



**DFWA (QLD) SUBMISSION TO
THE SENATE ECONOMIC LEGISLATION COMMITTEE INQUIRY INTO
TREASURY LAWS AMENDMENT (2022 MEASURES NO. 4) BILL 2022.**

**SCHEDULE 9 - TAXATION OF MILITARY SUPERANNUATION BENEFITS:
REVERSING THE DOUGLAS DECISION**

DFWAQ Office
RUSI Building
Victoria Barracks Brisbane
ENOGGERA MC QLD 4051

John Lewis
President
DFWAQ
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Any Inquiries regarding this submission,
please contact John Lewis



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EXECUTIVE SUMMARY

<p>The provisions of this legislation affect the tax treatment the superannuation Invalidity Benefits of all Veterans who are compulsorily discharged from the ADF for physical or mental conditions and are unlikely to ever work again. The Royal Commission has identified these transitioning Veterans to be at an increased risk of mental health issues and suicidality.</p>	<p>GO</p>
<p>Current serving ADF members' Invalidity Benefits are covered by DFRDB, MSBS and ADF Cover schemes operated by Commonwealth Superannuation Corporation (CSC). For over 70 years, these were all designed to produce harmonised administration and equivalent benefits to Veterans serving together, regardless of the legislation.</p>	<p>GO</p>
<p>The <i>Douglas</i> decision delivered favourable tax treatment to the vast majority of DFRDB and MSBS invalid Veterans whose payments started on/after 20 September 2007. The proposed legislation retained and extended these benefits and addressed the adverse effects <i>Douglas</i> caused to a small number of veterans.</p>	<p>GO</p>
<p>The Royal Commission's highest priority for urgent action was to simplify and harmonise the veteran entitlement system by implementing legislative reforms. Action is required, not just on DVA administered legislation but also on other legislation, including this legislation, which form part of the system delivering Invalidity Benefit entitlements to veterans.</p>	<p>GO</p>
<p>The <i>Douglas</i> decision created disharmony of financial outcomes for invalid Veterans who have a right to expect all would receive the same tax treatment on their Invalidity Benefits. Apart from risks identified by the Royal Commission to mental health, there is a consequent increased risk to ADF recruitment, and therefore to National defence. There is no reasonable justification for treating Veterans and their families differently. The proposed legislation ignores these adverse effects and deliberately entrenches this disharmony.</p>	<p>GO</p>
<p>The provisions of Schedule 9 of the proposed legislation should be changed to allow all DFRDB and MSBS Invalidity Benefit recipients to receive the benefits of the <i>Douglas</i> decision regardless of the date payment commenced, possibly by eliminating provisions concerning 20 September 2007.</p> <p>The ADF Cover Invalidity Benefits should receive the same favourable tax treatment of similar payments from MSBS, by suitable amendment, if technically possible, of the provisions of Schedule 9 of the legislation.</p>	<p>GO</p>

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BACKGROUND

DFWA welcomes the opportunity to make a submission to the Senate Economics Legislation Committee Inquiry on the provisions of the *Treasury Laws Amendment 2022 (Measures No. 4) Bill 2022*, specifically *Schedule 9 - Taxation of Military Superannuation Benefits: Reversing the Douglas decision*.

We previously made a submission to Treasury on the exposure draft of the *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2022: Taxation of Military Superannuation Benefits*.

ABOUT THE DEFENCE FORCE WELFARE ASSOCIATION (DFWA)

The Regular Defence Force Welfare Association was formed, with the support of the government, in 1959. At that time, there had been an expansion of regular forces and existing ex-service organisations were only interested in representing returned service personnel and the families of those who did not return. The association was formed for the purpose of representing to the government and public, the welfare and interests of serving members of the Australian Defence Force and their families. In 2007, to reflect the changing employment of the Reserves, the term, *Regular*, was dropped from our name.

Our purpose is to foster the best interests and welfare of all members of the Australian Defence Force and their families in any matter likely to affect them during or after their period of service.

While DFWA is a registered charity and, while providing some limited direct welfare support to veterans and their families, our primary focus is on government policy and practices affecting current and former ADF members and Families. Examples are:

- Official Intervener at the Defence Force Remuneration Tribunal (DFRT).
- Official ADF “Employee” Representative on the Public Safety Industry Reference Committee (union, employer and industry representatives, including Defence) of Government Skills Australia.
- Research and submissions to various parliamentary, government, departmental, ombudsman on own initiative and in response to inquiries at federal and state level, e.g., Senate committees.
- Support individual legal cases which set precedents for others, e.g., the *Douglas* case.

DFWA is a non-partisan organisation – we advocate for good policy.

DFWA has Branches or representation in each State and Territory, with the National Office located in Canberra at Royal Military College of Australia, Duntroon. As with other states, Qld Branch supports the National activities.

Douglas Test Case. DFWA has had an active role in supporting the veteran challenge of the nature of invalidity benefits since 2015. When test case litigation funding was initially provided to three affected Veterans, the DFWA Qld Branch Honorary Legal Advisor represented Mr *Douglas* and later, Mr Burns as well. DFWA also provided support during the stressful Administrative Appeals Tribunal and Federal Court hearings.

The Veterans Involved. DFWA would like to acknowledge the three veterans¹ who were granted test case litigation funding for the saga that resulted in the *Douglas* decision, a saga that lasted over three years before the Full Bench of the Federal Court decision. The Veterans were most conscious that the outcome of their cases, already stressful enough, would impact on the interests of thousands of other veterans, apart from themselves - adding to the stress.

This stress was not helped by the government, which made retrospective changes to tax regulations during an adjournment of the AAT Hearing to overcome what the presiding judge described as a “fatal flaw” in the government case. The equivalent of changing the rules of the game, mid match, because your team was losing. Ironic that during this period, legislation introducing the Australian Veterans’ Covenant was passed.

¹ Wayne *Douglas*, Peter Burns and Shane Walker.

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WHO IS AFFECTED?

The provisions of this legislation affect the tax treatment of the superannuation Invalidity Benefits of all Veterans who are compulsorily discharged from the ADF for physical or mental conditions and are unlikely to ever work again. The Royal Commission has identified these transitioning Veterans to be at an increased risk of mental health issues and suicidality.

What Are Invalidity Benefits?

The Invalidity Benefits provided by military superannuation schemes fill a similar role as death and total and permanent disability insurance as available with civilian superannuation schemes.

Invalidity Benefits are paid by the Commonwealth Superannuation Corporation (CSC) as a result of the Veteran's physical and/or mental incapacities whether or not they are "service caused."

- Many Invalidity Benefit recipients receive no payments from DVA.
- However, any payments from DVA to Veterans as a result of "service caused" injuries are off-set (reduced dollar for dollar) against any Invalidity Benefit received from the CSC.

Medical Discharge – Compulsory Transition. Veterans affected are all those who are compulsorily discharged from the ADF due to their physical and/or mental medical conditions which makes them ineligible to continue serving in the ADF and are unlikely to be employed again.

Higher Risk. The veterans concerned are those from the cohort that the Royal Commission into Defence and Veteran Suicide reported on as being at "higher risk of suicide", i.e., apart from the actual physical and mental health impairment, the actual involuntary separation from the ADF for not being good enough and removal from the team and familiar support networks - all increase risk.²

² Interim Report from the Royal Commission into Defence and Veteran Suicide (11 August 2022) p 73 and 76.

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INVALIDITY BENEFITS LEGISLATION

Current serving ADF members' Invalidity Benefits are provided by DFRDB, MSBS and ADF Cover schemes operated by CSC. For over 70 years, these were all designed to produce harmonised administration and equivalent benefits to Veterans serving together, regardless of the legislation.

Four Acts. Over the last 70 years, there have been four Acts providing superannuation Invalidity Benefits to Veterans. The main reason there has been a succession of acts is to keep up with the general approach to superannuation as provided to the Australian community.

- The **Defence Force Retirement Benefits** (DFRB) scheme was introduced in 1948. DFRB established the basis of Invalidity Benefits provided to the military.
- The **Defence Force Retirement and Death Benefits** scheme (DFRDBS) was introduced in 1972 and the DFRB scheme was closed. Members in DFRB scheme were automatically transferred to DFRDBS – there was no choice. DFRDBS provided similar Invalidity Benefits as DFRB.
- The **Military Superannuation Benefits Scheme (MSBS)** was introduced in 1991 for new ADF members and also provided Invalidity Benefits. The DFRDBS was closed for new members. Existing DFRDBS members were given the option of staying with DFRDBS or transferring to MSBS if they applied to do so.
- **ADF Cover** and ADF Super were introduced in 2016 for all new ADF members. Invalidity Benefits were provided by ADF Cover. MSBS was closed to new members. Existing MSBS members could stay with MSBS or could elect to switch to ADF Super. ADF Super members are included in ADF Cover, even if ADF members elect to have employer contributions paid into a non ADF Super fund. The ADF Advises that “Benefits under ADF Cover are consistent with the cover provided by MSBS.”³

Acts Affected by *Douglas* and Proposed Legislation. All currently serving ADF members are covered for Invalidity Benefits by either DFRDB, MSBS or ADF Cover. The *Douglas* decision did not address ADF Cover only DFRDBS and MSBS. The current wording of the Act, deliberately excludes *Douglas* benefits applying to veterans who signed up to ADF Cover.

³ <https://pay-conditions.defence.gov.au/sites/default/files/2021-09/march-14-updated-adf-cover-fact-sheet.pdf>

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HARMONISATION OF VETERAN INVALIDITY BENEFIT ENTITLEMENTS

Uniquely among legislation concerning Veteran entitlements, a high degree of harmonisation has been achieved in the four Acts to provide virtually the same quantum of Invalidity Benefit to veterans for over 70 years Invalidity Benefits.

SAME FUNDING

Unique Nature of Military Service. The unique nature on military service means, unlike any other occupation, members can be ordered into situations where there is high risk of death and injury. Disobeying such an order can result in criminal proceedings and imprisonment. Due to the difficulty of ADF members' obtaining death and total and permanent disability (DTPD) insurance at rates comparable to civilian occupations, all schemes have been funded by the Commonwealth. This has continued with ADF Cover⁴.

ADF Super also provide additional flexibility about where employer contributed Superannuation is held. Members can elect these contributions to be paid to a non-ADF Super fund.. In these instances, the ADF member is still covered by ADF Cover.⁵

Insurance companies also recognise the unique nature of military service and its effects on Veterans for life. Many refuse to provide DTPD insurance to Veterans in later civilian employment due to perceived higher risks related to their service. This can cause difficulties. Consequently, CSC now offers DTPD insurance to veterans after discharge.

HARMONISED INVALIDITY CLASSIFICATIONS AND CRITERIA

All of the schemes have the same Invalidity classifications and criteria resulting in a similar benefit. Medically discharged veterans are classified according to their level of incapacity for civilian employment:

- Class A – incapacity of 60% or more.
- Class B – incapacity of 30% or more, but less than 60%. (50% of a Class A benefit).
- Class C – incapacity of less than 30%. (No Invalidity Benefit)

HARMONISED CALCULATIONS AND PAYMENT OF BENEFIT

The methods of calculation of the Invalidity Benefit in each Act consider length of service, time to serve if had not been discharged, final salary or final average salary. The methods are designed to produce similar quantum of Invalidity Benefit payments for the same Class of Incapacity, e.g., the ADF claims that, "*ADF Cover will generally duplicate the average rate of benefit that would have occurred under the MSBS across all service.*"⁶

⁴ <https://www.directory.gov.au/portfolios/defence/australian-defence-force-cover-scheme-adf-cover>.

⁵ *ibid*

⁶ <https://pay-conditions.defence.gov.au/sites/default/files/2021-09/march-14-updated-adf-cover-fact-sheet.pdf>

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In all schemes, the Class B payment is calculated at 50% of the Class A Benefit. There is no Invalidity Benefit for a Class C.

All payments are fortnightly, except for ADF Cover. If the total invalidity pension is less than \$5,000 per year it must be converted into a lump sum.

SAME RETROSPECTIVE MEDICAL DISCHARGE

There is provision for a retrospective medical discharge. Sometimes, ADF Members are discharged without proper medical assessment or diagnosis of conditions. (Your war is over, return to civvy life as soon as possible - part of the [unique nature of military service](#).) Later, on application by the Veteran and investigation by the ADF, where the evidence indicates that they should have been medically discharged, a member can be granted a retrospective medical discharge by the ADF. The Veteran can then apply for Invalidity Benefits and a lump sum back payment to the date of discharge⁷. Retrospective medical discharge can occur within a couple of months of discharge, during transition, or years and decades later.

SAME REVIEWABLE RULES. The Invalidity Benefits are not “pensions for life” and are subject to periodic review by CSC up to retirement age. Invalidity Benefits from all schemes can be cancelled, suspended or reduced to nil in certain circumstances - and can be increased if conditions worsen.⁸

⁷ For example, at cessation of National Service, many Veterans were discharged with no or minimal medical examination- retrospective discharge claimed 40 years later. Similar occurrences, have occurred in more recent times, especially related to undiagnosed mental health conditions. (As an example. Mr *Douglas*, of the *Douglas* decision.)

⁸ Mr Burns, one of the test cases in the *Douglas* decision, was discharged on a Class A in 1994. Classification was reviewed 9 times, resulting in 4 changes. 1996-Class B, 2002-Class C, 2003-Class B, and 2008-Class A.

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BENEFITS OF THE *DOUGLAS* DECISION AND PROPOSED LEGISLATION

The *Douglas* decision delivered favourable tax treatment to the vast majority of DFRDB and MSBS invalid Veterans whose payments started on/after 20 September 2007. The proposed legislation retained and extended these benefits and addressed the adverse effects *Douglas* caused to a small number of veterans.

THE *DOUGLAS* DECISION

The main benefits from *Douglas* are due to the Invalidity Benefit being recognised as a superannuation lump sum and because the majority of military Class A and Class B Invalidity Benefit recipients also qualify for a disability superannuation benefit (DSB).

All taxpayers may receive a DSB from their super fund if they experience physical or mental ill health issues, and two medical practitioners have certified that it is unlikely they can ever work again in a job for which they are reasonably qualified. The DSB is applied differently to superannuation income streams and lump sums.

BEFORE THE *DOUGLAS* DECISION.

The DFRDB and MSBS payments before the *Douglas* Decision were treated as **superannuation income streams** (with no tax-free component) and were entitled to the **DSB tax offset**. The offset reduces the tax rate on the taxed element of the taxable component by 15%.

Example: A Veteran on an Invalidity Benefit of \$2,000 a fortnight [would receive after tax \\$1,746](#).

AFTER THE *DOUGLAS* DECISION.

The DFRDB and MSBS Invalidity Benefit payments (starting on or after the Divisive Date⁹ of 20 September 2007) are treated as **superannuation lump sums** and, as such, are entitled to the **DSB modification**. This increases the tax-free component of the Invalidity Benefit considerably.

Example. Direct Tax Benefit. In the same example given, the Veteran would:

- [Have the tax-free component increased to \\$1,641; and](#)
- [Receive, after tax \\$1,993 per fortnight](#) – an increase of about \$250 a fortnight (\$6,500 pa).

[Note: Details of the calculations of the tax calculations, including the DSB Modification used in the example, are shown in Annex B.]

Indirect Consequential Benefits. There may also be indirect consequential benefits depending on the veteran family circumstances. The reduction of the taxable income components as a result of the DSB Modification (Annex B, Table 2) can make some veteran families eligible for other benefits, e.g., Family Tax Benefit (FTB), childcare subsidy and the low-income healthcare card if the invalid veteran has dependents. FTB can be of significant help to the veteran suddenly an invalid without a job and with a family. FTB can be up to approx. \$7,000 per year per child in some circumstances.

⁹ Divisive Date is 20 September 2007. DFRDB/MSBS Veterans whose payments started on/after that date benefitted. Those before, missed out.

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PROPOSED LEGISLATION PROVISIONS

The proposed legislation:

- Retains the direct tax benefits and the consequential benefits (outlined above) of the veterans positively affected by *Douglas*. (8,000 estimated and growing each year by about 300)
- Improves on the *Douglas* decision by:
 - extending the benefits to the spouse and children pensions paid following the death of a Veteran whose Invalidity Benefit was affected by *Douglas*, and
 - nullifying the adverse effects on the minority of veterans who were adversely affected by *Douglas* (estimated under 500), by creating a new non-refundable tax offset: the *Veterans' Superannuation (Invalidity Pension) Offset* (VSIP).

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RELEVANCE OF ROYAL COMMISSION FINDINGS TO THIS LEGISLATION

Royal Commission highest priority for urgent action was to simplify and harmonise the veteran entitlement system by implementing legislative reforms. Action is required, not just on DVA administered legislation but also on other legislation, including this legislation, which form part of the system delivering Invalidity Benefit entitlements to veterans.

Recommendation Misquote- In his speech to the House on 30 November¹⁰, Minister Keogh indicated that the government supports the recommendations of the Interim Report of the Royal Commission and mentions that concerns were raised by stakeholders that the proposed legislation was ignoring the Royal Commission. He stated, “*We are currently undertaking work on that simplification and harmonisation of veterans’ entitlement legislation, as set out in recommendation 1.*” As far as publicly known, that work is on DVA legislation only and that is not what the Royal Commission stated.

What the Royal Commission Recommended. The Interim Report from the Royal Commission into Defence and Veteran Suicide (11 August 2022) first para in “Part 2 – Urgent Issues” states,

“Australia’s veteran compensation and rehabilitation legislative system is so complicated that it adversely affects the mental health of some veterans ... and can be a contributing factor to suicidality. The Australian Government should urgently implement legislative reforms to simplify and harmonise the veteran entitlement system.”

It is clear that reform is required on legislation impacting the broader veteran entitlement system including Superannuation and Taxation so that the system is simplified and harmonised. These other areas are the most complex – operating in “the no-one is responsible land” between bureaucracies.

Superannuation Legislation. The Royal Commission highlighted the complexity, slowness and impacts on mental health for Veterans dealing with superannuation invalidity benefits.¹¹

Taxation Involvement. Extra complexities and delays arise when recovery of taxed past payments of super or DVA benefits are required, often involving amendments of previous years of tax returns. It is a high stress area for both the veterans and staff involved. It was the subject of adverse judicial comment in the earlier *Douglas* AAT¹² Decision, and the delayed and poor implementation of changes to withholding rates of the *Douglas* decision.¹³ and ¹⁴.

Generally, some reform of taxation legislation is also required to simplify and harmonise the veteran invalidity benefit entitlement system.

The need to address this as part of the veteran entitlement system, is also recognised by the Minister’s actions in “*ensuring the unintended consequences of this [Douglas] decision are rectified, ensuring that no veteran is worse off.*”¹⁵

¹⁰ Hansard. House of Representatives 30 November 2022, Mr Keogh, P 3934

¹¹ Interim Report from the Royal Commission into Defence and Veteran Suicide (11 August 2022) P187 para 70, P 145 para 400, P 184 para 61.

¹² *Douglas* and Commissioner of Taxation [2020] AATA 494 dated 13 March 2020, paras 23, 113-114 and 118.

¹³ Camaraderie Vol 53 No1 page17. <https://dfwa.org.au/update/camaraderie-vol-53-no-1/>

¹⁴ Camaraderie Vol 53 No2 page16. <https://dfwa.org.au/update/camaraderie-vol-53-no-2/>

¹⁵ Hansard. House of Representatives 30 November 2022, Mr Keogh, P 3933

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MAJOR ADVERSE EFFECT OF *DOUGLAS* AND THE LEGISLATION

The *Douglas* decision created disharmony of financial outcomes for invalid Veterans who have a right to expect all would have similar tax treatment on their Invalidity Benefits. Apart from risks identified by the Royal Commission to mental health, there is a consequent increased risk to ADF recruitment, and therefore to National defence. There is no reasonable justification for treating Veterans and their families differently. The proposed legislation ignores these adverse effects and deliberately entrenches this disharmony.

DOUGLAS - IMPACT ON THE ALREADY DISCHARGED - SAME SUPER FUND (DFRDB AND MSBS)

It would be expected that Veterans with the same date of enlistment, same employment and pay, same length of service and discharged on same day and receiving the same Invalidity Benefit payment under the same superannuation scheme, would be taxed the same way.

They are not.

Veterans with DFRDB/MSBS on Invalidity Benefits where payments started before 20 September 2007 pay more tax than those on/after that date. The difference in pay starting dates can be attributed to anything from a processing clerk error, absence, sickness, paperwork lost or undiagnosed medical condition.

[Annex A, Examples 1 and 2](#) and on the ATO website¹⁶, illustrate the current disharmony and complexity.

Arbitrary Date. The legal technicalities regarding the 2007 date and pay starting date vs discharge date were subject of complex legal arguments beyond the ken of the average digger and involved 4 Federal Court Justices and about 20 solicitors and barristers over 4 years. The only agreement was the law was a complex mess. The earlier Douglas/Burns AAT Decision¹⁷ did not have this “*Arbitrary Date*” criteria. That came from the later Federal Court Decision. The inclusion of an arbitrary 20 Sep 2007 date inherently means that many equivalently injured ex-ADF personnel will have their superannuation disability benefits taxed in different ways. This is inherently unjust to personnel who signed up under the same conditions. *Douglas* is still challengeable, as indicated in another submission¹⁸ and by the inclusion of the date in the proposed legislation (Sections 1 and 2.) presumably to make challenges more difficult.

DOUGLAS – ADVERSE EFFECTS ON CURRENT SERVING ADF

Currently serving ADF members are either in DFRDB ((711), MSBS (34,390) or ADF Super (28,215)¹⁹. There will be a mix for at least 20 years. All new enlistees go into ADF Cover.

- ADF Members, serving side by side, have their pay taxed the same way.
YET
- ADF Members, when medically discharged side by side, do not have their Invalidity Benefits payments, taxed the same way. (No Harmonisation)

The Invalidity Benefits of a Veteran who is in ADF Cover, younger and potentially with young family, will be taxed more than an MSBS member (and miss out on Family Tax Benefit), even though both Invalidity Benefit payments will start after the 2007 date. ([See Annex A, Example 3.](#))

¹⁶ <https://www.ato.gov.au/Individuals/Super/In-detail/Withdrawing-and-using-your-super/Individuals-receiving-military-invalidity-benefits---impact-of-court-decision/>

¹⁷ AAT Burns V Commissioner of Taxation (2017/1647-1649,1663) dated 25 March 2020.

¹⁸ Submission No.4 - Mr Peter Thornton & Bradley Campbell dated 6 December 2022.

¹⁹ <https://www.csc.gov.au/Members/About-CSC/Corporate-governance/Annual-report-2021-22>

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In the words of Justice Logan²⁰, “...if the encounter in this case is any guide, to the prospect of being ‘broken by age and war’ there must now be added for members and former members of the ADF the prospect of encounter with how we as a Nation state have come to regulate and tax the bargain struck on enlistment.”

ADF Cover is still advertised on ADF and CSC websites as giving similar Invalidity Benefits as MSBS. After tax, the quantum of benefits is less. Not exactly the bargain struck!

Consequential Adverse Effects. Apart from the adverse effects of this on veterans and families as identified by the Royal Commission, there are broader adverse effects on the Nation as a whole. This sort of discrimination against new enlistees is likely to deter potential recruits and their families from service, especially in current employment market, with an ADF already understrength, but seeking to expand to support needed defence capabilities. This effect cannot be ignored.

ADVERSE EFFECTS ENTRENCHED BY THE LEGISLATION

Instead of addressing the adverse effects on Veterans:

- the 20 September 2007 divisive date affecting DFRDB and MSBS is entrenched by its inclusion the legislation (**Schedule 9 Sections 1 and 2**), and
- while ADF Cover is not mentioned in the legislation, the Minister specifically stated in his speech, the legislation “*retrospectively and prospectively reverses the effect of the Douglas decision in relation to all other schemes consistent with the intent of current superannuation law*”²¹.

Excluding Douglas Benefits from “other schemes”. The Minister’s statement highlights that the main Treasury purpose of the legislation is to prevent the *Douglas* decision from escaping to all other schemes²² i.e., including ADF Cover, and the Schedule attempts to shore up possible gaps in complex taxation legislation to hinder other legal challenges.

ADF Cover. ADF Cover is part of a continuum of the veteran invalidity benefit entitlements deliberately harmonised for over 70 years to provide similar outcomes to invalid Veterans and their families regardless of Act.

- Not to apply *Douglas* to ADF Cover for Treasury policy reasons, is to give lip service to the intent and spirit of the Royal Commission recommendation regarding harmonising the entitlement system. It totally disregards the importance of the harmonisation maintained for over 70 years.
- ADF Cover, like DFRDB and MSBS, Invalidity Benefit schemes is different to other civilian schemes - e.g., due to the unique nature of military service, it has to [be funded by the Commonwealth](#), and has to provide for [retrospective medical discharges due to the circumstances at time of discharge – due to the nature military service](#).

²⁰ *Douglas* and Commissioner of Taxation [2020] AATA 494 dated 13 March 2020, para 118

²¹ Hansard. House of Representatives 30 November 2022, Mr Keogh, p 3934

²² Highlighted in Submission No.4 - Mr Peter Thornton & Bradley Campbell dated 6 December 2022.

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The possibility of a future incident with multiple casualties e.g., an “accidental” encounter with a foreign vessel, laser beams blinding pilots, or in training, resulting in multiple casualties and eventual medical discharges, is real.

The younger veterans in ADF Cover will be taxed more than older Veterans in MSBS. Their families will also miss out on other consequent support such as FTB. Such discrimination against younger Veterans and their families is impossible to justify to Veterans, their families and the average Australian.

This legislation entrenches this discrimination.

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WAY AHEAD

The provisions of Schedule 9 of the proposed legislation should be changed to allow all DFRDB and MSBS Invalidity Benefit recipients to receive the benefits of the *Douglas* decision regardless of the date payment commenced, possibly by eliminating legislation provisions concerning 20 September 2007.

The ADF Cover Invalidity Benefits should receive the same favourable tax treatment of similar payments from MSBS, by suitable legislation, possibly by amendment of the provisions of Schedule 9 of the legislation.

FIX DISHARMONY - 20 SEPTEMBER DATE - WITHIN BOTH DFRDB AND MSBS

The disharmony created by *Douglas* decision treating taxation of Invalidity Benefits either side of the 20 September 2007 differently should be eliminated.

Way Ahead. It is suggested that a possible way to do this is to delete the reference to this date in Schedule 9 Sections 1 and 2.

FIX DISHARMONY – DISCRIMINATION AGAINST CONTEMPORARY VETERANS (ADF COVER)

The disharmony of contemporary invalid veterans and their families being excluded from the favourable taxation treatment afforded to DFRDB/MSBS Invalidity Benefit recipients should be eliminated by extending the benefits to ADF Cover.

Way Ahead. There are uncertainties concerning the way ahead. The key part of the *Douglas* benefits is for the Invalidity Benefit to be regarded as a **DSB** which is paid by a “super fund”. DFWA has requested ATO advice on their current interpretation and are awaiting a response²³.

- If ADF Cover is regarded as a super fund, it is suggested that a possible way to do this is to include ADF Cover with DFRDB and MSBS in Schedule 9 Sections 1 and 2.
- If they are regarded as not being paid from a superannuation fund, then other means will need to be found to address the adverse effects.

²³ Email Lewis to ATO on 19 January 2023.

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ANNEX A – EXAMPLES OF DISHARMONY

Box 1- Example 1. DFRDB or MSBS, Clerical Delay Pay Commence.

Jenny and David – DFRDB/MSBS - Medically discharged Same Day but Treated Differently

- A. **Jenny was medically discharged on 15 August 2007.** On 11 September 2007, she was determined by CSC as having a Class A incapacity and started receiving Invalidity Benefit payments. As Jenny started receiving payments before 20 September 2007, her Invalidity Benefit payments are treated as a superannuation income stream. **Jenny does not benefit from the favourable treatment.**
- B. **David was discharged on 15 August 2007.** He was determined by CSC as having a Class A incapacity but did not start receiving Invalidity Benefit payments until 19 November 2007 (Unexplained delay not uncommon.) Even though David was discharged before 20 September 2007, his invalidity pension started after 20 September 2007, and his Invalidity Benefit payments are taxed as superannuation lump sums. **David benefits from the favourable treatment.**

Box 2- Example 2. DFRDB or MSBS, Retrospective Medical Discharge.

Virginia and Roger - --Discharged same date - Effect of retrospective medical discharge.

- A. **Virginia was discharged on medical grounds on 2 October 2005** with a Class A incapacity and started receiving Invalidity Benefits on 14 October 2005. As Virginia started receiving payments before 20 September 2007, **she does not benefit from the favourable treatment.**
- B. **Roger was discharged on administrative grounds on 2 October 2005.** On 19 May 2015, it was determined by CSC that Roger should have been discharged on medical grounds and classified as Class A incapacity with an effective commencement date for the invalidity pension of 14 October 2005. He receives the same Invalidity Benefit payments as Virginia and a lump sum payment in arrears dating back to 2 October 2005. As payments did not start until after 20 September 2007, **Roger benefits from the favourable treatment. (He receives a lump sum backdated to 2 October 2005.)**

Box 3- ADF Cover Disadvantaged Compared to MSBS

Example 3. Bill and Jim were discharged on the same date after 20 September 2007. Both joined the ADF in 2010 and were in MSBS. In 2016 they were offered the chance switch from MSBS to the new ADF Super scheme.

- A. **Bill decided to switch to ADF Super** as it allowed him to choose the super fund of his choice. He was advised by CSC and ADF that Invalidity Benefits provided in ADF Cover were similar to MSBS. Bill is medically discharged on 15 September 2022 and started receiving invalidity pension payments on 16 September in accordance with being determined by CSC as having a Class A incapacity. As Bill was in ADF Cover, he **does not benefit from the favourable treatment.**
- B. **Jim decided to stay with MSBS.** Jim is also medically discharged on 15 September 2022 and started receiving invalidity pension payments on 16 September in accordance with being determined by CSC as having a Class A incapacity. As Jim was in MSBS and payments started after 20 September 2007, **Jim benefits from the favourable treatment.**

ANNEX B – CALCULATIONS OF DSB AND TAX BEFORE AND AFTER *DOUGLAS*

EXAMPLES

Veteran Jaydon is on a Pre-Tax Invalidation Benefit of \$2000 per fortnight and qualifies for the Disability Superannuation Benefit (DSB) as two medical practitioners have certified that it is unlikely he can ever work again in a job for which he is reasonably qualified.

BEFORE *DOUGLAS* DECISION

DSB Tax Offset Applied to Invalidation Benefit Superannuation Income Stream is shown in Table 1.

Table 1. Tax as Superannuation Income Stream with **DSB Tax Offset**

Taxation on all veteran Invalidation Benefit recipients before Douglas .	
Taxation Unchanged after Douglas where Payment Started Before 20 September 2007.	
Tax-Free Component	\$0
Taxable Taxed Element	+\$200
Taxable Untaxed Element	+\$1800
Making up the Gross Pre-Tax Invalidation Benefit	\$ 2,000
Less Tax Payable	-\$284
Add DSB Tax-Offset (15% Taxable Taxed Element)	+\$30
Fortnightly Pension after Tax	\$ 1,746

AFTER THE *DOUGLAS* DECISION.

The DFRDB and MSBS Invalidation Benefit payments (starting on or after 20 September 2007) are treated as **superannuation lump sums** and are entitled to the **DSB modification**. This increases the tax-free component of the Invalidation Benefit.

The DSB Modification calculation is shown in [Figure 1](#).

The DSB Modification applied to the Invalidation Benefit Superannuation Lump Sum is shown in Table 2.

Table 2. Tax as Superannuation Lump Sum with **DSB Modification**

Taxation on Invalidation Benefits where payments commenced on/after 20 September 2007.	
Tax-Free Component (DSB Modification Applied)	\$ 1,641
Taxable Taxed Element	\$50
Taxable Untaxed Element	\$309
Making up the Gross Pre-Tax Invalidation Benefit	\$ 2,000
Less Tax Payable	-\$7
Fortnightly Pension after Tax	\$ 1,993

Figure 1- Disability Superannuation Benefit Modification Calculation

