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Ombudsman Act 1976

Report of the Defence Force Ombudsman

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SREP

1986-6

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OMBUDSMAN ACT 1976

SECTION 15 REPORT

TO

DEPARTMENT OF DEFENCE

DEFENCE FORCE RETIREMENT AND DEATH BENEFITS AUTHORITY

in relation to investigation of the complaints by

██████████, ██████████ and ██████████ ██████████

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In 1983 and 1984 the Defence Force Ombudsman received three related complaints from former members of the Defence Force about their retirement benefits under the Defence Force Retirement and Death Benefits Act 1973 ('the Act'). Each of them had been denied benefits under the 'no detriment' provisions of the Act, whereby members who would have been better off under the superseded Defence Forces Retirement Benefits Act 1948 ('the 1948 Act') could elect in certain circumstances to receive retirement benefits at the rate applicable under that Act. In summary, their circumstances were as follows:

(a) [REDACTED]

[REDACTED] retired from the RAAF on [REDACTED] 1982 with the rank of [REDACTED], after 20 years service.

The Australian Government Retirement Benefits Office ('AGRBO') had informed him by letter dated 26 May 1981 that on retirement he would be in a position of detriment - i.e., that his retirement benefits would be less under the Act than under the 1948 Act and that he would be eligible to receive a higher pension on payment of an additional contribution. AGRBO provided figures which indicated that under the Act he would receive 35% of final salary if he chose to retire in

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██████████ 1982 but under the 1948 Act he could receive a pension of 53.88% of salary if he paid an additional \$5244. ██████████ thereafter submitted his resignation to take effect on ██████████ 1982. On 4 November 1981 AGRBO informed him that the delegate of the Defence Force Retirement and Death Benefits Authority ('the Authority') had given approval for the application of sub-section 25(2) of the Act so that he could receive the higher benefits. He was to apply for those benefits and send his cheque for \$5199 after he had retired.

On the day after he retired, ██████████ duly applied for the higher benefits and sent his cheque to the Authority. He had applied to commute part of his pension, and had been expecting a lump sum cheque in the order of \$63,000, with a reduced pension of \$12,682. Instead, he received a lump sum of \$48,020 and a pension of \$9687.

In a letter dated ██████████ 1982 AGRBO explained, without any apology for the misleading advice it had given him, that its earlier advice had been based on its understanding that to be eligible to benefit from the 'no detriment' provisions, he had to have served for a minimum period according to the rank he had held at 30 September 1972 - in his case, 20 years for a ██████████

██████████ Subsequent advice from Attorney-General's Department had indicated that the correct interpretation was that the minimum period of service should be determined in relation to rank at retirement - in his case, 24 years. He had not served for 24 years. AGRBO said he could request the Authority to reconsider its decision, and that the circumstances of his retirement would be examined 'to ascertain what remedial action may be applicable to your case'.

In ██████████ 1982 the Authority confirmed that the decision in ██████████ case was correct, but decided to refer to the Department of Defence the question of an act of grace payment to him. In January 1983 ██████████ solicitors wrote to the Chairman of the Authority to say that they understood legislation would be necessary to validate payments already made and continuing to be made to other former members under the old, incorrect interpretation of the Act but ██████████ could not wait for legislation; he was suffering continuing loss; the Authority had been negligent in its advice; and unless payment was made at the higher rate he would institute legal proceedings. The Authority referred those letters to the Deputy Crown Solicitor, but ██████████ did not take legal action.

During 1983 and 1984 the Hon T. McVeigh, MP made representations to the Minister for Defence on behalf of [REDACTED]. In August 1984 the Minister introduced a bill to make retrospective amendments to the Act to validate the payments made and continuing to be made, and to confer entitlement on former members like [REDACTED] who had not received the higher payments. The amending legislation received Royal Assent in October 1984.

On 26 November 1984 AGRBO informed [REDACTED] [REDACTED] that he would shortly receive some \$15,278 (less tax) by way of arrears of pension plus an additional lump sum of \$25,903. [REDACTED] subsequently wrote to the Authority to complain about the lack of any interest to him for the \$5199 he had paid in March 1982 to qualify to receive these higher amounts, and about the higher income tax he would have to pay in consequence of receiving the pension arrears in a lump sum.

(b) [REDACTED]

[REDACTED] retired from the Army on [REDACTED] 1982 with the rank of [REDACTED] after 21 years service.

In July 1981, in response to his enquiry, AGRBO informed him that if he retired in [REDACTED] 1982 he would

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receive a 36.5% pension, and that if he paid an additional \$1267 on retirement he could receive the benefits of the 'no detriment' provisions - a 40.59% pension, with an extra \$4300 if he chose to commute part of his pension over and above the \$38,821 he could otherwise receive by commutation. Shortly afterwards [REDACTED] submitted his resignation to take effect on [REDACTED] 1982.

In November 1981 [REDACTED] enquired as to his position if he joined the RAAF. AGRBO gave him oral advice about this in December 1981. According to the contemporary file note, he was informed that 'on present indications detriment would not apply in [REDACTED] 1982 however legal advice would shortly (new year) be received re this matter'. [REDACTED] said that written confirmation of the advice was unnecessary. Apparently he did not appreciate the import of this advice - he later claimed that he thought it related to his enquiry about the effect of transfer to the RAAF, which did not eventuate.

On [REDACTED] 1982 [REDACTED] wrote to the Authority to ask that the 'no detriment' provisions be applied to him on retirement. AGRBO replied on [REDACTED] 1982. It confirmed the oral advice said to have been given to him in December 1981, that he would not be eligible for

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the higher payments. The July 1981 advice had been given on the understanding that he would be eligible for the higher benefits if he served for 20 years, the minimum period specified for the rank he held in September 1972 ([REDACTED] whereas the Attorney-General's Department advice indicated that the minimum period of service required was based on the rank of [REDACTED] - which was 22 years.

AGRBO's advice came as bad news to [REDACTED]. He wrote on [REDACTED] 1982 to point out that he had decided in July 1981 to retire in [REDACTED] 1982 on the earlier advice he had received and the amended advice came too late for him to defer his retirement. In [REDACTED] 1982 the Authority confirmed that [REDACTED] was not eligible for 'no detriment' benefits.

In December 1984, following the passing of amending legislation, AGRBO informed [REDACTED] that he would receive \$2814 less tax in arrears of pension and \$5038 less \$1267 (the cost of overcoming detriment) by way of commutation of pension.

(c) [REDACTED]

[REDACTED] retired from the Navy on [REDACTED] 1984 with the rank of [REDACTED], after 15 years service. As

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a non-permanent officer and as someone who retired several years after earlier errors in interpretation of the legislation had been identified, his position was somewhat different to that of [REDACTED] [REDACTED]. They had chosen to resign to take advantage of resettlement opportunities, whereas his retirement was due to expiry of his commission. To distinguish the two groups, I shall refer in this report to 'resettlement' cases and 'non-permanent' cases.

In November 1980 AGRBO informed [REDACTED] that if he retired in [REDACTED] 1984 and paid in \$7438 to overcome detriment, his pension would increase from 30% to 47.8% of final salary and his lump sum on commutation would increase from \$28,526 to \$45,490. AGRBO did not correct that advice until March 1983, in response to enquiries by [REDACTED] who had learned from other sources that the advice he had been given was probably incorrect. It said that it appeared that although sub-section 25(5) of the Act (which was inserted in 1977) permitted non-permanent officers to elect to overcome detriment, it restricted the benefits payable to them to those applicable to the equivalent permanent officer. Consequently, [REDACTED]' pension would be 34.18% of final salary. AGRBO apologised for the inconvenience caused.

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■ ■ pursued through Navy channels the delay in introducing amending legislation, and subsequently complained to the Defence Force Ombudsman about it and the lack of clear advice as to what was being done to amend the legislation.

■ ■ retired on ■ ■ 1984 on the expiry of his short-service commission. In December 1984 AGRBO informed him that the amendments to the Act entitled him to higher retirement benefits. He would receive \$3254 less tax in arrears of pension, and \$17,553 (less \$5082 contribution to overcome detriment) by way of additional commutation lump sum.

2. The papers supplied by the complainants in support of their complaints indicated that their peers who had been granted the benefit of the 'no detriment' provisions before the changed interpretation of the law came into effect continued to receive pensions at rates to which they were not legally entitled.

3. In summary, while all three complainants eventually received the benefit of the 'no detriment' provisions, they considered that they were improperly discriminated against in comparison with other retired members of the Defence Force who had received the benefit of those provisions before the errors in interpretation were

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discovered and continued to receive pensions at the higher rate without legislative or act of grace cover while the complainants were denied those benefits. They complained about delay in amendment of the legislation. Two of them claim misleading advice about retirement benefits to their subsequent financial discomfiture, and one of them actually paid a large sum to AGRBO in [REDACTED] 1982 so as to be able to enjoy the higher benefits but did not in fact receive them until December 1984. It appears that not only were the complainants denied the higher benefits at retirement and therefore the use of the additional money to assist them in resettlement, but when eventually the money was paid there was no adjustment by way of interest or for loss of value of the money due to inflation, and they may have become liable to pay additional taxation on the payment of arrears of pension in a lump sum as compared to the amount of tax payable had the pension been paid at the higher rate from the date of retirement.

4. When the complaints were received my office made enquiries of AGRBO and the Department but did not seek then to resolve them to finality on advice that the legislation was being amended. The Deputy Ombudsman (Defence Force) did however seek to keep alive the question of interest and current value adjustments:

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. In June 1984 he remarked to the Department, in relation to the [REDACTED] complaint, that no doubt it would be considering the question of current values and interest payments to the people affected, if and when authority emerged for them to be paid corrected rates of pension. The Department responded in October 1984 that the payment of interest was a matter of policy for the Government to consider, and that the Government would not normally pay interest where payments have been made in accordance with legal entitlements. However, it said it would seek clarification from the Department of Finance, and would inform me further when the Finance response was received.

. Following the enactment of amending legislation, in November 1984 the Deputy Ombudsman again wrote to the Department to point out that payment only of the amounts that would have been paid previously if the 'no detriment' provision had then been applicable may not be an adequate remedy. He said that he was disappointed the Department had not sought Finance's comments much earlier in response to his June 1984 remarks, and he pointed out that the question of interest was different from the question of current value. In

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order to expedite resolution of the complaints and to clarify issues, he proposed discussions at the officer level with the Department, Finance and AGRBO.

Although AGRBO and Finance were willing to participate in the discussions which the Deputy Ombudsman had proposed, the Department at first declined to do so. In March 1985 the Department informed him that it had received advice from Finance on the issues he had raised and that it was endeavouring to arrange a meeting as he had proposed. On 3 June 1985 an Assistant Ombudsman met with officers of the Department and of Finance to discuss the issues. The outcome of the meeting was that the Department would consider them further.

In August 1985 the Department informed the Deputy Ombudsman that it had been able to formulate its views on the question of interest/current value payments (but it did not say what those views were). It said the issues of policy and principle involved required consideration at Government level, and would therefore be submitted to the Minister for Defence, who might wish to consult other Ministers. The Department said it would

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advise the Deputy Ombudsman when these steps had been completed.

- . In March 1986 my officers learned from the Department of the Prime Minister and Cabinet that in October 1985 the Minister for Defence had written to the Prime Minister and the Minister for Finance, arguing against payments of the kind the Deputy Ombudsman had informally suggested. The Acting Defence Force Ombudsman therefore informed the Minister of his intention to make a formal report of the investigation without further delay.

- . In accordance with sub-section 8(5) of the Ombudsman Act, on 13 May 1986 he issued a draft report of the investigation to the Secretary to the Department and to the Chairman of the Authority for whatever submissions or comments they wished to make. He also provided a copy to the Secretary to the Department of Finance. In settling this report, I have taken into account the submissions and comments of the Department and the Authority.

Legislative and Policy background

(a) Non-permanent officers

5. The legislative defect which prevented [REDACTED] from receiving benefit under the 'no detriment' provisions on his retirement in [REDACTED] 1984 had been identified not long after the amendments designed to grant those benefits to non-permanent officers became law in November 1977. In March 1978 the Authority resolved to seek through the Department a Ministerial direction to administer the legislation in terms of the policy intention pending receipt of a formal legal opinion. The Department did seek such a direction, but asked the Minister to give it in respect of 'the small number of cases currently awaiting settlement'. It appears that the Authority did not realise that it had not been given the blanket approval it had requested, the Department did not seek a legal advising in the matter, and that neither the Department nor the Authority pursued the matter. The Authority continued to grant 'no detriment' benefits to non-permanent officers on their retirement to which they were not legally entitled.

6. In July 1984 the Chairman of the Authority raised with his staff the validity of the 1982 Ministerial direction. He directed that all future cases be dealt with in accordance with the legislation, and in September 1982

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the Authority informed the Department. By that time, some 68 non-permanent officers had received 'no detriment' benefits to which they were not legally entitled, and those officers continued to receive higher pensions than they were entitled to. In June 1983 the Attorney-General's Department confirmed the Authority's understanding of the law. Further consideration of this issue became caught up in the issues which were involved in the [REDACTED] and [REDACTED] cases, so that the defective legislation was not corrected until October 1984, nearly seven years after the defect was first noted. [REDACTED] retirement came some six years after the defect was noted.

(b) Resettlement cases

7. The legislative deficiency affecting [REDACTED] [REDACTED] first came to the Authority's notice in August 1981. The Authority acknowledged the possibility that its interpretation of sub-paragraph 25(2)(d)(ii) concerning 'no detriment' benefits for officers resigning to take up resettlement, which it had been employing since February 1978, could be in error. The Authority resolved to defer an opinion in the particular cases pending further examination of the matter and if necessary a legal opinion.

8. In September 1981 the Director DFRDB in AGRBO referred another case to AGRBO officers and requested them

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to instruct their staff that pending clarification of the legal issue, benefits were not to be paid in resettlement cases on the basis of the 'no detriment' provisions. In October 1981 the Air Force Member of the Authority noted that one officer had sought to withdraw his resignation because his proposed retirement date might disqualify him from 'no detriment' benefits. The member asked, apparently unsuccessfully, that established policy be maintained pending clarification. According to a schedule subsequently prepared, there were no payments made in resettlement cases under the 'no detriment' provisions for retirements later than 24 August 1981.

9. At its meeting in November 1981 the Authority decided not to pay 'no detriment' benefits pending clarification of the issue, and directed that the Attorney-General's Department be asked to provide urgent legal advice. AGRBO was to identify officers still serving who may have been given incorrect advice; and Service members of the Authority were to obtain the names of those members of the Defence Force who were contemplating retirement, so that AGRBO could check their situations.

10. At its meeting on 12 February 1982 the Authority considered advice from the Attorney-General's Department which confirmed the new interpretation of paragraph 25(2)(d), that it was rank at retirement rather than the

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rank held on 30 September 1972 which was relevant in terms of the minimum period of service required to qualify for the 'no detriment' provisions. The Authority resolved to accept the advice and directed AGRBO to contact those persons whose circumstances were known and who were likely to be affected, as well as providing a statement explaining the 'no detriment' requirements to Service Officers for general promulgation. It deferred consideration of the position of members who may have acted on incorrect advice pending further legal advice.

11. On 20 April 1982 AGRBO released a general statement on the application of the 'no detriment' provisions under the new interpretation. The statement did not say that there had been any change in the interpretation of section 25 of the Act or that AGRBO may have given officers incorrect advice about their entitlements, but it did say in the penultimate paragraph that the application of section 25 had recently been the subject of legal advice and that officers who had previously been advised as to their entitlements should contact the Authority to have their position re-examined.

12. In May 1982 the Attorney-General's Department advised that:

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- (a) Q. In the case of former members who have received and are receiving incorrect entitlements, does an overpayment situation exist, and if so can the Authority recover the overpaid amounts in accordance with the principles enunciated in the Auckland Harbour Board case?
- A. Former members who have been paid more than their lawful entitlement have been overpaid without authority and the overpayment is recoverable by the Commonwealth.
- (b) Q. If action were taken successfully to recover overpayments from former members could those members claim damages from the Authority on the basis that they had been deprived of moneys to which they had been advised they were entitled?
- A. No.
- (c) Q. Would serving members who have been incorrectly advised of their entitlements on future retirement and who have acted on that advice, have cause to sue the Authority for damages, especially in the light of the recent High Court decision in Shaddock v. City of Parramatta.
- A. Perhaps, but that depends on the circumstances in each case.'

In elaborating on the answer to question (c), the Attorney-General's Department observed that the question had been framed in relation to serving members, and that it was difficult to see how a serving member could have actually suffered loss in the absence of a decision by the Authority determining his or her benefits. The advice referred to the Shaddock principles and was that a member could not recover damages unless he had suffered loss as a result of negligent misstatement, and that whether an action could succeed and if so how much the damages would amount to would depend on

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the circumstances of each case. It said that if there was a right to legal action, former members could also have it.

13. In consequence of this advice, in July 1982 the Authority decided to refer the matter to the Department. It thought it would be inappropriate to take any action with respect to the substantial overpayments which had occurred or with respect to the continuing overpayments of pension until the Department had determined the policy question because retrospective amending legislation was possible. It decided that any change in the way new cases were being handled would be contingent on the Department's acceptance of the Authority's recommendation for a change in policy.

14. The Authority formally raised the matter with the Department by memorandum dated 20 September 1982. It also brought to attention the situation of the non-permanent officers referred to above. The Authority said it did not propose to recover overpayments to non-permanent officers but was silent in regard to overpayments to others, and it did not raise the question of wrong advice it had given to officers before their retirement.

15. The Department's Industrial Division believed that the 'no detriment' provisions were operating unduly beneficially, and in February 1983 proposed to the Defence Conditions of Service Committee that not only should the Act

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be amended retrospectively to correct the identified deficiencies but also that it should be altered prospectively to amend the calculation of the detriment. The Committee considered that the latter proposal be put to further study.

16. In April 1983 the Department sought the Minister's approval to prepare a Cabinet submission for retrospective amendment of the legislation. It said this would restore the intention of the legislation, would legalise payments made and received in good faith prior to receipt of the legal advice, and would ensure full application of the 'no detriment' provisions to those who had been inadvertently denied access. The Department said that overpayments had occurred, but did not inform the Minister that the Authority was continuing to make overpayments of benefits to those who had retired before the correct interpretation of the Act was received, nor did it inform him that the Authority had given wrong advice about retirement benefits to some members. However, in response to the Minister's enquiry about the cost of the recommendations, the Department informed him that there were about 80 officers then being overpaid and 16 being paid less than their expectation, and that if retrospective legislation were not enacted there would be good grounds for seeking act of grace payment for the 'difference between entitlement and current value or expectation' - alternatively, some of those affected would

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probably seek legal redress on the basis of wrong advice given by AGRBO and one officer had already engaged solicitors.

17. In December 1983 the Defence (Conditions of Service) Committee considered a paper by the Department's Industrial Division which proposed that amendments to the legislation be deferred pending the outcome of a review of the DFRDB scheme initiated in July 1983, and that the Minister for Finance's approval be sought for act of grace payment to officers already enjoying the benefit of 'no detriment pensions' and to one particular officer (no doubt [REDACTED] [REDACTED]) who had been incorrectly advised. The Navy objected that all those affected should get the 'no detriment' benefits immediately (including those who had been denied them) and the amending legislation should not be deferred. The Department of Finance agreed that amending legislation should not be deferred but it said that could not justify a recommendation to the Minister for Finance for act of grace payments where a legislative remedy was available and there was no justifiable impediment to its implementation. The Committee agreed.

18. In March 1984 the Department presented to the Minister for Defence the Cabinet submission the preparation of which he had approved in May 1983. It recommended that the matter should proceed despite the fact that a review of

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the scheme had been announced. Amending legislation was introduced in the 1984 Budget session and became law in October 1984.

19. In response to the Deputy Ombudsman's June 1984 remarks, the Department sought advice in October 1984 from the Department of Finance about the policy regarding payment of interest on arrears arising from the retrospective amendment of legislation. Following his further remarks in November 1984 the Department augmented in December 1984 the reference to include payment at current rates. The Department of Finance responded in February 1985 that:

- . it may be appropriate to make payments in the nature of interest as an act of grace where the Commonwealth has accepted a moral obligation for withholding a claimant's legal entitlement, or denying him access to a legal remedy, through administrative error;
- . there was no policy to pay compensation, to reflect current values or interest, where benefits are paid under retrospective legislation;
- . the proper time to consider such issues was in the policy formulation stage of amending legislation;

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- . a general policy of adjusting payments arising from retrospective legislation by an erosion of value factor would have significant financial and administrative implications;
- . Finance was not aware that compensation was at any time contemplated by the Minister for Defence or during the passage of the Bill through Parliament; and
- . the onus was on Defence, if some sort of compensation was thought to be warranted, to formulate a proposal to the Government.

20. In August 1985 the Department advised the Minister, through a memorandum to him and a draft letter to the Prime Minister it presented for his signature, that current values and interest payments should not be made on DFRDB pension arrears because:

- . of the Department of Finance views;
- . the Commonwealth is not legally obliged under common law to pay, as a general policy, any form of adjustment in the arrears;

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- . at all times the officers concerned were paid their legal arrears;
- . to legislate then for additional payments entirely directed at compensating perceived losses during a period for which retrospective arrears had subsequently been legislated would be without precedent;
- . the delays in achieving the amendments represented no more and no less than the due processes of Government;
- . the proposition that entitlements to compensation arise because of delays in establishing proper entitlement by legislation has no bounds once a value judgement is made that proper entitlements should have been granted at a time earlier than Parliament legislated, and would open a Pandora's Box;
- . the expectation of some officers that they would enjoy the 'no detriment' provisions was answered by the grant of retrospectivity;
- . the comparison of those officers denied 'no detriment' benefits with others who were not was best answered, in logic, by the argument that the fact that some received more than their legal

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entitlement is not a basis for others to do so -
payments without legal authority did not establish
a precedent or confer rights.

. some officers were incorrectly advised of their
entitlement but the advice was corrected before
retirement; and

. there may be an officer who was not advised
correctly until after retirement but

- the advice was given in good faith,

- there was nothing unusual compared to
situations which have occurred in the past
under Commonwealth policy/legislation vis a
vis the expectations or undertakings of
particular individuals,

- the Commonwealth did not walk away from the
policy intent,

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- some members who retired after October 1982¹ did not receive advice from AGRBO which necessitated subsequent change,
- it would be open for individuals who believe they may have been disadvantaged due to incorrect or misleading advice to seek recourse in law on the basis of a claim for damages, or failing this, through the act of grace system,
- given the variation in the particular circumstances of individuals affected, it is arguable that any common law rights or other remedies which may exist in respect to individuals obviate any moral obligation on the Commonwealth to provide the sort of general compensation proposed.

¹ The Department apparently identified October 1982 as the date of application of the revised interpretation of s25(2)(d). As recorded above, it appears that AGRBO ceased to grant 'no detriment' benefits in resettlement cases in September 1981, although apparently it continued to pay 'no detriment' benefits to non-permanent officers on their retirement until about August 1982. The Department said that 16 resettlement officers and 10 non-permanent officers retired from October 1982 before the legislation was amended.

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Consideration of the issues

(a) Delays in amending legislation

21. Although the Authority and the Department were aware of the deficiencies in the legislation in relation to non-permanent officers in 1978, the Department did not propose amendment until March 1983 and did not present a Cabinet submission for the Minister's approval until March 1984. Similarly, although the Authority first became aware in August 1981 of a possible defect in the legislation concerning 'no detriment' benefits in resettlement cases (and therefore its Department and Service members were aware of the problem from that time) the Authority did not formally bring the matter to the Department's attention until September 1982, a year after it had ceased to grant new benefits on the 'no detriment' basis. (The Department was aware, through those of its officers who were members of the Authority, of the situation from at least October 1981.) Once again, it was not until March 1984 that the Department submitted a Cabinet submission for the Minister's approval.

22. The Department's action in seeking in 1978 a direction from the Minister that the Authority deal with the 'small number of cases currently awaiting settlement on the basis of the policy intention' was in all the circumstances wrong because the Minister had no power to direct the

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Authority to determine benefits other than in accordance with the legislation. The Department had proposed to the Minister an appropriate amendment 'when the next DFRDB amending Bill is to be introduced' but it appears not to have taken any further action even though there were two substantive amendments to the Act in 1979 and another one in 1981. The Department's omission to do so was unreasonable.

23. The delays in amending the legislation once the Authority ceased to pay 'no detriment' benefits to new non-permanent retirees involved a new element, since to that point of time the members had not been disadvantaged. The failure of the Department to seek to have the situation rectified promptly was in my opinion unreasonable. It resulted in members receiving less on retirement than had been intended as well as continuing overpayments to other members for much longer than was necessary..

24. It took some three years from the time AGRBO suspended payment of 'no detriment' benefits for resettlement cases until payments were authorised by amending legislation. The Authority does not believe that it unduly delayed informing the Department of the problems arising from the resettlement detriment legislation, pointing out that it did not receive the Attorney-General's Department's second advice until May 1982. The fact remains however that the Authority's officers were sufficiently

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confident of the legal error to have discontinued payments of 'no detriment' benefits on retirement to officers affected some 12 months before it formally informed the Department. For its part, the Department has acknowledged that the process of Government was longer on this occasion than would normally be the case for simply correcting straightforward defects in legislation, but points to the broader issues about the 'no detriment' provisions and the review of the scheme which were under consideration. Notwithstanding those comments, I believe that both agencies acted far more slowly than fairness to the affected members of the Defence Force required.

25. If the delays in amending the legislation to overcome the perceived defects were 'no less than the due processes of Government' (to use the words of the Department), this is a sad reflection on the administrative procedures involved. These delays were in my opinion unreasonable.

(b) Misleading advice

26. The fact that AGRBO in its letters of 26 May 1981 and 4 November 1981 gave misleading advice to [REDACTED] about his retirement benefits is not in dispute. The advice given on 4 November 1981 was contrary to a request made by the Director, DFRDB in AGRBO in September 1981 that 'no

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detriment' benefits were not to be granted. Although in terms of the Authority's direction on 13 November 1981 that members still serving who had been given incorrect advice should be identified, apparently nine such members were identified and notified, AGRBO omitted to identify and notify [REDACTED] [REDACTED]. The omission to do so was in my opinion unreasonable. It led to [REDACTED] [REDACTED] retirement on a much lower pension and commuted lump sum than he had been expecting, and indeed to the payment of some \$5199 by him (as directed by AGRBO) immediately after retirement, for which the Authority was not in a position to grant any benefit.

27. AGRBO's omission promptly to arrange the refund of the substantial amount [REDACTED] had paid in in error and as a result of AGRBO's misleading advice was unreasonable - particularly in the light of [REDACTED] [REDACTED] letter of [REDACTED] [REDACTED] 1982 outlining the effects on him of AGRBO's misleading advice. Even when the Authority confirmed the decision that [REDACTED] [REDACTED] was not eligible for 'no detriment' benefits, AGRBO took no action to refund the amount in question. Eventually, in February 1983, [REDACTED] asked about a refund but immediately withdrew his request on advice from an unnamed source.

28. The facts relating to the advice given to [REDACTED] are less clear-cut. He was certainly misinformed, in

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writing, in July 1981 about his retirement benefits. AGRBO believed it had given him oral advice in December 1981 that the 'no detriment' benefits would not be available in July 1982 when he retired. [REDACTED] [REDACTED] apparently misunderstood this advice, being preoccupied with the question about which he had contacted AGRBO (his position if he transferred to the RAAF), and said that he did not require written confirmation. In all the circumstances, it was an error of judgement by AGRBO that it did not correct in writing the wrong advice it had earlier given him. The advice circulated through Service channels in [REDACTED] 1982 was explicit in informing members who had previously been advised as to their entitlements that they should contact the Authority. But it was not in my opinion adequate action in itself as a remedy for earlier incorrect advice, and it suffered from the defect that it did not highlight that there was a new and adverse interpretation in force. On balance, I am of the opinion that there was failure clearly and unambiguously to correct in writing to [REDACTED] [REDACTED] the previous incorrect advice he had been given, and that the failure was unreasonable.

29. [REDACTED] [REDACTED] was given misleading advice about his pension entitlements in a letter from AGRBO dated 21 November 1980, even though at that time the 1977 legislative defect had been known for several years. The advice he was given was consistent with the Authority's

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practice at the time in paying 'no detriment' benefits to non-permanent officers. However, AGRBO did not correct that advice when in August 1982 the Chairman of the Authority reversed the practice. It was only as a result of [REDACTED] initiative in January 1983 in querying that advice that AGRBO wrote to him on 18 March 1983 to correct earlier advice. (Even then, it was not accurate to inform [REDACTED] that it was as a result of recent cases that the Authority had doubts as to whether the 1977 amendment had given effect to the policy intention in relation to non-permanent officers - that the 1977 amendment was defective had been recognised since 1978). Again, in my opinion AGRBO had a positive duty to correct earlier wrong advice, and its failure to take all necessary steps to ensure that affected members were properly informed was unreasonable.

(c) Detriment to complainants

30. As a result of the failures and delays mentioned above the complainants did not receive the benefits that they had been intended to have and which others who retired before the legislative defects were discovered continued to enjoy. Ultimately the complainants received the entitlements that the policy behind the 'no detriment' provisions intended they should have but this did not

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compensate for the inconvenience and anxiety that resulted from payments that were less than expected. In addition the complainants suffered financial detriment because of the delays in giving them their full entitlements. They should therefore receive a further remedy on that account. As the Department has said, the expectations of officers that they would enjoy the 'no detriment' benefit were not answered by the grant of retrospectivity.

31. The members' financial detriment stems from the denial to them on retirement of the considerably larger cash sums they had been led to expect and the payment to them of lower pensions for several years. It was not remedied adequately by later payment to them of only the amounts underpaid. To advance that proposition ignores not only the fact that in superannuation matters the investment interest to be earned from the investment of superannuation lump sum payments is an essential ingredient of the benefit (as has been recognised by the Department of Finance in approving act of grace payments made following a superannuation complaint to the Commonwealth Ombudsman) but also the fact that the members concerned had been denied the use of the full amounts of commutation lump sums on their retirement. It also disregards the fact that the DFRDB legislation recognises inflation by providing for annual adjustment to pensions by reference to movements in the consumer price index so as maintain their real values. The effect of this

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is that the payment of arrears of pension in only the amounts which would have been paid had the payments been made at the appropriate time results in underpayment of pension in real terms. Further, it ignores the fact that the deferred lump sum payment of arrears of pension can result in a greater tax liability than if the pension instalments had been paid progressively, and that compensation for this when delay in payment is the result of defective administration is an accepted ground for act of grace payment.

32. In summary, the Department failed to ensure that [REDACTED] [REDACTED] [REDACTED] [REDACTED] received payments that restored their financial position to what it would have been if they had received their full entitlements at the times when those entitlements would have been payable had the 'no detriment' provisions correctly given effect to the policy that was intended when those provisions were enacted. This failure was, in my opinion, unreasonable.

Summary of conclusions

33. In my opinion, in terms of sub-section 15(1) of the Ombudsman Act 1976, the following omissions were unreasonable:

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- . the failure by the Department of Defence, when it had the opportunity in 1979 and 1981, to take action to seek rectification of the legislative defect in relation to non-permanent officers;
- . the failure by the Department of Defence to seek to rectify the legislative defect in relation to non-permanent officers when the matter was again brought to notice in 1982, and in relation to resettlement cases;
- . the failure of AGRBO to notify [REDACTED] at the earliest possible date that it had given him wrong advice about his retirement benefits;
- . the failure of AGRBO to arrange refund of the \$5199 paid by [REDACTED], and the failure of the Authority to direct AGRBO to do so;
- . the failure of AGRBO clearly and unambiguously to correct in writing at the earliest possible date the erroneous advice it had given [REDACTED] about his retirement benefits;
- . the failure of AGRBO promptly to correct at the earliest possible date the erroneous advice it had given [REDACTED] about his retirement benefits;

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. the failure by the Department to ensure that [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] received payments restoring their financial position to what it would have been if they had received their full entitlements at the times when those entitlements would have been payable had the 'no detriment' provisions correctly given effect to the policy that was intended when those provisions were enacted.

Recommendations

34. In terms of sub-section 15(3) of the Ombudsman Act 1976 I recommend that the Department of Defence and the Defence Force Retirement and Death Benefits Authority be jointly responsible for:

. payment to all affected retired non-permanent and resettlement officers of the Defence Force of interest on the deferred payment of lump sums at an appropriate rate from the date of retirement to the date of the deferred payment, with interest on the amount of interest so calculated from the date of deferred payment;

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36.

- . recalculation of the amounts paid by way of arrears of pension at the pension rates applying at the date of deferred payment, and payment of the additional amount to the persons affected, with interest on that amount from the date of deferred payment; and
- . inviting the persons affected to identify any additional income tax they incurred as a result of the deferred payment of pension arrears, and compensating them for the additional tax, together with interest from the date of the additional tax payments.

G. KOLTS

(G. Kolts)
Defence Force Ombudsman

20 August 1986

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