Veterans Compensation and Rehabilitation Inquiry

Productivity Commission

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Canberra City ACT 2604

SUBMISSION OF ISSUES INTO THE COMMONWEALTH SUPERANNUATION CORPORATION

Dear Sir

FAMILY LAW – Cessation of Splitting of Military Invalidity benefits.

- The Commonwealth Superannuation Corporation (CSC) is incorrectly reporting Military Invalidity Benefits to the Family Court of Australia. As a result of this, Injured Veterans are being subjected to litigation that is completely unnecessary.

- Military Invalidity Benefits are subject to regular medical review however the benefit is being valued in the Family Courts as a "Defined Benefit Interest". This is then resulting in the Family court splitting disability benefits in favour of the Non-veteran who has no disabilities whatsoever. This split results in the Non-veteran receiving a permanent pension whereas the injured veterans payment remains discretionary.

- Growth phase Military Superannuation interests are also being misrepresented under Family Law without any consideration of the CSC's obligations in relation to the unique nature of Military Service.

-The CSC is valuing the growth phase "Employer benefits" using a formula and disregarding the fact that NO crystallising event has occurred. This valuation results in a value that pertains to the future and not the present time. Family Law splits pertain only to assets acquired during the relationship. CSC's practice also violates the "Clean Split" doctrine of Superannuation Splitting.

Therefore the obvious path would be to take the **Current Balance** at the operative time without the use of actuarial assistance.

-The CSC are also receiving splitting orders containing “Base Amount” lump sums but yet they ignore these orders and apply the “Base Amount” solely to the “Employer benefits” of the Individual. It is a far better outcome for the ADF member to transfer monies, in respect of base amounts, directly from the “Member Benefits” accrued by the individuals. This would also be effective with payment phase “Base Amounts” (providing of course, Member Benefits are still available)

-There can never be a “clean Split”, using actuarial tables, because the contingency benefits arise from the use of the member’s Final average salary whilst in the growth phase. The ex-spouse will end up receiving more than what the “Base Amount” provides and they benefit from the members future earnings as opposed to the assets accumulated during the marriage. This is also detrimental to future spouses and children.

-Since December 2017, Invalidity Beneficiaries are now being topped up under DVA legislation in relation to the offsetting of Invalidity Benefits and incapacity payments payable under the SRCA and MRCA Acts. This policy effectively means that the tax payer is now paying for Military Invalidity benefit splits in the Family Court.

- The Government needs to take a serious look at adding Military Invalidity Benefits into Regulation 12 of the Family Law (Superannuation) Regulations 2001 to prevent the tax payer being out of pocket. This would be in keeping with the discussion and clarification under the “Cole Report 1990” that Military Death and Invalidity Benefits are Insurance and compensation and should be treated as such. Currently the Family courts are reluctant to split Invalidity Benefits as they are well aware that these benefits are subject to regular medical review. The PSS and CSS Schemes currently enjoy provisions in regulation 12.

-The Attorney General stated in 2000 that Insurance Benefits play no part in the Family Law Superannuation Splitting regime.

-As a follow on from the previous points it is ridiculous how the new ADF Cover Act has Family Law Splitting provisions when it is clearly in breach of the Attorney Generals recommendations to the Senate Select Committee

overseeing the introduction of the Family Law Super Splitting. This needs to be remedied immediately.

STOP ILLEGAL GARNISHEEING OF MILITARY INVALIDITY BENEFITS

-The CSC is garnisheeing Military Invalidity Benefits in breach of the Superannuation Industry Supervision Act and Regulations. The common law rights associated with Invalidity Beneficiaries is that the statutory rights to receive payments from consolidated revenue are rights of a proprietary nature. (See Cunningham & Ors v Commonwealth of Australia [2016] HCA 39). Therefore the statutory chose in action rights under the MSBS Act are the property of the Individual Invalidity beneficiaries. In (Asgard Capital Management limited v Maher [2003] FCAFC 156 at paragraph 7) *"The reason why the beneficiary has the right to give such a direction is surely obvious and probably need not be stated. Nevertheless, so that there is no doubt about it, the reason is that the beneficiary is in substance the owner of the property and can deal with it as he likes:"*

- The CSC does not own or hold money on behalf of an Invalidity Beneficiary. See (s13 MSBS Act). The CSC must transfer to the Commonwealth any interest held by the beneficiary and any benefit payable is paid to the person by the Commonwealth.

-That being said, as per (Asgard above at paragraph 8) *"While there is no attempt to restrict the beneficiary's right to deal with his interest, his power of direction is, in a sense, restricted because of the imposition of an obligation upon the trustee not to "recognise" an assignment of, or charge over, the beneficiary's interest……The trustee must nevertheless cash (that is pay) the benefit in favour of the member and not to a assignee or a chargee".*

-We alledge that the CSC is in breach of Regulation 13.16 of the SIS as they are altering the accrued benefits of Injured veterans without seeking permission.

The Injured Veterans therefore demand a cessation of this practice. The CSC are also garnisheeing in respect of payments that they do not administer such the TPI Pension paid under the Veterans Entitlements Act 1986.

- On top of this the CSC is acting upon either a Section 45 notice or Section 72A notice under the CSA Collection Act. The Section 45 notice is specific to superannuation. The veteran community is aware that CSC is garnisheeing not only in respect of the Invalidity Benefits but also Veterans entitlements especially s24 payments under the VEA Act 1986. The s45 notice is ONLY specific to superannuation and not s24 VEA payments. The CSC is not permitted to withhold payments in respect of benefits that they do not administer. A Section 72A notice is invalid with respect to the CSC as s72A notices are specific to third party holders of payments. Under s12 and s13 of the MSBS Act the CSC is required by law to transfer money in respect to Employer Benefits to the Commonwealth. Therefore the CSC is not a third party holder of money on behalf of the Invalidity Beneficiary and so a s72A notice is void at law.

TAXATION

- The CSC is also misreporting Military Invalidity Benefits to the Australian Tax Office. The CSC is failing to adopt s307.145 of the ITAA 1997 when considering the taxation of payments of arrears of Invalidity Benefits.

- See paragraph 15 of (Cooper and the Commissioner of Taxation [2003] AATA 296) *"……..The fact that he was not able until 2000 to achieve that result with benefits backdated to the date of retirement does not, in my opinion, mean that he can be said to have derived those benefits for income tax purposes in the years between retirement and receipt of them…….Paragraph 12……..Employees or former employees are assessable upon the amount's actually received by them in a particular year of income, irrespective of whether some part could be said to relate to another year of income".*

- Payment of arrears is a lump sum payment received in respect of the delay in making an Invalidity Classification of the Veteran. The CSC are taxing these lump sums at the marginal rates however as per the previous point these lump sums should be taxed utilizing the formula at s307.145 because the Lump sums are for disability.