Mr Barry Cunningham,
President, AFMPA,

Thursday, 16 February 2012

Senator Helen Polley,
Chairperson,
Senate Legislation Standing Committee on Finance & Public Administration
Parliament House
Canberra

Dear Senator Polley,

INTRODUCTION

The Association of Former Members of the Parliament of Australia appreciates this opportunity to provide a written submission to the Senate Legislation Committee on Finance and Public Administration regarding its Inquiry into the Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012.

Given the voluntary nature of our organisation, combined with the limited time within which submissions have been required by the Committee, this submission may not fully develop all of the issues which we seek to address. Hence, we believe that it is important that the Committee give representatives of our Association the opportunity to appear before the Committee to explore further these issues and to respond to questions from the Committee, even if that be at only a brief hearing to fit Committee members' busy schedules.

Our submission is based on the limited amount of research we have been able to undertake in the few days since being alerted to this legislation and Inquiry but we believe our facts, findings and conclusions to be accurate.

Our Association particularly welcomes this opportunity to submit, as it appears that decisions taken and legislation passed during the last twelve months or so impacting on retired Federal parliamentarians have occurred largely in a vacuum as far as any consultation with or input from those most affected, the retired parliamentarians, are concerned. Therefore, of necessity, this submission relates also to those decisions, both in isolation and because they are relevant to the legislation under consideration.

BACKGROUND

The background to those decisions and the current legislation is the so-called Belcher Inquiry and Report which dealt principally with the remuneration of Federal parliamentarians in relation to both salary and other allowances, such as those which are expense related, including Electorate Allowance, Travel Allowance, motor vehicle, overseas study, etc.

Our Association made a brief submission to the Belcher Inquiry after belatedly becoming aware of it and requested to appear before it but were denied that opportunity.

Among other things, the principal recommendations of the Belcher Inquiry were that:

(1) there should be a substantial increase in parliamentary salary in recognition of work value and previous recommended increases which various governments had overturned.

(2) other allowances intended to cover the expenses necessarily incurred in the work of being a parliamentarian, such as Electorate Allowance, Travel Allowance, vehicle, overseas study, etc., should be aggregated into a total monetary amount and folded into the salary so that, in effect, the salary would become a global amount, with expenses to be deductible on the usual substantiated, work related expenses basis.

(3) the Life Gold pass should be abolished.

(4) henceforth, parliamentary remuneration should be determined completely independently by the Remuneration Tribunal.
(5) so-called "windfall gains," arising from the folding in of expenses to salary, should not accrue to retired or future retiring parliamentarians receiving the "old" 1948 Act parliamentary superannuation.

The Government and Opposition responded favourably to the Belcher Report and in March 2011, the House of Representatives passed the Remuneration and Other Legislation Amendment Bill, principally which restored to the Remuneration Tribunal the power to determine parliamentary salaries and allowances, as against the immediately preceding procedure of linking salaries to Public Service salaries. The Bill removed also from Parliament the power to disallow Tribunal Determinations.
During the debate on that Bill in the Senate in June 2011, at the Committee stage, the Government introduced further amendments to "delink" so-called "Base Salary" from "Parliamentary Allowance" to allow the Remuneration Tribunal to prevent "windfall gains" identified in the Belcher Report from flowing through to the superannuation of retirees eligible for the 1948 Act superannuation provisions. These amendments passed with Opposition support.

In December 2011, the Remuneration Tribunal published a Report, under its restored powers, confirming its intention to implement the Belcher recommendations. Following a detailed work value study , the Tribunal proposed an increase of $45,000 per annum in Backbenchers' salaries and proportionate increases in Ministerial and office-holders salaries but also deferred its formal Determination pending the passing of the legislation which is the subject of this submission and Committee Inquiry, which extends the "delinking" to the additional salaries of Ministers and office-holders.
However, as will be explained in more detail later in this submission, the Tribunal, quite contrary to the Belcher recommendations and the stated intention of the Government, reported also its intention to use that "delinking" provision to excise more than $38,000 of the $45,000 from the "Base Salary" to be used to determine the annual superannuation entitlement under the 1948 Act, allowing only that component apparently previously not implemented by the Rudd Government to flow through for the purpose of superannuation calculations.

An understanding of this history is key to the Committee's consideration of the legislation before it.

DELINKING "BASE SALARY" FROM "PARLIAMENTARY ALLOWANCE"

Turning to that legislation, the component before the Committee allowing the Remuneration Tribunal to "delink" a portion of future increases in Ministerial and office-holders' additional salaries must be considered in the context of the "parent" legislation, the Remuneration and Other Legislation Amendment Bill, as amended and passed in the Senate in June 2011, to provide "delinking" of Backbenchers' salary increases.

Prior to becoming aware of that legislation, which only occurred when we became aware of and commenced working on this submission for the legislation at hand, the Association had decided at its May 2011 AGM to address Association members' concerns regarding the Department of Finance and Deregulation's definition of, and in fact, the creation of the term "Base Salary," as the Allowance payable to a Backbencher for the purpose of calculating their superannuation entitlement.

In particular, our members identified various non cash benefits that had been introduced over the years as an alternative to the more politically sensitive salary increases recommended by the Tribunal. Over the last three decades and with the advent of the Fringe Benefits Tax, parliamentarians, including those on your Committee, have received annually, a Declaration from the Department of Finance and Deregulation, informing them of the sums involved and requiring

them to sign and return the Declaration, as confirmation of its accuracy. Such items include motor vehicle, home telephone and internet connection, spouse travel, etc.

This documentation also advises that whilst these payments do not attract Income Tax in the name of the individual, they will be added to their Gross Salary for the purpose of calculating other taxes and charges such as the Medicare Levy, the now discontinued Superannuation Surcharge (which coincidently, has created considerable financial difficulty for many parliamentarians of that era, and if not paid annually, is a first charge against any Superannuation Entitlement), eligibility for Family Tax Benefit, etc.

The irony of this situation should be considered by the Senate Committee.
The Superannuation Surcharge was calculated upon salary, including all Fringe Benefits.
However, the payment of superannuation is not calculated to include that Fringe Benefit value.
As a consequence of these concerns, our Association obtained *legal advice* by way of formal Opinion from Hon. Bob Ellicott QC, which is attached, along with an example of the departmental correspondence referred to above.

Whilst the addressee of this correspondence has agreed to his name remaining for purposes of authentication, it is requested that the name and address be deleted for purposes of publication.

Issues arising from this opinion make it clear that there are strong doubts over the Department's analysis of the legislation both legally and morally in excluding Fringe Benefits, otherwise referred to as Salary Sacrifice, from the so called Base Salary (a term Ellicott did not find in the Act).
It is therefore the opinion of our Association that, since at least the introduction of the Fringe Benefits Tax, all superannuation payments made to retired parliamentarians have been underpaid to the extent that such Fringe Benefits have been declared. Legal opinion from such an eminent source cannot be ignored and this issue alone demands a favourable response from this Senate Committee, the Remuneration Tribunal and the Government to the recommendations regarding superannuation we make in this Submission.
The Committee might inquire of the private sector as to how it deals with Salary Sacrifice in relation to superannuation contributions, both compulsory and voluntary.

In the light of the above, the Association has presented this information to the Minister and the Leader of the Opposition and your Committee's Inquiry provides an excellent opportunity to seek their responses. More particularly, your Committee has the opportunity to question Officials of the Department of Finance and Deregulation, both as to the details and quantum of the Fringe Benefits reported and just how they have ignored the Salary Sacrifice involved.

An even more significant issue is that the Remuneration and Other Legislation Amendment Bill 2011, to which reference has been made already, was amended in the Senate, some three months after it passed the House of Representatives, to provide a "delinking" of Base Salary from Parliamentary Allowance for the purpose of determining the portion of current parliamentarians' salary to which the years of service based percentage is to be applied to determine the annual superannuation payable to retirees under the 1948 Act superannuation provisions.
As earlier reference indicates, this legislation may be regarded as the "parent" legislation of the current Bill and therefore, is relevant to the Committee's current Inquiry. In particular, the key provision of that legislation is that the Remuneration Tribunal may determine that a portion of parliamentary base salary is not parliamentary allowance for the purposes of superannuation under the 1948 Act. In other words, it gives the Tribunal the discretion to determine those amounts that do not form part of salary for determining benefits under the 1948 Act.
Although the Senate Committee inquired into this legislation, as transmitted originally from the House of Representatives, unfortunately it appears not to have sought input from our Association.

More importantly, there was no Inquiry into the "delinking" amendments introduced in the Senate after the Committee had reported.
Never-the-less, so far, so good.

However, it is incontrovertibly, unarguably the case that the "delinking" was only ever intended to apply to allowances which are intended to be "folded in" to salary at some future time.
The "delinking" was never intended to apply to salary increases relating to a fair or work value assessment and Determination by the Remuneration Tribunal of what the parliamentary salary should be without any folding in.

The Belcher Report, the Explanatory Memorandum relating to the "delinking" amendments and the Minister's Senate Speech introducing the "delinking" amendments, all refer to preventing a "windfall gain" to retirees under the 1948 Act but WITHOUT EXCEPTION specifically describe such a "windfall gain" as arising from the folding in to parliamentary salaries of allowances, such as Electorate Allowance, Travelling Allowance, motor vehicle, overseas study travel, etc.

Our Association agrees entirely that if the 1948 Act retirees' superannuation calculations included these folded in components, then they would receive an unjustified "windfall gain" and agree that those folded in components should be "delinked." These amounts of money are provided to cover expenses incurred in doing the job. By and large, those expenses cease when one is no longer a parliamentarian.
However, in this context, the irony should not be ignored that reference to this "delinking" appears only to refer to the 1948 Act beneficiaries. If, at some future date, as the Remuneration Tribunal intends (refer also to comments later in the submission on this aspect), these expenses are folded in, it appears that the Government percentage contribution to the post-2004 accumulation superannuation scheme will include that folded in component and flow through to the superannuation of post-2004 scheme beneficiaries, despite that retirement ends those expenses.

This simply serves to reinforce that nowhere in the Belcher Report, the Explanatory Memorandum or the Minister's Speech is it even remotely suggested or even hinted that a salary increase relating to work value should be "delinked" for the purpose of calculating superannuation for 1948 Act retirees.

Our Association will not concede on or resile from this clear fact.

Hence, the consequences of the passage of the Bill before the Committee will be the perpetration by the Remuneration Tribunal of a giant "con" directly and unfairly detrimental to the welfare of retirees under the 1948 Act.

It is a fact that various governments of the day over the years have not implemented a number of previous salary increase recommendations from the Tribunal. In his Second Reading Speech on the "parent" Bill, the Minister identified a selection of these – 1975,1979,1981,1982,1986,1990. By and large, any salary increases subsequent to each of those not implemented were made simply from the then applying salary, without adding in any catch up for those not previously implemented. Therefore, quite apart from any work value analysis, the current Backbench salary of $140,000 is significantly behind where it would have been, had those previously recommended increases been implemented, especially in current "real dollar" terms. It may be a useful exercise to calculate in 2012 dollars the aggregated, cumulative real value of those increases denied over the years. It may prove to be a significant amount to be hypothecated against the proposed $45,000 increase.
However, it is also the case that, to the extent that the Tribunal regards the proposed $45,000 increase as arising from the work value study, rather than catch up, that work value has not just suddenly occurred or increased. It has been there for many years, albeit unrecognised and underpaid. Even emails are not a recent phenomenon.

In its December 2011 Report, the Remuneration Tribunal announced:
(1) a work value study based salary increase of $45,000, increasing the Backbench salary to $185,000 with proportionate additional increases for Ministers/officeholders.
(2) an intention, in the future, additionally to fold in to the salary what the Tribunal now terms "Business Expenses" i.e. Electorate Allowance, Travel Allowance, vehicle, etc. The Tribunal says more analysis needs to be done of these "Business Expenses" before they proceed with that fold in.
(3) it would apply the "delinking" legislation to prevent approximately $38,000+ of the $45,000 increase being applied to the calculation of the 1948 Act retirees' superannuation, allowing only the component previously overturned by the Rudd Government to flow through.
(4) its formal Determination of the new salary would not occur until passage of this Bill "delinking" Ministerial and office-holders' salaries.

It is clear that no valid argument can stand against the claim that items (3) and (4) above are grossly unfair to 1948 Act retirees and directly contrary to the stated intention of the "parent" and this "delinking" legislation. Indeed, given the the requirement in the Acts Interpretation Act that legislation is to be applied in accord with the Explanatory Memorandum and the Minister's Speech on the legislation, the proposed Determination of the Remuneration Tribunal is "ultra vires."

Based on those documents alone, it is clear that the $45,000 salary increase proposed is not a "windfall" as those documents define a "windfall," which is the potential impact of folding in Business Expenses to the salary. That $45,000 is clearly a warranted salary increase, whether determined by work value alone or a work value/thirty-five year catch up combined. There is no element of Business Expense folded in to that increase.

It is reasonable to argue that many past parliamentarians continued serving, notwithstanding lack of salary recognition, in the hope that one day a government would ensure better salary justice and even if that did not occur during their period of service, at least when it did occur, it would flow through to their superannuation. Hence, quite apart from the proposed $45,000 increase not being a "windfall" in the terms of the "parent" or this legislation, neither is it a "windfall" in moral or ethical terms. On the contrary, it is a deferred payment, well and truly overdue, now to be received as superannuation.

It not being a "windfall" is reinforced by the fact that it appears that currently serving parliamentarians who were elected prior to the 2004 election and therefore remain eligible, on eventual retirement, for the 1948 Act superannuation, will receive the full $185,000 new salary. A number of those may serve for another 10, 20 or more years. In other words, for half to two-thirds of their period in Parliament, they will receive the full benefit of the higher salary, for years denied their now retired colleagues, but on retirement will also receive what is, apparently, regarded as a more generous superannuation scheme than the new one and which may be the unspoken reason for the Tribunal seeking to behave in an ultra vires manner and apply the "delinking" legislation in a way never intended. If allowing the $45,000 increase to flow to 1948 Act superannuation calculations is a "windfall," which clearly it is not, then allowing it to flow as salary to current parliamentarians who remain qualified for the 1948 Act superannuation is also a "windfall."

The only logical conclusion is that there is no moral, ethical or legal justification for any of the Remuneration Tribunal's proposed $45,000 salary increase Determination to be "delinked" from the calculation of the 1948 Act retirees' superannuation.

These facts make the "delinking" component of the Bill before the Senate Committee superfluous and it should be deleted from the legislation. The Association is of the understanding that, other

than additional salary, Ministers and office-holders do not receive additional payments in the nature of "Business Expenses" that are likely to be folded in to their extra Ministerial salaries in the future. Given that Ministerial and office-holders' salaries are determined as an additional percentage of Backbench salaries, as with Backbenchers, the proposed salary increase is work value related, as will be any future salary increases and should be included in the superannuation calculations for those eligible under the 1948 Act.

LIFE GOLD PASS

The other main component of this legislation relates to the Life Gold Pass, which has a history of nearly a century. For many years it provided unlimited domestic air and rail travel for retired parliamentarians and their spouses who qualified by serving in the Federal Parliament for at least seven terms or twenty years, consecutively or in aggregate.
In 2002, the Howard Government substituted a limit of 25 return trips per annum for the previous unlimited provision and also no longer allowed connecting ground transport to or from airport/railway station.
Generally, all concerned, then current parliamentarians and eligible retirees, accepted those limits as reasonable and with good grace to prevent some examples of extreme abuse of the benefit.

The current Bill abolishes prospectively the Life Gold Pass and further reduces the entitlement for those with current or potential entitlement by a massive 60 per cent to 10 per annum.
Prospective abolition is clearly a matter for the current Parliament to determine and has no quasi-retrospective affect. Those elected in the future will be fully aware that they will be unable to qualify for that particular retirement benefit. Our Association therefore makes no comment on it.
However, for those with current entitlement, in reducing the trips to 10, the legislation clearly has quasi-retrospective impact. This is recognised in the Bill itself, which provides for reasonable compensation if the Bill is found to result in the acquisition of property under paragraph 51(xxxi) of the Constitution.

The Association believes this acquisition to be the case, potentially prompting a legal claim for compensation, if this drastic reduction in entitlement is implemented.

In 2002, 25 trips were regarded as reasonable and acceptable. The Minister's Second Reading Speech provides no detailed justification as to why, just a few years later, only 10 trips are acceptable, beyond saying that the previous limiting has not prevented ongoing criticism that the provision exceeds community standards.
That entirely begs the question as to what is the definition of community standards or the source of the criticism, which appears largely to be media driven. The same argument has been used previously to deny parliamentarians' salary increases – now debunked by Belcher and the Tribunal – and to abolish the 1948 Act superannuation provisions.
Yet numerous business executives, not just CEO's, with no greater responsibilities, time demands or stress than parliamentarians, have remuneration packages and retirement benefits after a limited number of years in their jobs, well in excess of parliamentarians' packages, including those under the 1948 Act superannuation provisions. After all, the Remuneration Tribunal work study has justified a salary as high as $250,000 per annum. The Tribunal proposes only to implement the bottom of the range provided by that study.
This point is relevant both to this section on the Life Gold Pass and our later comments on superannuation.
Furthermore, parliamentarians who have qualified for the Life Gold Pass are those who have served beyond the 18 years at which the maximum rate of superannuation is paid under the 1948 Act provisions and having compulsorily contributed 11.5 per cent after tax, approximately 20 per cent of taxable income, without getting a tax deduction for it, for that 18 years but are required compulsorily to continue contributing 5.75 per cent after tax, approximately 10 per cent before

tax, without a deductible claim, for the rest of their time in Parliament, without getting any additional superannuation entitlement.
The Life Gold Pass may fairly be considered as some offsetting compensation for these additional compulsory contributions, which otherwise provide no additional benefit to that for those who retire after 18 years.
Indeed, at this juncture, it may be pertinent to comment that while the !948 Act superannuation provisions are regarded as generous compared with the new scheme and may be so for those who meet only the minimum qualifying periods for the "old" scheme, back of the envelope calculations suggest that for those who serve for 20, 25, 30 years or more, the benefits of the two schemes are comparable because the new accumulation scheme has no 18 year, 75 per cent limit but continues to receive the government contributions and any additional individual contributions, comparable to the compulsory contribution under the 1948 scheme, for as long as the individual serves in the Parliament.
It is also pertinent to the number of trips to be allowed under the Life Gold Pass that the Minister's Second Reading Speech refers to a 15 December 20011 Ministerial Statement which acknowledges that some former members use the Life Gold Pass for the benefit of the community but also acknowledges that there has been inappropriate use of the entitlement and goes on to say that the proposed reduction in trips will constrain inappropriate use.
The Association submits that the entitlement has always had rules relating to its use, to determine what is and is not, appropriate. For example, use for commercial purposes or personal financial gain is not allowed. Any inappropriate use, therefore, should be prevented by proper enforcement of these rules, rather than penalising those who abide by them.
Furthermore, the community benefit/not for profit involvement use of the Pass by a retiree, to which the Minister refers favourably, almost invariably arises from the retiree's former involvement as a serving parliamentarian and so directly relates to their prior parliamentary role.

With such a drastic reduction in entitlement as proposed, it is more likely that beneficiaries will save their trips for appropriate personal use and not use them for community/not for profit involvement benefit than that the reduction will curtail inappropriate use,

Finally, on the Life Gold Pass issue, the legislation proposes limiting trips between April and June 2012 to two. This is less, pro rata, than even the proposed reduction. There may be people who have many unused trips in their current year's entitlement but have planned more than two trips in that three month period. It is grossly unfair to them to have to either cancel those plans, or meet the cost of travel personally, when they had a reasonable expectation of using the Gold Pass.

Hence, whatever Parliament chooses to do prospectively regarding Life Gold Pass eligibility, the Association submits that on all of the preceding grounds, a reduction in entitlement for existing beneficiaries is unjustified.
However, in a spirit of compromise we urge the Committee to recommend:
(1) amending the legislation to provide for a 33 per cent reduction, rather than a massive 60 per cent, in entitlement, that is to 17 return trips per annum, instead of to 10 or
in the alternative, provide for 10 return trips in accordance with existing guidelines and up to 10 additional trips only where the user specifically identifies the purpose of the trip in relation to a specific community benefit/not for profit organisation involvement.
(2) that any changes to entitlement apply only from 1 July 2012, with no pro rata limits for the balance of the current financial year.

CONCLUSIONS

Hence, for those retired parliamentarians or future retirees eligible for superannuation under the 1948 Act and/or a Life Gold Pass, the following conclusions are drawn:
(1) the stated intention of the Remuneration Tribunal to make a Determination which includes "delinking" most of the proposed $45,000 salary increase for determining superannuation under the 1948 Act is ultra vires and if persisted with, warrants action being undertaken on behalf of retirees
(2) the treatment of certain provisions for parliamentarians as Fringe Benefits by the Department of Finance and Deregulation, their potential definition as a form of salary and their inclusion in the superannuation surcharge and in determining other levies and eligibility for benefits, gives rise to a claim for underpayment of superannuation to current retirees and warrants action being taken on their behalf.
(3) any reduction in current Life Gold Pass entitlements may be found to be acquisition of property under paragraph 51(xxxi) of the Australian Constitution and warrants alternative amelioration being provided on Passholders' behalf.

RECOMMENDATIONS

In light of the strong moral, ethical and legal case above, the Association of Former Members of the Parliament of Australia proposes that a reasonable compromise with the Parliament, the Government and the Remuneration Tribunal would be appropriate and acceptable action. We therefore propose that the Senate Committee recommends:
(1) an amendment be included in this Bill amending the "parent" legislation to limit the capacity of the Remuneration Tribunal to "delink" Base Salary from Parliamentary Allowance only to the extent of any "Business Expenses" folded into the parliamentary salary and that all work value/cost of living or such related salary increases are not to be "delinked" from calculating 1948 Act superannuation entitlements; and in particular, the proposed current $45,000 increase flows through in full to those calculations
or in the alternative that the Committee obtain an irrevocable undertaking from the Remuneration Tribunal that they will interpret the legislation in this way, as the documentation makes clear, to pass on the full $45,000 and any future like increases for superannuation calculation purposes.
(2) the Ministerial/office-holder "delinking" in this Bill be deleted as superfluous.
(3) this legislation be amended to provide for 17 return trips per annum for retirees and spouses rather than the proposed 10,
or in the alternative the 10 plus 10 for community/not for profit activity, as proposed in the body of our submission.
(4) the pro-rata April to June travel limit be deleted and the new entitlement start from 1 July 2012.
The Association believes that the case for the Parliament, Government and Remuneration Tribunal agreeing to the above compromises, (1) to (4),is irrefutable in light of Conclusions (1), (2) and (3) above.

PLEASE NOTE THAT THIS SUBMISSION REPLACES THAT WHICH I LODGED EARLIER THIS WEEK BY ORDINARY MAIL, WITH THE EXCEPTION OF THE ATTACHMENTS TO THAT SUBMISSION WHICH SHOULD BE ADDED TO THIS ONE.
In view of the history, complexity and importance of these matters, the Association reiterates its request to appear before the Committee in relation to this submission.

Yours sincerely,
Barry Cunningham
President, AFMPA