DFRDB UPDATE - JANUARY 2020

Hi All,

In November last year we put the following contention to Levitt Robinson Solicitors (who mounted a successful appeal on behalf of 300 former trainee marine technicians) and Barrister Allan Anforth and sought an opinion regarding the potential for a legal challenge:

1.   *That the outcomes of the ordinary meaning conveyed by the text of the Commutation and Pension Increases provisions in the DFRDB Act:*

     a.   *Are not consistent with the intent expressed, by the Governments of the day, when the legislation was enacted;*

     b.   *Discriminate against members of the DFRDB scheme; and*

     c.   *Cause inequitable financial detriment to DFRDB beneficiaries, discriminating by age, gender, time of retirement and time of death.*

2.   *The use of static expectation of life factors, to determine the proportionate reduction of retirement pay after commutation, has transformed the Commutation arrangement from one that may have been seen to be equitable and even generous in 1973 into one that is manifestly inequitable today.*

3.   *The Pension Increases provisions have failed to maintain the relativity of DFRDB pensions because:*

     a.   *Indexation increases are not applied to the full amount of DFRDB pensions paid from the Consolidated Revenue Fund, as they are in other contemporary Commonwealth superannuation schemes;*

     b.   *The Consumer Price Index long ago ceased to be a valid measure of the increase in the cost of living.*

That contention was put in a 74 page brief, prepared by Herb, which provided irrefutable proof of the discriminatory and inequitable outcomes.

The response from Allan Anforth and Stuart Levitt was consistent and unequivocal, in that:

1.   The Australian Constitution confers on the Parliament the right to make laws.

2.   But while in countries such as the USA a Bill of Rights or equivalent gives its citizens the right to challenge laws which are discriminatory or inequitable, the Australian Constitution affords its citizens no such right, whatsoever.

3.   The remedy of bad legislation is a prerogative of the Parliament.

4.   Even though we have irrefutable evidence that the DFRDB Act is discriminatory and inequitable, a legal challenge cannot succeed because, at Law, that evidence is inadmissible.

We wish to express our gratitude to Stuart Levin and Allan Anforth for providing their advice pro bono. In particular, to Allan Anforth, who analysed Herb's brief, the Ombudsman's report and [2001] AATA 599 (*Reynolds vs Defence Force Retirement and Death Benefits Authority*), in addition to devoting his time to a meeting with Herb in his Canberra chambers.

This is a major disappointment as we incorporated the Australian Defence Force Retirees Association in preparation for a potential legal action and, through a small membership fee to this incorporated Association, to recover some of the costs we have already incurred and are likely to incur in taking this fight back to the politicians, because the remedy of the inequities in the DFRDB scheme can only occur through the amendment of the DFRDB Act.

We also submitted the brief we put to Allan Anforth and Stuart Levitt to the Ombudsman's investigation team with an expectation that these concerns, which were outside the Inquiry's terms of reference, would be acknowledged in the Ombudsman's report.

But, as all who have read the Ombudsman's report would know, no such acknowledgement was included.

We consider that acknowledgement to be important and because some of the Ombudsman's findings are based on flawed assumptions and irrelevant modelling, we will request a review of the Ombudsman's decision.

We will shortly make appropriate changes to our web site in respect of our incorporation and after we have received a response from the Ombudsman will advise our approach to the politicians.

We may be disappointed but we are not finished.

Regards,

Jim and Herb