gain is accrued on any contributions.
28. Whilst the amounts taken are lost to Pensioners, a liability is created on the Government for accrued entitlements. These entitlements become due and payable at time of Pensioners discharge as per the *Defence Force Retirement and (Death) Benefits (DFRDB) Act (Commonwealth) (1973)* and the *Veterans Entitlement Act (Commonwealth) (1986)*. In deducting funds from Veterans’ pay, the Government assumes fiduciary responsibilities for the management of accrued entitlements – not the contributions. The accrued entitlements are then held by Government in an implied or constructive trust.²⁶
29. The Government asserts, “that by commutation, the pensioner cancels, not only a portion of this current pension entitlement at the date of approval of the commutation, and a similar portion of any likely pension increases by the notional category method based on that pension entitlement”.²⁷ However, this assertion is not supported by the legislation and is yet another example of the Government proclaiming a policy and position highly and deliberately prejudicial to Pensioners while favouring Government. Many Veterans at the time of their election to commute, were not informed of the Government’s policy. The Government has

²⁵Ibid.

²⁶ Ibid. Constructive trusts are imposed by the court to remedy and prevent unconscionable conduct. Constructive trusts are distinct from resulting trusts in that they are imposed **irrespective of the intentions of the parties**. It is NOT the intentions of the parties at the time of contributions transfer that matters, but whether the principles of equity require its imposition.

²⁷ This Government assertion is extracted from a non-authoritative Defence Leaflet that pre-dates the 1973 legislation. See the DFRB Booklet issued in 1970.

failed in its obligations to ensure Veterans are put on notice and to ensure Veterans make fully informed decisions and fully understand the consequences of that decision. It is highly exploitative behaviour by the Commonwealth in an area where it has statutory obligations to be a model litigant and fully compliant with its fiduciary obligations as the stronger party in the relationship.

30. The 1970 views still prevail today. They are not sustainable in law and are completely repugnant to the fiduciary obligations under the conventions of Equity. The Government's lack of good faith, natural justice and procedural fairness in the administration and policy decisions on the DFRDB, breach fiduciary obligations and give rise to a course of action in both contract and equity.
31. The exploitation of trust and vulnerability of ADF personnel in the service of their government, is a breach of the understanding and intent underpinning employment agreements and Conditions of Service. It is also a breach of Equity. It breaches the Veterans' reasonable expectations of trust and conscionable conduct in the management of their accrued entitlement (refer *Hospital Products* cited above).²⁸

RIGHT TO FAIR INDEXATION

32. The Jess Committee recommended to the Whitlam government that "the new scheme should be indexed annually to maintain relativity with weekly earnings" There is no evidence in the legislation of any intention by the Whitlam government to remove this right as it existed at the time. The extrinsic material and history to the legislation supports the presumption that the Government did not intend to interfere with or remove a Pensioner's right to relativity.
33. Those who might claim it was the Government's intent to remove a pre-existing right are obligated to "displace the presumption" by providing factual, legally sustainable- evidence of the Government's express intention to do so. There is no evidence of such intention expressed in the legislation or extrinsic material to it. Where a pre-existing right is to be removed by legislation it is reasonable to apply the presumption that the legislation MUST state an express intention to remove the right.
34. On the 2 December 1972 the Government adopted all recommendations of the "Jess Committee" except the recommendation to adopt Male Total Average Weekly Earnings (MTAWE) index. It adopted a "relativity indexation" that was at that time a central plank in the centralised wage fixing system on the understanding that it was effectively a cost of living index that maintained real purchasing power.²⁹ This resolution provides evidence of bi-lateral and bi-partisan intent with the Defence leadership that relativity of purchasing power was to be an essential entitlement under the DFRDB Scheme carried over from the earlier DFRB Scheme which the DFRDB Scheme replaced.
35. In May 1973, COMSUPER – the designated DFRDB Administering Authority - introduced an interim adjustment of DFRB pensions based on proposals for pensions of retired public servants. These were incorporated in the *Superannuation Act* despite its acknowledged difficulties in applying it to Pensioners under the new DFRDB scheme.
36. In November 1974, the Government introduced another interim adjustment for both DFRB and DFRDB related to a 16.2% increase in average weekly earnings. But it applied that increase to just five-sevenths of DFRDB pensions. This changed in 1977 when the Fraser Government, (per the "Killen legislation") adopted the CPI as a cost of living index to align military superannuation with public service superannuation.³⁰ The legislation did not express any intention to remove the pre-existing and fundamental right to relativity. In fact, the intention was to achieve relativity on the premise the CPI was the best way of doing so.

²⁸ *Hospital Products* above n 5.

²⁹ ADISO Home>Fair Go Campaign>Legislative [History@http://adiso.org.au/fgcampaign/legislative-history](http://adiso.org.au/fgcampaign/legislative-history)

³⁰ Ibid.

37. The Killen legislation incorporated a general principle that only the portion of the pension payable from the CRF is to be adjusted by the increase in the CPI. It effectively eroded the baseline from that time on and denied relativity.
38. As demonstrated in a comparison of CPI and MTAW (Annex A), the loss in pension value this caused is considerable and remains today.³¹ Despite the Abbott government's adjustment of the index in 2014 nothing was done to restore pension baselines to what they should be if the correct index was applied and relativity preserved. All pensions should have been reset to what they would have been had a fair and reasonable index been used from the time their pension began in accordance with the original legislation.

CONTRIBUTIONS

39. It was a prime tenant of the Whitlam's government's DFRDB legislation that the nexus between contributions and benefits cease. The Scheme is not self-funding as was its predecessor and other ComSuper managed schemes. When the DFRDB Scheme replaced the DFRB Scheme, the Whitlam Government removed the funds from the old Scheme in exchange for a government backed guarantee preserving Pensioner's entitlements (under the new Scheme). Veterans contribute under an implied Covenant of Trust and Good Faith which creates reasonably founded expectations by Veterans that trust, and good faith will prevail. The reality is altogether different.
40. Whilst the DFRDB legislation was correct, its application in *ComSuper* policy, is and has always been wrong. The policy has ensured member contributions are not indexed relative to their original value. Current values of contributions no longer reflect their true value in today's dollars, so any meaningful analysis of member's contributions based on the non-indexed value is meaningless.
41. The Killen legislation of 1977 that installed the CPI as the index treated ADF Veterans as public servants with the same rights to superannuation. The concept that ADF Veterans are public servants in uniform is repugnant to ADF personnel and the spirit of loyalty and sacrifice unique to their service and *esprit de corps*. It denies the exigencies and special nature of military service acknowledged in the original Jess Committee recommendations and erodes ADF morale – the bedrock of military capability.
42. In March 2014, the Abbott Government fulfilled its election commitment; "to fairly index DFRB and DFRDB pensions"³² on the premise that "military service is unique—there is no other service and no other job in this nation like it—and, as such, deserves unique solutions to ensure that Australia's service personnel, past and present, are looked after in their retirement".³³
43. It did address a long-standing grievance of the veteran and ex-service community about differing—and inequitable—indexation arrangements that apply to DFRB and DFRDB pensions compared to age and service pensions. But it failed to compensate Pensioners for the losses resulting from the unfair and inequitable indexation arrangements; and retained "unfair and inequitable" indexation for recipients aged under 55.³⁴ It effectively introduces retrospectively a condition that was not present in the originating legislation when people joined the DFRB Scheme some 41 years earlier, and many years after the decision to retire was made and executed. For the author for instance it changed the conditions 16 years after retirement. Whilst "Fair Indexation" was inherent condition at the time of entering the scheme and at the time of making the retirement decision, the discriminatory condition against pensioners aged under 55 was not. The discriminatory condition is not sustainable at Law or Equity.

³¹ Ibid.

³² Ellerbock H "The Gross Reduction of DFRDB Benefits" Appendix 2 Passage of The Legislation Through The Parliament. 16 February 2017.

³³ Ibid.

³⁴ Ellerbock H. above n 2.

44. Limited compensation for these losses is now sought along with amendment of the baseline of each pension to what it would be had the fair and reasonable Index been applied as intended at time of DFRDB implementation.
45. Whilst the policy on indexation of pensions is deemed an administrative deficiency prejudicial to the rights of Pensioners, the same applies to indexation and excessive over repayment policy on commutation of lump sums.

COMMUTATION OVER REPAYMENTS ARE UNCONSCIONABLE

46. Whilst *ComSuper* leaflets and other Government promotional paraphernalia provide limited definitions favourable to Government, the term Commutation is not defined in DFRDB legislation and has no statutory or common law authority to support it. To avoid ambiguity and uncertainty the Macquarie dictionary definition (or similar dictionary) should be used. It defines commutation as a substitution of one kind of payment for another: a reciprocal collective payment in place of an equivalent sum over many payments.³⁵
47. In lay terms, commutation is best defined as a one-time lump-sum advance payment of a portion of accrued future superannuation entitlements. There is no statutory basis to suggest that Commutation implies an agreement to surrender all future rights to pension beyond an amount equivalent to the repayment of the lump sum advance. It is contrary to all principles of Equity and fairness to suggest that commutation implies agreement to forego the relevant portion of the pension and a similar portion of any likely pension increases. COMSUPER, as the DFRDB Administering Authority, has applied this to the detriment of all affected DFRDB Pensioners by deducting fortnightly amounts from each pension worth more than the amount of commutation advanced.
48. “Full and frank” disclosure of all the material information known to the Government (including any information it has deliberately refrained from acquiring in its fiduciary capacity) is required in order for a Veteran to give his/her informed consent to the methodology used for repayment of a commutation advance. And the onus is on the party with the obligation to disclose, to prove on the balance of probabilities that those obligations were met; not the reverse.
49. Failure by the government to provide full disclosure of the facts is a breach of its very prescriptive and mandatory fiduciary obligations at the time Pensioner’s decisions are made. A breach of the disclosure obligation means the transaction must not be interpreted to the Pensioners detriment. In fact, the transaction could be rendered void if the detriment to the Pensioner is significant. It is irrelevant whether the Pensioners would have or not have proceeded with the commutation arrangement. It is purely speculative what the Pensioners would have done had they been properly informed.³⁶
50. Such conduct falls within the definition of unconscionable conduct and represents a significant detrimental and deficient administrative decision. Again, it breaches the government’s fiduciary obligations to make decisions in accordance with its obligation of primary loyalty to Pensioners, without conflict of interest and without any budgetary of other gain.
51. The lump sum advance to those who choose to commute is a condition of Service provided to offset the cost of resettlement after discharge from ADF employment. The commutation provision acknowledges that ADF employment has unique features and hardships not experienced by public servants or any other group in the community.
52. However, whilst the legislation is adequate, the interpretation and administration of the legislation with respect to commutation entitlements is clearly wrong. As currently interpreted, the lump sum advance of future superannuation entitlements is off-set by a deduction from Pensioners’ pensions to repay the advance. The deduction amount is calculated by dividing the amount advanced by a notional expectancy of life factor based on

³⁵ *Macquarie Concise Dictionary* Macquarie Dictionary Publishers Pty Ltd Sydney Australia 5th edit 253.

³⁶ *Boardman v Phipps* [1967] 2 AC 46 *Mc Kenzie v Mc Donald* VLR 134 [1927].

the Government Actuary's 1960-1962 Life Tables. But there is no provision in the legislation to cease the deduction once Pensioners reach their Notional Life Expectancy (NLE) and have fully repaid the advance.

53. The interpretation of the meaning and methodology of commutation in the legislation ensures that those who die beyond their NLE offset the repayment balance due from those who die earlier. They suffer discrimination because they live longer. And, the method of indexation applied to deductions for commutation amounts is not supported by the legislation, is unreasonable and unfair and ensures excessive amounts are deducted.
54. The DFRDB Scheme, acting under the imprimatur of Government, effectively shifts debt from one pensioner to another. The Government, as the Settler of the Superannuation Trust, is thus imposing its will on vulnerable and disadvantaged Pensioners. It is argued that such practice constitutes unconscionable conduct.
55. While this may have seemed a reasonable risk to expect Veterans to accept in 1972, it has long ceased to be reasonable due to the increase in life expectancy, which, according to the Commonwealth Actuary's 2015-2017 Life Tables, has now shifted the risk an average of 14 years to the detriment of DFRDB Pensioners. Commutation is now an inequitable arrangement which discriminates against Pensioners by gender, age on retirement and date of retirement. The discrimination and detriment imposed constitutes unconscionable conduct.

UNCONSCIONABLE CONDUCT

56. Australian Consumer Competition Commission (ACCC) defines unconscionable conduct as conduct that is so unreasonable or harsh, it defies good conscience. Indicators of such conduct include:
 - a. The relative bargaining strength of the parties;
 - b. Whether any conditions were imposed on the weaker party that were not reasonably necessary to protect the legitimate interests of the stronger party;
 - c. Whether the weaker party could understand the documentation used;
 - d. The use of undue influence, pressure or unfair tactics by the stronger party;
 - e. The requirements of applicable industry codes;
 - f. The willingness of the stronger party to negotiate; and
 - g. The extent to which the parties acted in good faith.
57. All of these elements were, and still are, present to varying degrees at the time ADF Veterans became eligible to access the commutation provision and its associated repayment. However, the over repayment provision (i.e., payment beyond NLE) was never revealed. The ADFRA has evidence of individual repayment sums exceeding their original commutation amount by tens of thousands per annum – and growing every year.
58. The stronger party (the administering authority – acting for the Government) has knowingly exploited a recognised vulnerability of the weaker party (the Pensioners) and has done so on numerous occasions to its own advantage. Many Pensioners are suffering poverty and invalidity. Many are incapacitated and reside in nursing homes unaware of the overpayments imposed on them.
59. This situation defies the principles of conscionability, good faith, natural justice and procedural fairness. It is a clear case of unconscionable conduct. And where unconscionable conduct is a determining factor in an agreement, the agreement can be overturned.³⁷

³⁷ The HCA rulings in *Thorne V Kennedy* [2017] and *Muschinski v Dodds* (1985) have demonstrated this point of view. HCA 49. The plurality (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) held that (pre-nuptial) agreements were voidable where undue influence and unconscionable conduct (at [2]) were present. The plurality reiterated that this appeal focused on whether the agreements should be set aside because the appellant was subject to the vitiating factors applied: duress, undue influence or unconscionable conduct (at [22]).

60. The Government has breached Equity and Trust law which requires it to avoid conflicts of interest; avoid profit or gain from its position as an entity; and act in the sole interest, and with single minded loyalty for beneficiaries.³⁸
61. In meeting its fiduciary obligation, the Government is conflicted between ADF Member interests and its own (budgetary) interests. It profits from the investment of Veterans' contributions held in the Consolidated Revenue Fund (CRF) and it does not give "single minded loyalty" to beneficiaries of the superannuation schemes it has created.
62. The failure of the government to provide full disclosure to allow a fully informed decision by the Pensioner at the time of entering the commutation agreement, breaches the government's fiduciary obligations. This applies to each individual decision at the time his/her decision is made. The onus is on the Government to displace the claim it failed to disclose. It means each individual Pensioner has a claim in Equity to have the transaction rendered null and void and the Pensioners right to do so commences as at the date he is notified of, becomes aware of the information not provided at the time he entered the agreement i.e., the Limitation Period clock starts on the date the Pensioner becomes informed.³⁹

QUANTIFYING PENSIONERS LOSSES

63. The ADFRA has devised a "Loss Calculator" to enable Pensioners to calculate their losses under both grievances – CPI losses on pensions, and overpayment of lump sum advances. The Calculator calculates the amount lost where the Government has applied indexation to the pension less the amount recovered through fortnightly deductions – i.e., the index has not been applied to full pensions and should be from the time the pension commenced.
64. The calculator shows how much each pensioner is penalised by the present Scheme provisions for relativity indexation and commutation. Those penalties continue and magnify after the death of the Contributor with consequential impacts on any surviving dependent spouse and children.
65. Past attempts to remedy the wrong, achieved change of the index by the Abbott government in 2014, but overlooked the key issue: i.e. compensation for the loss incurred prior to 2014; adjustment of the pension baseline to what it would have been had the breach not occurred; and remedy of the over repayments of commutation lump sums. That said, the Abbott Government acknowledgement that the CPI was wrong is cogent evidence that Pensioners were disadvantaged by it since it lost its relevance as a cost of living index in the nineties.

THE WAY AHEAD

66. All Pensioners and their representatives should be invited to lend their support to the following action:
 - a. The ADFRA to seek the Commonwealth Ombudsman's determination under the Ombudsman Act 1976⁴⁰ that the application of the CPI between 1977 and 2014 was a "deficient" administrative decision and policy incongruent with the DFRDB Act 1973.⁴¹
 - b. Should the Ombudsman's powers be unable to redress the pensioner's collective grievances, then the Minister for Defence be requested to fund the Board of Trustees to submit a Pensioners' Class Action to the Full Federal Court (FC).
 - c. The Federal Court (FC) claim should seek orders to:
 - (i) Adjust all DFRDB pensions by resetting the pension baseline to what it should have been set to in 2014 when the index was changed, including removal of

³⁸ *Bristol & West Building Society v Mothew* EWCA Civ 533 [1998].

³⁹ Ibid.

⁴⁰ Part IIA—Establishment, functions, powers and duties of the Defence Force Ombudsman.

⁴¹ Ombudsman (Commonwealth) Fact Sheet: . The term 'administrative deficiency' encompasses actions that are: > unlawful, unreasonable, unjust, oppressive, improperly discriminatory or otherwise wrong; > not explained properly by an agency; > based on a law or policy that was unreasonable, unjust, oppressive or improperly discriminatory.

discrimination through “unfair and inequitable” indexation for recipients aged under 55. The new index be applied to the pension from the date the pension started (discharge date) and all future – not past – pension payments be indexed against the new baseline.

- (ii) Over repayment of lump sum advances to stop immediately; and
- (iii) All past over repayments be returned to Pensioners.

CONCLUSION

67. In conclusion, all DFRDB Pensioners have suffered significant loss because of the Commonwealth Government’s misinterpretation of legislation and misappropriation of Pensioners’ accrued pension entitlements.
68. DFRDB contributions do not fund benefits and were never intended to. It was a prime tenant of the Whitlam’s government’s DFRDB legislation to end the nexus between contributions and benefits. Pensioners contribute under an implied *Covenant of Trust and Good Faith*.
69. Accrued entitlements are held in a Constructive Trust with the Government as Trustee. The beneficiaries as the objects of the Trust, have a proprietary right to accrued entitlements held by Government as the subject of the trust. The Trustee of the trust is the Government which exercises its fiduciary obligations to Pensioners through COMSUPER and the Board of Trustees it appoints for this purpose.
70. The purpose of indexation is to adjust nominal values of pensions to real value as baselined at the time the pension began – the date of discharge. This achieves relativity and is the sole reason for indexation as implemented by both sides of politics.
71. The beneficiaries as the objects of the Trust have the right to a reasonable expectation of fair, reasonable and conscionable conduct in the demands of government for repayment of the advances paid on their accrued entitlements. The converse has occurred with the government breaching its trust obligation to the detriment of Pensioners through its’ dominant power and position for government gain under a conflict of interest.

72. Recurring fortnightly payments in excess of any commutation advance should cease forthwith and all over payments be returned to the respective Pensioner.
73. All surviving pensioner's fortnightly pension amounts should be reindexed to the corrected baseline.

A handwritten signature in black ink, appearing to read 'C Bennett', with a long horizontal flourish extending to the right.

Christian J Bennett
(WgCdr retired)

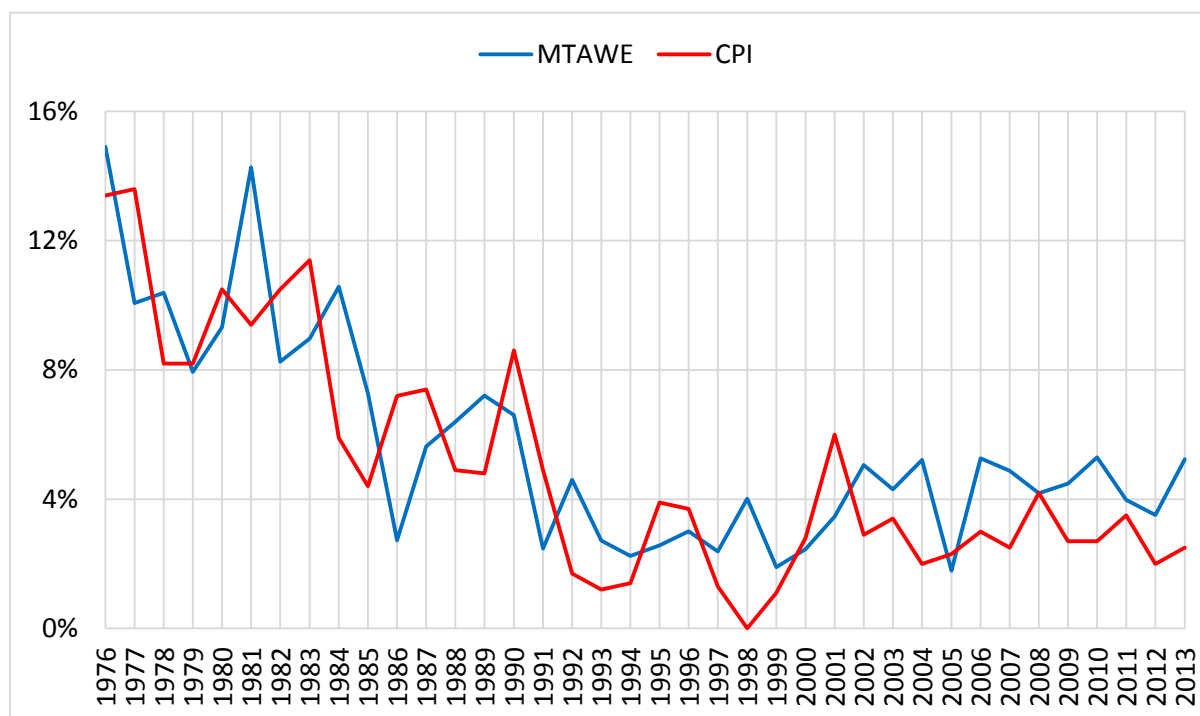
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8 April 2019

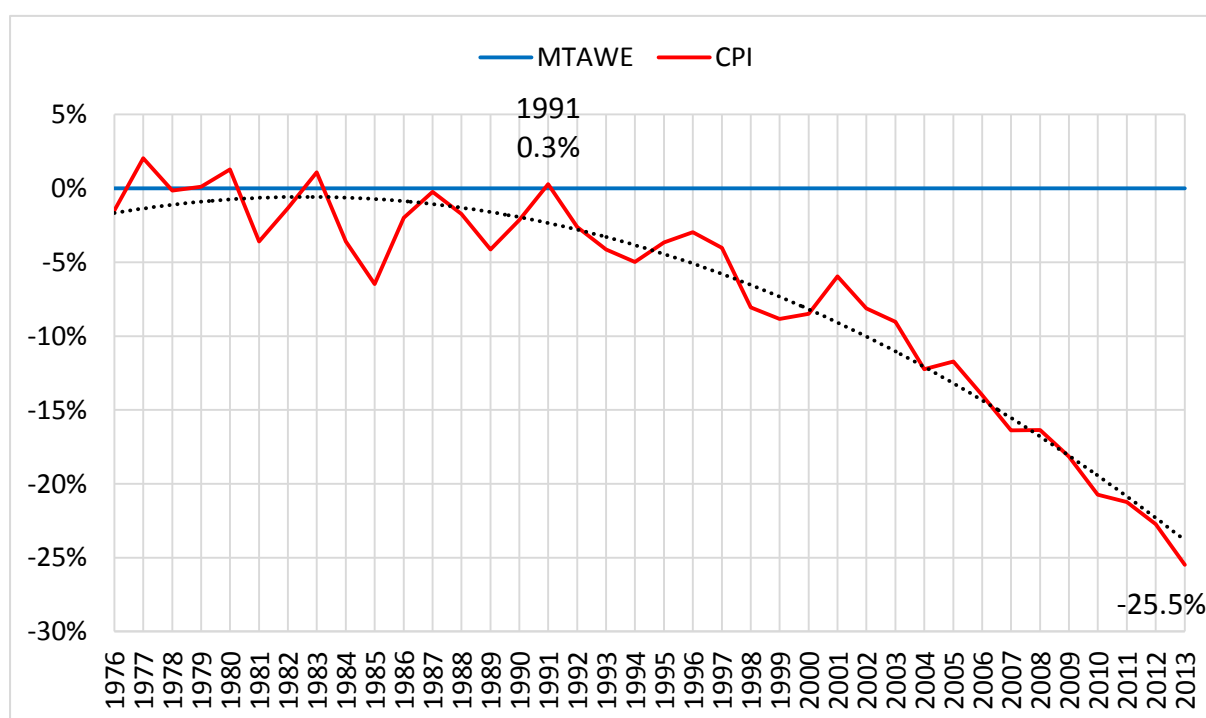
"when you're right you've got to fight"

FIGURE 1 – MOVEMENTS IN THE CPI AND MTAW⁴²

Source: Australian Bureau of Statistics and Commonwealth Superannuation Corporation

**FIGURE 2 – MOVEMENT OF THE CPI RELATIVE TO MTAW**

Source: Australian Bureau of Statistics and Commonwealth Superannuation Corporation



⁴² For a more detailed explanation on the relationship between CPI and MTAW and a history of their divergence, see the Explanatory Notes to Australian Bureau of Statistics (ABS) Index No 6467.0 - Selected Living Cost Indexes, Australia, Dec 2018.