

VETERANS AND THE AUSTRALIAN TAXATION OFFICE (ATO) – BASIC FACTS

Background.

Veterans medically discharged from the ADF, including those with mental wounds and at risk of self-harm, may receive Disability Benefit payments from the Commonwealth Superannuation Corporation (CSC) which manages the military superannuation schemes. These benefits are similar to those of Total and Permanent Disability insurance benefits associated with civilian superannuation schemes.

Benefit payments are reviewed up to age 55 years and can go up and down between CLASS A (about 70% of previous salary), Class B (half Class A) and Class C (0%). They are not lifetime pensions. The Australian Taxation Office (ATO) taxes the Disability Benefits as ordinary income treating the payments as a non-variable “Income Stream” rather than as a super fund disability benefit which can attract a lower tax rate.

The Veterans’ Question.

The Superannuation Industry (Supervision) Regulations (SISR) 1994 Reg1.06 defines criteria to determine the legal nature of payments. If the payments do not meet all the criteria as a pension, by default, they can end up being classed as lump sum disability benefits. For over 5 years, Veterans have requested CSC and the ATO to answer the question, “Which specific criteria in SISR 1.06 are being applied to define our payments?” It is a basic right of all Australians to know what law is being applied to their situation.

The ATO Breach of Taxpayers Charter and Model Litigant Principles

Both CSC and ATO have used every dodgy practice in the book to avoid answering this question. At times, each claimed the other was responsible. Since 2015, Private Ruling requests (requiring answers within 28 days) were unanswered for over 18 months. Then ATO encouraged the Veterans to change their Private Ruling requests and utilize a “loophole” in law to reduce tax thereby effectively cancelling their original Private Ruling requests on SISR 1.06. The faceless bureaucrats deliberately and callously did not inform the Veterans that the offered “loophole” was closing and the extra cash would cease. Some Veterans and their families suffered from financial over commitment as a result. In response to a Senate Estimates hearing question on notice, faceless bureaucrats even got away with a classic “Yes Minister “answer.

A Chance for the Rule of Law.

In May/June 2018, three veterans got the ATO to the Administrative Appeals Tribunal (AAT). On 1 June 2018, one of the points the ATO was arguing developed a “fatal flaw”. The ATO Senior Counsel requested a lengthy adjournment to assess the possible wide implications of the deficiency. Justice Logan reluctantly granted an adjournment until 12 December 2018 and stated he was concerned the ATO may attempt to introduce retrospective changes to the law to overcome the legal flaw in this particular ATO argument.

The Faceless Bureaucrats Strike.

The faceless bureaucrats of ATO and Treasury immediately started working on a fix. On 7 December 2018, the Assistant Treasurer issued a Media Statement announcing several changes to taxation related Regulations. Usually, retrospective changes to Regulations come into effect from the date of tabling, but do not effect rights of citizens to their disadvantage. After a defined period of time, the changes become law unless either House of parliament passes a Disallowance Motion.

In this case, the Australian Government Solicitor (AGS) and the ATO advised the Veterans that the changes, backdated to 2007, would affect their cases before the AAT. Due to limited sitting times and the election, there has been no time for a Disallowance Motion – yet.

The Faceless Bureaucrats Strike Again.

The Explanatory Statement informing Parliament hides the relevant change amongst innocuous changes to four other different Regulations and refers to the miscellaneous changes as a tidy up exercise, however:

- For other retrospective changes, it states the start of the changes does “*not affect a relevant person’s rights so as to disadvantage the person, or impose a relevant liability on that person.*” (**The principle.**)
- No such statement was made regarding retrospective changes affecting the Veterans. It implies it is just a minor tidy up exercise. (**Deception**). There is no mention that the retrospective change takes away a person’s rights so as to disadvantage that person in the middle of a court case. (**Falsehood by Omission.**) There is no mention that the Judge expressed concern that the ATO may try to change the law so that it effects the cases being heard.
- The statement claims, “The Regulations were released for public consultation from 22 October 2018 to 2 November 2018.” The public record indicates no such consultation was made for the specific change to Regulations affecting the Veteran cases before the courts. **The statement is false.**

Hearing Resumes 12 December 2018

The Hearing was advised that the AGS and ATO legal teams dealing with this case were only made aware of the changes and backdating on 7 December. (Some public consultation?). Justice Logan gave directions for the ATO to inform the Veterans on the impacts and set a timetable for further submissions to be made.

DFWA Representation (7 February and 11 March 2019 and the Minister’s Response (Received 16 April)

In response to DFWA representations, Stuart Robert, the Assistant Treasurer, denied the changes were targeted at the veterans (FOI evidence says otherwise). The reply did not address the false claim of public consultation nor the Judge’s concern of the ATO action. It did not address the legal principle raised by DFWA of not changing laws *to disadvantage the person or impose a relevant liability on that person* in middle of a court case, as per the Explanatory Note issued with the changes. It did thank Veterans for their service, presumably for protecting democratic principles and rule of law.

What Now?

A judicial decision is not expected until November 2019.

There will be limited time after the election for the Senate or the House of Representatives to pass a Disallowance Motion negating the retrospective changes affecting the case being heard.

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