



**ASSOCIATION of FORMER MEMBERS
of the PARLIAMENT OF AUSTRALIA**

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Senator Cory Bernardi,
Chairman,
Senate Legislation Standing Committee on Finance & Public Administration
Parliament House
Canberra

Dear Senator Bernardi,

INTRODUCTION

The Association of Former Members of the Parliament of Australia (AFMPA) appreciates this opportunity to provide a written submission to the Senate Legislation Committee on Finance and Public Administration regarding its Inquiry into the Parliamentary Entitlements Legislation Amendment Bill 2014.

Our Submission is limited to the aspects of the legislation which abolish access to travel by Life Gold Pass holders. The other aspects of the Bill deal with matters unrelated to our members.

Given the voluntary nature of our organisation and our limited resources our submission may not develop fully all of the issues which we seek to address. Nevertheless, we believe our facts, findings and conclusions to be accurate. However, we believe that it is important that the Committee give representatives of our Association the opportunity to appear before the Committee to explore further these issues and to respond to questions from the Committee.

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Our Association is disappointed that despite several decisions being taken and several pieces of legislation being passed during the past two years or so impacting on retired Federal parliamentarians, this has occurred in a vacuum as regards any consultation by the Government with or input from those most affected, the retired parliamentarians.

We welcomed the one occasion when input was sought from us, which was by the Senate Finance and Public Administration Committee regarding the Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012. However, we were concerned to note that in its Report on that Bill the Committee ignored the facts it recorded, including those arising independently of the Association's Submission, in concluding that the Bill be passed because it was "based on the findings and recommendations of extensive reviews of entitlements conducted by the Belcher Review and the Remuneration Tribunal." This conclusion by the Committee was incorrect because in relation to the portion of that legislation delinking parliamentary salary from the 1948 superannuation scheme, as the Committee itself quoted only a couple of paragraphs above its Recommendation, both the Remuneration Tribunal in its Submission to the Belcher Review and that Review itself recommended that such delinking, allowing a discounting of superannuation paid to parliamentary retirees under the 1948 scheme, should occur only in the possible future circumstances of and related directly to the Electorate Allowance and like expenses being folded in to an all up, global salary. This has not occurred but the delinking legislation has been used to discount substantially that superannuation.

Our Association notes that the current Committee has had a complete change of membership since 2012, so respectfully requests that the facts and conclusions which we present will be given due recognition in the conclusions and recommendations of the current Inquiry.

AFMPA's VIEW SUMMARISED

Based on expert legal advice from Senior Counsel, AFMPA takes the view that the Bill before the Committee, insofar as it relates to the Life Gold Pass, most probably would be declared unconstitutional and therefore, invalid. Similarly, all previous legislation restricting use of the Gold Pass also would be declared either wholly or partly invalid. For these reasons and as expanded on in the balance of this document, we submit that the Committee should recommend that the Bill not be passed by the Senate.

If this course of action is not followed by the Committee then, at the very least, the Committee should recommend that passage of this Bill be delayed pending the validity of earlier legislation being considered by the High Court, for which steps are well in progress to enable proceedings to be instituted. Furthermore, in these circumstances, the date of effect of the legislation also should be delayed until Royal Assent is given.

BACKGROUND

The background to the decisions and legislation of the past couple of years, which has some relevance also to the current Bill before the Committee, is the so-called Belcher Inquiry and Report, tabled in March 2011, which dealt principally with the remuneration of Federal parliamentarians in relation to both salary and other allowances, such as those which are expense related, including Electorate Allowance, Travel Allowance, motor vehicle, overseas study, etc.

Our Association made a brief submission to the Belcher Inquiry after belatedly becoming aware of it and requested to appear before it but was denied that opportunity.

Included among some thirty-nine recommendations of the Belcher Inquiry, was one that the Life Gold Pass should be abolished prospectively for parliamentarians elected from the following election but not for existing Pass holders or current parliamentarians who may, in the future, achieve the eligibility criteria; and that the number of trips per annum each for existing Pass holders and their spouses should be reduced from twenty-five to ten.

The Life Gold Pass has a history of nearly a century. For many years it provided unlimited domestic air and rail travel for retired parliamentarians and their spouses who qualified by serving in the Federal Parliament for at least seven terms or twenty years, consecutively or in aggregate, with less onerous qualification periods for Ministers and Prime Ministers.

In 2002, the Howard Government substituted a limit of twenty-five return trips per annum for the previous unlimited provision and also no longer allowed connecting ground transport to or from airport/railway station.

Without conceding the constitutional validity of that legislation, then current parliamentarians and eligible retirees generally accepted those limits with good grace to prevent perhaps a small number of cases of extreme use of the benefit.

The 2012 Bill, on which the Association submitted to this Committee, abolished prospectively the Life Gold Pass for parliamentarians elected after 2012 and further reduced the entitlement for those with current or potential entitlement by a massive sixty per cent to ten trips per annum. Prospective abolition of any benefit is clearly a matter for a current Parliament to determine and has no retrospective affect. Those elected after 2012 will be fully aware that they will be unable to qualify for that particular retirement benefit. Our Association therefore made no comment on it.

However, for those with current entitlement, in reducing the trips to ten per annum, the legislation clearly had retrospective impact. This was recognised in the Bill itself, which provided for reasonable compensation if the Bill is found to result in the acquisition of property under paragraph 51(xxxi) of the Constitution.

The Association has sound, senior legal advice that this reduction in trips is such an acquisition of property, prompting a legal claim for compensation.

We have sought to negotiate with both the previous and current federal governments for a judicial determination of this issue but no cooperation has been forthcoming from either. An understanding of this history is key to the Committee's consideration of the component of the legislation before it dealing with the Gold Pass.

THE CURRENT BILL – ABOLISHING LIFE GOLD PASS TRAVEL

Notwithstanding that the legislation provides for severely restricted post-retirement travel for a limited period for current or recently-retired parliamentarians who have qualified for a Life Gold Pass but not their spouses, the practical effect of the Bill for most qualified retirees was instant cancellation of their travel rights on 13th May 2014.

In announcing the abolition of the Life Gold Pass, including retrospectivity of that abolition, in his Budget speech that night, the Federal Treasurer gave as his only justification that retired Members of Parliament must make a contribution to the Budget repair task. The Minister introducing this Bill, giving effect to that announcement, gave no justification for it at all in his Second Reading Speech and provided only a technical explanation of the legislation.

However, it should be noted that other measures announced as being necessary for Budget repair have been described either as temporary or relating to areas of expenditure which are escalating exponentially, largely because of demographic change. Given the closure in 2012 of eligibility to qualify for a Life Gold Pass for anyone elected after that, the demographics of the scheme will progressively and automatically reduce and ultimately, eliminate its cost, as current Pass holders cease travel because of age or death. Thus Budget repair does not justify abolition of the benefit.

When the previous Government, in 2012, legislated to reduce the number of trips per annum allowed from twenty-five to ten, the then Minister's Second Reading Speech similarly provided no detailed justification as to why, just a few years after twenty-five were regarded as reasonable and acceptable, only ten trips were acceptable, beyond saying that introducing the previous limit had not prevented ongoing criticism that the provision exceeds community standards.

That entirely begs the question as to what is the definition of community standards and who are its arbiters or the source of the criticism. The same community standard argument was used on at least a dozen previous occasions by Prime Ministers in the past to deny parliamentarians' salary increases recommended by a series of Remuneration Tribunals. It was used also in 2004 to abolish the 1948 Act superannuation provisions. However, the now independent Remuneration Tribunal in 2011, in providing a substantial work value and "catch up" salary increase for parliamentarians, confirmed that parliamentarians' previous salaries were inadequate.

It should not be forgotten that the Remuneration Tribunal 2011 work study justified a salary as high as \$250,000 per annum. The Tribunal implemented only the bottom of the range provided by that study.

The truth is that previous political manipulations to keep salaries and entitlements of parliamentarians below those recommended by independent professional assessment have invariably been driven by incumbent Prime Ministers for perceived political advantage. Parliamentary salaries, entitlements and conditions of employment should not be arbitrated by public opinion. In the expressed court of public opinion, whatever remuneration parliamentarians receive is too much, regardless of how low it may be.

In 2011, the government established the independence of the Remuneration Tribunal and accepted its determination of a significant salary increase. However, that only makes it more unacceptable and disappointing that, in the absence of any rational justification for removing the benefit from existing Life Gold Pass holders, the government appears to have succumbed to a sustained media campaign and retrospectively removed an established benefit.

The Association submits that few would quibble with the view that the government's retrospective abolition of the Life Gold Pass is symbolic tokenism offered to make a "tough" Budget more palatable and has no intrinsic connection to merit. Parliamentarians' entitlements should not be the subject of political whim and expediency.

It is a fact that the Life Gold Pass was introduced many decades ago, as what now is termed officially a Fringe Benefit, in direct recognition that many recommended salary increases previously were foregone for the "political" reasons described above. Until this Bill, it has always been accepted that this benefit was one of the fixed terms and conditions of our parliamentary remuneration. That the provision of this benefit has been limited to longer serving parliamentarians, with qualification concessions for Ministers, recognises specifically that they have borne lower than justified salaries for longer than parliamentarians who serve for shorter periods of their life.

Furthermore, non-Ministerial parliamentarians who have qualified for the Life Gold Pass are those who have served beyond the eighteen years at which the maximum rate of superannuation is paid under the 1948 Act provisions and having compulsorily contributed 11.5 per cent after tax, approximately 20 per cent of taxable income, without getting a tax deduction for it. However, they are required compulsorily to continue contributing 5.75 per cent after tax, approximately 10 per cent before tax, without a deductible claim, for the rest of their time in Parliament, without receiving any additional superannuation benefit.

Indeed, regarding superannuation, for those who serve for twenty, twenty-five or thirty years or more, a back of the envelope actuarial calculation suggests that the "new" post-2004 scheme potentially provides greater benefits in

retirement, provided the member makes contributions equivalent to the compulsory contribution under the 1948 Scheme in addition to the government contribution, because the new accumulation scheme has no 18 year, 75 per cent ceiling but continues to receive the government contribution, any additional individual contributions and to grow for as long as the individual serves in the Parliament.

Hence, for current retirees on the 1948 Act superannuation scheme who serve more than eighteen years, the Life Gold Pass, as well as compensation for a long period receiving lower than justified salaries, may fairly be considered as some offsetting compensation for the additional compulsory superannuation contributions they made, which otherwise provide no additional benefit to that provided for those who retire at eighteen years' service and for the continuing accumulation of benefits longer serving members of the "new" scheme achieve.

The benefit of Life Gold Pass travel extends also to spouses accompanying the Pass holder on a particular trip. This appropriately recognises that during the era that most Life Gold Pass holders served in the Parliament their spouses, rather than pursuing their own careers, voluntarily and without remuneration supported the parliamentarian in their day-to-day electorate work, including attending functions in the electorate during the parliamentarian's absence in Canberra. In the words of former Minister, the late Hon Gordon Bilney, the electorate was served by two for the price of one.

As members of this Committee would be aware, for the various non-cash benefits that have been introduced over the years as an alternative to the more politically sensitive salary increases recommended by the Remuneration Tribunal, with the advent of the Fringe Benefits Tax, parliamentarians have received annually, a Declaration from the Department of Finance, informing them of the sums involved and requiring them to sign and return the Declaration, as confirmation of its accuracy. Such items include motor vehicle, home telephone and internet connection, spouse travel, etc.

This documentation also advises that whilst these payments do not attract Income Tax in the name of the individual, they will be added to their Gross Salary for the purpose of calculating other taxes and charges such as the Medicare levy surcharge, the now discontinued Superannuation Surcharge (which coincidentally, has created considerable financial difficulty for many parliamentarians of that era, and if not paid annually, is a first charge against any superannuation entitlement), eligibility for Family Tax Benefit, etc.

That the Life Gold Pass is a Fringe Benefit and therefore an integral part of employment terms and conditions is confirmed by the fact that Life Gold Pass holders receive exactly the same Declaration from the Department of Finance, requiring confirmation from the recipient.

Significantly, this declaration is sent to them as an employee, despite their retirement and has the same effect on other taxes and charges as above. In particular, it affects detrimentally eligibility to obtain tax deductions for personal superannuation contributions for after parliament earnings, for contributions to a

spouse's superannuation, for the dependent spouse tax offset, for the mature age worker tax offset and the senior Australians' tax offset.

Given these facts, it is unconscionable that the Government is seeking to legislate to remove retrospectively a benefit which clearly was a term and condition of parliamentary remuneration for which current retired Pass holders have met the eligibility criteria.

Retrospective legislation is contrary to all principles of democracy and fairness. Traditionally it has been regarded as unacceptable to the Australian Parliament. On the rare occasions in which it has been introduced, it always has been controversial and generally has been accepted only in dealing with the most serious mischief, for example, the bottom-of-the-harbour tax schemes, which were regarded by most as a tax fraud. Any suggestion that there is such justification for removing retrospectively the Life Gold Pass is fanciful.

Neither the Remuneration Tribunal, in its Submission to the Belcher Inquiry, nor the Belcher Inquiry itself, recommended withdrawing this benefit from existing Pass holders. On the contrary, although recommending a reduction in the number of trips available per annum, the Belcher Report said, "that current pass holders and severance travellers should be permitted to retain a reduced entitlement to travel on the basis that former and current Members and Senators entered the parliament with the understanding that post-retirement travel formed part of their benefits."

Also unconscionable regarding this decision was its applicability from the Budget night announcement, requiring Pass holders to cancel bookings made before 13th May 2014 but for travel after that date. Indeed, the Department of Finance attempted to obtain a refund for travel on 14th May 2014 undertaken by Pass holders who were, at that time, unaware of the announcement.

However, it is the view of AFMPA that not only is this legislation unconscionable but also it is unconstitutional. In early 2012, detailed legal advice was proffered to the Association by two senior counsel, both of whom have long experience in constitutional law, that the provisions of section 51 (xxxix) of the Australian Constitution, which prohibit the acquisition of property otherwise than on just terms, had the effect of invalidating the provisions in the Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012 which effected a reduction in Gold Pass travel entitlements. Recently, the same advice has been received regarding this Bill or any Executive action which would abolish the Gold Pass altogether.

It is significant that both the 2012 legislation and this Bill provide that provision shall be made for compensation to be paid if the legislation is found to be an acquisition of property other than on just terms. In the Association's view, this is a concession by both the previous and current governments that they are on very shaky ground indeed regarding the constitutional validity of the legislation.

This view is reinforced by the Association's understanding that neither government was able to obtain from the Attorney-General's Department a Certificate of Constitutional Compliance in relation to the 2012 legislation or the current Bill.

It is significant also that when the Howard Government in 2002 legislated to change the Gold Pass travel entitlement from unlimited travel to twenty-five trips per annum, it wrote to those who had qualified already for a Pass, requesting their voluntary compliance with the legislation. In other words, the then government recognised that Section 51 (xxxix) made it highly likely that it could not enforce retrospective reduction in the entitlement.

It is much more unlikely that the government will be able to enforce retrospective withdrawal of the benefit altogether.

POST-RETIREMENT TRAVEL

The Bill replaces the Life Gold Pass with extremely limited travel for recently retired parliamentarians who have qualified for a Life Gold Pass or current parliamentarians, elected prior to 2012 who subsequently will qualify. Extremely limited in the years for which it extends, in the number of trips per annum, in the special purpose required for travel and in the exclusion of spouses from travel.

As is the case with the retrospective removal of the Life Gold Pass, these retrospective extreme limitations, for all the reasons given in this Submission are unacceptable. Some former parliamentarians use the Life Gold Pass admirably in voluntarily assisting not-for-profit organisations and in other ways for the benefit of the community, whether or not that community benefit arises from the retiree's former involvement as a serving parliamentarian. It would appear that even that philanthropic use is not permitted under the extreme restrictions placed on retirement travel. Any such restrictions on Gold Pass travel or retirement travel, other than the existing and appropriate prevention of use of the benefit for commercial gain, completely ignore the reasons for the original provision of the benefit, principally as a retirement benefit offsetting inadequate remuneration while in office, as detailed in this Submission.

FINANCIAL IMPLICATIONS

The Government claims retrospective abolition of the Life Gold Pass will produce very modest Budget savings of \$1 million per annum for the next five years. That forecast appears to be based on the current annual usage.

Given the closure of Life Gold Pass eligibility to parliamentarians elected after 2012, the annual savings from retrospective abolition of existing entitlements will be even less in future years.

In the context of the annual whole-of-government Budget expenditure, continuation of this diminishing expenditure and hence, the savings from removing it are minuscule.

However, as described already in this Submission, the Bill provides for the payment of compensation if it is found to involve the acquisition of property without compensation under Section 51 (xxxix) of the Constitution. Given the expert legal advice tendered to the Association by highly experienced Senior Counsel on this Bill and the 2012 legislation, the liability of the Government to pay compensation is highly likely. This likelihood is reinforced by apparent advice, or perhaps inability to obtain the advice they sought, to the Government.

Such compensation necessarily would have to be capital in nature and take into account potential future use of the benefit by all Pass holders, rather than current use, which for some in some years is zero.

While the Association lacks the resources for financial and actuarial analysis to provide an accurate prediction of the cost of compensation, we assert confidently the annual opportunity cost of providing the capital required will be many multiples of the claimed \$1 million per annum saving.

Quite simply, given the likelihood of compensation being required and its cost, retrospective abolition of the Life Gold Pass will be a substantial cost, rather than saving, to the government and would be irresponsible financial management.

CONCLUSIONS

In light of the strong moral, ethical, legal and financial case above, the Association of Former Members of the Parliament of Australia concludes that:

- (1) the Life Gold Pass was a benefit provided to long-serving Federal parliamentarians in lieu of inadequate salaries arising from successive governments denying politically sensitive salary increases;
- (2) it was accepted as a fixed term and condition of parliamentary remuneration, including being incorporated formally into Fringe Benefits Tax arrangements after that tax was introduced;
- (3) given that eligibility to qualify for the Life Gold Pass has been abolished prospectively for anyone elected after 2012, its cost to government will reduce progressively as existing qualifiers cease travel altogether because of age or death;
- (4) retrospective legislation in general and in particular, retrospective legislation disadvantaging an individual generally has been regarded as unacceptable;
- (5) expert legal advice from Senior Counsel is that the Bill before the Committee, insofar as it relates to the Life Gold Pass, most probably would be declared unconstitutional and therefore, invalid, under section 51 (xxxix) of the Australian Constitution as acquisition of property on other than just terms. Similarly, all previous legislation restricting use of the Gold Pass would be declared either wholly or partly invalid;
- (6) provisions in the Bill and the 2012 legislation acknowledge this probability

(7) the Association is well advanced with plans to test in the High Court the validity of the 2012 and earlier legislation;

(8) a successful Court action would require the government to pay substantial compensation to current Pass holders and parliamentarians elected before 2012 who may, in the future, achieve the criteria to receive a Pass, which compensation would prove far more costly than the continuing annual cost of Pass usage.

Hence, the Association concludes that the government should withdraw the Bill before the Committee and delete from it all aspects relating to the Life Gold Pass. As regards the other aspects of the Bill, the Committee makes no submission.

RECOMMENDATIONS

Based on these conclusions, the Association submits that the Senate Legislation Committee on Finance and Public Administration should recommend to the Senate that:

(1) the Bill not be passed by the Senate, or

(2) if this course of action is not followed by the Committee then, at the very least, the Committee should recommend that passage of this Bill and a decision on its future be delayed pending the result of the proceedings for the High Court to consider the validity of earlier legislation and the date of effect of the Bill also should be delayed until Royal Assent is given rather than taking effect from Budget Night.

Yours sincerely,

Murray Sainsbury
President, AFMPA.