

CUNNINGHAM & ORS v COMMONWEALTH OF AUSTRALIA & ANOR
(S140/2015)

Date writ of summons filed: 21 July 2015

Special case referred to Full Court: 3 February 2016

Former members of the Commonwealth Parliament (who have completed a minimum period of service) are each paid a superannuation retiring allowance (“the Retiring Allowance”), which is calculated in part upon the duration of their parliamentary service. Former members who also held a parliamentary office (such as Government Whip or Chair of a Standing Committee) or who served as Ministers of State are entitled to an additional allowance for having held such office. The allowances are provided pursuant to the *Parliamentary Contributory Superannuation Act 1948* (Cth) (“the Superannuation Act”). Parliament has from time to time changed the form and content of the allowances payable to its former members.

Former members of Parliament are also entitled to a travel pass known as a “Life Gold Pass” (“LGP”) if their parliamentary service meets certain eligibility criteria as determined from time to time by the Remuneration Tribunal (“the Tribunal”). An LGP entitles its holder (and his or her spouse or de facto partner) to travel on various modes of public transport within Australia, for non-commercial purposes, at official expense (that is, the fees charged by carriers such as airlines are paid from the Commonwealth’s Consolidated Revenue Fund).

In 2002 the *Members of Parliament (Life Gold Pass) Act 2002* (Cth) (“the 2002 LGP Act”) was enacted. Section 11(2) of the 2002 LGP Act imposed a maximum of 25 return trips per year on holders of an LGP (or 40 trips per year for former Prime Ministers). In 2012 the 25 trips maximum was reduced to 10 return trips, following an amendment of s 11(2) of the 2002 LGP Act effected by the *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth) (“the 2012 Amendment Act”).

In August 2011 the *Remuneration and Other Legislation Amendment Act 2011* (Cth) amended various Acts in ways that changed the manner of calculation of the Retiring Allowance. Prior to those amendments, the calculation involved the application of a fixed percentage to the base salary payable to (current) members of Parliament (“the base salary”). Following the August 2011 amendments, the relevant percentage is applied to an amount less than the base salary. That lesser amount is calculated by deducting from the base salary an amount determined by the Remuneration Tribunal as not forming part of the base salary for the purposes of the Superannuation Act. The 2012 Amendment Act made similar changes to the manner of calculation of the additional allowances payable to former members who had held a parliamentary office or served as a Minister of State.

The plaintiffs are former members of the Commonwealth Parliament who held parliamentary offices and/or positions as Ministers of State. On 21 July 2015

they commenced proceedings in this Court, challenging the validity of certain statutory provisions and determinations made by the Remuneration Tribunal.

A notice of a constitutional matter was filed by the plaintiffs. No Attorney-General has given notice of an intention to intervene in the proceedings.

The parties filed a special case containing the following questions, which Justice Gageler referred for consideration by the Full Court:

1. Do any, and if so which, of the following laws and Determinations of the Tribunal constitute or authorise an acquisition of any, and if so what, property of the plaintiffs, or any of them, otherwise than on just terms, within the meaning of s 51(xxxi) of the Constitution:
 - a. *Remuneration Tribunal Act 1973* (Cth), ss 7(1A), 7(1B), 7(1C) and 7(2A);
 - b. *Remuneration and Other Legislation Amendment Act 2011* (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sch 2, items 1, 16A, 17A, 19, 20, 21(2));
 - c. *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sch 2, items 1, 2, 3, 5, 6, 7, 8 and 9);
 - d. *Members of Parliament (Life Gold Pass) Act 2002* (Cth), s 11(2) (as originally enacted);
 - e. *Members of Parliament (Life Gold Pass) and Other Legislation Amendment Act 2012* (Cth), s 3 (insofar as it made the amendments or repeals provided for in Sch 2, item 6);
 - f. Determination 2012/02, Pt 2 (cl 2.2);
 - g. Determination 2012/03, Pt 2 (cl 2.3), Pt 3 (cl 3.1);
 - h. Determination 2012/15, Pt 1 (cl 1.3 and cl 1.4 (insofar as it relates to cl 1.3));
 - i. Determination 2013/13, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
 - j. Determination 2014/10, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1);
 - k. Determination 2015/06, Pt 2 (cl 2.2), Pt 3 (cl 3.3), Pt 4 (cl 4.1)?
2. If the answer to question 1 is yes, to what, if any relief are the plaintiffs, or any of them, entitled in the proceedings?
3. Who should pay the costs of the proceedings?