FEDERAL COURT OF AUSTRALIA

Commissioner of Taxation v Douglas [2020] FCAFC 220

Appeal from:	*Douglas and Commissioner of Taxation* [2020] AATA 494 *Burns and Commissioner of Taxation* [2020] AATA 671 *GDGR and Commissioner of Taxation* [2020] AATA 766
File numbers:	QUD 103 of 2020 QUD 114 of 2020 QUD 115 of 2020
Judgment of:	**GRIFFITHS, DAVIES AND THAWLEY JJ**
Date of judgment:	4 December 2020
Catchwords:	**TAXATION** – "appeals" under s 44 of *Administrative Appeals Tribunal Act 1975* (Cth) – whether invalidity benefits received pursuant to *Military Superannuation and Benefits Act 1991* (Cth) and *Defence Force Retirement and Death Benefits Act 1973* (Cth) were "superannuation lump sums" or "superannuation income stream benefits" within the meaning of the *Income Tax Assessment Act 1997* (Cth) – where "superannuation income stream benefit" defined as a "superannuation benefit specified in the regulations" – whether regulations provided necessary specification – held regulations provided specification of superannuation income stream benefit – whether invalidity benefits were paid from a "superannuation income stream", as defined in the *Income Tax Assessment Regulations 1997* (Cth) – whether payments were made at least annually – whether size of payments of benefit in a year was fixed – whether income stream in the Burns proceeding commenced before 20 September 2007 – whether arrears payment in the Douglas proceeding was from an income stream that commenced before 20 September 2007 – held invalidity payments in Walker and Douglas proceedings were not paid from a superannuation income stream – held invalidity payments in Burns proceeding was paid from a superannuation income stream – appeals dismissed in Walker and Douglas proceedings – appeal allowed in Burns proceeding
Legislation:	*Acts Interpretation Act 1901* (Cth), ss 7, 19A *Administrative Appeals Tribunal Act 1975* (Cth), s 44 *Defence Force Retirement and Death Benefits Act 1973* (Cth), ss 3, 17, 23, 26, 30, 31, 32, 34, 35, 37, 62, 125, Sch 1 *Income Tax (Transitional Provisions) Act 1997* (Cth),

s 307-125

Income Tax Assessment Act 1997 (Cth), ss 307-5, 307-65, 307-70, 307-145, 995-1

Legislation Act 2003 (Cth), s 12

Military Superannuation and Benefits Act 1991 (Cth), ss 4, 6, 9, 10, 18

Superannuation Industry (Supervision) Act 1993 (Cth), s 10

Tax Laws Amendment (Simplified Superannuation) Act 2007 (Cth), Pt 3 of Sch 1

Taxation Administration Act 1953 (Cth)

Income Tax Assessment Amendment (Superannuation Measures No. 1) Regulation 2013 (Cth)

Income Tax Assessment Amendment Regulations 2007 (No. 2) (Cth)

Income Tax Assessment Amendment Regulations 2007 (No. 3) (Cth)

Income Tax Assessment Regulations 1997 (Cth), regs 307-70.01, 910-1.10, 995-1.01, 995-1.03

Military Superannuation and Benefits Trust Deed (Cth), cl 1, Sch – *Military Superannuation and Benefits Rules* rr 2, 22, 23, 25, 26, 27, 28, 29, 30, 35, 36

Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.06

Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017 (Cth)

Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018 (Cth)

Cases cited:

Australian Competition and Consumer Commission v Yazaki Corporation [2018] FCAFC 73; 262 FCR 243

Burns and Commissioner of Taxation [2020] AATA 671

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2;187 CLR 384

Commissioner of Taxation v Comber (1986) 10 FCR 88

Commissioner of Taxation v Glencore Investment Pty Ltd [2020] FCAFC 187

Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal) [2020] FCAFC 192

Douglas and Commissioner of Taxation [2020] AATA 494

Financial Synergy Holdings Pty Ltd v Commissioner of Taxation [2016] FCAFC 31; 243 FCR 250

GDGR and Commissioner of Taxation [2020] AATA 766

Gibb v Federal Commissioner of Taxation [1966] HCA 74;

	118 CLR 628 *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 *Moreton Bay Regional Council v Mekpine Pty Ltd* [2016] HCA 7; 256 CLR 437 *Newcastle City Council v GIO General Ltd* [1997] HCA 53; 191 CLR 85 *San v Rumble (No 2)* [2007] NSWCA 259 *Tubemakers of Australia Limited v Federal Commissioner of Taxation* (1993) 25 ATR 183
Division:	General Division
Registry:	Queensland
National Practice Area:	Taxation
Number of paragraphs:	178
Date of last submission:	19 November 2020
Date of hearing:	12 November 2020
Counsel for the Applicant:	P Looney QC with A Wheatley QC and C Pierce
Solicitor for the Applicant:	Australian Government Solicitor
Counsel for the Respondents in QUD 103 of 2020 and QUD 114 of 2020:	P Hack QC with G Del Villar QC and J Ward
Solicitor for the Respondents in QUD 103 of 2020 and QUD 114 of 2020:	Cleary Hoare Solicitors
Counsel for Respondent in QUD 115 of 2020:	P Hack QC with P Bickford and A Anderson
Solicitor for the Respondent in QUD 115 of 2020:	Irish Bentley Lawyers

ORDERS

QUD 103 of 2020

BETWEEN:	**COMMISSIONER OF TAXATION** Applicant
AND:	**WAYNE DOUGLAS** Respondent

ORDER MADE BY:	**GRIFFITHS, DAVIES AND THAWLEY JJ**
DATE OF ORDER:	**4 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The notice of appeal be dismissed.

2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

QUD 114 of 2020

BETWEEN:	**COMMISSIONER OF TAXATION** Applicant
AND:	**PETER BURNS** Respondent

ORDER MADE BY:	**GRIFFITHS, DAVIES AND THAWLEY JJ**
DATE OF ORDER:	**4 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The notice of appeal be allowed.
2. The decision dated 25 March 2020 of the Administrative Appeals Tribunal be set aside.
3. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

QUD 115 of 2020

BETWEEN:	**COMMISSIONER OF TAXATION** Applicant
AND:	**SHANE WALKER** Respondent

ORDER MADE BY:	**GRIFFITHS, DAVIES AND THAWLEY JJ**
DATE OF ORDER:	**4 DECEMBER 2020**

THE COURT ORDERS THAT:

1. The notice of appeal be dismissed.

2. There be no order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

OVERVIEW

1 This decision resolves three "appeals" under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) brought by the **Commissioner** of Taxation. The decisions from which the appeals are brought were "test cases" concerning the taxation of invalidity benefits received pursuant to the *Military Superannuation and Benefits Act 1991* (Cth) (**MSB Act**) and the *Defence Force Retirement and Death Benefits Act 1973* (Cth) (**DFRDB Act**). The decisions from which the appeals were brought are: *Burns and Commissioner of Taxation* [2020] AATA 671; *GDGR and Commissioner of Taxation* [2020] AATA 766 (GDGR is a pseudonym for Mr Walker); and *Douglas and Commissioner of Taxation* [2020] AATA 494. We will refer to the Tribunal's reasons for decision as **BJ**, **WJ** and **DJ** respectively.

2 The benefits received by Mr Burns and Mr Walker were received pursuant to the MSB Act. The benefits received by Mr Douglas were received under the DFRDB Act.

3 Mr Burns, Mr Walker and Mr Douglas (**the respondents**) each objected under Pt IVC of the *Taxation Administration Act 1953* (Cth) to assessments of income tax for various years of income. In the case of Mr Burns, he also applied for a private ruling and objected to the resulting ruling. Each of the respondents was dissatisfied with the Commissioner's decision on objection and sought review of the relevant objection decisions in the Administrative Appeals **Tribunal**.

4 At the heart of the issues on the appeals are ss 307-65 and 307-70 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**), which provide:

> **307-65 Meaning of *superannuation lump sum***
>
> (1) A ***superannuation lump sum*** is a *superannuation benefit that is not a *superannuation income stream benefit (see section 307-70).
>
> (2) Treat a lump sum payment arising from a partial commutation of a *superannuation income stream as a ***superannuation lump sum*** for the purposes of this Act (other than Subdivision 295-F).
>
> **307-70 Meaning of *superannuation income stream* and *superannuation income stream benefit***
>
> (1) A ***superannuation income stream benefit*** is a *superannuation benefit specified in the regulations that is paid from a *superannuation income stream.

(2) A ***superannuation income stream*** has the meaning given by the regulations.

Note: For the purposes of the transfer balance cap, the meaning of ***superannuation income stream*** is affected by subsection 294-50(2).

5 The principal argument of each respondent was that the invalidity benefits each had received was a "superannuation lump sum" within the meaning of s 307-65 because the payments received were not a "superannuation income stream benefit" within the meaning of s 307-70(1) of the ITAA 1997. The basis of that argument was that the payments could not be a "superannuation income stream benefit" because such a benefit had to be a "superannuation benefit" (as to which see s 307-5(1) of the ITAA 1997) which was "specified in the regulations" and that there was no such specification. The reference to the "regulations" is to the *Income Tax Assessment Regulations 1997* (Cth) (**ITAR 1997**). The Tribunal accepted the principal argument.

6 The reason the issue is important to the respondents is that, if the invalidity benefits they each received are "superannuation lump sums", the tax concession is greater than if the benefits were "superannuation income stream benefits" – cf: s 307-145 of the ITAA 1997.

7 The respondents also advanced various alternative arguments in support of the contention that the payments each received were not "from a superannuation income stream" as required by s 307-70(1). The phrase "superannuation income stream" is defined in s 307-70(2) as having the meaning given by the ITAR 1997. At the heart of the alternative arguments was the respondents' contention that the admitted income stream received by each respondent did not satisfy subpara (a)(ii) of the definition of superannuation income stream in reg 995-1.01(1) of the ITAR 1997 because the relevant superannuation fund rules did not meet certain requirements of the *Superannuation Industry (Supervision) Regulations 1994* (Cth) (**SIS Regulations**) made under the *Superannuation Industry (Supervision) Act 1993* (Cth) (**SIS Act**) The principal requirements contended not to have been met by the rules of the relevant superannuation funds were:

(1) to ensure that payments were made "at least annually" (SIS Regulations reg 1.06(9A)) and "at least annually throughout the life of the primary beneficiary": SIS Regulations regs 1.06(9A)(b)(iii), 1.06(2)(a); and

(2) that the "size of payments of benefit in a year was fixed", allowing for variation only in accordance with the governing rules: SIS Regulations regs 1.06(9A)(b)(iii), 1.06(2)(b)(i).

8 These were not the only alternative arguments.

9 An issue peculiar to Mr Douglas's appeal was whether his receipt of an "**arrears payment**" was a superannuation lump sum because it was not a "superannuation income stream benefit". The arrears payment was an amount paid to Mr Douglas reflecting the invalidity pay he would have been paid had he retired on medical grounds rather than administrative grounds. Sometime after Mr Douglas's retirement on administrative grounds it was determined that he should have been retired on medical grounds and he thereafter became entitled to a "catch up" payment.

10 The parties helpfully agreed that the appeals raised 14 issues and it is convenient to address seriatim those of the issues which require resolution (the issues are set out later in these reasons for judgment at [78]). The principal issue referred to above was Issue 1. Issues 2 to 6 concerned the effect of the *Treasury Laws Amendment (Miscellaneous Amendments) Regulations 2018* (Cth) (**2018 Amendment Regulations**). The 2018 Amendment Regulations amended the ITAR 1997 by introducing:

(1) reg 307-70.01 which directly and explicitly specified superannuation benefits for the purposes of s 307-70(1) of the ITAA 1997; and

(2) reg 910-1.10 which provided that the aforementioned amendment applied on and after 1 July 2007.

11 The Explanatory Statement to the 2018 Amendment Regulations explained that they were made to "ensure that the law continues to operate as intended" and "to confirm the meaning of *superannuation income stream benefit*" for the purpose of s 307-70(1) of the ITAA 1997. It stated:

> The retrospective nature of the application ensures that the meaning of *superannuation income stream benefits* operates as intended from 2007, when significant reforms to simplify the superannuation system commenced. The intention of the existing provisions is clear and taxpayers have been applying the provisions as intended.

12 The parties agreed that Issues 2 to 6 did not need to be decided if Issue 1 was answered favourably to the appellant. The reason for that is that, if the ITAR 1997 already "specified" superannuation income stream benefits, then the 2018 Amendment Regulations in their application to the respondents did not relevantly affect rights which had already accrued to the respondents and the result was not otherwise affected if it were the 2018 Amendment Regulations which applied rather than the pre-existing specification. For the reasons given

below, Issue 1 is resolved in favour of the appellant. It follows that Issues 2 to 6 do not require resolution.

13 The remaining issues, Issues 7 to 14, comprise the various alternative arguments. For the reasons which follow, with the exception of Issue 10, the various alternative arguments put by the respondents to the Tribunal have been made out.

14 Before turning to a brief summary of the factual background relevant to each respondent it is desirable to understand the general scheme of the MSB Act and the DFRDB Act so far as each relates to the payment of retirement and invalidity benefits. Further aspects of those Acts will be discussed where relevant to a particular issue.

THE MSB ACT

15 The MSB Act is relevant to the proceedings concerning Mr Walker and Mr Burns.

16 Section 4(1)(a) of the MSB Act provides for the establishment, by deed (**MSB Deed**), of an occupational superannuation scheme for the benefit of persons who will be members of the scheme. The MSB Deed is in the form of the Schedule to the MSB Act: s 4(2). The MSB Deed established the *Military Superannuation and Benefits Scheme* (**MSB Scheme**) to be administered by the Military Superannuation and Benefits Board of Trustees No 1 to which the administration of the Military Superannuation and Benefits Fund No 1 was consigned: cl 2 of the MSB Deed. The MSB Scheme is now administered by the Commonwealth Superannuation Corporation (**CSC**): s 18 of the MSB Act. The MSB Deed itself contained a schedule which comprised the *Military Superannuation and Benefits Rules* (**MSB Rules**), which formed part of the MSB Deed: MSB Deed cl 1(1).

17 The members of the MSB Scheme are specified in s 6 of the MSB Act:

> **6 Membership of Superannuation Scheme**
>
> (1) Each of the following persons is a ***member*** of the Scheme:
>
> (a) a person who is a member of the Permanent Forces;
>
> (b) a member of the Reserves:
>
> (i) whose undertaking to render a period of continuous full-time service has been accepted; and
>
> (ii) who is rendering that continuous service under the undertaking.
>
> (2) This section is subject to section 7.

18 The MSB Act provides for contributions to the MSB Scheme to be made by members and "the Department", being the Department administered by the Minister responsible for administration of that section: ss 9 and 10 of the MSB Act; s 19A of the *Acts Interpretation Act 1901* (Cth) (**AI Act**).

19 Payment of benefits is regulated by Pt 5 of the MSB Act and by the MSB Deed and MSB Rules. Part 3 of the MSB Rules contemplates two types of benefits. Division 1 of Pt 3 is entitled "benefits other than invalidity benefits". Division 2 of Pt 3 is entitled "invalidity benefits". Subdiv A of Div 2 provides for "incapacity classification". Rule 22(1) provides:

> Where a member is retired on the ground of invalidity, CSC or the Committee must determine the percentage of incapacity in relation to civil employment of the invalidity retiree and must classify the retiree according to the percentage of incapacity as follows:

Percentage of Incapacity	Class
60% or more	A
30% or more but less than 60%	B
Less than 30%	C

20 The terms "invalidity" and "invalidity retiree" are defined in the **Glossary** in Sch 1 to the MSB Rules (see MSB Rule 2(1)) in the following way:

> **"invalidity"**, in relation to a person, includes physical or mental incapacity of the person to perform his or her duties;
>
> …
>
> **"invalidity retiree"** means a person who is about to be, or has been, retired from the Defence Force on the ground of invalidity and includes a person who, in accordance with rule 30, is to be treated as if he or she had been retired on that ground;

21 Rule 23 provides for reclassification where a retiree's "percentage of incapacity in relation to civil employment" has changed. It is sufficient for present purposes to set out MSB Rule 23(1) and (2):

> 23. (1) Where CSC or the Committee, at any time, is satisfied that there has been such a change in the percentage of incapacity in relation to civil employment of an invalidity pensioner that his or her classification should be altered, CSC or the Committee may reclassify him or her in the appropriate classification set out in rule 22 according to the percentage of his or her incapacity in relation to civil employment.

(2) Where an invalidity pensioner has attained the age of 55 years and the invalidity pensioner is classified:

(a) as Class A—subrule (1) does not apply to him or her; or

(b) as Class B—subrule (1) is taken not to empower CSC to reclassify him or her as Class C.

22 The term "invalidity pension" and "invalidity pensioner" are defined in the Glossary in the following way:

> **"invalidity pension"** means a pension payable under rule 27 or 28;
>
> **"invalidity pensioner"** means a person who is entitled to invalidity pension or would be so entitled if payment of that pension had not been suspended under subrule 25(3);

23 MSB Rule 25(1) provides that the CSC may, by notice in writing, require a person in receipt of an invalidity pension to submit for medical examination or provide information. Where a person fails to comply, and the CSC is not satisfied there was a reasonable excuse, the person's invalidity pension may be suspended, in which case it is not payable: MSB Rule 25(1), (3) and (5).

24 A person who is classified as Class A or Class B – whether on retirement or by reclassification – is entitled to benefits in accordance with Subdiv B of Div 2. A person classified as Class C is not entitled to invalidity benefits under Div 2: Rule 31 in Subdiv C. Rules 26 to 28, in Subdiv B, provide:

> **Entitlement to invalidity benefits**
>
> **26.** A person who is classified as Class A or Class B under rule 22 (whether on his or her retirement or by reason of his or her having been reclassified under rule 23) is entitled to invalidity benefits in accordance with this Division.
>
> **Invalidity benefits for person classified as Class A**
>
> **27.** **(1)** Where a person who is entitled to invalidity benefits is classified as Class A:
>
> (a) his or her member benefit is payable to him or her as a lump sum; and
>
> (b) his or her employer benefit is converted into a pension payable to him or her.
>
> **(2)** A person who is entitled to be paid a member benefit under subrule (1) may elect that, instead of that benefit being paid to him or her, there be applicable to him or her a preserved benefit of the amount of the benefit and if he or she so elects:
>
> (a) the member benefit is not payable to him or her as a lump sum;

and

(b) there is applicable to him or her a preserved benefit of that amount.

Invalidity benefits for person classified as Class B

28. (1) Where a person who is entitled to invalidity benefits is classified as Class B:

(a) his or her member benefit is payable to him or her as a lump sum; and

(b) a pension is payable to him or her at an annual rate equal to:

(i) half the rate of the pension which would have been payable to him or her if he or she had been classified as Class A; or

(ii) the rate of the pension which would have been payable to him or her if he or she:

(A) had been retired otherwise than on the ground of invalidity; and

(B) were entitled to elect to convert his or her employer benefit into a pension and had elected to do so;

whichever is the greater.

(2) A person who is entitled to be paid a member benefit under subrule (1) may elect that, instead of that benefit being paid to him or her, there be applicable to him or her a preserved benefit of the amount of the benefit and if he or she so elects:

(a) the member benefit is not payable to him or her as a lump sum; and

(b) there is applicable to him or her a preserved benefit of that amount.

25 The MSB Rules define "pension" as a pension payable under the MSB Rules and the term "invalidity pension" as a pension payable under rr 27 or 28 – see: MSB Rule 2(1); Glossary at Sch 1 to the MSB Rules.

26 MSB Rule 29 provides:

Effect of change of invalidity classification on pension and preserved benefit

29. (1) Where a person who is classified as Class A or Class B is reclassified as Class C:

(a) the pension payable to him or her under rule 27 or 28 is cancelled; and

(b) there is applicable to him or her a preserved benefit of the

amount of his or her employer benefit.

(2) If a person referred to in subrule (1) is subsequently reclassified as Class A or Class B:

(a) the preserved benefit referred to in that subrule ceases to be applicable to him or her; and

(b) a pension is payable to him or her in accordance with rule 27 or 28, as the case may be, from the date specified under rule 23 by CSC or the Committee, as the case may be, as the date from which the reclassification has effect.

27 By reason of MSB Rule 29(1)(a), a reclassification to Class C results in the pension being "cancelled". The person is then entitled to a preserved benefit in the amount of their employer benefit. However, as explained in more detail below, such a person can again be reclassified as Class A or Class B: MSB Rule 29(2) and MSB Rule 23.

28 MSB Rule 30 provides:

Person may be treated as having been retired on ground of invalidity

30. (1) Where a person has been retired otherwise than on the ground of invalidity but, after his or her retirement, CSC is satisfied that, at the time the person was retired, grounds existed on which he or she could have been retired on the ground of invalidity, CSC may, for the purposes of these Rules, treat the person as if he or she had been retired on the last-mentioned ground.

(2) Where, because of action taken under subrule (1), a person is classified as Class A or Class B under rule 22:

(a) so much of the preserved benefit applicable to him or her under rule 12, 13 or 14 as consists of employer benefit ceases to be applicable to him or her; and

(b) a pension is payable to him or her in accordance with rule 27 or 28, as the case may be.

29 Division 3 is entitled "person rejoining the scheme". If a person in receipt of a benefit other than an invalidity benefit (namely a retirement benefit) again becomes a member of the MSB Scheme, then that person's pension is suspended for the duration of his or her membership: MSB Rule 35. That is, in practical terms, if a retiree returns to work as a member of the Permanent Forces or the Reserves rendering full-time service and thereby again becomes a member of the Scheme (see s 6 of the MSB Act), the pension is suspended for the period the person returns to work.

30 Rule 36 deals with the position of a person who was retired on the ground of invalidity again becoming a member of the Scheme. In summary, if a person who was retired on the ground of invalidity again becomes a member that person's invalidity pension is cancelled. When the person again retires, the person will not be treated as having been retired on the ground of invalidity only by reason of his or her having been retired on that ground previously. In other words, such a person must in fact meet the relevant criteria for retirement on the ground of invalidity at the time of retiring for the second or each subsequent time. Rule 36 provides:

> **Cancellation of pension etc. of invalidity retiree**
>
> **36.** Where a person, who was a member and was retired on the ground of invalidity, again becomes a member:
>
> (a) any determination of his or her incapacity in relation to civil employment and consequent classification or reclassification, under rule 22 or 23, is cancelled; and
>
> (b) if he or she was, immediately before again becoming a member, a person to whom an invalidity pension was payable, his or her entitlement to that pension is cancelled; and
>
> (c) when the person again retires, he or she is not treated as having been retired on the ground of invalidity only by reason of his or her retirement on that ground from his or her earlier period of service.

THE DFRDB ACT

31 The DFRDB Act is relevant to the Douglas proceedings.

32 The general administration of the DFRDB Act was entrusted to the *Defence Force Retirement and Death Benefits Authority* until 30 June 2011. From 1 July 2011, Pt II of the DFRDB Act was repealed and the functions of the DFRDB Authority were assumed by the CSC.

33 The DFRDB Act creates two kinds of benefits payable to members:

(1) Part IV of the DFRDB Act, comprising ss 23 to 25, is entitled "retirement benefits" and provides for "retirement pay". Retirement pay is calculated by reference to a member's annual rate of pay, rank and completed years of effective service: s 23 of the DFRDB Act and Sch 1 to that Act. A member is not entitled to "retirement pay" if the member is entitled to "invalidity benefit": s 23(1).

(2) Part V of the DFRDB Act, comprising ss 26 to 37, is entitled "invalidity benefits" and provides for "invalidity pay". Under s 30 of the DFRDB Act, invalidity benefits are

calculated by reference to the "percentage of incapacity [of a member] in relation to civil employment".

34 Part V commences with s 26 which provides:

> **Invalidity benefit**
>
> Subject to sections 27, 28 and 29, where a contributing member is retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he is entitled, on his retirement, to invalidity benefit in accordance with this Part.

35 Section 30 requires the CSC to determine the percentage of incapacity of a member who is, or is about to become, entitled to invalidity benefit. Section 30 includes:

> **30 Classification in respect of incapacity**
>
> (1) Where a member of the scheme, not being a member of the scheme to whom section 36 applies, is, or is about to become, entitled to invalidity benefit, CSC shall determine his percentage of incapacity in relation to civil employment and shall classify him according to the percentage of incapacity as follows:

Percentage of incapacity	Class
60% or more	A
30% or more but less than 60%	B
Less than 30%	C

> …
>
> (3) Where the invalidity pay of a person is cancelled under subsection 62(1), any classification of the person under subsection (1) ceases to have effect.

36 Whilst s 26 creates an entitlement to "invalidity benefit", s 31 creates the entitlement to "invalidity pay" in respect of Class A and Class B. A member classified as Class A is entitled to invalidity pay at 76.5% of the member's annual rate of pay immediately before retirement. A member classified as Class B is entitled to invalidity pay at 38.25% of the member's annual rate of pay before retirement. If the rate of invalidity pay for Class A or Class B would be less than the "retirement pay" to which the member would otherwise be payable, then the member receives as "invalidity pay" the amount which would have been received as "retirement pay". In simple terms, the prospect of this last situation occurring increases with the length of the member's total period of effective service – see: s 23 and Sch 1 to the DFRDB Act. Section 31(1) to (3) provides:

31 Class A and Class B invalidity pay

(1) A member of the scheme who is entitled to invalidity benefit and is classified as Class A or Class B under section 30 (whether on his retirement or by reason of his having been reclassified under subsection 34(1)) is entitled to invalidity pay at the rate applicable to him in accordance with this section.

(2) Subject to subsections (3) and (4), the rate at which invalidity pay is payable to a member of the scheme under this section is such amount per annum as is equal to, in the case of a recipient member classified as Class A under section 30, 76.5%, and, in the case of a recipient member classified as Class B, 38.25%, of the annual rate of pay applicable to him immediately before his retirement.

(3) Subject to section 33, where but for this subsection, the rate of invalidity pay payable to a member of the scheme under subsection (2) at any time would be less than the rate at which retirement pay would have been payable to him at that time if, at the time when he was retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he had retired on other grounds, the rate of invalidity pay payable to him at that first-mentioned time is the rate at which retirement pay would have been so payable at that time.

37 The "invalidity benefit" for members who are classified Class C is dealt with in s 32. Leaving aside complications which are irrelevant to the present proceedings, in substance, Class C does not entitle a member to "invalidity pay" calculated as a percentage of the member's annual rate of pay before retirement, but the member receives "invalidity pay" determined by reference to the "retirement pay" to which that the member would otherwise have been entitled. Section 32(1) provides:

32 Class C invalidity benefit

(1) Subject to section 33, where a member of the scheme who is entitled to invalidity benefit and is classified as Class C under section 30 (whether on his retirement or by reason of his having been reclassified under subsection 34(1)) would, if at the time when he was retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he had retired on other grounds, have been entitled to retirement pay, the member is entitled:

(a) if the member does not make an election under subsection 124(1)—to invalidity pay at the rate at which retirement pay would have been payable to the member if the member had not made an election under subsection 124(1) in respect of the retirement pay; or

(b) if the member makes an election under subsection 124(1)—to invalidity pay at the rate at which retirement pay would have been payable to the member if the member had made an election under subsection 124(1) in respect of the retirement pay.

38 Section 34 of the DFRDB Act allows for reclassification in respect of incapacity. Section 34(1) provides:

> CSC may, from time to time, if it is satisfied that the percentage of incapacity in relation to civil employment of a recipient member in receipt of invalidity pay is such that the classification of the member should be altered, reclassify him in the appropriate classification set out in section 30 according to the percentage of his incapacity in relation to civil employment.

39 If a member were reclassified to Class C, and the member had not completed 15 years in the total period of effective service, the member would not receive any "invalidity pay". This is because that member's "invalidity pay" would be calculated by reference to what that member would have been entitled to by way of "retirement pay" which begins at 30% of the annual rate of pay once the member has 15 complete years included in the total period of effective service – see: s 23(1), s 32 and Sch 1 to the DFRDB Act.

40 Section 35 of the DFRDB Act furnishes the CSC power to require, by notice in writing, a "recipient member in receipt of invalidity pay" to submit to medical examination or to provide information. Where the member fails, without reasonable cause, to submit to medical examination or to comply with the notice to provide information, the CSC may suspend invalidity pay with the result that invalidity pay is not payable to the member during the period of suspension – see: s 35(1), (3) and (5).

41 Section 37 of the DFRDB Act, which is still within Pt V, operates where a contributing member has been retired otherwise than on the grounds of invalidity or incapacity to perform duties (as was the case with Mr Douglas) and permits the Service Chiefs to inform the CSC that, at the time the member retired, grounds existed on which the member could have been retired on the grounds of invalidity or incapacity to perform duties. Where those two conditions are satisfied, the member may, for the purposes of the DFRDB Act, be treated as if he had been retired on that ground. Section 37 provides:

> Where a contributing member has been retired otherwise than on the ground of invalidity or of physical or mental incapacity to perform his duties but, after his retirement, the Chief of Navy, the Chief of Army or the Chief of Air Force or a person authorized in writing by the Chief of Navy, the Chief of Army or the Chief of Air Force, as the case requires, informs CSC that, at the time the member was retired, grounds existed on which he could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties, he may, for the purposes of this Act, be treated as if he had been retired on that ground.

42 Section 62(1) of the DFRDB Act provides for the cancellation of "invalidity pay" in the event of an eligible member re-joining the Defence Forces. It provides:

> Where a member of the scheme who is a recipient member becomes an eligible member of the Defence Force serving under an appointment or enlistment for a period of not less than one year, his retirement pay or invalidity pay, as the case may be, is, by force of this subsection, cancelled.

43 Section 125 of the DFRDB Act provides:

> **125 Payments by the Commonwealth**
>
> (1) Any payment of benefit under this Act shall be paid by the Commonwealth.
>
> (2) The costs of and incidental to a medical examination carried out for the purposes of section 35 shall be paid by the Commonwealth.
>
> (3) All payments by the Commonwealth under this Act shall be paid out of the Consolidated Revenue Fund, which is appropriated accordingly.

FACTUAL BACKGROUND

Mr Burns

44 Mr Burns was a member of the MSB Scheme. Mr Burns served in the Australian Defence Force (**ADF**). He enlisted in the Australian Army on 12 January 1988. Mr Burns was trained as a diesel mechanic and allotted to the Royal Australian Corps of Electrical and Mechanical Engineers. While serving with the Royal Australian Corps of Electrical and Mechanical Engineers, Mr Burns suffered a back injury.

45 On 12 December 1994 Mr Burns was discharged on medical grounds. On 13 December 1994, Mr Burns was classified by the Board then administering the MSB Scheme as having Class A invalidity, effective from that date. Since the initial classification determination, Mr Burns has been reclassified as follows:

(1) from 5 July 1996, reclassified as Class B;

(2) from 13 December 2002, reclassified as Class C;

(3) from 14 October 2003, reclassified as Class B; and

(4) on 11 August 2008, reclassified as Class A.

46 As a consequence of his reclassification as Class C, from 13 December 2002 to 13 October 2003 Mr Burns did not receive "invalidity pay" pursuant to the MSB Scheme.

47 Mr Burns lodged income tax returns in respect of each of the 2014 to 2016 income years. The Commissioner issued assessments to Mr Burns in respect of each of these years in which he treated the payment of the invalidity pension Mr Burns received as assessable to Mr Burns as

"superannuation income stream benefits". The result was not as favourable as it would have been if the invalidity pension had been received as a "superannuation lump sum".

48 In addition to lodging income tax returns, on 20 July 2015, Mr Burns made an application to the Commissioner for a private ruling as to the tax treatment of invalidity pension received by him pursuant to the MSB Scheme. On 25 October 2016, the Commissioner made a decision on the private ruling application.

49 Mr Burns objected to the Commissioner's private ruling decision and to the 2014 to 2016 assessments. On 16 March 2017, the Commissioner made his objection decisions. On 22 March 2017, Mr Burns lodged an application for review of the Commissioner's decision of 16 March 2017 with the Tribunal.

50 In the course of the hearing in the Tribunal it was agreed by both parties that the payments of invalidity pension made to Mr Burns in the 2014 to 2016 income years were both a "superannuation benefit" (see s 307-5 of the ITAA 1997) and a "disability superannuation benefit" (see s 995-1 of the ITAA 1997) as those terms are used in s 307-145(1) of the ITAA 1997.

51 On 25 March 2020, the Tribunal delivered its decision concluding that the review should be allowed. As mentioned, the Tribunal concluded that the invalidity pension was a "superannuation lump sum". The Tribunal also accepted the alternative arguments which had been advanced.

Mr Walker

52 Mr Walker was a member of the MSB Scheme. Mr Walker enlisted in the Australian Army Reserve in 1993. On 7 November 1995, he commenced serving in the Regular Army. He was allotted or remained allotted to the Royal Australian Infantry Corps from then until December 2002.

53 In January 2003, Mr Walker transferred to the Australian Intelligence Corps where he remained for the rest of his military service.

54 On 12 November 2009, Mr Walker was discharged from the Australian Army on medical grounds. On 13 November 2009, Mr Walker was classified by the Board then administering the MSB Scheme as having a Class A invalidity, effective from that date. That classification has remained the same during the relevant income years.

55 With effect on and from his Class A invalidity classification Mr Walker received, as part of the invalidity benefits to which he thereby became entitled, payments of an invalidity pension under the MSB Act. He continued to receive payments of that invalidity pension throughout the relevant income years.

56 Mr Walker lodged income tax returns for the 2010 to 2015 income years. The Commissioner issued assessments and amended assessments to Mr Walker that treated the payments of the invalidity pension as "superannuation income stream benefits".

57 Mr Walker lodged objections to these assessments. The Commissioner disallowed Mr Walker's objections. Mr Walker lodged an application for review of the Commissioner's decisions with the Tribunal.

58 In the course of the hearing in the Tribunal it was agreed by both parties that the payments of invalidity pension made to Mr Walker throughout the relevant years were both a "superannuation benefit" (see s 307-5 of the ITAA 1997) and a "disability superannuation benefit" (see s 995-1 of the ITAA 1997) as those terms are used in s 307-145(1) of the ITAA 1997.

59 On 30 March 2020, the Tribunal delivered its decision concluding that the review should be allowed. As mentioned, the Tribunal concluded that the invalidity pension was a "superannuation lump sum". The Tribunal also accepted the alternative arguments which had been advanced.

Mr Douglas

60 Mr Douglas served in the ADF for two periods of military service in the Australian Army:

(1) from 1 June 1976 until 31 May 1985; and

(2) from 13 July 1990 until 1 September 2002.

61 On 1 September 2002, Mr Douglas was discharged on administrative grounds. He was not discharged on medical grounds. As a consequence of his discharge from the Australian Army, on 2 September 2002, Mr Douglas became entitled to "retirement benefits" pursuant to Pt IV of the DFRDB Act.

62 Mr Douglas elected to take his retirement pay partly by way of a commutation lump sum payment (being an eligible termination payment) and partly by way of periodic payments. On 23 September 2002, Mr Douglas was paid a lump sum commutation of $87,199.85 being a

commutation lump sum of $95,546.51 less tax withheld of $8,346.66. Mr Douglas continued to receive periodic payments of retirement pay in accordance with his entitlement under the DFRDB Act.

63 On 11 February 2004, Mr Douglas lodged his income tax return for the 2003 income year. The amount of the commutation lump sum was not included in that income tax return by Mr Douglas. On 19 February 2004, the Commissioner issued to Mr Douglas a notice of assessment of income tax for the 2003 income year. The assessment and subsequent refund paid to Mr Douglas did not include the commutation lump sum amount or account for the associated withholding tax.

64 On 3 October 2012, and for the purposes of the *Veterans' Entitlements Act 1986* (Cth), the Repatriation Commission decided that Mr Douglas was totally and permanently incapacitated for work with effect from 26 July 2012.

65 On 29 April 2013, a submission was made to the ADF on Mr Douglas's behalf by the Veterans' Support & Advocacy Service Australia Inc that he should have been discharged on medical grounds in September 2002, as opposed to having been discharged on administrative grounds.

66 Mr Douglas's submission was treated by the Director-General Career Management – Army within the ADF as an application for review of Mr Douglas's discharge ground for the purposes of s 37 of the DFRDB Act. A delegate of the Chief of Army concluded that grounds existed to support the claim that Mr Douglas ought to have been medically discharged from the ADF.

67 As a result, on 26 November 2013 Mr Douglas applied to change the mode of his discharge from "administrative" to "medical".

68 On 16 June 2014, the application for the change of the mode of discharge was approved by a delegate of the Chief of Army. The Chief of Army then informed the CSC that "grounds existed on which Mr Douglas could have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties".

69 On 10 September 2014, Mr Douglas was requested by the CSC to complete an application for invalidity benefits under the DFRDB Act. He did so on 13 October 2014. On 4 November 2014, Mr Douglas was classified by the CSC as having a 75% Class A invalidity for the purposes of the DFRDB Act and the CSC determined that the effective date of that classification was 2 September 2002.

70 On 10 November 2014, the CSC calculated the amount payable to Mr Douglas pursuant to the 4 November 2014 invalidity determination, being the arrears payment. The arrears payment reflected the difference between the amounts that Mr Douglas had received since 2 September 2002 pursuant to his entitlement to "retirement pay", and the amount he would have been entitled to receive had his discharge on 1 September 2002 been on medical grounds at that time, that being an entitlement to "invalidity pay".

71 On 10 December 2014, a lump sum in arrears of $272,640.40 was paid to Mr Douglas. This reflected the arrears payment less the commutation lump sum of $95,546.51 paid to Mr Douglas in 2002 (as Mr Douglas could not be entitled to both retirement pay and invalidity pay). Tax was withheld in the amount of $175,266.00.

72 After the determination of invalidity of 4 November 2014, Mr Douglas received ongoing invalidity benefits under the DFRDB Act, including "invalidity pay" under s 31 of the DFRDB Act.

73 On 5 August 2015, Mr Douglas lodged his tax return for the 2015 income year. On 8 October 2015 the Commissioner issued a notice of assessment of income tax for the 2015 income year to Mr Douglas. That assessment treated the arrears payment assessable to Mr Douglas in that income year as a "superannuation income stream benefit". The assessment also allowed Mr Douglas a credit against tax payable of the withholding by the CSC of $175,266.00.

74 On 19 January 2016 and 4 February 2016 Mr Douglas objected to the notice of assessment. On 2 November 2016 the Commissioner disallowed Mr Douglas's objection in part.

75 On 22 December 2016 Mr Douglas lodged an application for review of the Commissioner's objection decision with the Tribunal. In the course of the hearing in the Tribunal it was agreed by both parties that the arrears payment was both a "superannuation benefit" (see s 307-5 of the ITAA 1997) and a "disability superannuation benefit" (see s 995-1 of the ITAA 1997) as those terms are used in s 307-145(1) of the ITAA 1997.

76 On 13 March 2020, the Tribunal delivered its decision concluding that the review should be allowed. As mentioned, the Tribunal concluded that the arrears payment and the invalidity pension was a "superannuation lump sum". The Tribunal also accepted the alternative arguments which had been advanced.

AGREED STATEMENT OF ISSUES

77 As previously mentioned, the parties agreed a joint list of issues for determination covering all three "appeals". It was common ground that there was no issue that the invalidity pension payments made to each of the taxpayers satisfied the definitions of "superannuation benefit" (see s 307-5 of the ITAA 1997) and "disability superannuation benefit" (see s 995-1 of the ITAA 1997) as those terms are used in s 307-145(1) of the ITAA 1997.

78 The following common and individual issues for determination were agreed:

The specification issue (Issue 1)

(1) Whether reg 995-1.01(2) of the ITAR 1997, as it was prior to the 2018 Amendment Regulations, provided the specification for the purposes of s 307-70(1) of the ITAA 1997?

The AI Act Issues (Issues 2 to 5)

(2) Which legislative instrument was the "affected act" within the meaning of s 7(2) of the AI Act because it was amended by the 2018 Amendment Regulations?

(3) What, for the purposes of s 7(2) of the AI Act, was the:

(1) right or liability; or

(2) the legal proceeding or remedy in respect of any such right or liability;

(if any) that each respondent acquired, accrued or incurred?

(4) What was the Act or legislative instrument pursuant to which any:

(1) right or liability; or

(2) legal proceeding or remedy in respect of any such right or liability

was acquired, accrued or incurred to each respondent?

(5) Whether, on a proper interpretation of the AI Act, s 7(2) of the AI Act was not engaged to negate the operation of the 2018 Amendment Regulations, because:

(1) of any of the answers to Issues 2, 3 or 4 above; or

(2) the 2018 Amendment Regulations manifested a contrary intention for the purposes of s 2(2) of the AI Act?

The Legislation Act Issue (Issue 6)

(6) Did the amendments made by the 2018 Amendment Regulations commence before their registration on 7 December 2018, such that s 12 of the *Legislation Act 2003* (Cth) was engaged?

Issues common to Mr Burns and Mr Walker (Issues 7 to 9)

The parties agreed that the following issues were common to the appeals relating to Mr Burns and Mr Walker:

(7) Did the MSB Rules, under which the invalidity pension payments were made:

  (1) meet the standards of reg 1.06(9A)(b)(iii) and therefore reg 1.06(2) of the SIS Regulations; and

  (2) satisfy reg 1.06(1)(a)(ii) of the SIS Regulations?

(8) Were the payments made to each of Mr Burns and Mr Walker under the MSB Act, a benefit that is taken to be a "pension" for the purposes of reg 1.06(1) of the SIS Regulations?

(9) Did the payments satisfy subpara (a)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997?

Issue specific to Mr Burns (Issue 10)

The parties were agreed that the following issue was specific to Mr Burns's appeal:

(10) Did the payments to Mr Burns satisfy subparas (b)(i) and (ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997?

Issues specific to Mr Douglas (Issues 11 to 14)

The parties were agreed that the following issues were specific to Mr Douglas's appeal:

(11) Did the arrears payment satisfy subparas (b)(i) and (ii) of the definition of "superannuation income stream" in r 995-1.01(1) of the ITAR 1997?

(12) Did the provisions of the DFRDB Act (being the rules of the superannuation fund):

  (1) meet the standards of reg 1.06(9A)(b)(iii) and therefore reg 1.06(2) of the SIS Regulations;

  (2) satisfy reg 1.06(1)(a)(ii) of the SIS Regulations?

(13) Was the arrears payment, a benefit which is taken to be a "pension" for the purposes of reg 1.06(1) of the SIS Regulations?

(14) Did the arrears payment satisfy subpara (a)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997?

ISSUE 1

79 Issue 1 relates to the Tribunal's finding that reg 995-1.01(2) of the ITAR 1997 did not contain the specification referred to in s 307-70(1) of the ITAA 1997. The Tribunal provided three reasons for this conclusion:

(a) the definition of superannuation income stream benefit in reg 995-1.01(2) of the ITAR 1997 did not "even purport to be a specification at all" (DJ at [54], BJ at [30]-[31] and WJ at [27]);

(b) the definition in reg 995-1.01(2) of the ITAR 1997 did not fit the numerical pattern of other "specifications" provided in the ITAR 1997 (DJ at [54], BJ at [30]-[31] and WJ at [27]); and

(c) the definition in reg 995-1.01 of the ITAR 1997 was limited for use within the ITAR 1997 themselves as reflected in the introductory phrase "**In** these Regulations" (DJ at [54], BJ at [30]-[31] and WJ at [27]) (emphasis added).

80 The terms of ss 307-65 and 307-70 of the ITAA 1997 are set out at [4] above.

81 It is desirable to trace the relevant history of amendments to the ITAR 1997. On 1 July 2007, definitions of both "superannuation income stream" and "superannuation income stream benefit" were inserted in reg 995-1.01 of the ITAR 1997 by the *Income Tax Assessment Amendment Regulations 2007 (No. 2)* (Cth) (**ITAR Amendments (No. 2)**). Prior to commencement, the definition of "superannuation income stream benefit" was subject to an amendment by way of the *Income Tax Assessment Amendment Regulations 2007 (No. 3)* (Cth). The two definitions in reg 995-1.01 (which is in Div 995 and is headed "Definitions") were as follows:

> **995-1.01 Definitions**
>
> In these Regulations, unless the contrary intention appears:
>
> …
>
> ***superannuation income stream*** means:

(a) an income stream that is taken to be:

(i) an annuity for the purposes of the SIS Act in accordance with subregulation 1.05 (1) of the SIS Regulations; or

(ii) a pension for the purposes of the SIS Act in accordance with subregulation 1.06 (1) of the SIS Regulations; or

(iii) a pension for the purposes of the RSA Act in accordance with regulation 1.07 of the RSA Regulations; or

(b) an income stream that:

(i) is an annuity or pension within the meaning of the SIS Act; and

(ii) commenced before 20 September 2007.

superannuation income stream benefit means a payment from an interest that supports a superannuation income stream, other than a payment to which regulation 995-1.03 applies.

Regulation 995-1.03 described payments that are not superannuation income stream payments.

82 The Explanatory Statement to the ITAR Amendments (No. 2) stated that their purpose was to "insert supporting regulations into the *Income Tax Assessments Regulations 1997*… as a consequence of the Simplified Superannuation reforms, under which superannuation taxation law was rewritten into the ITAA 1997". The Explanatory Statement further explained that the amendments also inserted into the ITAR 1997 "definitions required to support the ITAA 1997…". These statements in the Explanatory Statement confirm what is clear on the face of the amendments – that their purpose was to give effect to aspects of the 2007 amendments to the ITAA 1997 relating to superannuation reforms.

83 From 4 June 2013, following commencement of the *Income Tax Assessment Amendment (Superannuation Measures No. 1) Regulation 2013* (Cth), the definition of "superannuation income stream benefit" in reg 995-1.01 in Div 995 was amended as follows:

(1) In these Regulations, unless the contrary intention appears:

...

superannuation income stream benefit: see subregulations (2) to (5).

…

(2) In these Regulations:

superannuation income stream benefit:

(a) means a payment from an interest that supports a superannuation income stream, other than a payment to which regulation 995-1.03 applies; and

(b) for the purposes of sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the Act—includes an amount taken to be the amount of a superannuation income stream benefit under subregulation (3) or (4).

(3) For the purposes of sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the Act, if:

(a) a superannuation death benefit that is a superannuation lump sum is paid after the death of a person (the ***deceased***) using only an amount from a superannuation interest; and

(b) immediately before the deceased's death, the superannuation interest was supporting a superannuation income stream payable to the deceased; and

(c) the superannuation income stream did not automatically revert to another person on the death of the deceased;

the amount paid as the superannuation lump sum, to the extent it is not attributable to any amount (other than investment earnings) added to the superannuation interest on or after the deceased's death, is taken to be the amount of a payment from a superannuation income stream of a superannuation income stream benefit that was payable from the day of the deceased's death until as soon as it was practicable to pay the superannuation lump sum.

(4) For the purposes of sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the Act, if:

(a) immediately before the death of a person (the ***deceased***), a superannuation interest was supporting a superannuation income stream payable to the deceased; and

(b) a new superannuation income stream is commenced using an amount applied from the superannuation interest after the death of the deceased;

the amount so applied, to the extent it is not attributable to any amount (other than investments earnings) added to the superannuation interest on or after the deceased's death, is taken to be the amount of a payment from a superannuation income stream of a superannuation income stream benefit that was payable from the day of the deceased's death until as soon as it was practicable to commence the new superannuation income stream.

(5) In this regulation:

investment earnings does not include:

(a) an amount paid under a policy of insurance on the life of the deceased; or

(b) an amount arising from self-insurance.

84 Regulation 995-1.03 was repealed on 28 March 2017 by the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017* (Cth) and the words ", other than a

payment to which regulation 995-1.03 applies" were omitted from the definition of "superannuation income stream benefit" in reg 995-1.01(2)(a).

85 It is also desirable to mention the amendments made to the ITAR 1997 by the 2018 Amendment Regulations, which inserted a new Subdiv 307-B into the ITAR 1997 as follows (these amendments were made during the course of the three proceedings in the Tribunal which are now the subject of these appeals):

> **Subdivision 307-B–Superannuation lump sums and superannuation income stream benefits**
>
> **307-70.01 Superannuation income stream benefits**
>
> (1) For the purposes of subsection 307-70(1) of the Act (definition of ***superannuation income stream benefit***), all superannuation benefits are specified, apart from a superannuation benefit covered by subregulation (2).
>
> (2) A superannuation benefit is covered by this subregulation if:
>
> (a) the superannuation benefit was paid:
>
> (i) on or after 1 July 2007; and
>
> (ii) before 1 July 2017; and
>
> (b) the superannuation benefit was paid from a superannuation interest that supported a superannuation income stream; and
>
> (c) the superannuation income stream met the requirement in paragraph 995-1.03(a) (as in force before the commencement of Schedule 6 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Regulations 2017*) when the superannuation benefit was paid; and
>
> (d) the person to whom the superannuation benefit was paid made an election in relation to that payment under paragraph 995-1.03(b) (as in force before the commencement of that Schedule).

86 The Explanatory Statement to the 2018 Amendment Regulations relevantly said (emphasis added):

> *Superannuation income stream benefits*
>
> Items 5 to 8 of Schedule 1 to the Regulations amend the ITAR 1997 to confirm the meaning of *superannuation income stream benefit* for the purpose of section 307-70 of the ITA Act.
>
> Item 5 amends the ITAR 1997 so that all superannuation benefits are specified for the purposes of the ITA Act. Certain superannuation benefits paid in the period 1 July 2007 to 30 June 2017 are also specified for the purposes of the ITA Act.
>
> Items 7 and 8 amend the definition of *superannuation income stream* in subregulation 995-1.01 to clarify the meaning of this term for the purposes of subregulation 307-

> 70(2) of the ITAR 1997 which provides that the meaning of the term *superannuation income stream* can be specified in the regulations. These amendments apply in relation to the 2012-13 income year and later income years.
>
> The amendments commence the day after the instrument is registered. However, item 6 provide that item 5 applies from 1 July 2007 and items 7 and 8 apply in relation to the 2012-13 income year and later income years.
>
> **The retrospective nature of the application ensures that the meaning of *superannuation income stream benefits* operates as intended from 2007, when significant reforms to simplify the superannuation system commenced. The intention of the existing provisions is clear and taxpayers have been applying the provisions as intended**.

87 There are two limbs to the meaning of "superannuation income stream benefit" in s 307-70(1) of the ITAA 1997 (see [4] above). The first requires that the benefit be a "superannuation benefit specified in the regulations". The second requires that the benefit be paid from a "superannuation income stream". For the following reasons, we respectfully disagree with the Tribunal's conclusion that reg 995-1.01 failed to provide the requisite specification for the purposes of s 307-70(1) of the ITAA 1997.

88 First, the modern approach to legislative interpretation has been the subject of several High Court decisions. It is unnecessary to identify them individually. It is sufficient to set out Allsop CJ's summary in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192 at [4] (case references omitted):

> … The principle is clear: Meaning is to be ascribed to the text of the statute, read in its context. The context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision. The purpose and policy of the provision are to be deduced and understood from the text and structure of the Act and legitimate and relevant considerations of context, including secondary material…

89 There can be no doubting the purpose of reg 995-1.01 of the ITAR 1997. As is evident from both the terms of the provision and the relevant Explanatory Statement (see [82] above), the purpose was to provide regulations to support the superannuation reforms enacted in 2007 by amendments to the ITAA 1997.

90 It is well to bear in mind what Gageler and Keane JJ said in ***Taylor*** *v The Owners – Strata Plan No 11564* [2014] HCA 9; 253 CLR 531 at [60] (with reference to what was said in *Newcastle City Council v GIO General Ltd* [1997] HCA 53; 191 CLR 85 at 113, with emphasis added and footnotes omitted):

> That structure makes clear that the targets of the rule set out in s 12(2) are awards of damages within each of the three categories of personal injury damages identified in s 12(1). The express statutory identification of those targets leaves no room for the invocation of any presumption against statutory interference with the common law or statutory rights which would be vindicated by such awards of damages even assuming that such a presumption might otherwise have scope for operation. "**If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed**".

91 That principle is also reflected in the following passage from McHugh JA's judgment in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421 (emphasis added):

> Once the object or purpose of the legislation is delineated, the duty of the Court is to give effect to it in so far as, by addition or omission or clarification, the relevant provision is capable of achieving that purpose or object. **Where the court can see the purpose of a provision from an examination of its terms, little difficulty should be met in giving effect to that purpose. The days are gone when judges, having identified the purpose of a particular statutory provision, can legitimately say, as Lord Macmillan said in *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641, of the means used to achieve the purpose: "The legislature has plainly missed fire". Lord Diplock, in an extra judicial comment on that decision has said, that "if… the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed"**: "The Courts as Legislators", *The Lawyer and Justice (Sweet & Maxwell)* (1978) at 274.

92 Secondly, as the Commissioner frankly acknowledged, reg 995-1.01 is not well drafted. Some of the difficulty in determining whether or not it provides the requisite specification lies in the fact that it is, in its own terms, a definition provision. Generally, definition provisions are given a relatively narrow effect and are not normally viewed as having a substantive effect. Thus in ***Gibb*** *v Federal Commissioner of Taxation* [1966] HCA 74; 118 CLR 628, Barwick CJ, McTiernan and Taylor JJ effectively said that generally a definition is an aid to the construction of the substantive provisions of legislation and, if drafted properly, is not a provision which itself has substantive effect. Their Honours said at [10]:

> … The function of a definition clause in the statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statutory under consideration, they are to be understood in the defined sense – or are to be taken to include certain things which, but for the definition, they would not include. Such clauses are, therefore, no more than an aid to the construction of the statute and do not operate in any other way. …

93 In *Moreton Bay Regional Council v Mekpine Pty Ltd* [2016] HCA 7; 256 CLR 437 at [61], the plurality (French CJ, Kiefel, Bell and Nettle JJ) adopted and applied the majority approach in

Gibb. The plurality noted at [62] that the general principle may be modified by a clear contrary legislative intent but they found that there was no such intent there.

94 The relevant principles are discussed in Herzfeld and Prince, *Interpretation,* Second Edition, Thomson Reuters, 2020 at [3.10]. Reference is made there to *Australian Competition and Consumer Commission v* ***Yazaki*** *Corporation* [2018] FCAFC 73; 262 FCR 243 at [113]-[114] as an exceptional case in which a definition was construed as having a substantive effect. In *Yazaki*, the Court considered the phrase "exclusionary provision" in s 45 of the C*ompetition and Consumer Act 2012* (Cth) (**CC Act**) and its interaction with s 4D of the CC Act, which was titled "Exclusionary provisions". After noting what McHugh J said in *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 at [103], namely that the function of a definition is not to enact substantive law but is to provide aid in construing a statute, the Court in *Yazaki* said at [113] that *Kelly* involved a "simple definition" (being the meaning of the phrase "in the course of official questioning" within the definitions of "confession or admission" and "official questioning" in s 8(1) of the *Criminal Law (Detention and Interrogation) Act 1995* (Tas)). In contrast, the Court in *Yazaki* described s 4D of the CC Act as stating substantive law. At [114] the Court said that it was doubtful whether s 4D is a definition at all given that its main purpose was to enact substantive law. In terms of the relationship between ss 4D and 45, the Court said at [122] that the correct approach was to read s 4D, according to its terms and its legal context. Moreover, at [124] the Court said that s 4D is the more specific provision which was not displaced by the more general terms of s 45, particularly because s 45(3) did not purport to define the term "exclusionary provisions". This view was supported by extrinsic material and other Full Court authorities.

95 Another example of a definition being construed as having a substantive effect is *San v Rumble (No 2)* [2007] NSWCA 259, which focused on the proper construction of s 51 of the *Motor Accidents Compensation Act 1999* (NSW) and its interrelationship with provisions concerning costs under the *Civil Procedure Rules 2005* (NSW). Campbell JA (with whom Beazley P and Ipp JA agreed) said at [55]:

> The construction of section 151 that I prefer involves conferring a substantive effect on the definition, because it has the effect of altering the rights or obligations of people. It does so by providing that the only costs that can be recovered under section 151(2) are party and party costs, and (implicit in that) that costs on an indemnity basis are not recoverable under section 151(2). If the definition had not been in the legislation, it would have been open to a court to apply the rules and principles that are usually applied in litigation to make an award of indemnity costs in an appropriate case where litigation was brought concerning a claim that has been the subject of a CARS

> assessment. Thus, the effect of the definition is to take away what would otherwise have been a right of a litigant to seek an order for indemnity costs in such a case. I recognise that conferring a substantive effect on the definition is something that is usually not appropriate to the function of a statutory definition: *Gibb v The Commissioner of Taxation of The Commonwealth of Australia* (1966) 118 CLR 628 at 635. However, as Pearce and Geddes, *Statutory Interpretation in Australia*, 6th edition, para [6.63] point out,
>
> > Drafters do occasionally include substantive material in a definition. This is poor drafting and can lead to error in the interpretation of the legislation because of the approach set out in *Gibb's* case.
>
> Particularly when the definition in question is one that applies in one section of the legislation only, and the construction I prefer gives better effect to the policy of the Act, I am not troubled by this departure from the usual way in which statutory definitions are construed.

96 The construction of reg 995-1.01 cannot be divorced from relevant provisions of the parent act. Both the terms of the 2007 amendments to the ITAA 1997 and the accompanying extrinsic materials make clear that a primary purpose was to create a dichotomy between lump sum and income stream benefits in the superannuation context, the precise content of which was left to be supplied by the regulations. The respondents did not deny the Parliament's intention to create this dichotomy, but they contended that a lacuna was created by the Executive's failure to fulfil the task of specification contemplated by the primary legislation, at least until the 2018 Amendment Regulations were made which contained an explicit specification.

97 In brief, they submitted that there was no specification as contemplated by s 307-70 of the ITAA 1997 during the period from mid-2007 until the coming into force of the 2018 Amendment Regulations. Acceptance of that submission flies in the face of the observations of Gageler and Keane JJ in *Taylor* which are set out at [90] above. Contrary to the respondents' submission, construing reg 995-1.01 as in force during the period from mid-2007 to 7 December 2018 (when the 2018 Amendment Regulations commenced) does not involve the Court engaging in an impermissible task of repair. Rather, it involves giving effect to the clear purpose underlying reg 995-1.01, which was to provide the specification envisaged by s 307-70 of the ITAA 1997. This construction of the provision is consistent not only with its text, but also with the broader context in which the definition provision was inserted, which includes the purpose and context of s reg 995-1.01 itself.

98 The text of reg 995-1.01 does not preclude the Court from giving effect to the purpose of the 2007 amendments to both the ITAA 1997 and the ITAR 1997. It was common ground that the

word "specified" in s 307-70 should be given its ordinary meaning. According to the Macquarie Dictionary, Fifth Edition, "specified" means:

> **1.** to mention or name specifically or definitely; stating detail.
>
> **2.** to give a specific character to.
>
> **3.** to name or state as a condition.
>
> **4.** to make a specific mention or statement.

Regulation 995-1.01 states in detail or gives specific character to a particular type of superannuation benefit, namely the "superannuation income stream benefit" as referred to in Subdiv 307-B of the ITAA 1997. Notwithstanding the poor drafting practice of using a definition to achieve a substantive effect, that is what has occurred here. The absence of explicit language of specification is not determinative.

99 Thirdly, we respectfully disagree with the Tribunal's second and third reasons for concluding that reg 995-1.01 did not achieve the purpose of specification (see [79] above). As to the matching "numerical pattern" of other specifications provided in the ITAR 1997, there is no statutory requirement for such patterning. Once again, good drafting practice might encourage the use of such a numerical pattern for the sake of consistency and ease of comprehension, but the failure to do that here does not stand in the way of construing the relevant regulation as achieving the requisite specification when consideration is given to the relevant principles of construction, particularly the need to give effect to the plain purpose of the provision.

100 As to the Tribunal's view that the definition in reg 995-1.01 was confined to use within the ITAR 1997 only, that fails to take into account the following two matters.

(a) The ITAR 1997 should not be read in isolation from relevant provisions of the ITAA 1997 to which they relate and which clearly envisage that there would be specification.

(b) The position was made even more clear after the definition of "superannuation income stream benefit" in reg 995-1.01 was amended in mid-2013 by the *Income Tax Assessment Amendment (Superannuation Measures No. 1) Regulation 2013* (Cth) (see [83] above). At that time "superannuation income stream benefit" was defined in subregulations (2) to (5) of reg 995-1.01. The phrase "In these Regulations" appeared not only at the beginning of subregulation 995-1.01(1), but was repeated at the beginning of subregulation 995-1.01(2) (see at [83] above). It is notable that

subregulation (2) had two paragraphs. Reading the terms of the subregulation as a whole, and with particular reference to paragraph (b) thereof, it is clear that the definition of "superannuation income stream benefit" was not confined to an internal use within the ITAR 1997 themselves, but went beyond that by identifying particular sections of the ITAA 1997.

101 Finally, the Tribunal's view that reg 995-1.01 should be construed as not accomplishing the intended specification is inconsistent with the Parliament's clear intention as manifested in transitional statutory provisions that, despite the 2007 amendments to the ITAA 1997, there would be continuation of superannuation income stream benefits.

102 This point was raised by Thawley J in the course of the oral hearing. The parties took advantage of the opportunity to provide brief supplementary submissions on the issue after judgment was reserved. The point relates to the meaning and effect of s 307-125 in Div 307 of Pt 3-30 of the *Income Tax (Transitional Provisions) Act 1997* (Cth) (**Transitional Provisions Act**), which make clear that the Parliament intended that benefits paid from a superannuation income stream prior to mid-2007 would continue despite the 2007 superannuation reform amendments to the ITAA 1997.

103 The Government's 2007 superannuation reforms were introduced by the *Tax Laws Amendment (Simplified Superannuation) Act 2007* (Cth) (**Superannuation Amendment Act**). The main transitional amendments to the Transitional Provisions Act were supplied by Pt 3 of Sch 1 of the Superannuation Amendment Act. The transitional provisions addressed the treatment of a "superannuation income stream" from which at least one benefit had been paid before 1 July 2007. This suggests that the Parliament envisaged that a "superannuation income stream" in existence before 1 July 2007 could continue after that date. As the respondents acknowledged in their supplementary submissions, the effect of s 307-125 of the Transitional Provisions Act was, with some exceptions, to preserve the calculation of the deductible amount for pensions which commenced to be paid before 1 July 2007.

104 These transitional provisions provide relevant context for s 307-70 of the ITAA 1997 (as well as for the proper construction of reg 995-1.01 of the ITAR 1997). They make clear that the Parliament intended that there would be a continuation of superannuation income stream benefits (see in particular s 307-125(1) of the Transitional Provisions Act) which refers explicitly to a "superannuation income stream from which at least one superannuation income stream benefit has been paid before 1 July 2007". As the Commissioner pointed out in his

supplementary submissions, the "relevant dichotomy established by ss 307-65 and 307-70 of the ITAA 1997 was expected to be utilised immediately, rather than merely having been in Parliament's contemplation but left unutilised or incomplete". Of themselves, the transitional provisions do not demonstrate that the Parliament's purpose or intention was carried into effect by the Executive in drafting the envisaged regulations. But they do serve to highlight the clarity of the Parliament's purpose, which (together with other relevant indicia of purpose) is a contextual element in assessing whether or not the purpose was achieved by the terms of reg 995-1.01, the object of which was targeted or directed at implementing that purpose (see [89] above).

105 These matters of context provided by the Transitional Provisions Act are inconsistent with the Tribunal's view that there was no specification prior to the 2018 Amendment Regulations and with the respondents' support for that view.

106 For these reasons, Issue 1 should be answered "yes".

ISSUES 2 TO 6

107 In light of the answer to Issue 1, it is unnecessary to address Issues 2 to 6.

ISSUES 7 TO 9: MR BURNS AND MR WALKER

108 Issues 7 to 9 concerned the Burns and Walker proceedings which related to payments made under the MSB Rules which applied to the Military Superannuation and Benefits Fund No 1 that was established for the purposes of the MSB Scheme.

Issue 7

109 By reason of s 307-70 of the ITAA 1997, a "superannuation income stream benefit" must be a "superannuation benefit" (defined in s 307-5(1)) specified in the regulations that is paid from a "superannuation income stream". There was no dispute that there was a "superannuation benefit", namely a "payment to you from a *superannuation fund because you are a fund member" – see: s 307-5(1). For the reasons given in relation to Issue 1, the relevant superannuation benefit was "specified" in the ITAR 1997. That leaves for determination whether the superannuation benefit was paid from a "superannuation income stream" – see: s 307-70(1).

110 The term "superannuation income stream" has the meaning given by the ITAR 1997: s 307-70(2). At the relevant time, Div 995 of the ITAR 1997 provided:

Division 995—Definitions

995-1.01 Definitions

(1) In these Regulations, unless the contrary intention appears:

…

SIS Act means the *Superannuation Industry (Supervision) Act 1993*.

SIS Regulations means the *Superannuation Industry (Supervision) Regulations 1994*.

…

superannuation income stream means:

(a) an income stream that is taken to be:

(i) an annuity for the purposes of the SIS Act in accordance with subregulation 1.05(1) of the SIS Regulations; or

(ii) a pension for the purposes of the SIS Act in accordance with subregulation 1.06(1) of the SIS Regulations; or

(iii) a pension for the purposes of the RSA Act in accordance with regulation 1.07 of the RSA Regulations; or

(b) an income stream that:

(i) is an annuity or pension within the meaning of the SIS Act; and

(ii) commenced before 20 September 2007

superannuation income stream benefit: see subregulations (2) to (5).

…

(2) In these Regulations:

superannuation income stream benefit:

(a) means a payment from an interest that supports a superannuation income stream, other than a payment to which regulation 995-1.03 applies; and

(b) for the purposes of sections 295-385, 295-390, 295-395, 320-246 and 320-247 of the Act—includes an amount taken to be the amount of a superannuation income stream benefit under subregulation (3) or (4).

…

111 The Commissioner contended that the definitions relevant to the Burns and Walker proceedings were those in subparas (a)(ii) and b(i) and (ii) in the definition of "superannuation income stream" in reg 995-1.01(1), namely an "income stream" that is either:

(1) taken to be a pension for the purposes of the SIS Act in accordance with reg 1.06(1) of the SIS Regulations: reg 995-1.01(1)(a)(ii); or

(2) is a pension within the meaning of the SIS Act that commenced before 20 September 2007: reg 995-1.01(1)(b)(i) and (ii).

112 There is no definition of the term "income stream" in the ITAA 1997 or the ITAR 1997. Mr Burns and Mr Walker accepted that the payments to them amounted to an income stream.

113 The word "pension" is defined in s 10 of the SIS Act in the following way:

> ***pension***, except in the expression ***old-age pension***, includes a benefit provided by a fund, if the benefit is taken, under the regulations, to be a pension for the purposes of this Act.

114 There was no issue that this definition was satisfied.

115 At the relevant time, SIS Regulations reg 1.06(1) included:

> (1) A benefit is taken to be a pension for the purposes of the Act if:
>
> (a) it is provided under rules of a superannuation fund that:
>
> (i) meet the standards of subregulation (9A); and
>
> (ii) do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced; and
>
> (b) in the case of rules to which paragraph (9A)(a) applies—the rules also meet the standards of regulation 1.07D; and
>
> (c) in the case of rules to which paragraph (9A)(b) applies—the rules also meet the standards of regulation 1.07B.

116 The only dispute between the parties was whether SIS Regulations reg 1.06(1)(a)(i) and (ii) applied; it was not contended that SIS Regulations reg 1.06(1)(b) and (c) were not satisfied. It is to be noted, and the parties agreed, that SIS Regulations reg 1.06(1) directs attention to the rules of the relevant fund, not to the entitlement of a particular individual. It is also to be noted that SIS Regulations reg 1.06(1) directs attention to the particular "benefit" provided under the rules of the relevant superannuation fund.

Issue 7.1: SIS Regulation reg 1.06(1)(a)(i) and reg 1.06(9A)(b)(iii)

117 SIS Regulation reg 1.06(1)(a)(i) directs attention to whether the MSB Rules met the standards of reg 1.06(9A). Regulation 1.06(9A) is lengthy. However, only subpara (b)(iii) of reg 1.06(9A) was in issue. Regulation 1.06(9A)(b)(iii) provided:

> (9A) Rules for the provision of a benefit (the ***pension***) meet the standards of this subregulation if the rules ensure that payment of the pension is made at least annually, and also ensure that:
>
> …
>
> (b) for a pension that is not described in paragraph (a):
>
> …
>
> (iii) the standards of subregulation (2) are met …

118 Regulation 1.06(2) is also lengthy. However, it is sufficient to set out only those aspects which give rise to dispute between the parties:

> (2) Rules meet the standards of this subregulation if they ensure that:
>
> (a) the pension is paid at least annually throughout the life of the primary beneficiary in accordance with paragraph (b) and (c) and, if there is a reversionary beneficiary:
>
> (i) throughout the reversionary beneficiary's life; or
>
> …
>
> (b) the size of payments of benefit in a year is fixed, allowing for variation only:
>
> (i) as specified in the governing rules; or
>
> …

119 The Commissioner contended that the MSB Rules met these standards. Mr Burns and Mr Walker contended that the income stream did not satisfy subpara (a)(ii) of the definition of superannuation income stream in reg 995-1.01(1) because the MSB Rules did not meet the standards of SIS Regulations reg 1.06(9A)(b)(iii). The underlying reason why the MSB Rules did not meet these requirements, it was contended, was because the statute permitted both a suspension and cancellation of entitlement to the invalidity pension. These features of the MSB Scheme had the consequences, it was submitted, that:

(1) The payment of the pension was not made at least annually (SIS Regulations regs 1.06(9A)) and the pension was not paid at least annually throughout the life of the

primary beneficiary: SIS Regulations regs 1.06(9A)(b)(iii) 1.06(2)(a). The receipt of the invalidity pension was "defeasible" on reclassification to Class C (MSB Rule 23 and 29); or on a failure without reasonable cause to comply with a notice to attend a medical examination or provide information (MSB Rule 25); or on re-joining the Permanent Forces or the Reserves rendering full-time service and thereby again becoming a member (MSB Rule 36).

(2) The size of payments of benefit in a year was not fixed, allowing only for variation as specified in the governing rules: SIS Regulations reg 1.06(9A)(b)(iii) and SIS Regulations reg 1.06(2)(b)(i). The exception in the case of a "variation" was not capable of describing a cancellation because a "variation" necessarily contemplated that something remains.

120 Mr Burns and Mr Walker did not advance specific submissions as to why the other requirements of reg 1.06(2) were not met by the MSB Rules.

121 The Tribunal largely accepted the submissions advanced by Mr Burns and Mr Walker. In *Burns*, the Tribunal accepted that the "superannuation income stream" was the source of the relevant payment with the result that the "income stream" represented by a series of Class A invalidity payments commenced on being classified as having a Class A invalidity and ceased upon any reclassification. The Tribunal stated in BJ at [45] to [47]:

> [45] Adopting this approach, the effect of the MSB Rules is to create a scheme of member entitlements to distinct invalidity benefits, or none at all, dependent upon a particular classification or, as the case may be, reclassification decision. This is evident from Rules 26, 29 and 31 of the MSB Rules. A Class A invalidity pension is a one of the particular invalidity benefits for which Rule 27 provides, entitlement to which is dependent upon being classified as having, and retaining, a Class A invalidity. In turn, a Class B invalidity pension is one of the separate, particular invalidity benefits for which Rule 28 provides, entitlement to which is dependent upon being classified as having, and retaining, a Class B invalidity. However, Class A invalidity benefit entitlements and Class B invalidity benefit entitlements each have their origin in a distinct classification or reclassification decision made under Rule 22 or, as the case may be, Rule 23 of the MSB Rules. Before attaining 55 years of age (qv Rule 23(2)), no such classification decision gives rise to an indefeasible entitlement to any invalidity benefit, including any invalidity pension. Instead, the effect of the MSB Rules is that entitlements already accrued and paid as a result of a classification decision are retained but reclassification may result in a cessation of their continuance.
>
> [46] In the context of s 307-70(1) of the ITAA97 and as I explained in Douglas, a "superannuation income stream" is a source of a payment, not the particular payment itself. Hence, "income stream" is used in the sense of a stream from which water (relevantly, each invalidity pension payment under particular

consideration) is periodically drawn.

> [47] So understood, and on the view which I have taken of the effect of the MSB Rules, an "income stream" represented by a series of Class A invalidity pension payments commences upon being classified as having a Class A invalidity but that particular "income stream" ceases if the member is reclassified as either Class B or Class C. If reclassified as Class B, the Class A invalidity pension ceases and a fresh "income stream" represented by a series of Class B invalidity pension payments sourced in, and dating from, the fresh classification decision commences. If reclassified as Class C, the "income stream" ceases altogether. By parity of reasoning, if a member is originally classified as Class B but is reclassified as Class A, the "income stream" represented by the Class B invalidity pension and sourced in the original classification decision ceases and is wholly replaced by a distinct "income stream" represented by the Class A invalidity pension and sourced in the reclassification decision.

122 The Tribunal concluded in BJ at [59]:

> … [T]he scheme for which the MSB Act provides does not, for reasons given in the above analysis of the MSB Rules, ensure that any type of invalidity pension, be it Class A or Class B, is paid at least annually. Under the MSB Rules, an invalidity pension might be paid periodically for, for example, 11 months after a classification decision as a Class A invalidity pension. However, the entitlement to continue to be paid that pension might cease altogether if, upon the making of a review decision at the end of the 11th month, a member is reclassified as Class C. Even if a member were reclassified at that time as having a Class B invalidity, payment of the Class A invalidity pension would cease and payment of a different invalidity pension, a Class B invalidity pension, would commence. Mr Burns' submission that reg 1.06(9A) of the SIS Regulations cannot, for this reason, be satisfied is correct.

123 As noted earlier, SIS Regulations reg 1.06(1) directs attention to whether a "benefit" is provided under rules of a superannuation fund which meet certain standards. It is necessary, therefore, to identify the "benefit" provided under the rules of the MSB Scheme.

124 The Commissioner submitted that the relevant benefits were the Class A and Class B pensions. The Commissioner next submitted that, whilst the entitlement of any given person to the particular benefit might cease for various reasons, assuming continued eligibility, the Class A and Class B pension benefits were payable at least annually and for the lifetime of the primary beneficiary. The Commissioner submitted that the fact that a particular individual might have his or her classification altered from Class A to Class B or vice versa did not mean that each of those benefits, as provided under the relevant rules, was not payable at least annually and for the lifetime of the primary beneficiary. Further, he submitted, the fact that a particular individual might have his or her pension cancelled on reclassification to Class C (MSB Rule 29(1)) did not mean that the "benefits" comprising Class A and Class B pensions, as provided under the relevant rules, were not payable at least annually and for the lifetime of the

beneficiary. All that it meant was that a beneficiary who was reclassified might lose their entitlement to the relevant benefit.

125 The problem with this submission is that it is not possible to divorce the construction of the MSB Rules from the application of the rules to recipients of the benefit or benefits for which they provide. If the MSB Rules allow for the cancellation of the relevant benefit, it cannot be said that the rules "ensure" the benefit is payable for the lifetime of the recipient. Stating that the rules do ensure the benefit is so payable assuming the relevant recipient remains entitled implicitly recognises that the rules fail to ensure the benefit is so payable. The idea that the superannuation rules provide for annual payments for the lifetime of the recipient provided the recipient continued to meet requirements stated in the fund rules requires words to be read into the SIS Regulations and invites abuse of the SIS Regulations by allowing superannuation funds to create exceptions to the minimum standards required by SIS Regulations.

126 Turning to the provisions of the MSB Rules, the first step is to identify the relevant "benefit" the subject of the SIS Regulations in relation to which the superannuation fund rules must meet certain minimum requirements. The relevant "benefit" turns on a construction of the MSB Rules. Where a member is retired on the ground of invalidity, the CSC must determine the percentage incapacity: MSB Rule 22(1). A person who is classified as Class A or Class B under r 22 is entitled to "invalidity benefits" in accordance with Div 2 of the MSB Rules: MSB Rule 26. Division 2 provides for payment of a pension calculated on alternative bases. If a person entitled to "invalidity benefits" is classified as Class A, his or her employer benefit is converted into a pension payable to him or her: MSB Rule 27(1). The same is, inferentially, true if a person is classified as Class B: MSB Rule 28(1). The amount of the pension payable differs depending, amongst other things, on the classification.

127 According to the definitions in Pt 1 of Sch 1 to the MSB Rules, unless a contrary intention appears, an "invalidity pensioner" is a person who is entitled to an "invalidity pension" under MSB Rules 27 or 28.

128 The classification of an "invalidity pensioner" can be altered at any time before the age of 55: MSB Rule 23(1). After the age of 55, the classification of a Class A invalidity pensioner cannot be altered and a Class B invalidity pensioner can only be reclassified to Class A (not Class C): MSB Rule 23(2).

129 If the definition of "invalidity pensioner" found in Pt 1 of Sch 1 applies according to its terms to MSB Rule 23(1), the effect of r 23(1) would be that a person who had been classified as Class A or Class B, but reclassified as Class C, could never be reclassified from Class C to Class A or Class B. That is because, as soon as a person is reclassified as Class C, that person would no longer be a person entitled to invalidity pension under MSB Rules 27 or 28 and thus, according to the definition, could not be an "invalidity pensioner". This is not the intended effect of r 23(1) or its effect properly construed. If it were, r 23(1) would be directly inconsistent with r 29(2) which expressly provides for reclassification from Class C to Class A or Class B in respect of a person who had earlier been reclassified from Class A or Class B to Class C. Accordingly, a "contrary intention appears" (Glossary in Schedule 1) in respect of the meaning of "invalidity pensioner", at least as used in MSB Rule 23(1). For the purposes of MSB Rule 23(1), a person classified as Class C falls within the meaning "invalidity pensioner" as used in that rule.

130 On a proper construction of the MSB Rules, once a person is retired on the ground of invalidity, from the point in time that the person is first classified as Class A or Class B, that person becomes entitled to an "invalidity pension" – namely "invalidity benefits" under Class A or Class B – the amount of which will vary according to the terms of the MSB Rules. The MSB Rules contemplate one income stream which will rise or fall depending on classification as Class A or Class B by reference to percentage of incapacity. As explained next, this "benefit" might cease under MSB Rule 29.

131 MSB Rule 29(1) provides that, if a person classified as Class A or Class B is reclassified as Class C, that person's pension is "cancelled". Although the pension is "cancelled" on reclassification to Class C, the MSB Rules ensure that the person's right again to receive the "invalidity pension" as contemplated by MSB Rules 27 or 28 upon reclassification from Class C to Class A or Class B is preserved: MSB Rule 29(2)(b). A person reclassified as Class C can again be reclassified to Class A or Class B under MSB Rule 23 and, where that occurs, "a pension is payable to him or her in accordance with rule 27 or 28, as the case may be, from the date specified under rule 23 by CSC or the Committee … as the date from which the reclassification has effect": MSB Rule 29(2)(b).

132 The better construction of MSB Rule 29 is that, upon reclassification to Class C, the pension is cancelled. However, MSB Rule 29(2)(b) allows for a new pension to be payable in the event of later reclassification to Class A or Class B. This gives the same meaning to the word

"cancel" as used in MSB Rule 36, a meaning which accords with its ordinary meaning and the structure of the MSB Rules as a whole.

133 The fact that the "invalidity pension" can be cancelled under MSB Rule 29(1) means that the MSB Rules do not "ensure" that "the pension is paid at least annually throughout the life of the primary beneficiary": SIS Regulations reg 1.06(2).

134 The same result flows from MSB Rule 36, which provides that, where a person in receipt of an invalidity pension again becomes a member of the MSB Scheme (by coming out of retirement), his or her entitlement to that pension is cancelled.

135 It is unnecessary to reach a conclusion whether MSB Rule 25 also causes the MSB Rules to fail to meet the minimum standards.

136 The Tribunal made the observation in BJ at [60] that there are difficulties in applying SIS Regulations reg 1.06, which was drafted to cover "the ordinary indicia of a conventional pension or superannuation entitlement", to the provisions of a unique statutory scheme. That observation should be endorsed. It is tolerably clear that the statutory scheme of which the MSB Rules form a part was designed with a view to it providing invalidity benefits in the form of income stream benefits. However, it is a unique scheme which contains significant differences to those more obviously the intended subject of SIS Regulations reg 1.06. Assuming the legislature intended and intends the "invalidity pension" under the MSB Rules to constitute "superannuation income stream benefits", which appears likely, it would not be difficult for the SIS Act or SIS Regulations to exempt them from the minimum standards or otherwise address the MSB Scheme separately.

137 The answer to Issue 7.1 is that the MSB Rules did not meet the standards of reg 1.06(9A)(b)(iii) or reg 1.06(2) of the SIS Regulations.

Issue 7.2: SIS Regulation reg 1.06(1)(a)(ii)

138 SIS Regulation reg 1.06(1)(a)(ii) requires that the relevant rules "do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced". Under the MSB Scheme, members are required to contribute: MSB Rule 3. Membership ceases upon retirement: s 6 of the MSB Act. Under the MSB Rules a member may not contribute to the MSB Scheme after he or she has ceased to be a member. Accordingly, the MSB Rules satisfy the requirements of reg 1.06(1)(a)(ii). Mr Burns and Mr Walker did not submit otherwise.

Issues 8 and 9

139 Issues 8 and 9 were:

> 8. Were the invalidity pension payments made to each of Mr Burns and Mr Walker under the MSB Act, a benefit that is taken to be a '*pension*' for the purposes of reg 1.06(1) of the SIS Regulations?
>
> 9. Did the payments satisfy subparagraph (a)(ii) of the definition of '*superannuation income stream*' in reg 995-1.01(1) of the ITAR 1997?

140 Subparagraph (a)(ii) of the definition of superannuation income stream in reg 995-1.01(1) of the ITAR 1997 provides that a "superannuation income stream" is an income stream that is taken to be a pension for the purposes of the SIS Act in accordance with reg 1.06(1) of the SIS Regulations. The term "income stream", being undefined, takes its ordinary meaning, read in the statutory context: *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at 408. An "income stream" is a series of payments, paid periodically even if not necessarily at regular intervals, which may be seen to relate to each other usually as having come from a particular source. The invalidity pension payments were an "income stream".

141 For the reasons given in relation to Issue 7.1, the payments made to Mr Burns and Mr Walker did not meet: (a) the standard required by the chapeau to SIS Regulations reg 1.06(9A) because the rules did not ensure that payment of the pension was made "at least annually"; (b) the standard required by SIS Regulations reg 1.06(9A)(b)(iii) because the rules did not ensure that the standards of SIS Regulations reg 1.06(2) were met in that the rules did not ensure that the payments were made "at least annually throughout the life of the primary beneficiary". The MSB Rules did not meet the requirement that the "size of payments of benefit in a year [was] fixed", subject to variation as contemplated by the superannuation fund's rules (SIS Regulations regs 1.06(9A)(b)(iii), 1.06(2)(b)(i)), because the size of the payments would be reduced to nil by cancellation under MSB Rule 29(1) on reclassification to Class C.

142 For the reasons given in relation to Issue 7.2, the MSB Rules did meet the requirements of SIS Regulations reg 1.06(1)(a)(ii).

143 It follows that the payments of an invalidity pension made to each of Mr Burns and Mr Walker under the MSB Act were not benefits that were taken to be a pension for the purposes of reg 1.06(1) of the SIS Regulations (Issue 8) and that the payments did not satisfy the requirements of the definition of superannuation income stream in subpara (a)(ii) of the definition of superannuation income stream in reg 995-1.01(1) of the ITAR 1997 (Issue 9).

ISSUE 10: MR BURNS

144 Issue 10 was an alternative argument raised by the Commissioner in relation to the proceedings concerning Mr Burns. It was:

> Did the invalidity pension payments to Mr Burns satisfy subparagraphs (b)(i) and (ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997?

145 These subparas provide that a superannuation income stream means an income stream that: (i) is an annuity or pension within the meaning of the SIS Act; and (ii) commenced before 20 September 2007. There was no dispute that the income stream was a pension within the meaning of the SIS Act. Accordingly, the only question was whether the income stream commenced before 20 September 2007.

146 The Tribunal held that the income stream comprising Mr Burns's pension did not commence before 20 September 2007. This followed from an application of the Tribunal's conclusion that Class A and Class B comprised separate benefits or income streams to a consideration of Mr Burns's classification history. As noted above that history was:

(1) on 13 December 1994 – classified as Class A

(2) from 5 July 1996 – reclassified as Class B

(3) from 13 December 2002 – reclassified as Class C

(4) from 14 October 2003 – reclassified as Class B

(5) from 11 August 2008 – reclassified as Class A

147 According to the Tribunal, a change in classification between Classes A and B resulted in the coming to an end of one income stream and the commencement of another. A reclassification to Class C resulted in the end of the income stream. The Tribunal concluded that the relevant "income stream" for the relevant income tax years (2014 to 2016) commenced on 11 August 2008. Because this was after 20 September 2007 subpara (b)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997 was not met.

148 As noted in respect of Issue 7.1, the preferable construction of the MSB rules is that Mr Burns became an "invalidity pensioner" on 13 December 1994 when he was classified as Class A. From that time, he was entitled to the benefit of an "invalidity pension" (under MSB Rules 27 or 28) sourced from his employer contribution whilst ever he remained classified as Class A or Class B. The invalidity pension was "cancelled" when he was reclassified as Class C on

13 December 2002: MSB Rule 29(1). Mr Burns was then reclassified, on 14 October 2003, to Class B. From that time, he was entitled to the benefit of an "invalidity pension" (under MSB Rules 27 or 28) sourced from his employer contribution whilst ever he remained classified as Class A or Class B. The income stream did not cease when he was reclassified to Class A on 11 August 2008. Rather, the sluice gate was fully opened and the benefit, being the invalidity pension, increased in amount. The better view is that the "income stream" to which the Class A "invalidity pay" related commenced before 20 September 2007. It is true that the "income stream" increased from 11 August 2008, upon reclassification from Class B to Class A. However, this merely operated to increase the amount payable from the employer contribution by way of "invalidity pension". It was not the commencement of a new "income stream".

149 It follows that the answer to Issue 10 is that the payments to Mr Burns satisfied subparas (b)(i) and (ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997.

ISSUES 11 TO 14: MR DOUGLAS

Issue 11

150 Issue 11 was whether the arrears payment made to Mr Douglas satisfied subparas (b)(i) and (ii) of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR 1997.

151 As noted above, Mr Douglas was discharged from the Australian Army on administrative grounds on 1 September 2002. He then became entitled to "retirement benefits" pursuant to Pt IV of the DFRDB Act. However, on 16 June 2014 a delegate of the Chief of Army approved Mr Douglas's application for a change to his mode of discharge, namely to a discharge on medical grounds. Mr Douglas then completed an application for invalidity benefits under the DFRDB Act on 13 October 2014.

152 On 4 November 2014, Mr Douglas was classified by the CSC as having a 75% Class A invalidity and the CSC determined that the effective date to be 2 September 2002. On 10 November 2014, the CSC calculated the amount payable to Mr Douglas, being the arrears payment which reflected the difference between the amounts that Mr Douglas had received in since 2 September 2002 as "retirement pay", and the amount he would have been entitled to receive had his discharge on 1 September 2002 been on medical grounds at that time, that being an entitlement to "invalidity pay". On 10 December 2014, $272,640.40 was paid to Mr Douglas. This reflected the arrears payment less the commutation lump sum of $95,546.51

paid to Mr Douglas in 2002. Mr Douglas continued to receive payments of invalidity benefits after he received the arrears payment. The arrears payment was by way of a "catch up" payment.

153 The question raised by Issue 11 is whether the arrears payment satisfied subparas (b)(i) and (ii) of the definition of "superannuation income stream" in reg 995-1.01 of the ITAR 1997. As noted earlier, those provided:

> ***superannuation income stream*** means:
>
> …
>
> (b) an income stream that:
>
> (i) is an annuity or pension within the meaning of the SIS Act; and
>
> (ii) commenced before 20 September 2007; …

154 The parties agreed, as the Tribunal concluded at DJ[63], that the definition of "pension" in s 10 of the SIS Act was "of an inclusive type, leaving scope for the ordinary meaning of that word". The parties agreed, correctly, that the arrears payment was a pension within the ordinary meaning of the word. In *Tubemakers of Australia Limited v Federal Commissioner of Taxation* (1993) 25 ATR 183 at 189, Hill J observed:

> There remains then the question whether the payments in either or both periods constituted a "pension" to the ex-employees.
>
> The *Macquarie Dictionary* defines "pension" relevantly as:
>
> > 1. a fixed periodical payment made in consideration of past services, injury or loss sustained, merit, poverty etc. 2. an allowance or annuity.
>
> The word has as its origin the Latin *pensio* meaning "payment".
>
> The *Oxford English Dictionary*, 2nd ed, vol XI contains the following definition relevant to the present context:
>
> > 4. An annuity or other periodical payment made by a person or body of persons, now esp. by a government, a company, or an employer of labour, in consideration of past services or of the relinquishment of rights, claims, or emoluments.
>
> What these dictionary definitions show is that it is a necessary characteristic of a pension that it be periodical. A series of annual payments, that is to say, payments which happen to be made annually but where each payment is determined upon at or about the time it is made, may have an income character but not be periodical. Thus the payment by an employer of amounts to employees who satisfactorily passed employment-related courses of study might be income, but, although made over a period of years, would not necessarily be periodic: cf the payments made by the bank in *Smith v FCT* (1987) 164 CLR 513; 19 ATR 274; 74 ALR 411. Although perhaps irrelevant to the decision, it did not occur to the majority of the Full Court of this court

> in *FCT v Harris* (1980) 10 ATR 869; 80 ATC 4238 to refer to the ex gratia lump sum payments made to retired bank personnel, in that case to supplement their pensions, as themselves being pensions, notwithstanding that the payments were in fact repeated from year to year. Bowen CJ observed in that case (at ATC 4244) that:
>
> > It is true to say, that a lump sum payment of uncertain and varying amount paid in each of 5 successive income years, may in a sense be described as a "periodic" payment. So might one paid every 5 years or every 10 years. But it is not "periodic" in any sense which is of much help in determining whether the payment is, or is not, of an income nature.
>
> Deane J in the same case was of the view that the amounts in question were income in ordinary concepts and in reaching that conclusion took account of the fact that the payment in dispute was one of a group of a series of annual payments made in respect of successive annual periods. However, at no time did his Honour refer to the payments in that case as being "pensions".

155 Whilst the ordinary meaning of "pension" contemplates a series of periodic payments, it does not require the payments to be in the same or in a fixed amount. Mr Douglas's entitlement to Class A invalidity pay was an entitlement to receive a series of periodic payments due to his past service and incapacity.

156 Accordingly, the arrears payment was part of an income stream that was a pension within the meaning of the SIS Act such that subpara (b)(i) of the definition of "superannuation income stream" in reg 995-1.01(1) was satisfied. However, the parties were in dispute as to whether the income stream "commenced before 20 September 2007" such that subpara (b)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) was satisfied. The Tribunal concluded it was not: DJ[63]-[71].

157 The Tribunal concluded, at DJ[71], that the 4 November 2014 determination by the CSC that Mr Douglas had a 75% Class A invalidity created an entitlement to an income stream and that the arrears payment was paid from that "income stream" but that the determination only had that effect when it was made, which was after 20 September 2007. The Tribunal stated at DJ[71]:

> I agree that the November 2014 determination created an entitlement to an income stream, being a series of invalidity pay payments, taken, for the purposes of that determination and the DFRDB Act, to have commenced on 2 September 2002. The arrears payment was a sequel to that determination and paid from the "income stream" source thereby created. But in terms of paragraph (b) in the definition of "superannuation income stream" in the ITAR, the determination only had this effect when it was made. That was after 20 September 2007. I therefore conclude that the arrears payment does not fall within paragraph (b) in the definition of "superannuation income stream" in the ITAR.

158 Mr Douglas submitted that this conclusion was correct. Mr Douglas submitted that the 4 November 2014 determination by the CSC created an entitlement to a series of invalidity payments that were taken, for the purposes of that determination, to have commenced on 2 September 2002. However, there was no entitlement to payment until there was both the decision by the delegate of the Chief of Army on 16 June 2014 under s 37 of the DFRDB Act and the determination by the CSC on 4 November 2014. Section 37 of the DFRDB Act created, it was submitted, a statutory fiction that Mr Douglas might be treated, for the purposes of that Act, as if he had been retired on the ground of invalidity or physical or mental incapacity to perform his duties as a soldier.

159 The Commissioner submitted that the Tribunal's focus at DJ[71] on the 4 November 2014 determination rather than on the date when Mr Douglas's entitlement to receive an invalidity pension was taken to have commenced led it into error. The Commissioner's submission were, more specifically:

(1) In the particular circumstances of Mr Douglas's case, the arrears payment calculated on the basis of a medical discharge from service effective on 2 September 2002 was made from an interest created by the DFRDB Act that supported an income stream that was a "pension" within the meaning of the SIS Act. The ongoing, regular pension payments Mr Douglas received, including his receipt of the arrears payment, all bear the same characterisation.

(2) The arrears payment was made from an interest in the DFRDB Act, being the entitlement to Class A invalidity pay, that supported an income stream, which must have commenced before 20 September 2007. The basis for this was that the arrears payment, properly characterised, was the individual fortnightly payments – the pension – which commenced before 20 September 2007, paid together in arrears. The arrears payment was one payment, as part of a series of payments, being an income stream, the entitlement to which commenced before 20 September 2007 and which continued.

160 As to the first submission, it may be accepted that the arrears payment was calculated on the hypothesis of a medical discharge from service effective on 2 September 2002. It may also be accepted that the arrears payment was made because of an entitlement created by the DFRDB Act that supported an income stream that was a "pension" within the meaning of the SIS Act. It is also correct that the ongoing, regular pension payments Mr Douglas received, including

his receipt of the arrears payment, all bear the same characterisation. None of this means that the income stream commenced before 20 September 2007. It just means he received a pension.

161 As to the second submission, it may be accepted that the arrears payment was made because of the entitlement to Class A invalidity pay created by the DFRDB Act. However, the assertion that the resultant income stream "must have commenced before 20 September 2007" is just that: assertion. The fact is that the entitlement to the arrears payment did not arise until 4 November 2014. The statutory fiction created by s 37 of the DFRDB Act is expressed to apply "for the purposes of this Act". A statutory fiction should be construed strictly and only for the purpose which it serves: *Commissioner of Taxation v Comber* (1986) 10 FCR 88 at 96 (Fisher J); *Financial Synergy Holdings Pty Ltd v Commissioner of Taxation* [2016] FCAFC 31; 243 FCR 250 at [34] (Middleton and Davies JJ); *Commissioner of Taxation v Glencore Investment Pty Ltd* [2020] FCAFC 187 at [155] (Middleton and Steward JJ). The statutory fiction cannot be transplanted into different statutory provisions. By reason of s 37 of the DFRDB Act, Mr Douglas was taken (was deemed) to have been retired on the ground of invalidity or of physical or mental incapacity to perform his duties, for the purposes of the DFRDB Act from 2 September 2002. Because he was taken to have been so retired, he was necessarily also taken to have been entitled to invalidity pay under s 31 of the DFRDB Act, because he was classified Class A. He was not thereby deemed, for the purposes of the ITAA 1997 or the ITAR 1997, to have been in receipt of invalidity pay from that time. The deeming which operated by reason of s 37 of the DFRDB Act, for the purposes of that Act, did not create an income stream for the purposes of the ITAR 1997 which commenced before 20 September 2007. Nor did it deem the income stream which commenced with the arrears payment made on 10 December 2014 to have commenced before 20 September 2007.

Issue 12

Issue 12.1: SIS Regulation reg 1.06(1)(a)(i) and reg 1.06(9A)(b)(iii)

162 Issue 12.1 is the equivalent issue to Issue 7.1, except with respect to Mr Douglas and the DFRDB Act. The issue is whether the provisions of the DFRDB Act:

(1) met the standards of SIS Regulations reg 1.06(9A)(b)(iii) and therefore SIS Regulations reg 1.06(2); and

(2) satisfied SIS Regulations reg 1.06(1)(a)(ii).

163 SIS Regulations reg 1.06(9A)(b)(iii) provides that rules for the provision of a benefit meet the standards of that regulation if the payment of the pension is made at least annually and the standards of SIS Regulations reg 1.06(2) are met. As noted earlier, the question is one of construction of the rules, here relevantly the provision of the DFRDB Act. The question is whether the benefit received by Mr Douglas was a benefit provided under rules of a superannuation fund that met the standards of reg 1.06(9A)(b)(iii) such that it was taken to be a pension. The focus of reg 1.06(9A)(b)(iii) is on the characteristics of the benefit provided under the rules of the superannuation fund.

164 Mr Douglas accepted that the arrears payment amounted to an income stream. However, he contended that it did not satisfy subpara (a)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997 because it could not be taken to be a pension for the purposes of the SIS Act in accordance with reg 1.06(1) of the SIS Regulations because the provisions of the DFRDB Act did not meet the standards of SIS Regulations reg 1.06(9A) because those provisions did not ensure that:

(1) payment is made "at least annually" (SIS Regulations reg 1.06(9A)) or "at least annually throughout the life of the primary beneficiary" (SIS Regulations reg 1.06(2)(a));

(2) the size of payments of benefit in a year was fixed: SIS Regulations reg 1.06(2)(b).

165 Mr Douglas did not advance specific submissions as to why the other requirements of reg 1.06(2) were not met by the MSB Rules.

166 The Tribunal concluded at DJ[75] that the provisions of the DFRDB Act did not ensure that the payment of an invalidity pension under that Act was paid at least annually. That conclusion was reached because "invalidity pay" was subject to contingencies: reclassification under s 34 of the DFRDB Act and suspension under s 35(3) of the DFRDB Act for failure to submit to a medical examination or the provide information. To these could be added that the "invalidity pay" could be cancelled under s 62 of the DFRDB Act if the relevant person again became a member. The Tribunal stated at DJ[74] and [75]:

> [74] Another definitional requirement is that the "rules of a superannuation fund", "meet the standards of subregulation (9A)". Materially, rules for the provision of a benefit (the "pension") meet the standards of this subregulation if those rules ensure that payment of the pension is made at least annually and also ensure that …".

> [75] It is not necessary to consider the complex provisions in these cumulative requirements. Assuming in the Commissioner's favour that the provisions of the DFRDB Act can be characterised as the "rules of a superannuation fund", they do not ensure that the payment of an invalidity pension under that Act is paid at least annually. Invalidity pay is always subject to the contingency of reclassification pursuant to s 34 of the DFRDB Act. It is also subject to the contingency of suspension in the event of a failure by the recipient to comply with a requirement to submit to medical examination or to comply with a notice to provide information: s 35(3) of the DFRDB Act. In short, there is no vested entitlement to invalidity pay which ensures that it is paid at least annually. An entitlement determination provides lawful authority for its payment but that payment is always subject to the contingencies mentioned.

167 It was not contended on appeal that the provisions of the DFRDB Act were not "rules of a superannuation fund". At least in part, they are. Mr Douglas embraced DJ[75], submitting that there was "no vested entitlement to invalidity pay which ensured that it is paid at least annually". He submitted that "[a]n entitlement determination provides lawful authority for its payment but that payment is always subject to the contingencies mentioned". Mr Douglas also submitted that the potential for cancellation or reduction of the amount of the invalidity pay to nil meant that the size of the payments in a year cannot "be fixed". The exception in the case of a variation is not capable of describing a cancellation or a reduction to nil: a variation necessarily contemplates that something remains.

168 There are significant differences between the MSB Scheme and that under the DFRDB Act. Under the DFRDB Act, even on classification as (or reclassification to) Class C, the benefit recipient receives "invalidity pay"; it is calculated by reference to "retirement pay", but is still "invalidity pay". Leaving aside for the moment suspension of payment under s 35 and cancellation under s 62, upon classification as Class A, Class B or Class C, a person is entitled to "invalidity pay" for the person's lifetime, subject to variation in accordance with the fund rules. Classification as Class C, which results in "invalidity pay" calculated by reference to what would have been the person's "retirement pay", might result in no "invalidity pay" whilst on that classification, but this might later increase on further reclassification. The invalidity pension is not "cancelled" on reclassification to Class C. However, a person classified as Class C might receive nothing by way of invalidity pay and it could hardly be said that the DFRDB Act ensures that the benefit is paid at least annually in those circumstances.

169 A further difficulty arises by reason of s 62 of the DFRDB. The benefit or pension can be cancelled. It is true that the circumstance might not arise often, but that is not to the point. The minimum standard created by the SIS Regulations is that the rules of the superannuation fund

"ensure" payment at least annually for the person's lifetime. The DFRDB rules do not meet this standard. That is not to say that the scheme is in some way deficient. As observed earlier in the context of Issue 7.1, it would not be difficult for the SIS Act and SIS Regulations to address schemes such as this.

170 It is not necessary to address suspension of payment under s 35 for failure to undertake a medical examination or provide information.

171 The answer to Issue 12.1 is that the provisions of the DFRDB Act did not meet the standards of reg 1.06(9A)(b)(iii) or reg 1.06(2) of the SIS Regulations.

Issue 12.2: SIS Regulation reg 1.06(1)(a)(ii)

172 SIS Regulation reg 1.06(1)(a)(ii) requires that the relevant rules "do not permit the capital supporting the pension to be added to by way of contribution or rollover after the pension has commenced". Mr Douglas did not advance submissions as to why this requirement was not met.

173 Section 17 of the DFRDB Act provides that an "eligible member of the Defence Force" must contribute "fortnightly contributions" to the Commonwealth. By reason of the definition of "eligible member of the Defence Force" in s 3 of the DFRDB Act, a member who has retired cannot be an "eligible member of the Defence Force". There is no ability under the DFRDB Act for Mr Douglas to contribute to the DFRDB Act after he has ceased to be an eligible member of the Defence Force. Accordingly, reg 1.06(1)(a)(ii) is satisfied.

Issues 13 and 14

174 Issues 13 and 14 were:

> Issue 13 Was the arrears payment, a benefit which is taken to be a "pension" for the purposes of reg 1.06(1) of the SIS Regulations?
>
> Issue 14 Did the arrears payment satisfy subparagraph (a)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997?

175 The answer to Issue 12.1 determines the answer to Issues 13 and 14. The arrears payment is not taken to be a "pension" for the purposes of SIS Regulations reg 1.06(1) because it was not provided under rules of a superannuation fund which met the standards of SIS Regulations reg 1.06(9A) (Issue 13). It necessarily follows that the arrears payment did not satisfy subpara

(a)(ii) of the definition of "superannuation income stream" in reg 995-1.01(1) of the ITAR 1997.

CONCLUSION

176 For the reasons given above, the Commissioner has succeeded on Issues 1 and 10 but failed on Issues 7 to 9 and 11 to 14. As noted, Issues 2 to 6 did not need to be determined because of the resolution of Issue 1.

177 This means that the notices of appeal in the Walker and Douglas matters should be dismissed, but the notice of appeal in the Burns matter should be allowed in the light of the resolution of Issue 10. The Tribunal's decision in *Burns and Commissioner of Taxation* [2020] AATA 671 will be set aside.

178 There should be no order as to costs in circumstances where the three proceedings were viewed by the Commissioner as "test cases".

I certify that the preceding one hundred and seventy-eight (178) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Griffiths, Davies and Thawley.

Associate:

Dated: 4 December 2020