IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S140 OF 2015**

BETWEEN: **BARRY THOMAS CUNNINGHAM**
First Plaintiff

DR ANTONY HAMILTON LAMB OAM
Second Plaintiff

THE HONOURABLE JOHN COLINTON MOORE AO
Third Plaintiff

THE HONOURABLE BARRY COHEN AM
Fourth Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
First Defendant

REMUNERATION TRIBUNAL
Second Defendant

SUBMISSIONS OF THE FIRST DEFENDANT

Filed on behalf of the First Defendant by:

The Australian Government Solicitor
4 National Circuit, Barton, ACT 2600
DX 5678 Canberra

Date of this document: 1 April 2016
Contact: Emily Kerr / Andrew Chapman

File ref: 15136600
Telephone: 02 6253 7354 / 02 6253 7206
Lawyer's E-mail: emily.kerr@ags.gov.au / andrew.chapman@ags.gov.au
Facsimile: 02 6253 7303

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The Special Case (**SC**) reserves three questions of law for determination by the Full Court (SC [192]–[194], Special Case Book (**SCB**) 87–88).

3. Contrary to Plaintiffs' Submissions (**PS**) [2], the Special Case does not raise any issues concerning the application of s 51(xxxi) of the Constitution to the superannuation, pension and entitlement schemes of Commonwealth public servants. Nor is the Court requested to decide any issues concerning such schemes for federal judges, other than to observe that the constitutional underpinning for such schemes is radically different to that for serving or retiring parliamentarians.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given by the plaintiffs on 28 July 2015 (SCB 26). No further notice is necessary.

PART IV FACTS

5. The First Defendant considers that the facts set out at length in the Special Case (SCB 56) require fuller restatement than that offered by the plaintiffs. Paragraphs [6]–[35] below do this.

Constitutional framework

6. A critical feature of this case is the manner in which the Constitution governs the provision of remuneration and other allowances to serving and retired members of Parliament.

7. Section 48 of the Constitution has at all times provided:

> Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

8. Section 66 of the Constitution has at all times provided:

> There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

9. Read with s 51(xxxvi), ss 48 and 66 provide the constitutional basis for the provision of allowances and salaries to serving and retired parliamentarians.[1] The allowances for retired parliamentarians, in issue in this case, need to be understood against the allowance for serving parliamentarians.

Allowances to serving parliamentarians

10. Three categories of remuneration paid to serving parliamentarians are relevant to this proceeding.

11. The first category of remuneration is the allowance provided to serving members of Parliament (**parliamentary allowance**). Parliament has 'otherwise provided' for the payment of parliamentary allowance since 1907 (SC [160], SCB 79).[2]

12. The second category is the allowance provided to certain parliamentary office holders (**parliamentary office holder allowance**). Parliament has made provision for parliamentary office holder allowance at all times during which the plaintiffs were members of Parliament (SC [162], SCB 80). The parliamentary offices to which parliamentary office holder allowance has attached have changed over time.

13. The third category of remuneration is the salary provided to Ministers of State (**ministerial salary**). Parliament has 'otherwise provided' for the payment of ministerial salary since at least 1915 (SC [170], SCB 82).

14. Each category of remuneration has been subject to reductions in amounts, including on a retrospective basis since Federation: see further at [74]ff.[3]

Retiring allowance to retired parliamentarians

15. Since 1948, the *Parliamentary Retiring Allowances Act 1948* (Cth) (later renamed the *Parliamentary Contributory Superannuation Act 1948* (Cth)) (**Superannuation Act**) has provided for the payment of retiring allowance to certain retired members of Parliament. The form and content of the retiring allowance has changed over time (SC [175]–[176], SCB 83). For example:

    (a) from 1 December 1948 to 1 November 1964, the rate of retiring allowance was fixed at a weekly amount;

    (b) from 1 November 1964 to 7 June 1973, the rate of retiring allowance was fixed by reference to a percentage of the parliamentary allowance paid to the relevant retired parliamentarian immediately before they became entitled

---

1 While neither provision refers in terms to allowances for retired parliamentarians, s 48 authorises those payments: *Theophanous v Commonwealth* (2006) 225 CLR 101 at 113–114 [7] (Gleeson CJ), 121 [37] (plurality) (***Theophanous***). Section 61 of the Constitution authorises the determination of the amount of the salaries paid to individual Ministers of State from the funds provided for by Parliament under s 66.

2 Parliamentarians also receive a range of other entitlements: SC [9]–[10], SCB 58–59.

3 See also SC [161], SCB 79; SC [171], SCB 82.

to retiring allowance (with the percentage being calculated on the basis of the age of the member at that date); and

(c) with effect from 8 June 1973, the rate of retiring allowance was fixed by reference to a percentage of the parliamentary allowance payable to a serving parliamentarian from time to time (with the percentage being calculated on the basis of the retired member's period of parliamentary service).

16. Since at least 1978, additional retiring allowance has been paid to certain retired parliamentary office holders and Ministers of State (SC [183], [186], SCB 85–86). The form and content of the additional retiring allowance has also changed from time to time (SC [184], [187], SCB 84–86).

2011 and 2012 changes to the calculation of retiring allowance

17. The plaintiffs challenge the validity of changes to the calculation of retiring allowance achieved by two pieces of legislation:

(a) the *Remuneration and Other Legislation Amendment Act 2011* (Cth) (**2011 Amendment Act**), which commenced on 5 August 2011; and

(b) the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth) (**2012 LGP Act**), which relevantly took effect from 6 March 2012.

18. While PS [14]–[16] and [18] accurately summarise the effect of those changes, the significance of the changes should not be overstated. Immediately prior to the changes coming into effect, retired members were not entitled to any fixed amount but merely to a prescribed percentage of whatever allowance or salary serving members, parliamentary office holders and Ministers of State (as applicable) received from time to time. After the changes came into effect, retired members were entitled to a prescribed percentage of an amount determined by the Remuneration Tribunal from time to time by reference to the allowances and salaries paid to serving parliamentarians.

19. It is also important to recognise that the legislative changes made in 2011 and 2012, and the Remuneration Tribunal Determinations made pursuant to them, did <u>not</u> result in any reduction in the amount of retiring allowance received by the plaintiffs (SC [96]–[101], SCB 70–71). By way of example:

(a) immediately before the coming into force of the first Determination made under the provisions of the 2011 Amendment Act (Determination 2012/02), the amount of 'parliamentary allowance' for the purposes of the Superannuation Act was $140,910 (SC [98], SCB 71);

(b) by Determination 2012/02, the amount of 'parliamentary allowance' for the purposes of the Superannuation Act was $146,380 (SC [100], SCB 71); and

(c) under the most recent Determination before the Court, the amount of 'parliamentary allowance' for the purposes of the Superannuation Act is $154,400 (SC [101], SCB 71).

20. While the plaintiffs seek to contrast their current position with the retiring allowance that would 'otherwise have been payable' (PS [3(a)]), the word 'otherwise' conceals a number of unproved assumptions concerning decisions that might have been made by the Remuneration Tribunal and the Executive as to amounts payable to serving members of Parliament if a different legislative regime had been or remained in force.

History of the Life Gold Pass Scheme

21. The history of the Life Gold Pass Scheme is set out at SC [103]–[159] (SCB 71–79). That history can conveniently be divided into three parts.

22. **Administrative scheme.** Prior to Federation, colonial governments were accustomed to issue railway passes, in the form of gold medallions, to persons serving in their respective Parliaments for travel on the railways of that colony at no cost (SC [107], SCB 72). Shortly after Federation, the Commonwealth Executive, in conjunction with one or more of the States, implemented a scheme for the issue of passes to serving members of the new Parliament permitting them to travel on railways at government expense (SC [108]–[110], SCB 73).

23. Passes were first issued to retired Commonwealth parliamentarians in 1923, in the form of a gold medallion that was then described as a 'Gold Life Pass' (SC [124], SCB 74). From 1955 onward, the term 'Life Gold Pass' was commonly used (SC [104], SCB 72). Between 1959 and 1965, air travel privileges were extended to those who held Life Gold Passes on the basis of service in the Commonwealth Parliament (SC [138], SCB 76).

24. Three matters are of particular note with respect to the period up to 1976.

25. First, because of the limited number of railways under the Commonwealth's direct control, the provision of Life Gold Passes depended on cooperative arrangements between the Commonwealth and the States that were the subject of regular negotiation (SC [107]–[109], [112]–[123] (SCB 72–73).

26. Second, regular changes were made to the terms of the executive scheme and to the classes of persons who were entitled to the issue of Life Gold Passes (SC [126], [129], [130], [139], [142], [143], SCB 75–77). Life Gold Passes were also liable to recall or revocation on an *ad hoc* basis as determined by the Commonwealth Cabinet or the Railway Commissioners (SC [127], SCB 75; [144], SCB 77). Property in the passes remained in the applicable Railway Commissioners (SC [124], SCB 75; SC [140], SCB 77).

27. Third, the provision of Life Gold Passes to retired parliamentarians was repeatedly the subject of particular public debate and criticism. Successive government-mandated reviews either called for the discontinuation of the Life

Gold Pass scheme or for major changes to its terms (SC [119], SCB 74; SC [131], [133], SCB 76).

28. **1976 – 1 January 1994: a statutory footing.** In March 1976, the Minister for Administrative Services requested the Remuneration Tribunal to enquire into the Life Gold Pass Scheme. By Determination No 1976/6, the Remuneration Tribunal determined the criteria applicable to the issue and use of Life Gold Passes (Book of Documents (**BD**) 2.321). On and from this time, the scheme has had a statutory footing.

29. Pursuant to Determination 1976/6, certain members of Parliament were eligible, on retirement, for the issue of a Life Gold Pass entitling them to 'travel at official expense for non-commercial purposes within Australia on scheduled commercial/commuter air services, mainline rail services and other government services, or by motor coach or other vehicles operating as regular carriers' (cl [2.28], BD 2.337).

30. Determination 1976/6 confined the availability of the Life Gold Pass to certain retired members. This was achieved by 'suspending' Life Gold Passes that had been issued to sitting members prior to the date on which the Determination came into effect (cl [2.28], BD 2.337). The Determination also made it more difficult for both Ministers and members to qualify for a Life Gold Pass, when compared with the arrangements in place immediately prior to the Determination (cl [2.28], BD 2.337).

31. In the period from 1976 to 1 January 1994, the Remuneration Tribunal issued various determinations that modified the terms of the Life Gold Pass Scheme during that period.[4]

32. The Remuneration Tribunal reviewed the operation of the Life Gold Pass Scheme in 1993 and, with effect from 1 January 1994, determined that a cap of 25 trips should apply to members to whom a Life Gold Pass was issued on or after that date (Determination 1993/18, cl [7.1]: BD 2.451). Life Gold Pass holders who were issued with a pass prior to 1 January 1994 continued to enjoy an unlimited number of domestic return trips per year.

33. **2002 legislative scheme.** With relevant effect from 30 December 2002, s 11(2) of the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) (**2002 LGP Act**) provided that former members who were the holders of a Life Gold Pass, other than a former Prime Minister, were entitled to a maximum of 25 domestic return trips per year under the scheme.[5]

34. The 25-trip cap was reduced to 10 domestic return trips per year with effect from 1 July 2012 (pursuant to item 6 of sch 1 of the 2012 LGP Act).

---

4 See Determinations 1977/9 (BD 2.356), 1980/8 (BD 2.378), 1981/13 (BD 2.402), 1984/18 (BD 2.427).

5 BD at 1.15. Clause 3 of sch 1 of the Act, read with s 34, provided for a pro-rata reduction in the maximum number of trips to which former members were entitled during a 'transitional period' ending on 30 June 2003 (cl 1 of sch 1).

35. With effect from 6 March 2012, the 2012 LGP Act closed the Life Gold Pass scheme to members of Parliament who first became entitled to parliamentary allowance on or after 1 July 2012 (SC [159], SCB 79).

PART V LEGISLATIVE PROVISIONS

36. Annexure A to the plaintiffs' submissions extracts the core constitutional and legislative provisions relevant to this proceeding, as they exist in their current form. Annexure A to these submissions contains further historical versions of key legislative provisions. It will also be necessary in oral argument to consider historical versions of the *Superannuation Act* and *Remuneration Tribunal Act 1973* (Cth) (**RT Act**), the majority of which are contained in the Book of Documents.

PART VI ARGUMENT

SUMMARY

37. First, ss 48 and 66 of the Constitution reserve to Parliament the question of what benefits should be paid to serving and retired parliamentarians. If Parliament considers it appropriate that benefits be paid, Parliament may vary the amount of such payments (either up or down), as well as the manner in which those payments are calculated and the circumstances in which they will be paid, at any time thereafter. The Constitution notably distinguishes the position of parliamentarians from other constitutional office holders (such as federal judges and the Governor-General), where the ability of Parliament to vary their remuneration is restricted.

38. When read with the power of the Parliament to 'otherwise provide' under s 51(xxxvi), the discretion reposed in Parliament by ss 48 and 66 is not constrained (or 'abstracted') by s 51(xxxi). It follows that s 51(xxxi) has no relevant operation in the present context: see paragraphs [57]–[65] below.

39. Second, even if there is a relevant 'abstraction' of the power enjoyed by Parliament to determine parliamentary benefits, the entitlements at issue here were created by legislation that is inherently liable to subsequent variation by Parliament from time to time. This conclusion is further reinforced by the status of the entitlements as gratuitous payments provided in the absence of any contract or agreement between individual members and the Commonwealth: see paragraphs [66]–[86] below.

40. Third, the plaintiffs' case is further undercut by the fact that the impugned legislation and Tribunal Determinations increased, rather than reduced, the Commonwealth's liability to pay retiring allowance: see paragraph [82] below. The plaintiffs' various and somewhat inconsistent formulations of their 'property' entitlement to retiring allowance find no support in the legislative scheme and are couched in language that allows the plaintiffs the benefit of any changes that would increase their benefits while rendering them immune from any downside risk: see paragraphs [46]–[53] below. So far as the Life Gold Pass

Scheme is concerned, the entitlements upon which the plaintiffs rely were, by their terms, only ever in force 'from time to time': see paragraphs [97]–[99] below.

41. Fourth, the result is that the plaintiffs' entitlements to retiring allowance, and the third and fourth plaintiffs' entitlements under the Life Gold Pass Scheme, are not 'property' for the purposes of s 51(xxxi) and, further, are not liable to acquisition by subsequent legislation that modifies the nature or extent of the entitlement: see paragraphs [87], [88]–[91], [95]–[100], [101]–[106] below. The same analysis means that none of the laws impugned by the plaintiffs are properly characterised as laws with respect to the acquisition of property, within the meaning of s 51(xxxi): see paragraphs [92], [101] and [104] below.

42. Overall, the legislation impugned by the plaintiffs is simply the most recent in a long history of changes made by Parliament to the form and content of the remuneration paid to serving and former parliamentarians, having regard to a wide range of factors including the Commonwealth's fiscal and economic circumstances and community concerns. This is entirely in accordance with the constitutional scheme agreed upon by the founders.

FIRST CHALLENGE: RETIRING ALLOWANCES

43. The first of the plaintiffs' challenges concerns the validity of legislative provisions (and associated Remuneration Tribunal determinations) which had the effect of calculating the rate of retiring allowance by reference to an amount less than that payable to serving members of Parliament, Ministers and parliamentary office holders from time to time.

44. The plaintiffs' claim fails at several levels in the analysis required by s 51(xxxi) of the Constitution.

Property

45. For the following reasons, the respective entitlements of the plaintiffs to retiring allowance under s 18 of the Superannuation Act were not 'property' within the meaning of s 51(xxxi).

46. **The 'property' alleged by the plaintiffs.** The first task is to identify, with particularity, the bundle of rights alleged by the plaintiffs to constitute the 'property' to which s 51(xxxi) applies.[6]

47. The plaintiffs in places assert that, upon ceasing to be a member of Parliament, each of them became 'entitled', or had a 'statutory right', to receive a fortnightly benefit during their lifetimes pursuant to s 18 of the Superannuation Act as then in force: PS [50], [51].

---

6 Cf *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at 664 [23] (plurality) (***Chaffey***).

48. The plaintiffs in other places assert that a 'vested chose in action' existed, either at the time the plaintiffs entered Parliament and began to make contributions in accordance with the Superannuation Act "or at least once' the plaintiffs had satisfied the minimum qualifying period of service necessary to entitle each to receive a retiring allowance: PS [52].

49. The twin, or perhaps triple, formulations posited by the plaintiffs have several curious features that immediately cast doubt on the force of their submissions.

10 50. First, the 'statutory right' allegedly arising on retirement must, on the plaintiffs' case, be governed by the terms of the Superannuation Acts in force at the various dates on which each plaintiff retired from the Parliament. As a result, each plaintiff allegedly enjoys a 'statutory right' with different characteristics and subject to different terms and conditions.[7] The consequence of such an approach would be that numerous different schemes (or sub-schemes) currently exist in which groups of members reside depending on their respective retirement dates. No attempt is made by the plaintiffs to support such a consequence by reference to the terms of the Superannuation Act.

20 51. Second, the positing of a 'vested chose in action' means that, on the plaintiffs' case, they enjoy an additional, or perhaps alternative, property entitlement that is governed by the terms of the Superannuation Acts in force at the various dates on which they entered Parliament or otherwise satisfied the minimum qualifying periods of service applicable at that time. Given the regular changes in the terms of the Superannuation Act in the period between the dates on which the plaintiffs first entered Parliament (a period extending between 1969–1980), and the dates on which they each satisfied the minimum qualifying period (a period extending between 1977–1992), the alleged vested choses in
30 action will differ amongst the plaintiffs (and amongst all other retired members) and also differ from the 'statutory rights' each retired member is said to have enjoyed upon their respective retirements. The plaintiffs do not explain why they should be treated as enjoying multiple property rights that arise at different points in time and under different versions of the legislative regime.

52. Third, the first and second plaintiffs both enjoyed interrupted periods of service in the Parliament. On the plaintiffs' case, these persons would possess four bundles of rights (two 'statutory rights' arising on their two retirements from
40 Parliament and two 'vested choses in action' arising on their two separate entries into the Parliament). The plaintiffs' submissions do not grapple with this problem.

53. Fourth, on the plaintiffs' case, both the 'statutory right' arising on retirement and the 'vested chose in action' arising at either of two earlier times are inherently liable to some subsequent modifications: namely modifications that maximise their financial advantage.[8] Yet the plaintiffs do not identify how the provisions of

50

7 SC [26]–[27], SCB 60; SC [47]–[48], SCB 63; SC [61]–[62], SCB 64–65; SC [79]–[81], SCB 67.

8 See PS [64]. In addition, if it were otherwise, the vested choses in action allegedly enjoyed by the second and fourth plaintiffs upon their entry into Parliament (in 1972 and 1969 respectively: SC [32], SCB 61; SC [69], SCB 66) would only entitle them to retiring allowance at a rate calculated by

the Superannuation Act support the conclusion that the rights/choses in action allegedly enjoyed by them are subject to conditionality that is only 'one way' in its operation.

54. The difficulties identified above flow from the plaintiffs' somewhat indiscriminate attempts to map onto their entitlements under s 18 of the Superannuation Act general law concepts of 'property', 'rights' and 'choses in action'. However, where the alleged 'property' is statutory in nature, 'further analysis is imperative' in order to determine its true character for the purposes of s 51(xxxi) and, in particular, whether the 'property' is of a nature that renders it inherently liable to subsequent variation.[9] In answering that question, it is necessary scrutinise closely the legal context in which the 'property' is conferred, the terms by which the conferral takes place, and the nature and subject-matter of the rights allegedly arising in favour of the plaintiffs as a result of the conferral.

55. Contrary to PS [39]–[40], those cases in which the Court has considered whether a statutory entitlement is inherently liable to subsequent modification disclose no error. Those authorities do not suggest the existence of a free-standing or automatic 'exception' to s 51(xxxi) but instead recognise that statutory entitlements are, by definition, the creations of Parliament and that the context, terms and subject-matter of that legislation may reveal that Parliament intended the entitlement to have, as one of its incidents, a liability to alteration at a later date. Put another way, the process of analysis may reveal that a statutory entitlement suffers from the 'congenital infirmity' that its content was subject to the terms of the applicable Act 'in the form it might from time to time thereafter assume'.[10]

56. The following five considerations indicate that the plaintiffs' respective entitlements to retiring allowance pursuant to s 18 of the Superannuation Act were not 'property' for the purposes of s 51(xxxi) because they were, at all times, inherently liable to subsequent variation.

57. **Constitutional context**. The entitlements were conferred pursuant to a specific constitutional power that reserved all questions concerning the remuneration of serving and retired parliamentarians to Parliament itself.

58. Nothing in s 48 or s 66 of the Constitution confers an irrevocable entitlement upon serving or retired members of Parliament to a particular amount of allowance or salary. The effect of the expression 'until the Parliament otherwise provides', wherever used, is to leave the relevant decision within the remit of

---

reference to the parliamentary allowances they were entitled to at their respective retirements (a position far less advantageous to them than the regime which they now challenge).

9 *Chaffey* (2007) 231 CLR 651 at 664 [23], Cf at 665–666 [30] (plurality); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 73 [196] (Gummow J) (***WMC Resources***); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 361–362 [93] (French CJ) (***Wurridjal***).

10 *WMC Resources* (1998) 194 CLR 1 at 75 [203] (Gummow J), citing *Norman v Baltimore & Ohio Railroad Co* 294 US 240 (1935) at 308.

Parliament to 'provide and modify from time to time'.[11] The expression accommodates:[12]

> the notion that representative government is a dynamic rather than a static institution and one that has developed in the course of this century. The accommodation is effected in the Constitution itself by authorising the legislature to make appropriate provision from time to time.

59. The unconstrained flexibility enjoyed by Parliament under ss 48 and 66 was clearly understood at the time of Federation. As Quick and Garran observed with respect to s 48:[13]

> [N]either the principle nor the amount of payment are permanent constitutional provisions. Without an amendment of the Constitution, the Federal Parliament may at any time either abolish payment of members or reduce or increase the allowance which each member is to receive, or alter the method of apportioning the allowance ...

60. Harrison Moore was of the same view: '[t]he payment of members of the Commonwealth Parliament is under no constitutional guarantee: the Parliament may abolish it or alter the amount.'[14]

61. It is unsurprising that the founders would wish Parliament to retain the utmost flexibility as to the form and quantum of allowances to be paid to its serving and former members. Depending upon economic and fiscal circumstances, an appropriate level of remuneration may be higher or lower than that specified in both sections. A wide range of other considerations (including public perceptions[15]) may also be relevant in determining whether, and to what extent, members of Parliament ought be remunerated. With reference to s 48's counterpart in the United States Constitution (Art I § 6.1), Story observed:[16]

> If [congressional remuneration were] fixed by the constitution, it might, from the change of the value of money, and the modes of life, have become too low, and utterly inadequate. Or it might have become too high in consequence of serious changes in the prosperity of the nation. It is wisest, therefore, to have it left, where it is, to be decided by congress from time to time, according to their own sense of justice, and a large view of the national resources. There is no danger, that it will ever become excessive, without exciting general discontent, and then it will soon be changed from the reaction of public opinion. (emphasis added)

---

11 *McGinty v Western Australia* (1996) 186 CLR 140 at 285 (Gummow J) (***McGinty***).

12 Ibid at 280–281 (Gummow J); see also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 237–238 [157] (Gummow and Hayne JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 71 [202] (Hayne J), 130 [419]–[420] (Kiefel J), in the context of ss 10, 24, 30 and 31.

13 J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth* (1900) at 499.

14 *The Constitution of the Commonwealth of Australia* (1902) at 113.

15 See eg W Harrison Moore, *The Constitution of the Commonwealth of Australia* (1910) at 138, who records that the increase in parliamentary allowances provided for in the *Parliamentary Allowances Act 1907* (Cth) 'called forth a large amount of public disapproval, directed less at the increase itself than at the impropriety of the members of the Parliament voting public money to themselves without any mandate on the subject from the country.'

16 J Story, *Commentaries on the Constitution* (1891) at 627 §858.

62. The provision of allowances and salaries to members and Ministers stands in stark contrast to the quantitative and temporal restrictions governing the payment of remuneration to other constitutional office holders. Thse different remunerative arrangements for each branch of government constitute a deliberate constitutional scheme directed towards preserving institutional independence in a context where control over expenditure of public money is vested generally in the Parliament (ss 81 and 83 of the Constitution). Thus federal judges receive such remuneration as Parliament may fix but subject to the express condition that 'the remuneration shall not be diminished during their continuance in office': s 72.[17] The remuneration payable to Governors-General (who do not have the same tenure as federal judges) is further confined: their salaries are also set by Parliament but may not be altered, either up or down, during their continuance in office: s 3. In contrast, as it is Parliament itself, rather than the other branches of government, that ultimately sets parliamentary allowances (consistent with control over the expenditure of public money), it is not necessary to protect those allowances to secure the independence of Parliament from the other branches of government.

63. This flexibility is reinforced by the political accountability of parliamentarians to the electorate and the comparatively short terms of office enjoyed by members of Parliament (approximately 3 years for members of the House and 6 years for members of the Senate), in contrast to the position of federal judges who, until 1977, served for life.[18] Unlike federal judges or Governors-General, the body of serving and retired parliamentarians is also likely to be large and ever-changing. In such circumstances, it is understandable that Parliament would retain control of the manner and extent to which it provides financial benefits to its serving and retired members and, moreover, that one Parliament would not be able, via the protection afforded by s 51(xxxi), to 'entrench' benefits that a succeeding Parliament may consider inappropriate or unaffordable.

64. These matters have a further significance in the context of s 51(xxxi). The protection conferred by that section arises from a rule of construction and, as a result, 'is subject to a contrary intention either expressed or made manifest' in other grants of power.[19] Here, it is 'of the essence' of ss 48 and 66 that Parliament may choose to alter from time to time the entitlements that serving and retired parliamentarians may enjoy in a public interest assessment tailored to the circumstances of the given time.[20] This essential characteristic of ss 48

---

17 See *Baker v Commonwealth* (2012) 206 FCR 229 at 237–238 [37]–[39] (Keane CJ and Lander J) (***Baker***); *Austin v The Commonwealth* (2003) 215 CLR 185 at 286–287 [240]–[241] (Kirby J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 80 [77]. The same protection applies to remuneration for members of the Inter-State Commission: Constitution, s 103.

18 Cf *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 157 [12] (Gleeson CJ), 170 [57] (plurality).

19 *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134 at 160 (plurality) (***Nintendo***).

20 Cf Ibid at 160 (plurality); see also *Theophanous* (2006) 225 CLR 101 at 127–128 [68] (plurality): 'The enjoyment of benefits provided thereunder [ss 48 and 51(xxxvi)] by reason of membership of the House of Representatives or the Senate may be brought to an end as a further operation of the legislative power which supported their creation.' While that case had to decide only the narrow question of termination of benefits for misconduct, the 'public interest' considerations that *Theophanous* pointed to are consistent with the broader argument put here.

and 66, when read with the legislative head of power in s 51(xxxvi), is sufficient to manifest a contrary intention that precludes the operation of s 51(xxxi).[21] Put simply, the constitutional scheme indicates that s 51(xxxi) was not intended to constrain the flexibility otherwise enjoyed by Parliament as to the nature and level of the entitlements to be conferred on serving and retired members.

65. Notably, the plaintiffs' submissions make no attempt to grapple with the constitutional context in which the Superannuation Act stands. Yet that context is critical to an accurate understanding of the nature of the entitlement conferred by s 18 on retired parliamentarians and immediately suggests that the entitlement was inherently liable to subsequent modification by Parliament at any time without triggering s 51(xxxi).

66. **The Superannuation Act.** The defeasible nature of the entitlement enjoyed by the plaintiffs is reinforced by a consideration of the Superannuation Act itself. Since the Act's commencement, the operative provision conferring an entitlement to retiring allowance has been s 18(1). With non-material exceptions, it has consistently provided:[22]

> Subject to this Act, a member who ceases to be entitled to a parliamentary allowance shall be entitled to benefits in accordance with this section. (emphasis added)

67. The underlined expressions in s 18(1) are to be construed as referring to the terms of the Superannuation Act as they operate from time to time. In *Chaffey*, the Court accepted a submission that the expressions 'subject to this Part' and 'in accordance with this Part', and the obligation to provide 'such compensation as is prescribed', rendered the rights provided for in the applicable section inherently variable.[23] The plurality referred to *Ocean Road Motel Pty Ltd v Pacific Acceptance Corporation Ltd*, where it was held that the expression 'this Act' refers to the 'Act in the form which it may from time to time thereafter assume'.[24]

68. A consideration of the Superannuation Act as a whole reinforces the limited nature of the rights conferred by s 18(1) on retired members of Parliament.

69. First, since 1973, the rate of retiring allowance has been calculated by reference to a percentage of the rate of 'parliamentary allowance' paid to serving members of Parliament from time to time. For most of the period since 1973, the rate of 'parliamentary allowance' has, in turn, been the subject of determination by the Remuneration Tribunal and regulation by the Executive. No challenge is made by the plaintiffs to this long-standing link. Nor do the plaintiffs allege either that the content of the parliamentary allowance provided to members was unable to be altered or the level of the allowance to be

---

21 Cf *Nintendo* (1994) 181 CLR 134 at 161 (plurality).

22 PS [62(a)] wrongly suggests that the section commences 'Subject to this Part'.

23 *Chaffey* (2007) 231 CLR 651 at 662 [18], 663 [20], 665–666 [30] (plurality); see also *WMC Resources* (1998) 194 CLR 1 at 73–74 [198]–[200] (Gummow J).

24 (1963) 109 CLR at 280 (Taylor J); see also 282–283 (Menzies J).

reduced. These matters necessarily render retiring allowance subject to regular alteration and are not relevantly different to the regulations relied upon in *Chaffey* as one of the indicia of inherent variability: cf PS [62(a)].

70. Second, the retiring allowance payable to a former member has always been liable to reduction where the recipient of a retiring allowance holds office in a State or Territory Parliament, or receives a parliamentary retiring allowance under State or Territory law: s 21.[25] Since 1983, retiring allowance has also been liable to reduction where the recipient holds an office of profit under the Commonwealth or under a State: s 21B. If a member of Parliament is disqualified by ss 44(i) or (ii), or s 45(iii) of the Constitution, his or her contributions are refunded but no other benefit is payable under the Act: s 22. Since the Act's commencement, the benefits payable by way of retiring allowance have also not been assignable to third-parties: s 24.[26]

71. Third, the enactment of the protection in s 22T in 1996 is another important indication of Parliamentary intention. The section reflects a deliberate decision by Parliament to ameliorate the effect that any future reductions in the amount of parliamentary allowance would have on retired members. The section would be otiose unless it was contemplated by Parliament that reductions in the rate of parliamentary allowance would otherwise result in consequential reductions in the rate of retiring allowance.[27] Parliament has observed the protection in the present case.

72. For these reasons, neither at the time each of the plaintiffs had commenced office, nor when each had reached the minimum qualifying period, nor on retirement, nor since, has the Superannuation Act indicated 'a legislative intention by the Parliament that it will not alter, reduce or abolish' the benefits conferred by s 18.[28] Rather, an orthodox process of statutory construction indicates that any rights enjoyed by the plaintiffs pursuant to s 18(1) of the Act were of variable content and 'inherently unstable'.[29] Amendments to the terms of s 18 were not dealings in any species of property but, rather, the 'exercise of power inherent at the time of its creation and integral to the property itself.'[30]

73. **A statutory scheme requiring regular modification**. Adopting the language of Crennan J in *Wurridjal*, s 18 of the Superannuation Act is 'part of a scheme of statutory entitlements which will inevitably require modification over time'.[31] It is inevitable that legislation providing for the payment of financial benefits from

---

25 The plaintiffs' description of s 21 as a mechanism to prevent 'double-dipping' is inapt given the section applies to benefits paid by State and Territory governments: cf PS [62(b)].

26 Contrast the rights conferred upon holders by the *Copyright Act 1968* (Cth) and *Patents Act 1990* (Cth) referred to in *WMC Resources* (1998) 194 CLR 1 at 70 [183] (Gummow J).

27 Cf *Remuneration and Allowances Amendment Act 1981* ss 2, 4 (BD 1.145) and *Remuneration and Allowances Alteration Act 1986* ss 2(2), 4, 15 (BD 1.168).

28 Cf *Health Insurance Commission v Peverill* (1994) 179 CLR 226 at 263 (McHugh J) (***Peverill***).

29 Cf *WMC Resources* (1998) 194 CLR 1 at 73 [195] (Gummow J).

30 *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 165 (Black CJ and Lander J); cf *Baker* (2012) 206 FCR 229 at 247 [75] (Keane CJ and Lander J).

31 *Wurridjal* (2009) 237 CLR 309 at 439–440 [363]–[364] (Crennan J).

the public purse will, over time, require alteration to reflect changes in economic circumstances and inflation, amongst other things.

74. In the immediate context of retiring allowance, SC [176] (SCB 83) shows how the manner in which retiring allowances have been calculated and provided for has changed: starting with a fixed amount, then moving to a percentage of the retired member's own parliamentary allowance at retirement, and then to a percentage of the parliamentary allowance paid to a member from time to time. Regular reviews of the scheme have also been undertaken.[32]

10

75. These matters mirror the wider history of regular changes to the remuneration provided to serving and retired parliamentarians pursuant to the power of the Parliament to 'otherwise provide' pursuant to ss 48 and 66 of the Constitution.

76. Special Case [161] – [173] identify a large number of changes with respect to the provision to serving parliamentarians of parliamentary allowances, parliamentary office holder allowances and ministerial salary. These changes concerned both the mechanisms by which allowances and salaries are calculated (including changes in the involvement of the Remuneration Tribunal) and also changes to the amount of allowances and salaries payable to members of Parliament (including reductions in payments).

20

77. An example of the latter is the reductions in allowances and salaries payable to parliamentarians during the Great Depression, commencing with the passing of the *Financial Emergency Act 1931* (Cth) (SC [161(a)], SCB 79); see also SC [161(b)]). Those reductions were made on the footing that the 'grave financial emergency existing in Australia' required a 'common sacrifice' in order to restore 'industrial and general prosperity'.[33] Reductions in parliamentary entitlements matched reductions in a wide range of other Commonwealth outlays, including reductions in the rate of the aged pension and war pensions.[34] Members have also been subject to reductions in their parliamentary allowances in more recent times, including retrospective reductions in 1981 and 1986 (with a consequent reduction in the amount of retiring allowance payable to retired members) (SC [161(c), (d)], SCB 79). At still other times, Remuneration Tribunal Determinations that would have resulted in an increase in the rate of parliamentary allowance (and a consequent increase in retiring allowance) have been modified or disapproved by Parliament (see eg SC [165], [166], SCB 81).

30

40

78. **Wholly a creature of statute.** The inherent variability of entitlements to retiring allowance is reinforced by the nature of the entitlement provided. Retiring allowance is wholly a creature of statute and is not known to the general law. That fact does not automatically render the rights conferred by the

50

32 SC [189], SCB 86–87; cf *Chaffey* (2007) 231 CLR 651 at 673–634 [63] (Heydon J).

33 Recitals to the 1931 Act (BD 1.72).

34 1931 Act, ss 33–35 (BD 1.83).

Superannuation Act inherently defeasible[35] and does not negate the need to construe the terms of the Act to divine Parliament's intention (as has been done above). Nevertheless, the exclusively statutory foundation of retiring allowance means that such rights will more readily be of a nature that renders them liable to subsequent variation than other categories of rights and interests.[36]

79. **A gratuitous benefit**. Retiring allowance is a benefit provided in the absence of any contract or agreement between the member and the Commonwealth. As a result, it is properly characterised as gratuitous in nature. Any rights to receive gratuitous payments 'are the creation of the legislature and are always liable to alteration or abolition by later legislation'.[37] Put another way, Parliament may alter, 'whether by way of increase or decrease, prospectively or retrospectively, the benefits it pays as part of' such schemes.[38]

80. The approach adopted by the Court to payments made in the absence of a contract or agreement reflects long-standing authority in the United States. Such benefits may be 'redistributed or withdrawn at any time in the discretion of Congress'.[39] This ability on the part of Congress is not affected by the existence of a legitimate expectation on the part of a recipient that he or she will continue to receive entitlements without alteration.[40]

81. The fact that the Superannuation Act requires the making of contributions by members while in office does not alter the above analysis: *contra* PS [59]. The making of contributions is not expressed to be a condition precedent to the payment of retiring allowance. Nor are members' contributions intended to provide significant funding for the retiring allowances ultimately paid. By way of example, the second plaintiff contributed approximately $35,297 during his period as a parliamentarian but has been paid approximately $1.323 million by way of retiring allowance in retirement (i.e. about 3% to date) (SC [46], [51], SCB 62–63).

82. Even if the 'contributory' status of the scheme were brought to account, it would primarily indicate that Parliament chose to structure the benefits such that the retiring allowance would not be less than the amount actually contributed by a member.[41] In any event, no such issue arises here because: (a) there has been

---

35 *JT International SA v Commonwealth* (2012) 250 CLR 1 at 48 [103] (Gummow J) (***JT International***); *Wurridjal* (2009) 237 CLR 309 at 439–440 [363] (Crennan J).

36 *Georgiadis v Australian Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305–306 (Mason CJ, Deane and Gaudron JJ) (***Georgiadis***); *WMC Resources* (1998) 194 CLR 1 at 16–17 [15]–[17] (Brennan J), 35–36 [78] (Gaudron J).

37 *WMC Resources* (1998) 194 CLR 1 at 73 [197] (Gummow J), referring to *Allpike v The Commonwealth* (1948) 77 CLR 62 at 69, 76–77; *Peverill* (1994) 179 CLR 226 at 245, 256, 263–265.

38 *Peverill* (1994) 179 CLR 226 at 256 (Toohey J) (in the context of medicare benefits); see also at 260 (McHugh J).

39 *Lynch v United States* 292 US 571 (1934) at 577 (quoted with approval by McHugh J in *Peverill* (1994) 179 CLR 226 at 262); see also *Frisbie v United States* 157 US 160 (1894) at 166; *Flemming v Nestor* 363 US 603 (1960) at 610–611; *United States Railroad Retirement Board v Fritz* 449 US 166 (1980) at 174.

40 *Hoffman v City of Warwick* 909 F 2d 608 (1990) at 616–617.

41 Eg ss 19AB, 22 (which provide for the refund of member contributions in prescribed circumstances).

no reduction in the amount of retiring allowance payable to the plaintiffs; and (b) each plaintiff has already received vastly more by way of retiring allowance than they contributed during their service in the Parliament (SC [24], [31], SCB 60–61; SC [46], [51], SCB 62–63; SC [60], [66], SCB 64–65; SC [78], [83], SCB 67–68). The operation of the legislation impugned by the plaintiffs does not therefore give rise to any 'inconsistency' with the contributions actually made by the plaintiffs: cf PS [61].

83. The plaintiffs' reliance on the existence, in 1948, of a dedicated trust fund into which contributions by members and the Commonwealth were transferred is also misplaced: cf PS [63(a)]. In its original form, a 'Parliamentary Retiring Allowances Fund' was vested in, and administered by, a 'Parliamentary Retiring Allowances Trust'.[42] Contributions by both members and the Commonwealth were required to be paid directly to the Fund and the retiring allowance payable under s 18 to retired members was to be paid from the Fund.[43] However, in 1964 the Commonwealth was authorised to pay retiring allowance directly from Consolidated Revenue.[44] In 1973, all the assets of the Parliamentary Retiring Allowances Fund were unilaterally vested in the Commonwealth.[45] Contributions to be made by members were henceforth to be paid to the Commonwealth directly.[46] From 1973, no contributions paid by members have been vested in the Trust or any fund administered by the Trust. While the Trust remains in existence, it holds no assets on behalf of serving or retired members and is solely concerned with administering certain confined aspects of the statutory scheme.[47]

84. Far from supporting the plaintiffs' contentions, these unilateral changes to the core architecture of the retiring allowance scheme further underscore Parliament's intention to retain control at all times of the existence, manner and form of any retiring allowance to be paid to retired members.

85. The same difficulties confront the plaintiffs' characterisation of retiring allowance as a *quid pro quo* for 'services rendered' as a member of Parliament: PS [58]. To the extent it is helpful to speak of a member of Parliament having duties, their performance is not conditional upon receipt of a retiring allowance (nor any other allowance). Conversely, an entitlement to retiring allowance is not expressed to be conditional upon any act by a member (such as attendance at sittings of the Parliament) but merely upon the duration of the member's status as a member of Parliament.

86. Even if a retiring allowance were viewed loosely as 'part of a member's remuneration' (PS [59]), that description only serves to undercut the plaintiffs'

---

42 *Parliamentary Retiring Allowances Act 1948* (Cth), ss 5, 9 (BD 1.207–208).

43 Ibid, ss 13, 14, 18 (BD 1.209–212).

44 *Parliamentary Retiring Allowances Act 1964* (Cth), s 5 (BD 1.218).

45 *Parliamentary and Judicial Retiring Allowances Act 1973* (Cth), s 9 (BD 1.268).

46 Ibid, s 10 (BD 1.268–269).

47 See eg s 15A(2), where the Trust is responsible for determining that a person's resignation or failure to be a candidate is to be treated as an invalidity retirement for the purposes of the Act.

case once it is accepted that the remuneration paid to serving members of Parliament may be increased or reduced as Parliament decides.

87. **Conclusion.** Having regard to the matters identified above, the entitlements to retiring allowance asserted by the plaintiffs are not 'property' for the purposes of s 51(xxxi).[48]

No acquisition

88. If the Court concludes that the entitlements conferred by s 18(1) were not, in truth, 'property' within the meaning of s 51(xxxi), that is the end of the enquiry and no regard need be had to whether those rights were acquired.

89. However, even if the entitlements are considered to be 'property', the 2011 Amendment Act and 2012 LGP Act did not effect an 'acquisition' of those rights for the purposes of s 51(xxxi) of the Constitution.[49] The reasons given above demonstrate that this is a case where, like the observation of the plurality in *Peverill*, 'what is involved is a variation of a right which is inherently susceptible of variation and the mere fact that a particular variation involves a reduction in entitlement ... does not convert it into an acquisition of property.'[50] Put another way, the nature of the rights conferred on retired parliamentarians with respect to retiring allowance are such that 'defeasance or abrogation does not occasion any acquisition in the constitutional sense'.[51]

90. In addition, the fact that the amendments impugned by the plaintiffs effected no reduction in the amount of retiring allowance in fact payable to the plaintiffs independently demonstrates that no acquisition of property occurred.

91. Finally, the impugned provisions did not result in the Commonwealth nor another person obtaining an identifiable advantage of a proprietary kind.[52] The impugned legislation, and Determinations, did not extinguish or modify any vested cause of action[53] to the consequential financial benefit of the Commonwealth. Rather, the legislation and Determinations merely operated to alter the manner in which a monetary benefit payable by the Commonwealth to the plaintiffs was to be calculated for the future and did so in a way that increased the amount of that benefit, to the Commonwealth's disadvantage.

Not a law with respect to the acquisition of property

92. The above analysis also produces the conclusion that the 2011 Amendment

---

48 Cf *Chaffey* (2007) 231 CLR 651 at 665–666 [30] (plurality); *WMC Resources* (1998) 194 CLR 1 at 73 [195] (Gummow J).

49 *Chaffey* (2007) 231 CLR 651; *Peverill* (1994) 179 CLR 226 at 263 (McHugh J).

50 *Peverill* (1994) 179 CLR 226 at 237 (plurality). See also *Georgiadis* (1994) 179 CLR 297 at 306 (plurality).

51 *WMC Resources* (1998) 194 CLR 1 at 73 [196] (Gummow J).

52 See *JT International* at 61 [143]–[144] (Gummow J), 67–68 [169] (Hayne and Bell JJ), 110 [305] (Crennan J), 130–131 [365] (Kiefel J).

53 Cf *Georgiadis* (1994) 179 CLR 297 at 305 (Mason CJ, Deane and Gaudron JJ); *Smith v ANL Ltd* (2000) 204 CLR 493.

Act and 2012 LGP Act are not properly characterised as laws 'with respect to' the acquisition of property within the meaning of s 51(xxxi).[54]

Just terms

93. This question is not reached. Nevertheless, the plaintiffs are protected from a reduction in the amount of their retiring allowance by s 22T of the Superannuation Act, which has been in force since 2 March 1996. Section 22T sufficiently protects the plaintiffs and satisfies any obligation on the Commonwealth to provide just terms for any acquisition of property.

SECOND CHALLENGE: LIFE GOLD PASS

94. The plaintiffs' challenge to 2002 and 2012 legislative changes to the Life Gold Pass scheme may be dealt with shortly.

Property

95. So far as the fourth plaintiff is concerned, immediately prior to 30 December 2002 he enjoyed a statutory entitlement, pursuant to Determinations made by the Remuneration Tribunal under s 7 of the RT Act, to an unlimited number of domestic return trips per year. So far as the third plaintiff is concerned, he became entitled to the issue of a Life Gold Pass pursuant to Determination 1993/18 (which applied a 25 return trip cap to persons in his position). However, it does not follow that these entitlements are properly to be treated as 'vested rights' or as 'property' protected from subsequent variation for the purposes of s 51(xxxi): cf PS [66].

96. First, it is common ground that s 7 of the RT Act was authorised by ss 48 and 51(xxxvi) of the Constitution to the extent that the Tribunal made determinations with respect to Life Gold Passes: see PS [22]. As submitted above at [58]–[65], s 48 conferred no rights upon a serving or retired parliamentarian to any specific level or type of financial remuneration. Rather, s 48 left those matters to the discretion of the Parliament, as exercised from time to time.

97. Second, the same conclusion follows from an examination of the particular provision pursuant to which each Determination with respect to the Life Gold Pass scheme was made. At all times since its enactment, s 7(1) of the RT Act has provided:

> The Tribunal shall, from time to time as provided by this Act, inquire into, and determine, the allowances (including allowances in accordance with section 48 of the Constitution) to be paid out of public moneys of Australia to members of the Parliament by reason of their membership of the Parliament ...

Where the Tribunal exercises the power under s 7(1), s 7(4) has at all times conferred a derivative power upon the Tribunal to inquire into, and determine, matters significantly related to the subject of the s 7(1) inquiry or determination (although the precise terms of the power in s 7(4) have changed over time).

---

54 *Peverill* (1994) 179 CLR 226 at 264–265 (McHugh J); see also at 237 (plurality).

98. The Determinations made by the Tribunal with respect to the Life Gold Pass scheme were made pursuant to s 7(1) and/or the derivative power conferred by s 7(4) of the RT Act. It follows that, on the proper construction of s 7(1), the Determinations were always liable to variation 'from time to time' as the Tribunal considered necessary.[55] The fact that the Tribunal chose not to reduce the number of domestic return trips to which Life Gold Pass holders in the position of the fourth plaintiff were entitled is irrelevant in circumstances where it was always open to the Tribunal to do so. The defeasible nature of entitlements conferred by the Determinations is further reinforced by the fact that all such Determinations were liable to disallowance by either House of Parliament (s 7(8)).

99. While the plaintiffs rely on s 7(9), that sub-section operates (in both its original and current forms[56]) to authorise the payment of funds 'in accordance with' the applicable Determination. The sub-section does not entrench entitlements conferred by prior Determinations or otherwise constrain the power conferred upon the Tribunal by s 7(1).

100. Third, the history of the Life Gold Pass in both its administrative and legislative forms makes clear that it constitutes a scheme that is inevitably likely to require alteration from time to time. The provision of free post-retirement travel to parliamentarians is also clearly gratuitous in nature and is an entitlement not known to the general law. In these circumstances, the entitlement will more likely be recognised as inherently defeasible for the reasons set out at [73]ff above.

No Acquisition

101. Having regard to the nature of the 'right' enjoyed by the third and fourth plaintiffs immediately prior to the 30 March 2002, the 2002 LGP Act did not effect any acquisition of property, and is not properly described as a law 'with respect to' the acquisition of property, within the meaning of s 51(xxxi).

102. So far as the fourth plaintiff is concerned, the 2002 LGP Act merely modified rights that were always inherently subject to modification. That Parliament chose directly to modify those rights, rather than leave that decision to the Remuneration Tribunal, is of no moment.

103. The same submissions apply with even greater force to the third plaintiff given that no effective modification of his rights occurred (because the 25 return trip cap provided for under the 2002 LGP Act was the same as that governing his rights under Determination 1993/18).

104. The subsequent reduction of the cap from 25 to 10 domestic return trips under the 2012 LGP Act is subject to the same analysis. The 2012 LGP Act merely

---

55 See also *WMC Resources* (1998) 194 CLR 1 at 69–70 [181] (Gummow J), where the reference to a permit in the relevant Act was to a permit 'as varied for the time being'.

56 Subsection 7(9) has been modified on a large number of occasions. It is not clear which version of the sub-section is relied upon by the plaintiffs.

modified benefits provided under the 2002 LGP Act that were, by their nature, liable to change from time to time.

105. In truth, the 2002 LGP Act and 2012 LGP Act were merely two of a number of steps taken, either by the Remuneration Tribunal or Parliament itself, to reduce over time the benefits provided for pursuant to the LGP Scheme. The reduction in the cap to 10 domestic return trips per year accorded with a recommendation that the Remuneration Tribunal had made in a 2011 report[57] and reflected a concern that the provisions of the Life Gold Pass scheme still exceeded 'community standards'.[58] The Remuneration Tribunal referred in its 2011 report to the fact that, in its view, '[t]here is possibly no single issue on which there is such a disconnect between parliamentarians and their constituents as the Life Gold Pass ... the public view of actual LGP usage seems to be one of derision.'[59]

106. In these circumstances, the issue of just terms does not arise.

PART VII QUESTIONS STATED

107. The questions stated for the opinion of the Full Court should be answered as follows: **Question one**: 'No'; **Question two**: 'Unnecessary to answer'; **Question three**: 'The plaintiffs'.

PART VIII LENGTH OF ORAL ARGUMENT

108. The Commonwealth notes the plaintiffs seek 4.5 hours for oral argument. The Commonwealth submits the parties should be able to complete all oral argument within one day, with an equal division of time.

Dated: 1 April 2016

Justin Gleeson SC
Solicitor-General of the Commonwealth
Telephone: 02 6141 4145
Facsimile: 02 6141 4149
Email: justin.gleeson@ag.gov.au

David Thomas
Telephone: 02 9232 4478
Facsimile: 02 9232 1069
Email: dthomas@sixthfloor.com.au

Counsel for the First Defendant

57 *Review of the Remuneration of Members of Parliament* dated 15 December 2011 (**2011 Report**), Chapter 8 (BD 5.1866).

58 Second Reading Speech to the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Bill 2012* (Cth).

59 BD 5.1867. See also *Remuneration Tribunal 1993 Review* at [20] (BD 2.682): 'The public submissions have expressed the most serious concern about entitlements of gold pass holders'; *Review of Parliamentary Entitlements* dated April 2010 at 83 (BD 5.1748).