IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S140 of 2015**

BETWEEN: **BARRY THOMAS CUNNINGHAM**
First Plaintiff

DR ANTHONY HAMILTON LAMB OAM
Second Plaintiff

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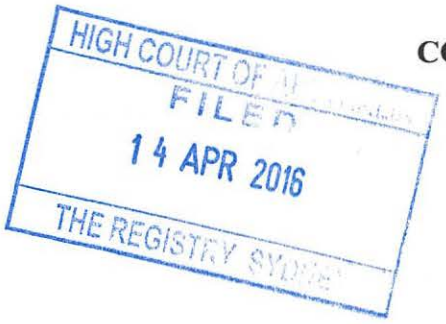
THE HONOURABLE JOHN COLINTON MOORE AO
Third Plaintiff

THE HONOURABLE BARRY COHEN AM
Fourth Plaintiff

AND:



COMMONWEALTH OF AUSTRALIA
First Defendant

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REMUNERATION TRIBUNAL
Second Defendant

PLAINTIFFS' REPLY SUBMISSIONS

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Part I: Internet Certification

1. The plaintiffs certify that this submission is suitable for publication on the Internet.

Part II: Reply

Retiring allowances under Superannuation Act

2. At the outset it should be noted that a consequence of the Commonwealth's arguments is that the benefits payable under the Superannuation Act are capable of being extinguished entirely, so that a current member of Parliament who has been making superannuation contributions for 30 years could receive nothing upon retirement – not even a refund of his or her contributions (let alone a return on those contributions). In the plaintiffs' submission, that consequence immediately casts doubt on the validity of the Commonwealth's arguments.

3. The Commonwealth's arguments overlap and conflate a number of distinct issues. When disentangled, it can be seen that the Commonwealth advances four distinct arguments:

   (i) *First*, legislation enacted under s 51(xxxvi) of the *Constitution*, when read with ss 48 or 66, is not subject to the operation of s 51(xxxi): CS [38], [57]–[65].

   (ii) *Secondly*, the plaintiffs' rights under the Superannuation Act are not, and were never, property: CS [45].

   (iii) *Thirdly*, even if the plaintiffs' rights were property, the impugned legislative provisions did not effect an acquisition of that property: CS [89]–[91].[1]

   (iv) *Fourthly*, even if the impugned provisions did effect an acquisition of the plaintiffs' property, s 22T of the Superannuation Act provided just terms: CS [93].

First argument: operation of s 51(xxxi) in respect of s 51(xxxvi) read with ss 48 or 66

4. The Commonwealth's first argument conflates two issues. The first is whether s 51(xxxvi) lies wholly outside the scope of the protection conferred by s 51(xxxi), by reason of the fact that s 51(xxxvi) is engaged only with respect to matters in respect of which the *Constitution* makes provision "until the Parliament otherwise provides". The second is whether the nature and subject matter of s 51(xxxvi), when read with ss 48 and/or 66, is necessarily incongruous or inconsistent with the provision of just terms for any acquisition of property pursuant to a law enacted under that head of power.

5. The first issue is answered by the decisions in *ICM Agriculture v The Commonwealth*[2] and *Wurridjal v The Commonwealth*.[3] The conclusion of four members of the Court in the former case was that s 96 read with s 51(xxxvi) was subject to s 51(xxxi).[4] The

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[1] The Commonwealth also argues that the impugned provisions are not laws with the respect to the acquisition of property (CS [92]) but the argument is wholly derivative on the second and third arguments.
[2] (2009) 240 CLR 140.
[3] (2009) 237 CLR 309.
[4] (2009) 240 CLR 140 at [31]-[46] per French CJ, Gummow and Crennan JJ (Heydon J agreeing at [174]). The other members of the Court did not decide the question, but gave no support to the view that s 96 was unconstrained by s 51(xxxi): see at [136]-[141] per Hayne, Kiefel and Bell JJ.

conclusion in the latter case that s 122 of the *Constitution* is subject to s 51(xxxi)[5] applies *a fortiori* to s 51(xxxvi). Contrary to what appears to be argued at CS [57]–[58], the mere fact that s 51(xxxvi) only operates in respect of matters where the *Constitution* makes provision "until Parliament otherwise provides" does not mean that a law enacted under s 51(xxxvi) is not subject to s 51(xxxi). *All* heads of legislative power leave it up to Parliament to determine the content of legislation: cf CS [58].

6. The reasoning in *ICM* is also against the Commonwealth on the second issue, given the nature of s 96. There is nothing to support the notion that all laws conferring pension or superannuation benefits on former members of Parliament are necessarily incongruous or inconsistent with the provision of just terms. The Commonwealth's argument on this point hinges solely (see CS [59]–[63]) on the assertion that the Parliament may alter or abolish the annual allowances and salaries payable to *current* members and Ministers. But the allowances and salaries to current members and Ministers are in the nature of future (unearned) wages and salary, which are not property,[6] and hence outside the scope of s 51(xxxi). Thus, acceptance of the Commonwealth's assertion says nothing about whether s 51(xxxi) applies to the acquisition of property granted under s 51(xxxvi), read with ss 48 or 66.

7. More generally, the laws to which the guarantee of just terms has been said not to apply – such as laws concerning taxation, bankruptcy, the exaction of penalties and forfeitures[7] – are ones where the nature and subject matter of the head of power relied upon is *necessarily* inconsistent with the provision of just terms. Sections 48 and 66, read with s 51(xxxvi) are concerned with the grant of valuable benefits, not their destruction. Consistently with the beneficial construction to be given to a constitutional guarantee, there is nothing in the nature of ss 48 and 66, read with s 51(xxxvi), to suggest that all property conferred under those sections lies outside the protection of s 51(xxxi). Accordingly, the Commonwealth's first argument should be rejected.

Second argument: property

8. The Commonwealth's submissions concerning the second argument are based on a number of misconceptions. Its submissions should be rejected for the reasons below.

9. CS [47]–[52] attack a straw man. The plaintiffs do not assert the existence of multiple bundles of rights. From the time of entering or reentering the Parliament each of the plaintiffs has been the holder of a single bundle of statutory rights entitling him to recover money from the Commonwealth (i.e. a statutory chose in action). That bundle of rights is property within the meaning of s 51(xxxi).[8] PS [49]–[52] focus on the issue of vesting and explain how that bundle of rights matures from a vested right to receive money in the

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[5] (2009) 237 CLR 309 at [55], [73]-[81] per French CJ, [175]-[189] per Gummow and Hayne JJ, [283]-[288] per Kirby J; see also at [456]-[460] per Kiefel J.

[6] See *Victoria v The Commonwealth* (1996) 187 CLR 416 at 559 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

[7] See *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372 per Dixon CJ (the other members of the Court agreeing) (bankruptcy); *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at [77] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ, [110]-[112] per Gageler J.

[8] See *Telstra Corp v The Commonwealth* (2008) 234 CLR 210 at [44] per curiam and the cases cited at PS [33]. The fact that s 24 made the rights non-assignable does not alter that conclusion: cf CS [70]. See generally *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342-343 per Mason J ("Assignability is not in all circumstances an essential characteristic of a right of property. By statute some forms of property are expressed to be inalienable.")

future (a presently existing chose in action) at the time of entry into Parliament, into a presently payable debt at the time of leaving Parliament.

10. Further, contrary to CS [53], there is no difficulty whatever in the conclusion that each of the plaintiffs' bundle of rights may be varied by amendments to the Superannuation Act *which do not involve an acquisition of property other than on just terms.* As noted at PS [40], *all* statutory rights are subject to *valid* legislative modification. The question is whether a particular modification effects an acquisition of property other than on just terms.

11. The balance of the Commonwealth's submissions on this argument – which identify five considerations said to support the argument (see CS [56]–[87]) – in fact have nothing to do with whether something is "property" within s 51(xxxi).

12. The first of the five considerations concerns why ss 48 and 66 are said to lie outside the scope of s 51(xxxi): CS [57]–[65]. That argument says nothing about the identification of property. It should be rejected for the reasons above.

13. The second, third, fourth and fifth considerations are all directed to arguing that the rights under the Superannuation Act are "inherently defeasible": CS [66]–[86]. However, as the reasoning of six members of the Court in *Health Insurance Commission v Peverill*[9] demonstrates, those considerations are not relevant to whether something is property. These matters are properly to be considered in determining whether or not there has been an "acquisition" of property. Each of these four considerations is addressed below in relation to that issue.

Third argument: acquisition of property

14. The Commonwealth appears to advance five reasons why there is no "acquisition" of property in the present case:

    (i) The rights under the Superannuation Act are said to be entirely defeasible: CS [66]–[72].

    (ii) Section 18 of the Superannuation Act is said inevitably to require modification over time: CS [73]–[77].

    (iii) The benefits payable under the Superannuation Act are wholly a creature of statute: CS [78].

    (iv) The benefits payable under the Superannuation Act are said to be gratuitous in nature: CS [79]–[86].

    (v) It is alleged that the impugned provisions and determinations did not confer an advantage of a proprietary kind on the Commonwealth: CS [91].

15. In relation to the first reason, the Commonwealth's submissions are answered at PS [61]–[64]. Further, CS [72] improperly reverses the onus. As explained as PS [38]–[43] it is for the Commonwealth to establish that the rights in question were subject to a condition

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[9] (1994) 179 CLR 226 at 235 per Mason CJ, Deane and Gaudron JJ, 249 per Dawson J, 256 per Toohey J, 263-264 per McHugh J. See also *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [30].

permitting complete extinguishment, not for the plaintiffs to establish that the rights were not subject to such a condition.

16. The Commonwealth's second reason fails to deal with the point made at PS [43]. Contrary to CS [73], Crennan J's reasons in *Wurridjal*[10] in truth demonstrate the fact that property may be subject to *some* kinds of condition, and hence subject to *some* kinds of modifications over time, does not mean that the property will be subject to *all* conditions and therefore *all* modifications. CS [75]–[77] are irrelevant. The plaintiffs do not assert that the parliamentary allowance may not be decreased. Changes to the parliamentary allowances are reflected in the retiring allowance payable.

17. The third reason – namely that the benefits payable under s 18 are wholly a creature of statute – is also irrelevant. The authorities are plain that the mere fact that a right is statutory says nothing about whether it is subject to defeasance: see PS [38]. The fact that there may be numerically more cases where it is concluded that a statutory right is subject to defeasance says nothing about the particular statutory rights in issue.

18. The fourth reason relies on an artificial definition of the word "gratuitous", namely not pursuant to a formal contract or agreement with the Commonwealth: see CS [79]. Such a definition improperly elevates form over substance.[11] The ordinary meaning of the word "gratuitous" is "given or obtained for nothing; not earned or paid for; free".[12] On any ordinary understanding of the word, benefits payable under the Superannuation Act are not gratuitous.

19. Contrary to CS [81], the fact that the making of contributions is not *expressed* to be a condition precedent to the payment of retiring allowance does not deny that as a matter of *fact* it is a condition precedent. Further, the Commonwealth's comparison between the amount of contributions and the amount of payments at CS [81]–[82] is disingenuous, since it takes no account whatever of inflation, the return on investment which the member could have derived on his or her contributions, or the benefit to the Commonwealth from the use of the contributions. Moreover, it is to be expected that members receive more in benefits than their contributions, otherwise there would be no point in making superannuation contributions at all. The Commonwealth's submissions on this matter are entirely unreal.

20. It has been orthodox[13] for at least the last 350 years to speak of members of Parliament having duties and providing services in Parliament: cf CS [85]. As a matter of substance, the benefits payable under the Superannuation Act are in consideration for those services. That reinforces the conclusion that the rights in question are not "inherently defeasible"[14]: cf CS [86].

21. The Commonwealth's final reason (CS [91]) – namely that the Commonwealth did not acquire an identifiable advantage of a proprietary kind by reason of the impugned provisions and Determinations – is fatuous. But for ss 7(1A), 7(1B) and 7(2A) of the RT

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[10] See (2009) 237 CLR 309 at [412]-[413], [441], [443].

[11] See *Telstra Corp v The Commonwealth* (2008) 234 CLR 210 at [43] per curiam, and the cases cited; *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [43]-[44] per French CJ, Gummow and Crennan JJ.

[12] L Brown (ed), *The New Shorter Oxford English Dictionary* (Clarendon Press, 4th ed, 1993), p 1135.

[13] See *R v Boston* (1923) 33 CLR 386 at 399-402 per Isaacs and Rich JJ and the many authorities cited there. See also *McCloy v State of New South Wales* (2015) 89 ALJR 857 at [170]-[171] per Gageler J.

[14] See *Theophanous v The Commonwealth* (2006) 225 CLR 101 at [7] per Gleeson CJ.

Act and the determinations made under those provisions, the Commonwealth would be paying the plaintiffs *more* money.[15] The evidence shows that the focus of the legislative changes in 2011 to the RT Act was to allow the Remuneration Tribunal to independently determine parliamentary base salary with reference to a work value assessment of parliamentary remuneration.[16] The Remuneration Tribunal conducted that assessment and determined that the parliamentary base salary should be $185,000,[17] $38,620 *more* than the amount used for the purposes of calculating retiring allowances: see PS [19]–[20]. Thus, the direct effect of the impugned determinations was to alleviate the Commonwealth from a liability to pay money to the plaintiffs which it would otherwise have had: cf CS [20], [90]–[91].

Fourth argument: just terms

22. The fourth argument – which tellingly formed no part of the Commonwealth's defence – may be dealt with shortly. On its terms, s 22T has no operation unless there is a decrease in the rate of an underlying payment (most relevantly parliamentary allowance): see s 22T(1). As the Commonwealth itself submits (see CS [19], [90]) the rate of parliamentary allowance was not reduced. Further, s 22T does not ensure that retired members receive what, but for the effect of the impugned provisions, they would receive from the Commonwealth. Hence, even if s 22T applied, it could not provide just terms.

Life Gold Pass

23. Almost all of the Commonwealth's submissions concerning the Life Gold Pass are similar to those concerning the Superannuation Act (see CS [95]–[96], [100]–[105]) and have already been addressed above and at PS [66]–[69]. The only additional argument is the argument (CS [97]–[99]) that because the Tribunal may make determinations under s 7(1) "from time to time", and because certain determinations are subject to disallowance under s 7(8), the rights created by s 7(9) of the RT Act are defeasible in nature. The reference to "from time to time" in s 7(1) merely removes any doubt that the Tribunal has an ambulatory power to make determinations on certain topics. It does not support the view that property rights created under s 7(9) once vested or accrued are subject to a condition permitting defeat at any time. Nor is s 7(8) of relevance. The power of disallowance is only exercisable within 15 sitting days after the determination is laid before the relevant House. Further, if a determination is disallowed the determination never comes into operation, so there is never any vested property right at all.

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[15] The determinations of parliamentary base salary and additional parliamentary office holder salary are separate extant determinations made under s 7(1) of the RT Act. Total Ministerial salary is provided for directly by s 5 of the *Ministers of State Act 1952* (Cth).

[16] See Committee for the Review of Parliamentary Entitlements, *Review of Parliamentary Entitlements* (2010) (Belcher Review) (BD, Vol 5, p 1723); Senate Finance and Public Administration Legislation Committee, Report on Remuneration and Other Legislation Amendment Bill 2011, June 2011, [1.7]-[1.18] (BD, Vol 5, pp 2125-2128).

[17] Remuneration Tribunal, Review of the Remuneration of Members of Parliament: Initial Report, December 2011: BD, Vol 5, pp 1838-1839.