

IN-CONFIDENCE (COVERING LEGAL & MEDICAL-IN-CONFIDENCE)

Mr. Peter Thornton

18 April 2021

The Hon Darren Chester MP
Minister for Veterans' Affairs
GPO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Transmittal via email

For Information:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Dear Minister (Darren),

LETTER OF GRIEVANCE - UNACCEPTABLE DELAYS & RELATED COMPENSATION MATTERS – PERTAINING TO [REDACTED]
[REDACTED]

INTRODUCTION & EXECUTIVE SUMMARY

1. It is with regret that find myself now writing to you about the unacceptable delays that [REDACTED] and I have had to endure over time with DVA. This was in order to prosecute [REDACTED]. In brief, the following summarises some of the matters [REDACTED]

- [REDACTED] of today, that's 3 years, 5 months, [REDACTED] weeks, and [REDACTED] days ago, but with no proper finalisation or settlement [REDACTED].
- Time delays in answering formal correspondence of anywhere up to 156 calendar days was and remains unacceptable (e.g. it has now been 85+ days and no response has been forthcoming to [REDACTED]
[REDACTED])

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- As detailed in [REDACTED] delegated determinations and a VRB remittance were seriously mishandled, where correspondence has either gone astray or not been responded to.
- The extraordinary elapsed time of 7+ months and incorrect calculations by DVA forced [REDACTED] to forfeit [REDACTED] proper consideration and rightful entitlement to Special Rate Disability Pension (SRDP).
- The Commission ignored lawful process when [REDACTED] reviewed by the VRB. The VRB's remittance was not actioned before a final Permanent Impairment Determination was promulgated. Subsequent requests to rectify this situation were ignored.
- Various matters caused serious delays and extraordinary stress on [REDACTED]
- Incorrect calculations of entitlements that have neither been acknowledged nor corrected. Errors in Incapacity Payments represent a current shortfall [REDACTED]
- The matter regarding the incorrect process of properly determining the correct rate of Incapacity Payments is the focal point of this letter, [REDACTED] but likely for an estimated 18,000 other Veterans also.
- *I seek your [the Minister's] immediate intervention to resolve this serious matter to its proper and final conclusion please, so as to ensure that [REDACTED] according to the proper process as laid down in law.*

2. With the foregoing in mind, and under the caveat of *Error & Omissions Excepted*, this letter will endeavour to appraise you and Information Addressees fully of DVA's unacceptable delays in responding to formal correspondence; it will endeavour to explain the Incapacity Payment Offset issue with direct reference to excerpts from legislation; it will provide readers with an excerpt of Legal Counsel's formal opinion; and finally, it will attempt to appraise you of the estimated accrual [REDACTED] shortfall in Incapacity Payments (not including interest) that Counsel and I believe is owing [REDACTED]

GENERAL

A Synopsis of Unacceptable Delays

3. [REDACTED] discharged from the ADF on the [REDACTED] 2017; being: 3 years, 5 months, [REDACTED] weeks and [REDACTED] days ago.

4. The matter raised here concerns the defective administration in determining [REDACTED] where specifically now, an incorrect rate of incapacity payments applies. This has resulted in an accrued shortfall of [REDACTED] not including penalty interest payable. By extension, the Department's failure at law will likely affect an estimated 18,000 other Veterans also, some of whom will presumably have an accrual prior to 2004.¹

5. As per the correspondence register found on page 11, over the last 14 Months or so, Legal Counsel and I have submitted various pieces of formal correspondence directly to the DVA Secretary. In my case, this was with the expressed view and wish in May 2020 to provide the Secretary with the benefit of doubt over a number of very serious concerns raised. An offer to discuss these matters in person, with ESO Presidents present, was never taken up by the Secretary.

¹ It is estimated from CSC data that the matter of incorrectly calculated Incapacity Payments affects approximately 18,000 Veterans (i.e., 13,000 MRCA and 5,000 SRCA/DRCA Veterans).

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6. Whilst I provided dispensation several times because of the Bushfires and COVID-19, the continued delays and response times of anywhere up to 156 calendar days became unacceptable, and particularly so, when the responses were clearly lacking any intellectual and factual rigor. We now have the current unacceptable 85+ day delay [REDACTED] latest letter at [REDACTED]. This delay seems rather incongruous to me when the DVA Secretary seemingly spends time at inconsequential events and functions when such serious matters remain unresolved.²

7. As ESO National Presidents and Legal Counsel can readily attest, Departmental delays amounted to well over 7+ months of elapsed time, where in addition to improperly calculated entitlements, the delays inadvertently eroded the fixed 12-month election window for one pathway in compensation (i.e. the Special Rate Disability Pension - SRDP). This resulted in the unexpected forfeiture of that compensation option, because the election timeframe for this pathway in compensation could not be extended at law and/or properly assessed or accepted [REDACTED] advisors, as highlighted in part at Para 2 of [REDACTED] letter at Ref E.

8. [REDACTED] advised the Secretary that Counsel had been 'retained' to act on behalf [REDACTED], Counsel requested detailed information. However, after a 6-week delay, and as per Ref C., DVA contacted Counsel via email (copy myself) stating that it would not release the requested information until DVA received a signed 'Authority to Act'. A signed Authority was staffed back to the Secretary by myself within 2 days, with an explicit note stating that surely this was not necessary because ... *'professional legal standards would dictate that Counsel would not have written formally to you [the Secretary] had Counsel not been retained to do so'*. But as the record shows, the Department still lacked a sense of urgency and did not provide Counsel with a response until the [REDACTED] Jan 2020, being 69 days after the original request was submitted.

9. Upon receipt of DVA's response at Ref D., Counsel undertook further in-depth legal discovery and analysis of the Department's letter, dispatching a detailed and considered response back to the DVA Secretary and DVA General Counsel on the [REDACTED] Jan 2021, as per [REDACTED] 85+ days later and DVA has still not responded to the veracity of Counsel's letter, but instead, has sent an insulting 'Approval to Represent' letter, as per [REDACTED]. Outrageously, the author of that letter did not have the courtesy to address Counsel by [REDACTED] and then presumed to school a distinguished Barrister of the Federal and High Court, on how Counsel should conduct [REDACTED] in properly representing [REDACTED]!

'Incapacity Payment' Offsets – The Issue In A Nutshell

10. As you may or may not be aware, Veterans and the Commonwealth contribute collectively to a Veteran's Military Superannuation scheme (i.e. in this case Military Super / MSBS), as illustrated by Figure 1.

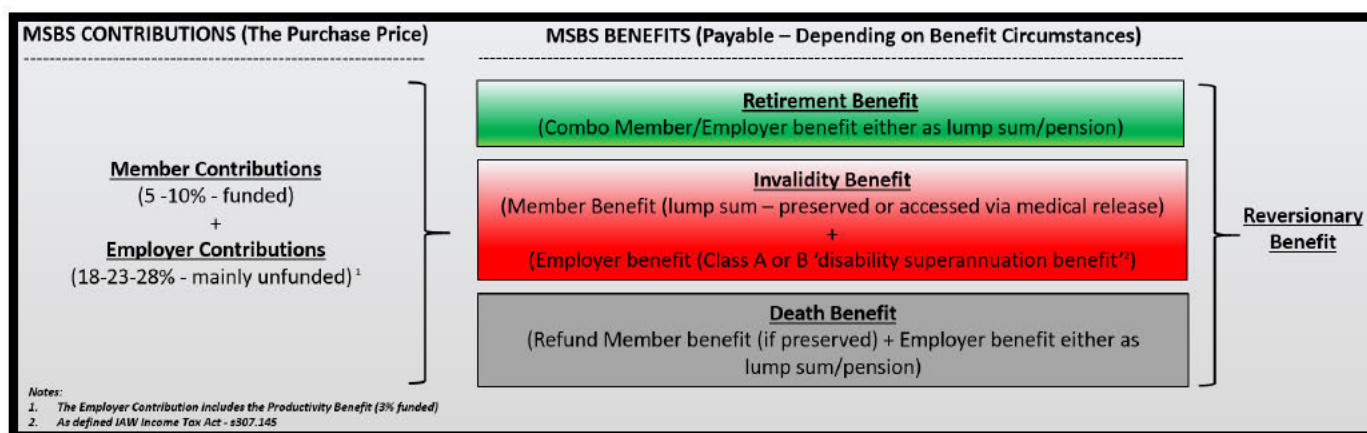


Figure 1

² The Secretary advised the March 2021 Senate Estimates that she had spent a "full 2 days" at the 10-11 March Veterans' Suicide Symposium, as held by the Interim Suicide Commissioner.

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11. As can be seen, collective contributions³ form the basis of the purchase price upon which a future benefit becomes payable (i.e. when a Veteran meets certain conditions of release; such as Retirement, Invalidity or Death).

12. In the case [REDACTED], the matter focuses solely on the MSBS scheme, but as commented previously under separate cover, the same formal pre-existing concept of a contributions purchase price and future benefits payable is equally applicable to members of the DFRDB scheme also.⁴

13. DVA has developed a set of policies that are supposedly enablers to Legislation. In regard to superannuation off-setting, the following explicit policy currently applies:

*'... Incapacity benefits are reduced dollar-for-dollar by the Commonwealth-funded portion of any superannuation you receive. The part of your superannuation benefit which is attributable to your own contributions is not taken into account.'*⁵

14. However, as can be seen at Figure 2 below, policy does not reflect legislation, because s 134(2) of the MRCA clearly states that the Department is required by Statute to undergo a very specific set of steps in order to properly determine the correct contribution rate that is "attributable to" the Commonwealth, for superannuation off-setting purposes.

134 Amount of compensation for retired person receiving only Commonwealth superannuation pension

(1) If paragraph 126(c) applies to a person, the amount of compensation that the Commonwealth is liable, under section 118, to pay to the person for a week is worked out using the following formula:

$$\text{Person's Subdivision C compensation amount} - \text{Person's superannuation pension amount}$$

(2) In this Subdivision:

Subdivision C compensation amount for a person for a week means the amount of compensation the person would have been paid for the week if Subdivision C had applied.

superannuation pension amount for a person who receives a pension for a week under a Commonwealth superannuation scheme means:

(a) if the scheme identifies a part of the pension as attributable to the contributions made under or to the scheme by the Commonwealth or a Commonwealth authority—the amount of that part; or

(b) in any other case, either:

(i) the amount assessed by the Commission to be the part of the pension that is attributable to the contribution made under or to the scheme by the Commonwealth or a Commonwealth authority; or

(ii) if such an assessment cannot be made—the amount of the pension received by the person for the week.

Figure 2 – Section 134 MRCA – Modified from Source

15. The requirements of s 134 provide a foundation stone to other associated assessments conducted under subsequent Sections of s 135 and s 136. This process and calculation also pertains to the calculations for Special Rate Disability Pension (SRDP), as described at s 204(6), as can be seen at Figure 3 below.

³ Inclusive of Productivity Benefit

⁴ Please see page 8 of the link here: http://tiny.cc/TPI_FED_Abridged_Research

⁵ Please see the Superannuation section in this link - http://tiny.cc/DVA_incap_payments

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204 Offsets

- (1) The maximum weekly amount of a Special Rate Disability Pension that could be payable to a person is reduced in accordance with this section.

Permanent impairment compensation

- (2) There is a reduction that is made by reference to amounts payable or paid to the person under Part 2 (permanent impairment). However, a payment received for eligible young persons, financial advice, legal advice or energy supplement under that Part does not reduce the maximum weekly amount of Special Rate Disability Pension that could be payable to the person.
- (3) The maximum weekly amount of a Special Rate Disability Pension that could be payable to a person is reduced by the sum of:
- (a) any weekly amounts that are being paid to the person under Part 2; and
 - (b) if the person has chosen to convert all or part of one or more weekly amounts that were payable to the person under that Part to lump sums—those weekly amounts or those parts of those weekly amounts.
- (4) Subsection (3) applies to a person to whom section 389 or 402 applies as if the person were being paid the weekly amounts under Part 2 that the person would be paid if that section did not apply to the person.

Note: Section 389 provides that compensation under Part 2 is not payable to a person who chooses to institute proceedings for damages against the Commonwealth. Under section 402, compensation under this Act is not payable to a person who recovers damages from a third party.

Commonwealth superannuation

- (5) There is a reduction if the person:
- (a) has retired voluntarily, or has been compulsorily retired, from his or her work; and
 - (b) receives either or both a pension or lump sum under a Commonwealth superannuation scheme as a result of the retirement.
- (6) The amount of the reduction under subsection (5) is 60% of the reduction that would apply to the person under section 134, 135 or 136 if the person were receiving compensation worked out under Division 2 of Part 4.

Figure 3 – Section 204 MRCA – SRDP Offsets - Modified from Source

16. As detailed at [REDACTED] and as seen at Figure 4., DVA has failed to comply with the law, because it has incorrectly developed a static policy that has no regard for the first two steps required of it (i.e., s134(2)(a) and s134(2)(b)(i)).

17. Without the proper basis and authority at law, the Department has merely invoked a policy for MSBS that subscribes solely to s134(2)(b)(ii), where, without due consideration, it wrongly off-sets the Incapacity Payments or an SRDP entitlement benefit by 100% or “dollar for dollar” against Superannuation benefits.

18. It is important to note here that the offsetting policy specifically for MSBS is at considerable odds with the Department’s offsetting policy for DFRDB, where the latter policy (whilst also static) only offsets 80% of an “assumed” contribution rate that was “attributable to” the Commonwealth.⁶ This then begs a serious question: WHY?

19. Whilst speculative, one can only surmise that in 2003-2004, DVA’s bureaucratic forebears were too lazy to properly calculate for themselves, and therefore today’s contemporary bureaucrats, the necessary tools to properly determine the correct offsets required, as was/is required of them by law.

20. At face value, this should not have been an arduous task, because as a rough order of magnitude, I produced and provided the DVA Secretary with the applicable calculations in the MS Excel workbook, as can be found at [REDACTED] of this letter.

⁶ DVA’s offsetting policy for DFRDB Superannuation can be found here: http://tiny.cc/DVA_Offset_Policy_DFRDB

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Legal Counsel's Professional Opinion Confirms Thornton's Analysis / Claim

21. Over time, and after careful analysis and extensive legal discovery, ██████████ Counsel (and Counsel assisting) concurred with my long-held contention that the Department had had not properly assessed or applied the correct superannuation offset ██████████ Incapacity Payments, ██████████ entitlement to SRDP also.

22. As such, the Department has effectively short-changed ██████████ Incapacity Payments from the date ██████████ from the ADF. Counsel's relevant advice concerning this specific matter can be seen in the excerpt at Figure 4. below, or as can be read in full at the link ██████████

Incapacity Payments – Superannuation Set-Off

17 While my client accepts that his incapacity payments are to be reduced by reason of his receipt of Commonwealth superannuation, he disputes the set-off of 100% of the amount of the superannuation payments, as contended at paragraph [20] of your letter dated 8 January 2021.

18 Sections 118 and 126 of the MRCA apply the set-off defined in s 134, which is a deduction of the “*superannuation pension amount*”. This is defined by reference to the particular superannuation scheme involved.

19 Paragraph (a) of the s 134 definition applies where the scheme itself identifies the part of a pension attributable to the contributions of the Commonwealth. Your letter at paragraph [44] suggests that the MSBS scheme identifies 100% of the invalidity pension as attributable to the Commonwealth's contributions, but nothing in the MSBS legislation or trust deed makes that assertion.

20 Paragraph (b)(i) of the s 134 definition then applies, which is:

... the amount assessed by the Commission to be the part of the pension that is attributable to the contribution made under or to the scheme by the Commonwealth or a Commonwealth authority;

21 On my instructions, the Commission has not made an assessment of the Commonwealth's contributions in respect of my client's pension. If the Commission has assessed the contribution as 100%, as suggested in your letter, that determination would be an original determination, to be issued in the form required by s 346 of the MRCA, which my client has never received.

22 It is only where an assessment “*cannot be made*” that 100% would apply by operation of paragraph (b)(ii) of the definition. There is no basis for that thinking that an assessment of the relative contributions is impossible.

23 As Peter Thornton has previously submitted, under the MSBS scheme, the respective contributions by ██████████ and the Commonwealth to the superannuation scheme were, throughout his entire period of employment, 5% and 18% respectively. Accordingly, the part of his pension attributable to the Commonwealth is not 100% but by this 5:18 ratio is in fact 78.26%.

Figure 4 –Excerpt from ██████████ Letter to DVA, dated ██████████ – Modified from Source

Superannuation Offsets for SRCA / DRCA Incapacity Payment Are Now Also Questionable

23. Whilst Legal Counsel has not been asked to offer an opinion, it would appear from the excerpt shown at Figure 5., that DVA's policy and defective administration equally applies to Veterans covered under the SRCA / DRCA legislation also.

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superannuation amount, in relation to a pension received by an employee in respect of a week, or a lump sum benefit received by an employee, being a pension or benefit under a superannuation scheme, means an amount equal to:

- (a) if the scheme identifies a part of the pension or lump sum as **attributable to the contributions made under the scheme by the Commonwealth, Commonwealth authority or licensed corporation—the amount of that part; or**
- (b) in any other case—the amount assessed by the relevant authority to be the part of the pension or lump sum that is so attributable or, if such an assessment cannot be made, the amount of the pension received by the employee in respect of that week or the amount of the lump sum, as the case requires.

Figure 5 – Section 4 Part 1 SRCA/DRCA 1988 – page 13 (Interpretation)

24. The circumstances surrounding Veterans covered under SRCA / DRCA seems even more egregious, because these Veterans, and dare I say Commonwealth invalidity recipients also, are required to continue to contribute notionally to respective Super schemes, even though they are effectively no longer members.

25. The likely ramifications of DVA's defective administration cannot be overstated, given that an entitlement to SRCA / DRCA is WEF 1988, but where invalidity benefits may confer from service rendered since 3rd of January 1949.⁷

The Shortfall In Incapacity Payments

26. Figure 6 illustrates the averaging effect of the Commonwealth's contribution rate over time where the Veteran's contribution remains fixed at the default rate of 5%. The data and calculations that underpin Figure 6 can be found in the workbook at [REDACTED],

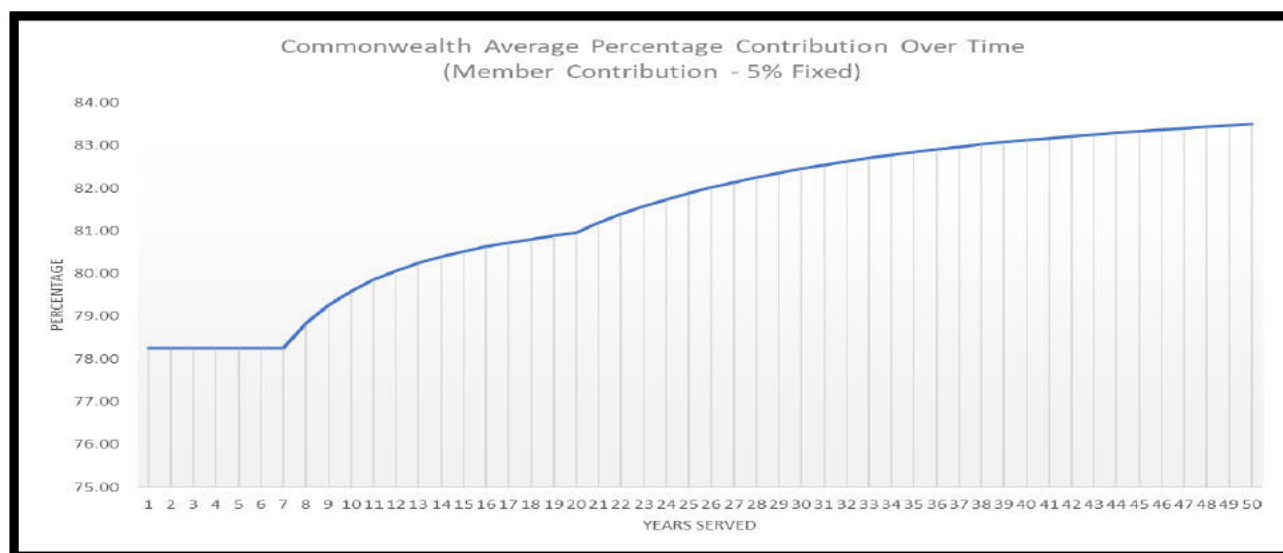


Figure 6 – Commonwealth's Average % Contribution Rate Based Upon The 5% Default Rate of Member Contribution

27. Each discrete worksheet within that workbook calculates, in the far-right-hand column, the resulting final % average contribution rate that is "attributable to" the Commonwealth, based upon in part, the Veteran's fixed or variable contribution rate over the period of military service rendered.

⁷ <https://www.dva.gov.au/financial-support/compensation-claims/claims-if-you-were-injured-1-july-2004/drca/overview-drca>

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28. The default rate of contribution for all ADF members is 5%. This was the [REDACTED] in contributions during [REDACTED] military service.

29. You will find that [REDACTED] also provides calculations for member contribution ranging from 5->10%. However, arguably, a member's contribution is not just a financial one, but instead, one of blood, sweat and tears also.

30. Upon election, the Veteran can change the rate of contribution, and as such, I not only provide additional worksheets of the various static contribution rates, but also a worked example of how the Commonwealth's final % contribution for offsetting might vary had the Veteran's contribution rate changed over time.

31. I suspect most Veterans and currently serving personnel would not fully appreciate or understand the nuances of their Superannuation scheme, as it relates to a final compensation entitlement. I feel it is critical that currently serving personnel be appraised formally of these salient facts, so that they can fully consider and manage their affairs accordingly.

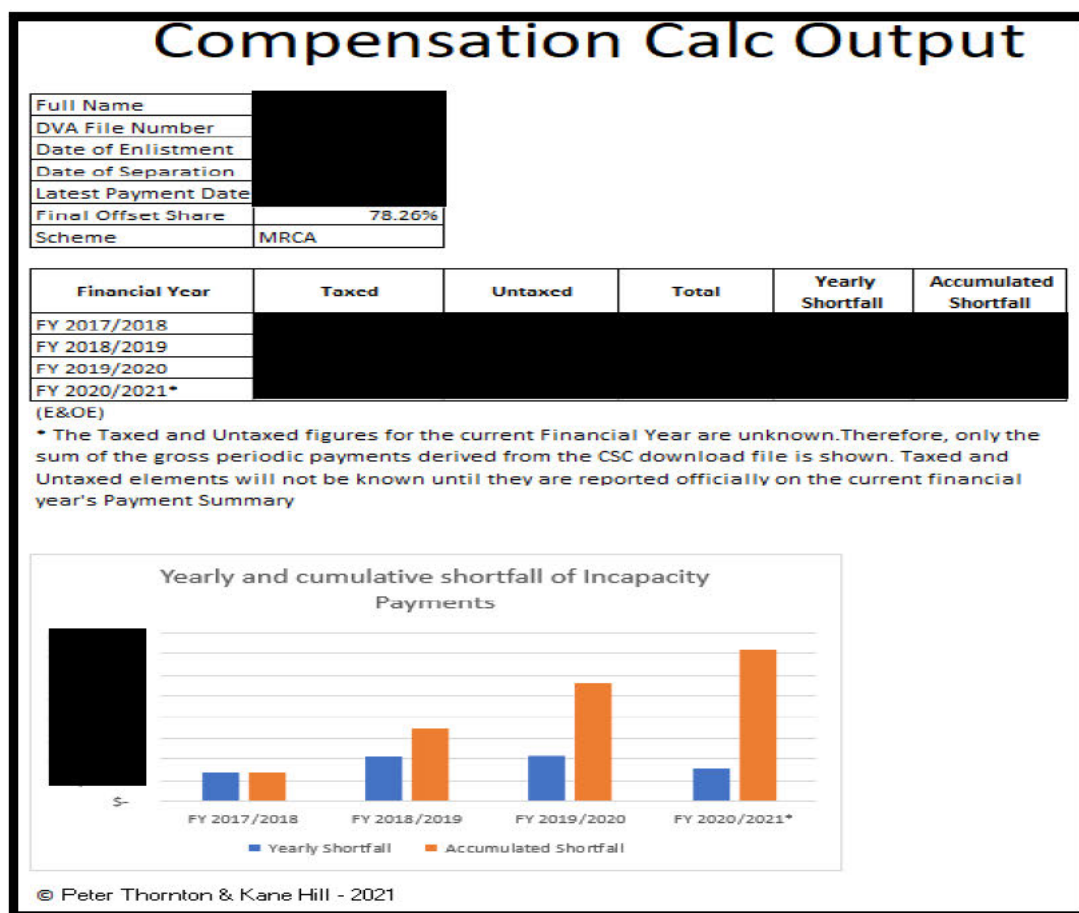


Figure 7 – Calculations from 'Veteran's Incapacity Payments Shortfall Calculator' (Beta)

32. Given the criticality of the issue at hand, preliminary software has been developed with the aim to provide and empower affected Veterans with a more precise final calculation, derived daily, as seen in part at Figure 7.

33. Figure 7 provides an output of the estimated shortfall of [REDACTED] for the Incapacity Payments that has accrued [REDACTED] from the ADF. This figure derives from [REDACTED] Tax Payment Summaries and CSC's periodic payments for this Financial Year up until [REDACTED]. This shortfall is calculated on the final average contribution rate 'applicable to' the Commonwealth, where in his case, it was 78.26%.

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34. Whilst not shown, this accrued shortfall figure will continue to increment by a factor of \$ [REDACTED] per fortnight, until the end of the 2020/2021 financial year, at which time an upwards statutory adjustment maybe applicable. These calculations do not include an accrual for interest that would also be applicable from [REDACTED] separation.⁸

Conclusion

35. In conclusion, the foregoing information is brief and should not be read in isolation to the correspondence found at the links at [REDACTED] and particularly that of [REDACTED] compelling letter at [REDACTED]. Important excerpts from MRCA contained within those references provide clear and unequivocal validation of the Parliament's legislative intent; an intent that DVA policy has failed to reflect.

36. Counsel's very comprehensive letter is a compelling read in order to grasp expert legal opinion as to the clear deficiencies in policy that exist. What is not explicitly stated is that with the law spread out in front of them, Counsel was "astounded" and "appalled" at what was found in both legislative amendments and other, and where the surreptitious white-anting of pre-existing entitlements was clearly evident. Counsel explicitly stated at one point that discovery had found current legislation being "as illogical as you feared".

37. In the case of Incapacity Payments and SRDP, Departmental policy and procedure is not strictly in accordance with the law, and as such, it has ceased to be an enabler of the Parliament's original intent. It instead serves as a regressive and financially punitive alternative.

38. With the foregoing in mind, I would respectfully request your immediate Ministerial assistance to direct the Department to provide [REDACTED] a considered response, and/or to have the Department immediately acquiesce to the rightful corrective actions that [REDACTED]

39. For your quick reference, and with respect of my [REDACTED] respectfully requested that: *'... the Commission:*

[REDACTED]

[REDACTED]

[REDACTED]

40. Given the nature of these matters to hand, I would appreciate your personal and earliest considered response grievous concerns please. A letter of apology to [REDACTED] would also be in order I feel.

Yours sincerely

[REDACTED]

Peter Thornton

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⁸ It is assumed the interest payable would accrue at a rate of the 'Shortfall Interest Charge (SIC)'. If this is correct, then please see here: [https://www.ato.gov.au/Rates/Shortfall-interest-charge-\(SIC\)-rates/](https://www.ato.gov.au/Rates/Shortfall-interest-charge-(SIC)-rates/)

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ANNEX A

Years Served	Mbr Contributions %	C'wlth Contribution	C'wlth Avg Contribution	Resulting C'wlth % Contribution for Offsetting
1	5	18	18.00	78.26
2	5	18	18.00	78.26
3	5	18	18.00	78.26
4	5	18	18.00	78.26
5	5	18	18.00	78.26
6	5	18	18.00	78.26
7	5	18	18.00	78.26
8	5	23	18.63	78.84
9	5	23	19.11	79.26
10	5	23	19.50	79.59
11	5	23	19.82	79.85
12	5	23	20.08	80.07
13	5	23	20.31	80.24
14	5	23	20.50	80.39
15	5	23	20.67	80.52
16	5	23	20.81	80.63
17	5	23	20.94	80.73
18	5	23	21.06	80.81
19	5	23	21.16	80.89
20	5	23	21.25	80.95
21	5	28	21.57	81.18
22	5	28	21.86	81.39
23	5	28	22.13	81.57
24	5	28	22.38	81.74
25	5	28	22.60	81.88
26	5	28	22.81	82.02
27	5	28	23.00	82.14
28	5	28	23.18	82.26
29	5	28	23.34	82.36
30	5	28	23.50	82.46
31	5	28	23.65	82.55
32	5	28	23.78	82.63
33	5	28	23.91	82.70
34	5	28	24.03	82.78
35	5	28	24.14	82.84
36	5	28	24.25	82.91
37	5	28	24.35	82.97
38	5	28	24.45	83.02
39	5	28	24.54	83.07
40	5	28	24.63	83.12
41	5	28	24.71	83.17
42	5	28	24.79	83.21
43	5	28	24.86	83.26
44	5	28	24.93	83.30
45	5	28	25.00	83.33
46	5	28	25.07	83.37
47	5	28	25.13	83.40
48	5	28	25.19	83.44
49	5	28	25.24	83.47
50	5	28	25.30	83.50

Table 1 - Final % contribution attributable to the Commonwealth - 5% Members fixed rate contribution (i.e. the default rate)