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SUBMISSION TO THE FINANCE AND PUBLIC ADMINISTRATION LEGISLATION COMMITTEE OF THE AUSTRALIAN SENATE

In particular we wish to comment on the impact of the two Superannuation Bills on the rights of former Members of Parliament who may re-enter the Parliament at an election more than three months after their retirement.

PRECIS:

In short, clause 15 of the Amendment Bill is a denial of the right of former Members and Senators to exercise an option to **resume** membership of the current Parliamentary Superannuation Scheme on their return to Parliament as set out under section 20 of the original legislation (1948 as amended). It is a denial of property rights as recognised under section 51(xxxi) of the Australian Constitution. Retrospectivity, negatively affecting the contract of employment and its attendant rights and expectations as set out in the current Superannuation legislation is in breach of the undertaking given by the Prime Minister that former arrangements should be honoured.

We propose that the new Superannuation legislation be restricted only to new Members and Senators entering Parliament for the first time at and after the next election. This is a simple change based on the principle of contract and would affect very few people.

Further, we have some observations to make regarding the adoption of so-called 'community standards', in particular their relevance to MPs and the option to salary sacrifice with an accompanying employer contribution.

THE CASE FOR FORMER MEMBERS TO REMAIN IN THE CURRENT SCHEME

The original Superannuation Scheme was introduced in 1948 to secure a wide range of Parliamentarians from career paths into the uncertainty of politics. Without appropriate entitlements to recruit, retain and reward politicians the people may not be represented by the optimum profile of the community. Furthermore the threat of bribery, such as the promise of a post-parliamentary position for services rendered, a sometime practice of the past when MPs were not paid adequately, may reappear. However, community regard for the current Superannuation Scheme, that it is far too generous, along with over-payment and excessive

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travel rights, is married to their general suspicion and distrust of MPs' behaviour and not based on comparative, objective judgment. An over-reaction, by reducing the Superannuation Scheme for MPs to the minimum community standards may not be in the best interests of quality representative government, notwithstanding that people enter Parliament for a range of reasons, offering as it does the opportunity for a rewarding life of community service along with the attendant status and influence of the position. On the other hand, compared with alternative employment, an MP can be sacked overnight following an election (for no individual fault of his/her own) without compensation, long service leave nor holiday entitlements. Without the superannuation arrangements there is no severance nor redundancy package for retiring MPs.

Section 20 of the Parliamentary Contributory Superannuation Act recognised the perilous career of a politician (who on average serve less than the eight years necessary to qualify for a pension) by providing for 'retired' members who re-enter Parliament to opt for resumption (not a new contract) of their participation in the Superannuation Scheme. This is a condition and expectation of the 'contract of employment' entered into by an MP and it still exists. Clause 15 of the proposed amendments will remove this property right without compensation and will be in conflict with section 51(xxxi) of the Australian Constitution.

Recent amendments to the Superannuation Scheme have recognised that changes should not be retrospective as in the case of those in the Scheme before 2001 not being obliged to observe the change that they must be 55 years of age before being eligible for a retirement benefit and in the current amendments in that they will not apply to current Members and those who 'retire' and are re-elected to Parliament within three months. This latter provision recognises the requirements of the Australian Constitution. Now it seems one amendment, to wit clause 15, will contravene the principle of negative non-retrospectivity in the case of former MPs who re-enter the Parliament, denying their contractual rights to resume (not begin) their participation in the current Superannuation Scheme.

The Prime Minister put our case well when he said in the House of Representatives on the 16th. February, 2004, *inter alia:*

> "It is a fair and reasonable and entirely defensible, indeed well arguable, proposition that people who enter into an arrangement for part of their career on a certain basis are entitled to enjoy the entitlements of that arrangement as they enter into them."

During the debate in the House of Representatives, the Member for Fisher and Parliamentary Secretary to the Minister for Finance and Adminstration emphasised the principle of retrospectivity when he said - "The Government does not support retrospective changes to accrued superannuation. Of course, retrospectivity in most circumstances is a most undesirable

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thing." Towards the end of the debate he stresssed the point again saying that "The government is not prepared to accept any level of retrospectivity with respect to this matter"....."It is in keeping with general practice"....."When Superannuation schemes have been altered in the past, existing members have been grandfathered." We could not agree more, yet we witness moves to contradict this very principle.

Several other Members referred to the fact that the Bill should not be retrospective...that is, for sitting members, conveniently overlooking the fact that their very argument also applied equally to former Members who have the contracted right to resume their scheme on re-entering parliament. The Member for Kingston explained why the amendments would be prospective - "The reason for that is a Constitutional one - the Commonwealth is not able to expropriate people's property or rights without just compensation." We learned also from the Member for Cunningham in that same debate that Superannuation legislation had been amended on more than seventeen occasions before the 2001 amendments and to our knowledge none of those amendments were negatively retrospective in character and implementation This long sequence of Constitutional propriety underlines our case.

It may be argued that few former Members will be involved and that we have are making a mountain out of a mole-hill. But the principle is important just as it was important many years ago when despite the damaging case against the "Bottom of the Harbour Tax Schemes" the Parliament refused, in the face of the evidence and the High Court decision, to introduce retrospective legislation. We understand that two former Members are contesting the next election, both with excellent chances of re-election, after an absence of more than 3 months. Their position and rights should not be jeopardised by the proposed amendments. Nor should they be expected to take the matter to the High Court to prove the obvious flaw in this legislation.

We therefore seek that the amendments to the Superannuation Legislation be altered to ensure the rights of former Members be honoured and the new Scheme be limited to new MPs entering Parliament for the first time.

OBSERVATIONS ON THE CONCEPT OF COMMUNITY STANDARDS

Much has been said about the need to reflect community standards in the new Superannuation Scheme for MPs. However, the proposed scheme with its 9% employer contribution ignores the fact that this is a minimum community standard and that many members of the community receive a multiple of 2 to 4 times the proposed 9%, as in the cases of the Public Service, Academia and the Defence Forces. Furthermore, these are professional occupations with more security, separation benefits and in some cases higher salaries than those received by Members of Parliament. Perhaps the rush by the parties to outbid eachother in the 'dutch auction' may lead to a lower than desirable employer contribution. Also, it may well lead to the need for a

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two-tiered MPs' salary scale to more equalise total MPs' remuneration when current MPs and new MPs sit side by side, an awkward and embarrassing situation.

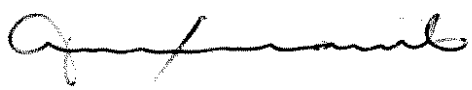
This principle of community standards seems to have been set aside when there is the option for MPs to receive the employer 9% on the portion (up to 50%) of their salary they choose to salary sacrifice. While salary sacrifice is open to the general public the employer is not legally required to pay the 9% towards that sacrifice. Is this not a break with community standards? Furthermore, it is discriminatory in that some MPs, younger, those without alternative incomes, and single or sole-working parents, will not be able to salary sacrifice, while older MPs, those with alternative income sources or without dependants will be able to. Why should the taxpayer subsidise one group more than the other when it is not available to the general public and is discriminatory in operation?

There is a case to be made for the whole matter of MPs' rewards, including salary and superannuation to be again referred to the Remuneration Tribunal. However, it is recognised that the Tribunal is not directly concerned with the benefits and rights of former Members. On another matter, however, when our Association was invited to meet with the Tribunal, it was indicated to us that should the government seek their opinion on the matter of negative retrospectivity affecting benefits of former Members they would advise the same as for current MPs. That is, entitlements should not be dealt with in a retrospective way.

SUMMARY

Being a Member of Parliament is a unique profession with an unpredictable tenancy for many entrants. Their employment package including such factors as superannuation cannot be simply compared with minimum community standards. This is a debateable point, but those same MPs are entitled to enjoy the same safeguards to their employment contracts as other members of the community, protected further by the Australian Government's obligations under the Constitution.

The new legislation, should apply only to new MPs, elected for the first time to ensure that the principle of non-retrospectivity is honoured.



TONY LAMB
(Immediate Past President)

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