SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

"***If the law should be in danger of doing injustice, then equity should be called in to remedy it.***"

Lord Denning - Re Vandervell's Trusts (No 2)

Peter Thornton
Em:

Bradley Campbell
Em:

8 April 2024

Standing Committee On Community Affairs - Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

(*Transmittal – Electronic:* mailto:community.affairs.sen@aph.gov.au*)*

For Information:
Senate FADT Legislation Committee
TPI Federation – Federal President Ms Patricia McCabe
RSL National – National President MAJGEN Aziz "Greg" Melick
Defence Force Welfare Association – National President Ms Del Gaudry
Australian Peacekeepers & Peacemakers Association – Federal Chairman Mr Ian Lindgren
Australian Council of Public Sector Retiree Organisations – Federal President Mr John Pauley

Dear Committee Chair, Deputy Chair, and members of the Community Affairs Legislation Committee,

SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

References:

A. Statement of Facts Issues and Contentions Submission - Peter Thornton 2021-9795 - dated 4 Mar 2024.pdf

B. Commissioner of Taxation v Douglas [2020] FCAFC 220, dated 4 Dec 2020

C. Thornton & Campbell Combined Submission (Sub No.4) – Senate Economics Legislation Committee Inquiry – Re: *' Schedule 9 - Treasury Laws Amendment (No. 4 2022) Bill 2022* – dated 6 Dec 2022

D. FADT Senate Inquiry – Veteran Suicide – Thornton Submission 335, dated 6 Dec 2016

E. Campbell and Thornton Submissions to Treasury:

(i.) Thornton, Peter - Submission in response to: Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Military superannuation benefits – dated 12 June 2023

SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

(ii.) Campbell, Bradley - Submission in response to: Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Military superannuation benefits – dated 12 June 2023

INTRODUCTION

1. We refer to the above Subject and tender this supplementary submission as a right of reply written submissions and verbal testimony given by SSA and DVA in response to the amending Bill still under review by the Committee / Senate.

2. The Authors tender the following additional information to provide clarity about how public sector invalidity provisions and associated social security provisions should have lawfully operated, but haven't, and to highlight from Services Australia and Department of Veterans Affairs themselves, that the Senate was indeed deceived about the supposed "original policy intent" and validity surrounding ***Schedule 9 – Tax Laws Amendment (No.4 2022) Bill 2022*** (Schedule 9).

GENERAL

Updates to Graphs Conveying Tax Treatments that Affect Social Security Provisions

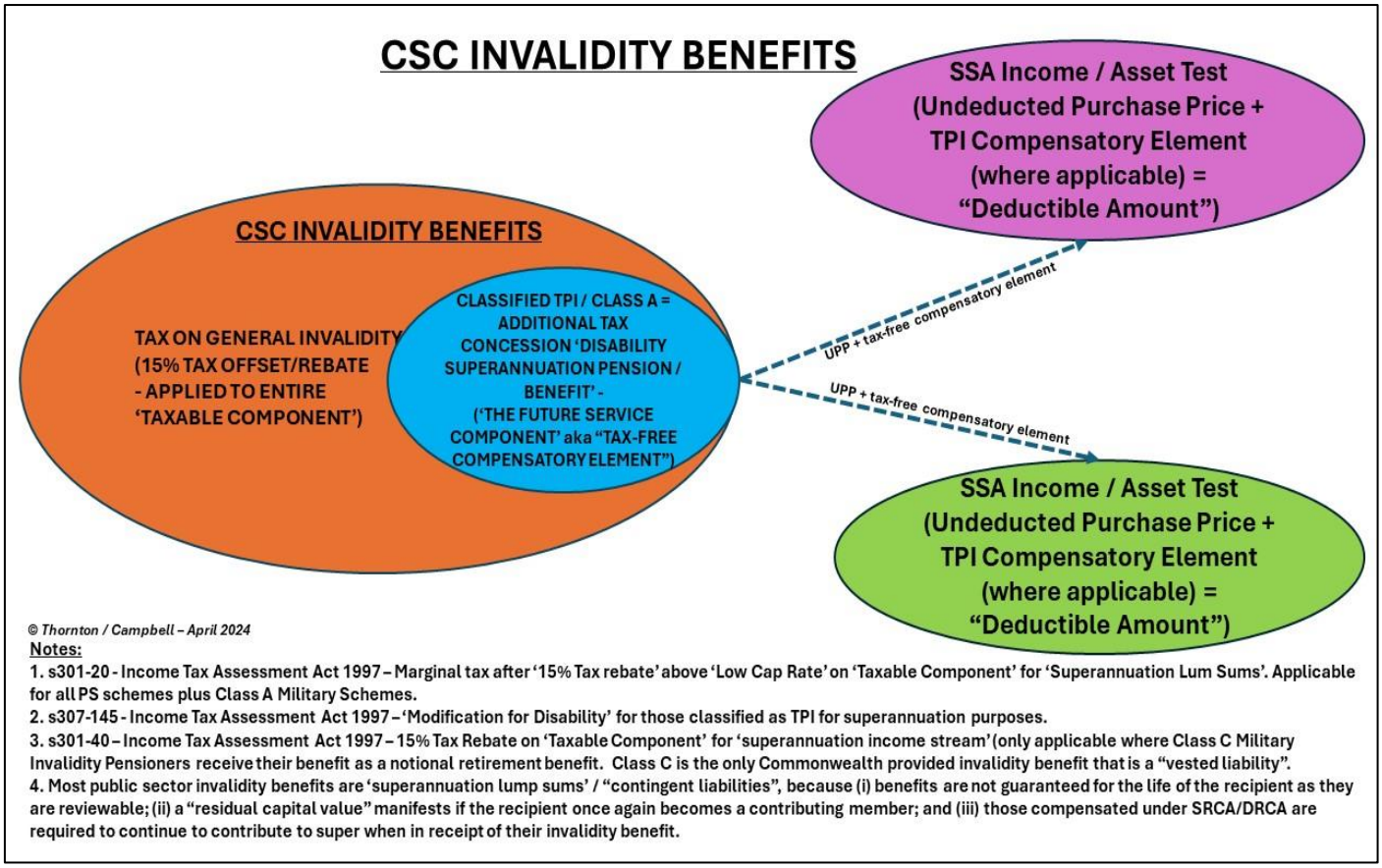


Figure 1

SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

3. Figure 1 synthesizes all that is reasonably known in an important update to the previous envelop graph that was provided under separate cover in Annexures to other submissions[1]. Appendices to Annex B provide legislative detail as to the required tax treatment as seen in the Notes at Fig 1., as provided.

4. Importantly, "the modification for disability" found at Sect 307-145, Division 307-C of the Income Tax Assessment Act 1997, which the Social Security Act (SSA) references, is derived from a Superannuation Lump Sum, not a Defined Benefit Income Stream, as Services Australia has incorrectly applied over time. This highlights the authors contention that invalidity benefits have been incorrectly classified/treated and need further investigation rather than a quick fix. This tax treatment confers the tax free amount, that the intent of the Social Security Act uses this as the 'deductable amount'.

5. Figure 2 is likewise updated, because with Annex B references as a legislative guide post then it is now apparent to the Authors that CSC in its various historical guises has once again not applied the correct "15% Tax Rebate" to the entire 'Taxable Component', as policy and law had always intended.

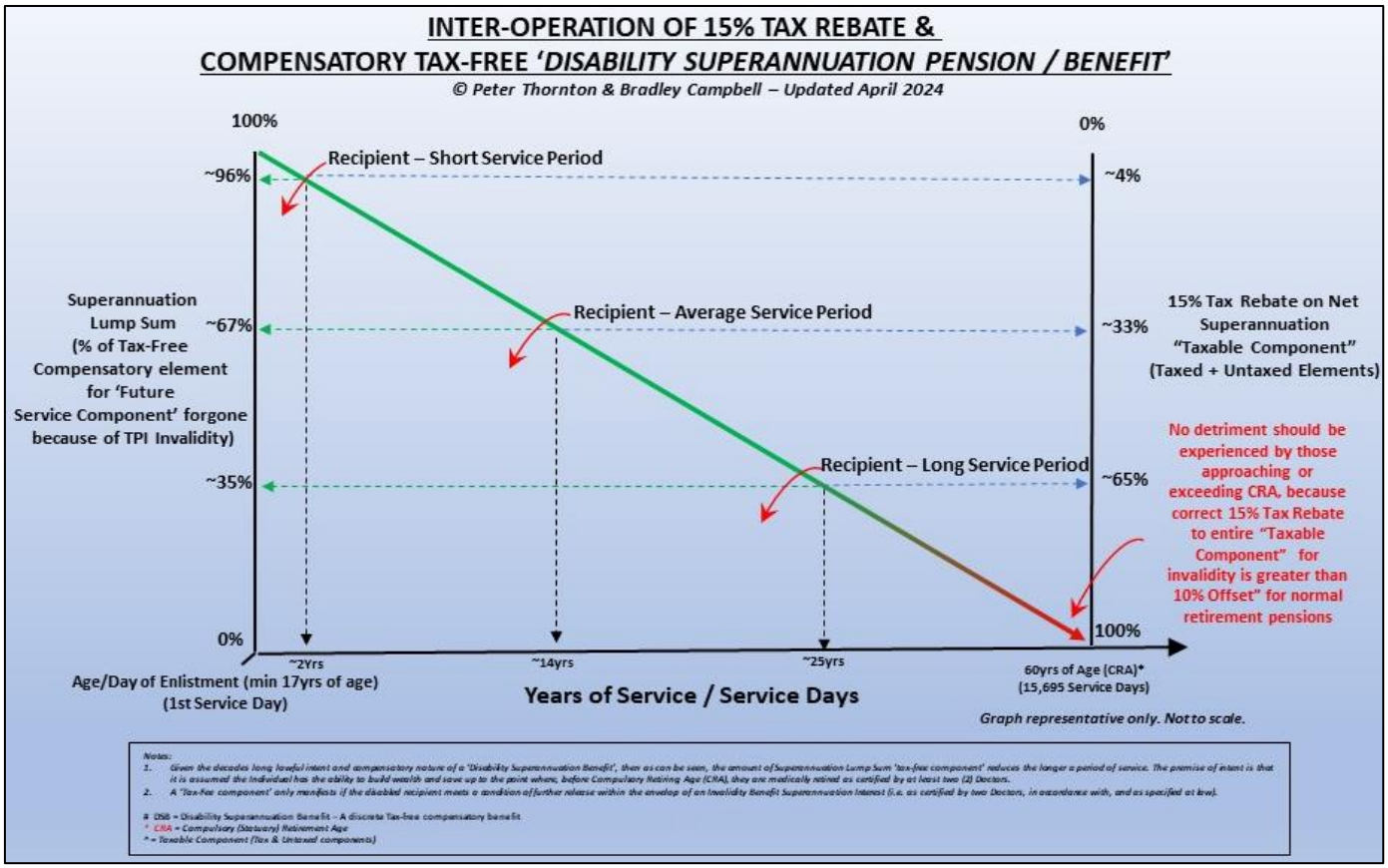


Figure 2[2]

[1] For better visibility, a larger format image of this graphic is provided at Annex C
[2] For better visibility, a larger format image of this graphic is provided at Annex D

6. The importance of Fig. 2 can not be over stated, because had the "15% tax rebate" been applied to the entire "Taxable Component", then no detriment would have been apparent, relative to those in receipt of normal pensions who received such vested retirement benefits with a 10% offset, from age 60.

7. It was indeed, through no fault of their own, that former Minister of Veterans Affairs – The Hon Andrew Gee MP, and Assistant Treasurer The Hon. Michael Suuker MP, where they claimed that "7,000 Veterans were worse off under Douglas". These claims were proven to be completely false, where in a meeting conducted early 2022, senior Treasury and Finance officials were challenged to the veracity of such claims, and who under pressure then agreed and admitted to all those present, including Author Mr Campbell, that such detriment could not possibly exist.

8. Upon being advised that the heralded detriment could not be substantiated, and when other statements did not stack up either, then the responsible Ministers decided to shelve the proposed offensive retrospective legislation that attempted to completely reverse the Court's ruling.

Public Sector Invalidity Benefits – Phoenixes Rising Out Of Hawke/Keating's Super Cauldron

9. In witness testimony, Mr Thornton stated that "the risk profile from one end of the spectrum to the other is irrelevant" stating further that this was because the "superannuation system was set up in the mid-1980s to late 1980s with an egalitarian intent." This statement does not at all dismiss the fact that it is those who assume the highest risks serving in the ADF and other high risk vocations within the public service (such as AFP, Border Force, and Intelligence Agencies just to cite a few) bear the greatest burden in life if and when they fall foul of career-ending illness or injury. Like Phoenixes out of Hawke / Keating's architectural cauldron it was Commonwealth invalidity schemes that were either designed or modified to assume these very complex arrangements where the social security system was supposed to act as a third leg or a backstop to prevent financial deprivation. The A.I. outputs found at Annex E give credence to this fact.

10. Indeed, in witness testimony, Mr Campbell provided some hard hitting personal insights into how his circumstances were greatly impacted and what resulting benefits he received from the Military Superannuation Benefits Scheme Act 1991 (MSBS). Like Mr Campbell, Mr Thornton is in receipt of a similar benefit under the Public Sector Superannuation Scheme Act 1990 (PSS). At age 44, and with a young family of four under foot, Mr. Thornton was forced into early medical retirement in 2007 as a senior Executive Level 2 Commonwealth Officer, where his pre-medical retirement wage was approximately

$120,000 p.a.. Because of the limited time served and his associated accruals up to his 'Compulsory Retiring Age', then Thornton's final invalidity benefit was just $52,000 p.a.[3] According to the law, Mr. Thornton should have received a tax-free withholding concession of 71.11% on this benefit, in recognition of the loss of progression, ability to save; namely the 'future service component' of his assumed and expected service that was forfeited.

9. Most readers would know of the harrowing story of one of the Senate's own kindred spirits - Senator Jacqui Lambie. Senator Lambie often cites her trouble with the Department of Veterans Affairs as being the root cause of her financial deprivation, but the Authors know instinctively that it was instead the ineptitude of the Commonwealth Superannuation Corporation and the Commissioner of Taxation that was the real root cause, where after 11 years of service and being medically retired on a very low salary, Senator Lambie tried to survive with two children underfoot without the approximate 73% tax-free compensatory element and the social security backstop of the "deductible amount" that she was entitled too. In the end, in a state of financial deprivation that young vulnerable lady / Veteran in absolute despair decided to walk out in front of a car. Thankfully Senator Lambie was spared from becoming another Veteran statistic on that fateful day.

DVA and SSA Submissions Reveal The Real Inconvenient Truth

10. In addition to the Authors' combined submission provided to the Senate Economics Legislation Committee, as found at Ref C to this submission, so did they provide detailed submissions to a Treasury Consultation, each separately itemised at Ref E. These submissions were provided in direct response to: *Treasury Laws Amendment (Measures for Consultation) Regulations 2023: Military superannuation benefits*, where both authors provided conclusive proof that invalidity benefits were not normal retirement benefits, as the Court (through no fault of its own) had ruled.

11. Whilst these submissions were tendered well in advance of the date the principal Bill of Schedule 9 being debated in the Senate, it was clear from statements made in the Senate debate that Senators who had undertaken their due diligence were continually told / deceived by the Government and its functionaries that it was always the "original policy intent" that public sector invalidity benefits were just normal "superannuation pensions" in the ordinary sense / meaning of the word. The detailed research found in Ref

[3] As per PSS Scheme Rules, the final lump sum internally rolled over into Consolidated Revenue is divided by 11 to arrive at the final benefit payable

A. to this submission, and that of other related submissions also, lays waste to the Government's supposed wholesome advice.

12. It is apparent in various Government agency submissions, that this bill seeks to ensure that previous assessments of Veterans' entitlements to Services Australia income support remain as though they have always been assessed correctly. What if they haven't been? The authors are trying to highlight that there is no application of a 'deductible amount' for a veterans' superannuation lump sum, when the law allows for a deductible amount to be assessed. The CSC has failed its duty in reporting these benefits correctly to various agencies.

13. Further, when the design of the system is explored, the deductible amount makes sense with what parliament intended. That was recognition that the 'future service component' is the compensatory element of an invalidity benefit and as such is regarded as being tax free. The rhetoric that Douglas threw a spanner in the works, couldn't be further from the truth. Douglas exposed a failure of public administration to treat an invalidity benefit for what it is, rather than what it is not. It appears the recent spate of legislative changes seek to shave the edges of the square peg to jam it into the round hole and keep the status quo.

14. There are elements of the Bill that are required as alluded to by other agencies, where the invalidity benefit retains an asset test exemption as per the legislative intent. Through no fault of the veteran, their invalidity entitlement is reviewable and does not meet the legislated requirements to be considered a lifetime pension.

15. In the submissions tendered to this Inquiry DVA and Social Services now reveal the "truth", where in seeking additional Legislative Instruments and associated powers, they reveal by way of detailed consultations with both Treasury and the Attorney General's Departments, that Treasury and AGs know only too well that elements of the Douglas ruling must be plainly wrong (i.e., that the definition of a "pension" and the date of the 20 Sep 2007 as adjudicated under Douglas is nothing more than a legal fiction for the vast majority of those in receipt of a public sector superannuation invalidity benefit).

16. Indeed, Service's Australia states in part, and we quote:

'The Bill includes an instrument making power that provides for the Secretary of the Department of Social Services, or the Repatriation Commission, to specify an income stream as a military invalidity pension income stream by making a legislative instrument under the SS Act or VE Act respectively.

The instrument making power will allow for certain incapacity payments provided by a small number of legacy superannuation schemes to be treated on the same basis as military invalidity pensions affected by the Douglas decision. These payments may also fail to meet the requirements for being treated as a defined benefit income stream in the means test, for reasons independent of Douglas. The need to include arrangements for these schemes was identified in consultations with the Department of the Treasury.'[4] (emphasis added)

AND

'The Department of Veterans' Affairs, the Department of the Treasury and the Attorney-General's Department were consulted and provided input to assist in the preparation of this submission. '[5] (emphasis added)

17. This then begs a serious question that we feel the Community Affairs Legislation Committee and the Senate as whole should be seriously asking, and that is: given all the facts that the Authors have presented to the Government and the Parliament over the last 2 years or so, and given that the Commissioner of Taxation has had regulatory responsibilities for superannuation since 1992, then why is the Commissioner acting as a vexatious litigant where he continues to act arbitrarily and capriciously in prosecuting cases he knows, or should know as the Regulator, against post-Douglas Case public sector invalidity recipients who rightfully seek remediation of their invalidity benefits in line with e common law principles handed down by the Court; principles that are not in dispute.

18. Indeed, with the evidence of the Authors before it, and pursuant to powers under Sect 49 of the Constitution the Committee and Senate as a whole is urged to immediately ask as to why the Commissioner is acting unlawfully in breach his model litigant obligations under the Legal Services Directions 2017, where in accordance to those obligations, he is required to:

(i) - not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true[6] (i.e., Sect 2(e)(i) LDS 2017) ?

AND … where Mr Thornton's rightful evidence based and compelling Test Case Funding applications have been rejected TWICE, then the Commissioner should not be:

(ii) - (not) taking advantage of a claimant who lacks the resources to litigate a legitimate claim (i.e., Sect 2(f) LDS 2017) ?

[4] Dept of Social Services Senate Submission, Pg. 4: Sub 4 - Department of Social Services.pdf
[5] Ibid, Pg., 6. - Conclusion
[6] Or as the responsible Regulator with unlimited resources, it should have known this to be true?

'… 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.'

Justice Logan – AAT Douglas Case - March 2020

CONCLUSION

19. In conclusion, the Authors hope that this further information will better inform them in regards to the matter under review.

20. Again, the authors stress this bill is part of a larger problem, one that needs to be looked at due to the impact it has on an injured veterans' financial stability. It is imperative that the Committee recognise that public sector invalidity benefits are NOT Defined Benefit Income Streams or Military Invalidity Pension Income Streams, as proposed, but instead Superannuation Lump Sums as formally defined elsewhere in law. We trust that the Committee will instruct the Government to make further amendments and arrangements accordingly, save creating an even greater mess than already exists.

21. Finally, we once ask the Senate to not only refer the matter for investigation as previously requested, but to demand of the Government that it repeal Schedule 9 of the Tax Laws Amendment (No.4 2022) Bill 2022 but also to immediately instruct the Commissioner of Taxation to immediately withdraw from litigation, because it is patently clear for all to see, that he breaches his model litigant obligations as a vexatious litigant against all those who are very ill and injured.

Yours sincerely

Peter Thornton & Bradley Campbell

About the Authors

Peter Thornton *is a retired member of the Defence Force & Commonwealth. Peter provides independent analysis and commentary on matters relating to Commonwealth & Military Superannuation and Tax, Veterans' compensation, and Social Security issues. Peter's independent research and commentary aims to underpin the advocacy and representational activities of national peak bodies and individuals alike.*

Bradley Campbell *is a Veteran Advocate and subject matter expert in matter pertaining to tax, superannuation, family law, and Social Security associated with Veterans. Brad gives his time freely to help thousands of Veterans when navigating complex matters.*

ANNEX A

RELEVENT DEFINITIONAL EXCERPTS - SOCIAL SECURITY ACT 1991 - SECT 9

Financial assets and income streams definitions[7]

"deductible amount" , in relation to a defined benefit income stream for a year, means the sum of the amounts that are the tax free components (worked out under Subdivision 307-C of the *Income Tax Assessment Act 1997* or, if applicable, section 307-125 of the *Income Tax (Transitional Provisions) Act 1997*) of the payments received from the defined benefit income stream during the year.

"income stream" means

(a) an income stream arising under arrangements that are regulated by the *Superannuation Industry (Supervision) Act 1993* ; or

(b) an income stream arising under a public sector superannuation scheme (within the meaning of that Act); or

(c) an income stream arising under a retirement savings account; or

(d) an income stream provided as life insurance business by a life company registered under section 21 of the *Life Insurance Act 1995* ; or

(f) an income stream designated in writing by the Secretary for the purposes of this definition, having regard to the guidelines determined under subsection (1E); or

(fa) a family law affected income stream;

but does not include any of the following:

(g) available money;

(h) deposit money;

(i) a managed investment;

(j) a listed security;

(k) a loan that has not been repaid in full;

[7] Accessed 2:18pm 21st Feb 2024

(l) an unlisted public security;

(m) gold, silver or platinum bullion

(n) a payment of compensation to a person, or a payment to a person under an insurance scheme, in relation to:

(i) the person's inability to earn, derive or receive income from remunerative work; or

(ii) the person's total and permanent disability or incapacity.

"defined benefit income stream" has the meaning given by subsection (1F).

(1F) An income stream is a ***defined benefit income stream*** if:

(a) under the *Superannuation Industry (Supervision) Regulations 1994* , the income stream is taken to be a pension for the purposes of the *Superannuation Industry (Supervision) Act 1993* ; and

(b) except in the case of an income stream arising under a superannuation fund established before 20 September 1998--the income stream is provided under rules that meet the standards of sub-regulation 1.06(2) of the *Superannuation Industry (Supervision) Regulations 1994* ; and

(ba) in the case of an income stream arising under a superannuation fund established before 20 September 1998--the income stream is provided under rules that meet the standards determined, by legislative instrument, by the Minister; and

(c) in any case--the income stream is attributable to a defined benefit interest within the meaning of the *Superannuation Industry (Supervision) Regulations 1994* (for this purpose, disregard subparagraph 1.03AA(1)(b)(ii) of those regulations).

"residual capital value" , in relation to an income stream, means the capital amount payable on the termination of the income stream.

ANNEX B

Appendix 1 to Annex B

INCOME TAX ASSESSMENT ACT 1997 - SECT 301.20

Superannuation lump sum--taxable component taxed at 0% up to low rate cap amount, 15% on remainder

(1) If you are under 60 years but have reached your *preservation age when you receive a *superannuation lump sum, the *taxable component of the lump sum is assessable income.

Note 1: For *taxable component*, see Subdivision 307 - C.

Note 2: If your lump sum includes an element untaxed in the fund, see Subdivision 301 - C.

(2) You are entitled to a *tax offset that ensures that the rate of income tax on the amount mentioned in subsection (3) does not exceed 0%.

(3) The amount is so much of the total of the *taxable components included in your assessable income for the income year under subsection (1) as does not exceed your *low rate cap amount (see section 307 - 345) for the income year.

(4) You are entitled to a *tax offset that ensures that the rate of income tax on the amount mentioned in subsection (5) does not exceed 15%.

(5) The amount is so much of the total of the *taxable components included in your assessable income for an income year under subsection (1) as exceeds your *low rate cap amount for the income year.

Note: This amount will be nil if the total of the taxable components falls short of your low rate cap amount for the income year.

INCOME TAX ASSESSMENT ACT 1997 - SECT 301.40

Superannuation income stream--taxable component is assessable income, 15% offset for disability benefit

(1) If you are under your *preservation age when you receive a *superannuation income stream benefit, the *taxable component of the benefit is assessable income.

Note: For *taxable component, see Subdivision 307 - C.

Offset for disability benefit

(2) If the benefit is a *superannuation income stream benefit and a *disability superannuation benefit, you are entitled to a *tax offset equal to 15% of the *taxable component of the benefit.

Table of sections

301 - 90 Tax free component and element taxed in fund dealt with under Subdivision 301 - B, but element untaxed in the fund dealt with under this Subdivision

Member benefits (element untaxed in fund)--recipient aged 60 or above

301 - 95 Superannuation lump sum--element untaxed in fund taxed at 15% up to untaxed plan cap amount, top rate on remainder

301 - 100 Superannuation income stream--element untaxed in fund attracts 10% offset

Member benefits (element untaxed in fund)--recipient aged over preservation age and under 60

301 - 105 Superannuation lump sum--element untaxed in fund taxed at 15% up to low rate cap amount, 30% up to untaxed plan cap amount, top rate on remainder

301 - 110 Superannuation income stream--element untaxed in fund is assessable income

Member benefits (element untaxed in fund)--recipient aged under preservation age

301 - 115 Superannuation lump sum--element untaxed in fund taxed at 30% up to untaxed plan cap amount, top rate on remainder

301 - 120 Superannuation income stream--element untaxed in fund is assessable income

INCOME TAX ASSESSMENT ACT 1997 - SECT 307.145

Modification for disability benefits

(1) Work out the ***tax free component*** of the * superannuation benefit under subsection (2) if the benefit is a * superannuation lump sum and a * disability superannuation benefit.

Note: This section does not apply to an unclaimed money payment.

(2) The ***tax free component*** is the sum of:

(a) the * tax free component of the benefit worked out apart from this section; and

(b) the amount worked out under subsection (3).

However, the tax free component cannot exceed the amount of the benefit.

(3) Work out the amount by applying the following formula:

Start formula Amount of benefit times start fraction Days to retirement over Service days plus Days to retirement end fraction

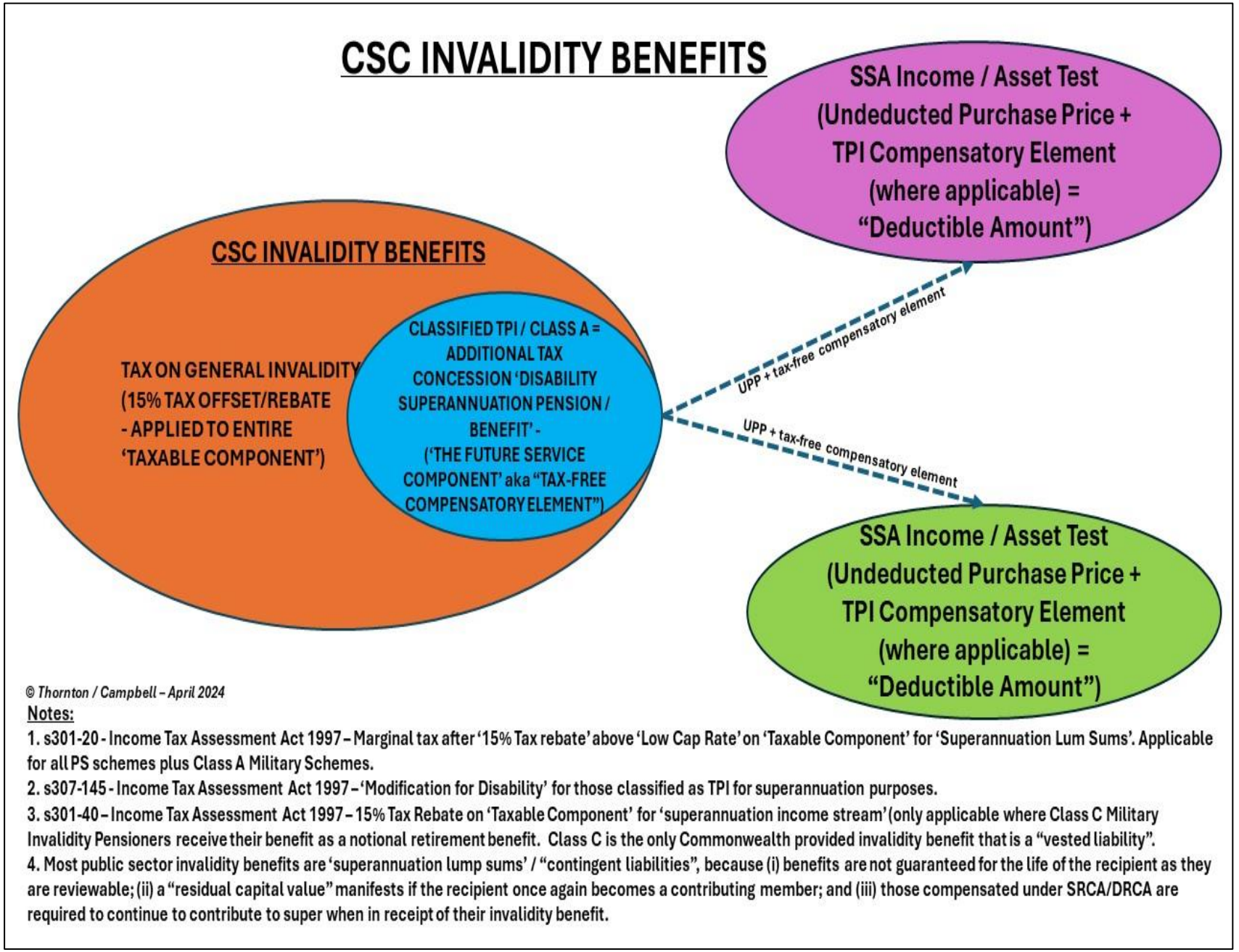
where:

"days to retirement" is the number of days from the day on which the person stopped being capable of being * gainfully employed to his or her * last retirement day.

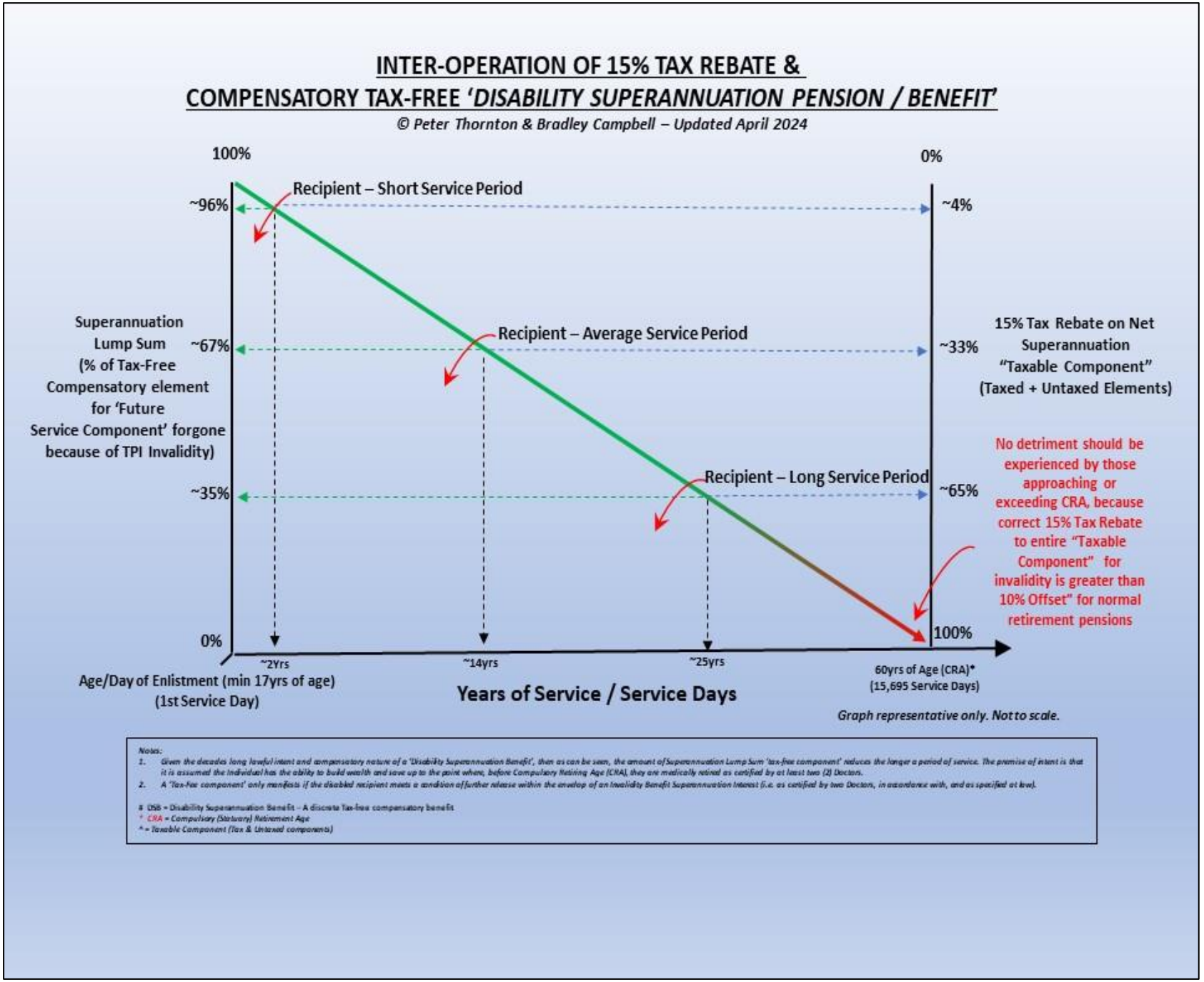
"service days" is the number of days in the * service period for the lump sum.

(4) The balance of the * superannuation benefit is the ***taxable component*** of the benefit.

ANNEX C


CSC INVALIDITY BENEFITS
SSA Income / Asset Test (Undeducted Purchase Price + TPI Compensatory Element (where applicable) = "Deductible Amount")
CSC INVALIDITY BENEFITS
TAX ON GENERAL INVALIDITY (15% TAX OFFSET/REBATE - APPLIED TO ENTIRE 'TAXABLE COMPONENT')
CLASSIFIED TPI / CLASS A = ADDITIONAL TAX CONCESSION 'DISABILITY SUPERANNUATION PENSION / BENEFIT' - ('THE FUTURE SERVICE COMPONENT' aka "TAX-FREE COMPENSATORY ELEMENT")
UPP + tax-free compensatory element
UPP + tax-free compensatory element
SSA Income / Asset Test (Undeducted Purchase Price + TPI Compensatory Element (where applicable) = "Deductible Amount")
© Thornton / Campbell – April 2024
Notes:
1. s301-20 - Income Tax Assessment Act 1997 – Marginal tax after '15% Tax rebate' above 'Low Cap Rate' on 'Taxable Component' for 'Superannuation Lum Sums'. Applicable for all PS schemes plus Class A Military Schemes.
2. s307-145 - Income Tax Assessment Act 1997 – 'Modification for Disability' for those classified as TPI for superannuation purposes.
3. s301-40 – Income Tax Assessment Act 1997 – 15% Tax Rebate on 'Taxable Component' for 'superannuation income stream' (only applicable where Class C Military Invalidity Pensioners receive their benefit as a notional retirement benefit. Class C is the only Commonwealth provided invalidity benefit that is a "vested liability".
4. Most public sector invalidity benefits are 'superannuation lump sums' / "contingent liabilities", because (i) benefits are not guaranteed for the life of the recipient as they are reviewable; (ii) a "residual capital value" manifests if the recipient once again becomes a contributing member; and (iii) those compensated under SRCA/DRCA are required to continue to contribute to super when in receipt of their invalidity benefit.

ANNEX D


INTER-OPERATION OF 15% TAX REBATE &
COMPENSATORY TAX-FREE 'DISABILITY SUPERANNUATION PENSION / BENEFIT'
© Peter Thornton & Bradley Campbell – Updated April 2024
100%
0%
Recipient – Short Service Period
~96%
~4%
Superannuation Lump Sum (% of Tax-Free Compensatory element for 'Future Service Component' forgone because of TPI Invalidity)
~67%
Recipient – Average Service Period
~33%
15% Tax Rebate on Net Superannuation "Taxable Component" (Taxed + Untaxed Elements)
~35%
Recipient – Long Service Period
~65%
No detriment should be experienced by those approaching or exceeding CRA, because correct 15% Tax Rebate to entire "Taxable Component" for invalidity is greater than 10% Offset" for normal retirement pensions
0%
100%
~2Yrs
~14yrs
~25yrs
60yrs of Age (CRA)*
(15,695 Service Days)
Age/Day of Enlistment (min 17yrs of age)
(1st Service Day)
Years of Service / Service Days
Graph representative only. Not to scale.
Notes:
1. Given the decades long lawful intent and compensatory nature of a 'Disability Superannuation Benefit', then as can be seen, the amount of Superannuation Lump Sum 'tax-free component' reduces the longer a period of service. The premise of intent is that it is assumed the Individual has the ability to build wealth and save up to the point where, before Compulsory Retiring Age (CRA), they are medically retired as certified by at least two (2) Doctors.
2. A 'Tax-Fee component' only manifests if the disabled recipient meets a condition of further release within the envelop of an Invalidity Benefit Superannuation Interest (i.e. as certified by two Doctors, in accordance with, and as specified at law).
DSB = Disability Superannuation Benefit – A discrete Tax-free compensatory benefit
* CRA = Compulsory (Statutory) Retirement Age
^ = Taxable Component (Tax & Untaxed components)

ANNEX E

SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

MICROSOFT AI COPILOT RESPONSES TO QUESTIONS POSED

(Responses have not been validated by Authors)

Examples of explicit statements from authoritative sources

The following are some examples of explicit statements from authoritative sources that support that disability superannuation pensions provided compensation and insurance for the public sector invalidity recipient.

- The Defence Force Retirement and Death Benefits Act 1973, which established the DFRDB scheme for military personnel, states in section 3 that the scheme "is designed to provide benefits for members and their dependants that are appropriate to the special nature of military service, having regard to the following factors:

(a) the obligation of members to serve anywhere in the world at any time;

(b) the degree of physical and mental stress to which members are subject;

(c) the risk of death or injury to which members are exposed;

(d) the disabilities that members may suffer as a result of their service; and

(e) the restrictions imposed on members in respect of their choice of civilian occupation."

(https://www.legislation.gov.au/Details/C2017C00286)

- The Explanatory Memorandum to the Taxation Laws Amendment (Superannuation) Bill 1992, which introduced the new regime for taxing superannuation benefits, states in paragraph 2.20 that "the Bill will provide a tax rebate of 15 per cent for disability superannuation pensions. This will apply to all disability pensions, irrespective of whether they are paid from a taxed or an untaxed source. The rebate recognises that disability pensions are paid as compensation for the loss of earning capacity and are not merely a form of retirement income." (https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/BD9293/93bd051)

- The Parliamentary Debates (Hansard) of the House of Representatives on 6 May 1992, when the Taxation Laws Amendment (Superannuation) Bill 1992 was introduced, contain a speech by the then Treasurer, Mr Dawkins MP, who said that "the Government recognises that disability pensions are paid as compensation for the loss of earning capacity and are not merely a form of retirement income. Accordingly, the Bill will provide a tax rebate of 15 per cent for disability superannuation pensions. This will apply to all disability pensions, irrespective of whether they are paid from a taxed or an untaxed source." (https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1992-05-06/0041%22)

- The Product Disclosure Statement for the Military Superannuation and Benefits Scheme, pg 14 2019-2020 - "Military Super provides you with insurance cover while you are a contributing member. This cover is for invalidity and death, and is designed to protect you and your family from the financial impact of death or injury that prevents you from continuing to work." (https://www.csc.gov.au/-/media/Files/MilitarySuper/Product-Disclosure-Statements/MilitarySuper-PDS-2020.pdf)

- The aim of the MSBS is to ensure that an income stream is provided to members on retirement from the workforce. It would also give access to a lump sum on separation from the ADF to assist resettlement into civilian life. Finally, it would provide insurance against invalidity and death with the amount of benefit payable providing compensation for the retirement benefit foregone because of premature termination of service. (June 1990 Cole Review - Report Of Defence Force Retirement And

Death Benefits Scheme Review Committee)

- The Review of Military Compensation Arrangements, which was conducted by Mr Justice Mohr in 1987, states in page 11 that "the purpose of military compensation is to provide a measure of financial security for members of the Defence Force and their dependants in the event of death or injury arising out of or in the course of military service. The compensation should be adequate to meet the needs of the individual and his or her family, having regard to the nature and extent of the disability, the loss of income and the additional expenses incurred as a result of the disability." (https://www.dva.gov.au/sites/default/files/files/consultation%20and%20grants/reviews/mohrreview.pdf)

- The High Court case of Goodfellow v Commissioner of Taxation [1977] HCA 42, which was a landmark case on the taxation of the then disability superannuation pensions, involved a former member of the RAAF who received a disability pension under the DFRB scheme. The High Court held that the disability pension was not assessable income for tax purposes, as it was paid as compensation for the loss of earning capacity and not as a reward for past services. The High Court also recognised that the disability pension was different from a retirement pension, as it was not based on the length of service or the amount of contributions, but on the degree of incapacity and the rank at the time of discharge. (http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1977/42.html)

- The Government and Parliament's response to the High Court case of Goodfellow v Commissioner of Taxation was to amend the Income Tax Assessment Act 1936 to include disability superannuation pensions in the definition of assessable income, subject to a tax rebate of 15%. The Taxation Laws Amendment Act (No. 2) 1978, which introduced this change, states in the second reading speech by the Treasurer, Mr Howard, that "the Government considers that there is no justification for treating disability pensions paid under the superannuation schemes more favourably than other forms of income. However, the Government recognises that disability pensions are paid as compensation for the loss of earning capacity and not as a reward for past services. Accordingly, the Bill will provide a tax rebate of 15 per cent for disability superannuation pensions." (https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1978-05-10/0074%22)

Definition of a Totally and Permanently Incapacitated (TPI) disability superannuation recipient

The Commonwealth Superannuation Scheme Act 1976, which established the CSS scheme for public sector employees, defines a TPI disability superannuation recipient in section 4 as follows: "A person is taken to be totally and permanently incapacitated if the Board is satisfied that the person's incapacity is likely to render the person permanently unable to engage in any work for which he or she is reasonably qualified by education, training or experience." (https://www.legislation.gov.au/Details/C2017C00327)

To qualify as a TPI disability superannuation recipient for superannuation purposes, a person must satisfy the following conditions:

- The person must be a member of the CSS scheme who has ceased to be employed in the Commonwealth public service or a prescribed authority.

- The person must have a medical condition that prevents them from working in any capacity for which they are reasonably qualified by education, training or experience.

- The person's medical condition must be permanent, or likely to be permanent, and not subject to improvement or rehabilitation.

- The person must apply for a disability pension within two years of ceasing employment, or within such further period as the Board allows.

- The person must provide medical evidence and other information to support their claim, and undergo any medical examination or assessment as required by the Board.

- The Board must determine that the person is totally and permanently incapacitated in accordance with the definition and the rules of the scheme.

The Hawke Government and the New Superannuation Standards

In 1987, the Hawke Government introduced the Occupational Superannuation Standards Act (OSSA) and Regulations, which aimed to improve the security, equity and efficiency of superannuation in Australia. The OSSA and Regulations established minimum standards for superannuation funds and schemes, such as vesting, preservation, portability, disclosure and reporting.

One of the objectives of the OSSA was to ensure that all public sector superannuation schemes, including the Defence Force Retirement and Death Benefits Scheme (DFRDB), were subject to the same standards as private sector schemes. The Government argued that this would enhance the choice and mobility of public sector employees, as well as reduce the fiscal burden on future taxpayers.

In a Ministerial Statement on 3 May 1988, the Minister for Veterans' Affairs, Ben Humphreys, announced that the Government had decided to amend the DFRDB to conform to the OSSA standards, and that the amendments would take effect from 1 July 1988. He said:

"The amendment will bring the retirement benefits payable under the scheme into line with those payable under other public sector superannuation schemes. It will ensure that the members of the scheme are treated equitably in relation to members of other public sector schemes and that the long-term cost of providing the benefits is contained." (Hansard, House of Representatives, 3 May 1988, p. 2062)

The Minister also stated that the Government would consult with the Defence Force Welfare Association and other interested parties on the details of the amendments, and that the Government was committed to preserving the "unique and special nature" of the DFRDB scheme. He added:

"The Government recognises that the members of the defence forces make a vital contribution to the security and well-being of Australia. The Government also recognises that service in the defence forces entails special risks and hardships not experienced by other members of the community. The Government is determined to ensure that the members of the defence forces receive fair and adequate compensation for any disabilities they may suffer as a result of their service." (Hansard, House of Representatives, 3 May 1988, p. 2063)

The Commonwealth Rehabilitation and Compensation Act and the Interaction with the OSSA

In 1988, the Government also introduced the Commonwealth Rehabilitation and Compensation Act (CRCA), which replaced the Commonwealth Employees' Compensation Act 1930 and the Seamen's War Pensions and Allowances Act 1940. The CRCA aimed to provide a comprehensive and consistent system of rehabilitation and compensation for Commonwealth employees, including veterans, who suffered injuries or diseases arising out of their employment.

One of the features of the CRCA was that it allowed the Commonwealth to offset the amount of compensation payable to an employee by the amount of any superannuation benefit that the employee was entitled to receive or had received in respect of the same incapacity. This was known as the 'superannuation offset'. The Government argued that this would avoid double compensation and ensure that the total level of income replacement for an employee was not excessive.

However, the superannuation offset also had implications for the DFRDB scheme and its members. Under the OSSA, the DFRDB scheme was required to provide a minimum level of benefits for its members, regardless of any other source of income. This meant that the DFRDB scheme could not reduce the amount of superannuation benefit payable to a member by the amount of any compensation payment that the member received or was entitled to receive under the CRCA. Therefore, the superannuation offset could only operate in one direction: by reducing the amount of compensation payment by the amount of superannuation benefit.

This created a potential discrepancy between the total level of income replacement for DFRDB members and other public sector employees who were covered by different superannuation schemes that allowed for a mutual offset of both superannuation and compensation payments. The Government recognised this issue and stated that it would monitor the situation and review the superannuation offset arrangements if necessary. The Minister for Veterans' Affairs said:

"The Government will closely watch the operation of the new offsetting arrangements. It has undertaken to review them after two years in the light of experience and representations from interested parties. The Government is prepared to make adjustments to the arrangements if they prove to be inequitable or unworkable in practice." (Hansard, House of Representatives, 3 May 1988, p. 2064)

The New System as a Framework of Benefits and Entitlements for Disability

The Government also claimed that the new system of superannuation and compensation provided a coherent and comprehensive framework of benefits and entitlements for employees, including veterans, who suffered disabilities as a result of their employment. The Government argued that the new system recognised the different types and degrees of disability and provided appropriate levels of support and assistance for each

The Retrospective Application of the OSSA and the Alignment of the CRCA and the VEA

In 1989, the Government amended the OSSA to make it retrospective to 1 July 1986, the same date as the commencement of the Veterans' Entitlements Act 1986 (VEA). The Government said that this was necessary to ensure consistency and fairness across all public sector superannuation schemes, and to avoid any unintended consequences or anomalies arising from the interaction of the OSSA and the VEA. The Minister for Veterans' Affairs said:

"The amendment will ensure that the same standards apply to all public sector superannuation schemes as from 1 July 1986. This will avoid any unfair or anomalous situations that might otherwise arise because of the different dates of commencement of the OSSA and the VEA. The amendment will also ensure that the superannuation offset arrangements under the CRCA operate consistently and equitably for all public sector employees, including veterans." (Hansard, House of Representatives, 24 May 1989, p. 3079)

The amendment also aligned the CRCA with the VEA in relation to the definition of incapacity and the calculation of compensation payments. The Government said that this was intended to simplify the administration and delivery of compensation and rehabilitation services to veterans, and to ensure that veterans received the same level of benefits as other Commonwealth employees. The Minister for Veterans' Affairs said:

"The amendment will ensure that the same definition of incapacity applies under both the CRCA and the VEA. This will avoid any confusion or inconsistency that might arise from having different definitions of incapacity under the two Acts. The amendment will also ensure that the same method of calculating compensation payments applies under both the CRCA and the VEA. This will avoid any unfair or unreasonable differences in the amount of compensation payable to veterans and other Commonwealth employees who suffer the same degree of incapacity." (Hansard, House of Representatives, 24 May 1989, p. 3080)

The CRCA was later renamed the Safety, Rehabilitation and Compensation Act 1988 (SRCA) in 1992, following a review of the Commonwealth's occupational health and safety legislation. The Government said that this was part of its commitment to improving the safety and well-being of Commonwealth employees, and to ensuring that the Commonwealth's workers' compensation scheme was responsive and effective. The Minister for Industrial Relations said:

"The name change reflects the Government's emphasis on the prevention of workplace injuries and diseases, and the provision of comprehensive rehabilitation and compensation services to injured employees. The name change also reflects the Government's intention to harmonise the Commonwealth's occupational health and safety and workers' compensation legislation, and to ensure that the Commonwealth's scheme is consistent with best practice and community standards." (Hansard, House of Representatives, 26 November 1992, p. 3434)

SUPPLEMENTARY SUBMISSION TO INQUIRY – 'SOCIAL SERVICES AND OTHER LEGISLATION AMENDMENT (MILITARY INVALIDITY PAYMENTS MEANS TESTING) BILL 2024'

The Government's introduction of the superannuation offsetting arrangements in 1989 was met with criticism and opposition from some quarters, especially from the public sector unions and disability groups. They argued that the offsetting arrangements were unfair and discriminatory, as they reduced the compensation payments to Commonwealth employees who had suffered permanent incapacity and who were also entitled to a superannuation pension. They claimed that the offsetting arrangements effectively penalised those employees for having contributed to their superannuation, and that they created a disincentive for rehabilitation and return to work. They also pointed out that the offsetting arrangements did not apply to other categories of workers, such as state government employees, private sector employees, or self-employed persons, who could receive both workers' compensation and superannuation benefits without any reduction.

The Government defended the offsetting arrangements as a necessary and reasonable measure to avoid double compensation and to ensure equity and consistency across the Commonwealth's compensation schemes. The Government said that the offsetting arrangements were consistent with the principle of income maintenance, which aimed to provide an injured employee with a reasonable level of income replacement, but not to exceed the employee's pre-injury earnings. The Government also said that the offsetting arrangements were consistent with the practice of most other developed countries, such as the United Kingdom, Canada, and New Zealand, where workers' compensation and superannuation benefits were reduced or adjusted to take account of each other.

One of the arguments that the Government used to justify the offsetting arrangements was that Commonwealth employees who suffered permanent incapacity and who received a reduced compensation payment due to the offsetting arrangements could still access the Disability Support Pension (DSP) under the Social Security Act 1991, if they met the eligibility criteria. The Government said that the DSP was designed to provide a safety net for people who were unable to work because of a severe disability, and that it was intended to supplement other sources of income, such as workers' compensation or superannuation. The Government said that the DSP was not affected by the offsetting arrangements, and that it was paid at the same rate regardless of whether the person received a workers' compensation or superannuation benefit. The Government said that this ensured that Commonwealth employees who suffered permanent incapacity and who received a reduced compensation payment due to the offsetting arrangements would not be left in financial hardship, as they could rely on the DSP as a source of income support.

However, the Government's claim that the DSP was a sufficient and adequate safety net for Commonwealth employees who suffered permanent incapacity and who received a reduced compensation payment due to the offsetting arrangements was challenged by some critics, who pointed out several flaws and limitations of the DSP. They argued that the DSP was not easy to access, as it required a person to meet strict medical and non-medical criteria, such as having a severe impairment that prevented them from working for at least 15 hours per week, and having a low level of income and assets. They also argued that the DSP was not generous, as it paid a maximum of $304.35 per week for a single person and $457.60 per week for a couple, which was below the poverty line and significantly lower than the average weekly earnings. They also argued that the DSP was not secure, as it was subject to periodic reviews and changes in legislation and policy, which could affect the eligibility and payment of the DSP. They also argued that the DSP was not fair, as it required Commonwealth employees who suffered permanent incapacity and who received a reduced compensation payment due to the offsetting arrangements to pay a superannuation contribution from their compensation, at the rate they were contributing before they were medically retired. This meant that they had to pay for their own superannuation pension, while also having their compensation payment reduced by the amount of their superannuation pension. They claimed that this amounted to double taxation and double offsetting, and that it reduced their net income even further.

The following sections will provide more details on how the DSP was used as a safety net to underpin any financial deprivation suffered by public sector invalidity recipients who were now subject to the new superannuation offsetting arrangements as applied against to CERA / SRCA. They will also provide details of how invalidity recipients were also required to pay a superannuation contribution from their compensation, at the rate they were contributing before they

were medically retired. They will draw on evidence from the Hansard or other authoritative documents to support their arguments, and provide citations, references, and links where possible.

The Government's statements on the superannuation offsetting arrangements and the DSP can be found in the following sources:

- Commonwealth Employees' Rehabilitation and Compensation Bill 1988: Second Reading Speech by the Minister for Industrial Relations, the Hon. Ralph Willis, on 19 October 1988. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1988-10-19/0096%22
- Commonwealth Employees' Rehabilitation and Compensation Bill 1988: Consideration in Detail by the Minister for Industrial Relations, the Hon. Ralph Willis, on 27 October 1988. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1988-10-27/0207%22
- Commonwealth Employees' Rehabilitation and Compensation Bill 1988: Second Reading Speech by the Minister for Community Services and Health, the Hon. Neal Blewett, on 29 November 1988. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansards/1988-11-29/0052%22

In addition to the Government's statements, there were also some references to the 'deductible amount' and the 'modifications for disability' under the Social Security Act and the Income Tax Assessment Act 1936 respectively, which were relevant to the offsetting arrangements and the DSP. These references can be found in the following sources:

- Commonwealth Employees' Rehabilitation and Compensation Bill 1988: Consideration in Detail by the Minister for Industrial Relations, the Hon. Ralph Willis, on 27 October 1988. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/1988-10-27/0207%22

In this source, the Minister explained that the 'deductible amount' was the amount of the superannuation pension that was not subject to the offsetting arrangements, and that it was calculated as follows:

<blockquote>"The deductible amount is calculated by multiplying the amount of superannuation pension received by the employee by the percentage of the employee's Commonwealth superannuation contributions that were paid from after-tax income. The purpose of the deductible amount is to ensure that the employee does not suffer a reduction in compensation for that part of the superannuation pension that represents a return of the employee's own contributions from after-tax income." (p. 2289)</blockquote>

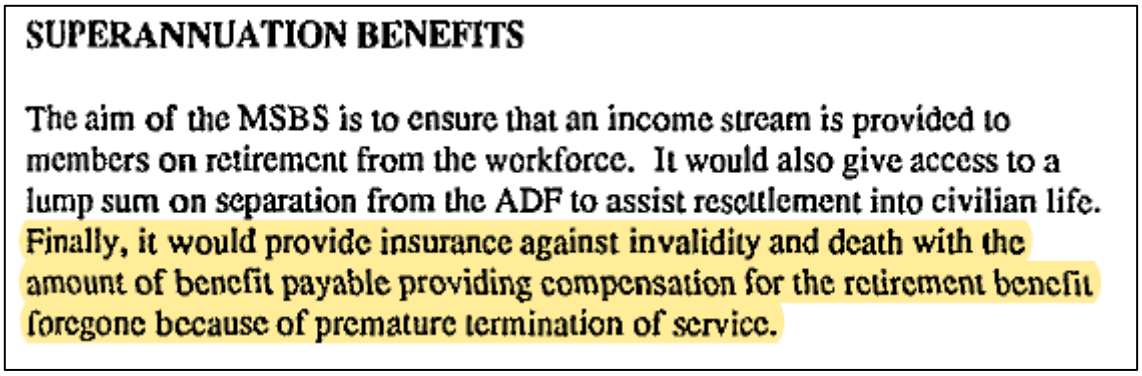
- Commonwealth Employees' Rehabilitation and Compensation Bill 1988: Second Reading Speech by the Minister for Community Services and Health, the Hon. Neal Blewett, on 29 November 1988. Available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansards/1988-11-29/0052%22

In this source, the Minister explained that the 'modifications for disability' were the provisions in the Income Tax Assessment Act 1936 that allowed a person who received a superannuation pension due to permanent incapacity to claim a tax rebate or exemption, and that they were amended to take into account the offsetting arrangements, as follows:

<blockquote>"The Bill also amends the Income Tax Assessment Act 1936 to ensure that the modifications for disability that apply to superannuation pensions received by persons who retire because of permanent incapacity continue to apply after the introduction of the offsetting arrangements. The modifications for disability allow a person who receives a superannuation pension because of permanent incapacity to claim a tax rebate or exemption in respect of that pension. The amendments ensure that the modifications for disability apply to the amount of superannuation pension received by the person, not the amount of superannuation pension that is offset against the person's compensation payment. This means that the person will not lose any tax benefit because of the offsetting arrangements." (p. 2069)</blockquote>

ANNEX F

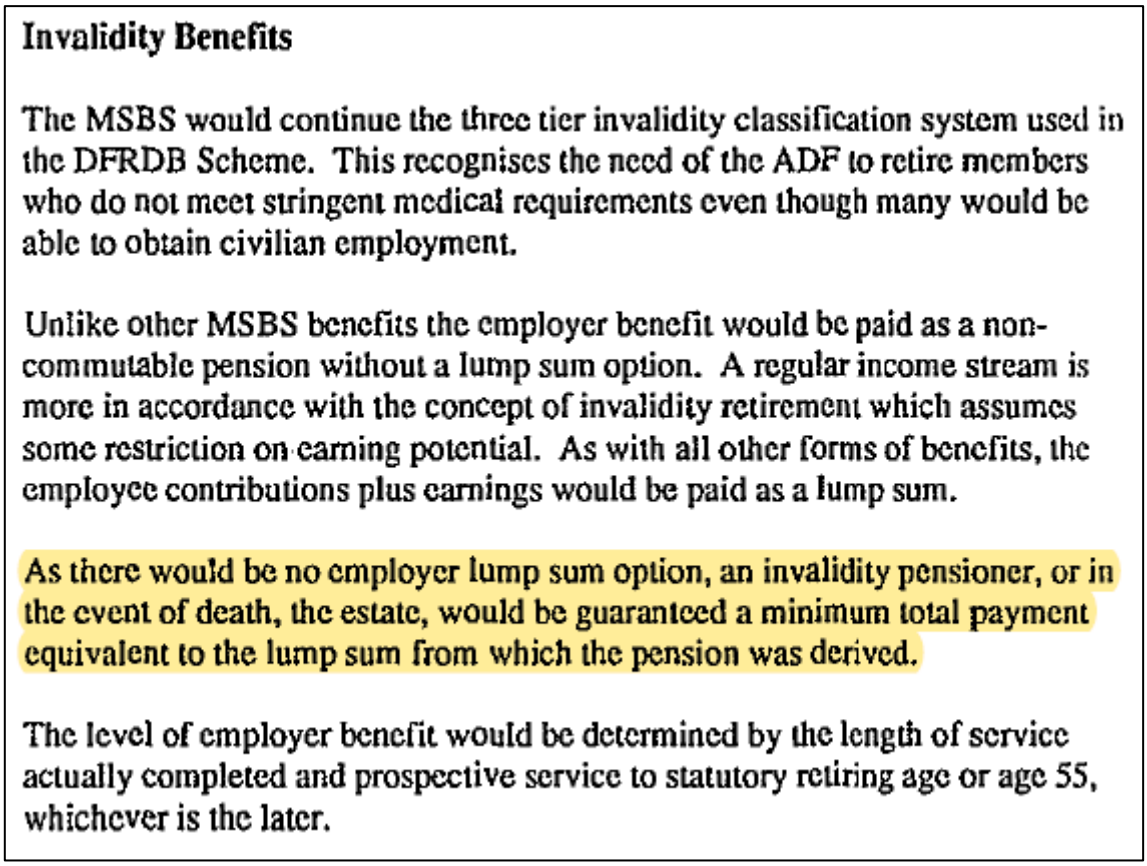
JUNE 1990 COLE REVIEW EXCERPTS



SUPERANNUATION BENEFITS

The aim of the MSBS is to ensure that an income stream is provided to members on retirement from the workforce. It would also give access to a lump sum on separation from the ADF to assist resettlement into civilian life. Finally, it would provide insurance against invalidity and death with the amount of benefit payable providing compensation for the retirement benefit foregone because of premature termination of service.

Fig 1 - Source: Executive Summary – June 1990 Cole Review – pg. 4



Invalidity Benefits

The MSBS would continue the three tier invalidity classification system used in the DFRDB Scheme. This recognises the need of the ADF to retire members who do not meet stringent medical requirements even though many would be able to obtain civilian employment.

Unlike other MSBS benefits the employer benefit would be paid as a non-commutable pension without a lump sum option. A regular income stream is more in accordance with the concept of invalidity retirement which assumes some restriction on earning potential. As with all other forms of benefits, the employee contributions plus earnings would be paid as a lump sum.

As there would be no employer lump sum option, an invalidity pensioner, or in the event of death, the estate, would be guaranteed a minimum total payment equivalent to the lump sum from which the pension was derived.

The level of employer benefit would be determined by the length of service actually completed and prospective service to statutory retiring age or age 55, whichever is the later.

Fig 2 - Source: Executive Summary – June 1990 Cole Review – pg. 5

- the unsuitability of large scale redeployment within the ADF because of distortion to the desired personnel profile; and

- the relevant provisions of the Occupational Superannuation Standards (OSS) Act.

10.15 Briefly, that part of the OSS relating to invalidity retirement provides that a retirement benefit is paid only if a member of a scheme is totally and permanently incapacitated for employment for which that member is suited. While the OSS do not appear to envisage payment of invalidity benefits for less than total and permanent incapacity, they do not specifically preclude such benefits. However, the OSS do restrict the way in which these benefits may be paid, limiting them to a benefit preserved to age 55 or a non-commutable pension payable for life.

Invalidity Classification Structure

10.16 A three tiered system of classification is considered to be the most appropriate structure for invalidity retirement from the ADF. This structure has advantages for both the ADF and the member; the ADF has the freedom to shed personnel whose incapacities range from minor disabilities to total invalidity and members can be confident of receiving a benefit commensurate with the effect this medical condition has on their ability to obtain civil employment.

10.17 An additional advantage is that a three tiered system is already familiar to ADF members and management as a similar structure has been used in the DFRDB Scheme since its inception in 1973.

10.18 The three tiered system of invalidity retirement classification is based upon incapacity for suitable civil employment as follows:

- **Class A** 60% - 100% incapacity : total, or near total, invalidity, unlikely to work in a job for which the member is reasonably qualified by education, training or experience;

- **Class B** 30% - 59% incapacity : partial invalidity, some restrictions on working in own job, but capable of performing other types of employment outside the ADF;

- **Class C** less than 30% incapacity : partial invalidity unfit for ADF employment but capable of performing own job outside the ADF.

Although the percentages may appear arbitrary, experience has shown that the majority of invalidity retirees fall clearly within the categories described above, with few marginal cases.

Fig 3 - Source: Chapter 10 – Invalidity Benefits – June 1990 Cole Review – pg. 59

Report of the DFRDB Review

Benefits

10.19 The benefits for each of the above classifications would be as follows:

- Class A - lump sum return of contributions plus earnings. Non-commutable indexed pension based on actual and prospective service;

- Class B - lump sum return of contributions plus earnings. Non-commutable indexed pension based on half the Class A rate, or the accrued benefit to date of retirement, whichever is greater;

- Class C - lump sum return of contributions plus earnings. Preserved employer benefit with full vesting.

Actual and Prospective Service

10.20 Actual and prospective service has been chosen as the basis for calculation of benefits. This is in keeping with practically all major private and public superannuation schemes. However, it does contrast with the DFRDB Scheme which uses 40 years service as a basis for benefits. Prospective service is the period from date of retirement to the date the member would have reached age 55, or the member's retiring age for rank, whichever is the greater.

10.21 Statutory retiring ages for officers vary from 45 to 63 years, with the most common age being 55; the retiring age for other ranks is also 55. Using prospective service achieves equity between officers and other ranks. It also recognises that officers may have progressed to higher rank with age 55 retirement had invalidity retirement not been necessary.

10.22 Invalidity benefits therefore would represent a substitute for the maximum retirement benefit foregone because of disability. This is the proper and relevant criterion to employ rather than the current basis where benefits have no regard to the period of service which could have been achieved.

10.23 Basing invalidity benefits on actual and prospective service would be particularly appropriate if the ADF is to recruit from older age groups in the future. ADF career members who are retired on invalidity grounds after a significant period of service would receive a larger benefit than those members who enter the ADF later in life and subsequently retire on invalidity grounds. In the DFRDB Scheme the latter are potentially very costly recruits as the employer assumes a liability out of proportion to the potential service to be rendered.

Fig 4 - Source: Chapter 10 – Invalidity Benefits – June 1990 Cole Review – pg. 60