"The King's Shilling": Military industrial relations in Australia

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Jeffrey Phillips SC was appointed to the part-time position of Defence Force Advocate in February 2015. This is an edited version of a paper he delivered in Canberra in February 2017 to members of the Directorate of Military Remuneration, Defence People Group, and members of the tri-services' industrial relations cells.

INTRODUCTION

I have entitled this paper "The King's Shilling" on account of the Australian Defence Force's (ADF) historical origins with the armed forces of the United Kingdom. The King's Shilling is historical slang for the payment of one shilling given to recruits in the United Kingdom in the 18th and 19th centuries, although the practice dates back to the end of the English Civil War in the 1600s. The expression "To take the King's Shilling" meant to enlist as a sailor or soldier respectively in the Royal Navy or the British Army. The practice stopped towards the end of the 19th century, although the expression is still used colloquially.[1] It has also been referred to as the "Queen's Shilling" depending upon whether or not the Monarch was a Queen or a King.[2]

In the First World War Australian troops in the First Australian Imperial Force (AIF) were so well paid they were described as "Six Bob a Day Tourists". That amount of money was above the average wage paid to a worker, and made the First AIF the best-paid troops in the Great War.[3] The fixation of military remuneration has more ancient origins than the English Civil War. Roman soldiers during the Classical Age were paid money differentially according to their rank, and were also paid in salt, a valuable commodity at the time, hence the expression "To be worth one's salt".[4] As interesting as it might be, it is not the purpose of this paper to delve into the historical origins of military remuneration but to consider how remuneration has more recently been determined for members of the ADF in Australia.

MORE RECENT ORIGINS OF ADF SALARY AND ALLOWANCES DETERMINATION

Some useful historical background to the formulation of ADF remuneration is found in the reasons for decision in a case before the Defence Force Remuneration Tribunal (DFRT) entitled the "*Remuneration Reform Project*" (2004 to 2006).

That case referred to what was described as the Officers' Common Scale which was introduced in 1948 after a post-Second World War review conducted by a special committee on pay for the post-war forces which the Chifley Labor Government had established in 1947. The review sought to provide recommendations to the government with respect to post-war pay codes having regard to the British White Papers on pay and conditions for the armed forces.

In submissions filed by the ADF in the *Remuneration Reform Project*, reference to that committee, headed by then-Minister for Defence, JJ Dedman, and consequently referred to as the Dedman Committee, stated that the recommendations made by the Committee were aimed to produce a pay code which was substantially uniform across the three services, and that would:

> … provide an inducement to young men of the best type to enter the Armed Services either under short-term engagements or as a career.

[1] Lesley Brown (ed), *The New Shorter Oxford Dictionary on Historical Principles* (Clarendon Press, 1993) Vol 2, 2826.

[2] Ivor H Evans (ed), *Brewer's Dictionary of Phrase & Fable* (Harper Perennial, 14th ed) 1012.

[3] Peter Dennis (ed), *The Oxford Companion to Australian Military History* (Oxford University Press, 2nd ed, 2008) 496.

[4] Evans (ed), n 3, 976.

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It was said that a key outcome of the Dedman Report was the structural shift away from separate pay scales for each military branch or category of officers – as had been in operation prior to the Second World War – in favour of the establishment of an Officers' Common Scale (OCS). The OCS was developed with regard to the Commonwealth Public Service Basic Wage.[5]

In the *Remuneration Reform Project* submissions following on from the Dedman Report, reference was made to other subsequently established inquiries into the formulation of pay for the armed forces, such as the Allison Review Committee (1958), the Treasury Finance Committee Review (1964), the Defence Conditions of Service Committee (1968), the Committee of Inquiry into Financial Terms and Conditions of Service for Male and Female Members of the Regular Armed Forces (1972), and finally, the Committee of Reference for Defence Force Pay (1975–1984).[6]

THE NATURE OF MILITARY SERVICE

Members of the armed forces do not have their remuneration determined like employees, in Australia. Employees have their employment regulated by normal contract law, that is, express and implied terms of an agreement made between an employer and an employee, and obligations imported into such contracts by orders of industrial relations commissions and by relevant statutes and regulations touching upon the provision of services by an employee to an employer.

Prior to Federation, the Australian colonies had various arbitration or industrial relations statutes in place which modified common law contracts for the supply of labour. In many instances such legislation set minimum conditions for the supply of labour. After Federation, the Commonwealth Parliament, using the industrial power (s 51(xxxv)) under the *Constitution*, established the Conciliation and Arbitration Commission to regulate employment conditions based upon inter-state industrial disputes.

During the 20th century, the regulation of employment contracts became greater, and since the so-called *WorkChoices* legislation under the *Workplace Relations Act 1996* (Cth) and subsequently the *Fair Work Act 2009* (Cth), the Commonwealth has pre-eminent involvement in regulating contracts of employment, save for State government and Local government employees. However, the common law dealing with contracts, and industrial relations legislation, do not apply to members of the armed forces; they have never been regarded as employees. This position has recently been re-stated by the Full Federal Court of Australia in a case entitled *C v Commonwealth of Australia* [2015] FCAFC 113. In that case, the position at common law was set out as follows:

> 22. The legal history relating to the relationship between service men and women and the Crown can be traced back over many centuries: see *China Navigation Company Limited v Attorney-General* [1932] 2 KB 197 at 214–6, 225–9, 242–3. The authorities reviewed in this case establish that, at least since the reign of Charles II, the government and command of the military forces had been vested in the Crown by prerogative right of common law and by statute. This meant, among other things that, as Lord Esher MR said in *Mitchell v The Queen* [1896] 1 QB 121 at 123:
>
> > "[a service officer] cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing whatever to do with such a matter."
>
> 23. Soldiers served at the pleasure of the Crown and could have their services terminated with or without cause: *Kaye v Attorney-General (Tas)* (1956) 94 CLR 193 at 203.
>
> 24. Another implication of the common law position was that "neither commission nor enlistment in the services does or can amount to a contract with the Crown": *Commonwealth v Welsh* (1947) 74 CLR 245 at 268 (Dixon J).

[5] ADF's Submissions *Remuneration Reform Project*, matter 2/2003, 25/26 August 2005, Pt 2, subparagraph 2.5. The submissions also referred to various committees and reports which were established by the Commonwealth government to consider how best to pay members of the armed forces.

[6] *Remuneration Reform Project*, Phase 3, matter 2/2003, 25/26 August 2004, Pt 2, subparagraph 2.2.

In a more recent decision of the Federal Court, *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, the Court reiterated the principle that military service is not based upon a contract of employment.[7]

However, it is to be noted that military service is no longer based only on the notion of prerogative. The service is now regulated decisively by statute, but not by any of the statutes which deal with the relations between employers and employees. It is subject to its own statutory code which has been progressively expanded.[8]

THE ESTABLISHMENT OF THE DEFENCE FORCE REMUNERATION TRIBUNAL

It became apparent over many years that the fixation of military remuneration was at times *ad hoc*, that is, only meeting emerging urgent circumstances and lacking independent and transparent determination.

In 1984, the *Defence Legislation Amendment Bill 1984* (Cth) was introduced by the then-Minister for Defence, Gordon Scholes, who was a member of the Hawke Labor Government.

In the Second Reading Speech, which related to a number of Defence matters, focus was given to the establishment of an independent pay-fixing authority for the Defence Force. The proposal for an independent body to determine salaries and allowances was said to be desirable by the Minister for Defence for these reasons:

> It will supersede the existing arrangements for Defence pay fixing which were established in 1979 as a result of serious problems which had arisen in Defence Force pay fixing. At that time pay fixing was dependent on the making of regulations and this resulted in excessive delays.

It was said to be desirable for determinations which were to be made for Defence personnel, to have the same force and effect as determinations made by other pay-fixing authorities. The Minister said this about the Bill:

> This Bill brings into operation those proposals and will eliminate once and for all the practice which has unfortunately been inherent in pay fixing for the Defence Force, whereby references to the committee by Ministers have not been made regularly. In many cases there have been serious delays in the hearing of the Defence Force salary-related matters, with the result that, when recommended rises have been substantial and have caused serious problems within the Defence vote. In turn, this has caused delays and has created hardship to members of the Defence Force and their families.

It was said that what was needed were similar arrangements for the fixation of wages as existed in the Public Service. That fixation was to be twofold: first, the Minister for Defence would be able to determine the financial conditions of service of members of the Defence Force under s 58B of the *Defence Act 1903* (Cth); and second, wage-fixation for such members of the Defence Force would be through the Defence Force Remuneration Tribunal (DFRT) which would have similar powers and independence to that of the then-Conciliation and Arbitration Commission.

The Tribunal to be established would comprise three members, one being a Deputy President of the Conciliation and Arbitration Commission as its President, and the other two persons being one experienced in industrial relations and the other who was a former member of the Defence Force. The Tribunal would have jurisdiction to determine salaries, and salary-related allowances, for members of the Defence Force, and would be required to review those matters at least every two years. The amendment to the *Defence Act* also included the establishment of the office of Defence Force Advocate (DFA). The Minister said this:

> The Advocate will have the function of preparing matters for reference to the Tribunal by the Chief of the Defence Force and of preparing submissions to the Tribunal on behalf of the Defence Force. He will also represent the Defence Force in any proceedings before the Tribunal. This arrangement recognises the fact that the Defence Force has no industrial organisation.

[7] Reliance was placed upon *C v Commonwealth of Australia* [2015] FCAFC 113 and also the comments passed by Justice Dixon in *Commonwealth v Welsh* (1947) 74 CLR 245, as referred to in *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, [38]–[39] (Buchanan J).

[8] *Gaynor v Chief of the Defence Force (No 3)* [2015] FCA 1370, [39] (Buchanan J).

The institution of the DFRT and of the office of DFA was by way of an amendment to the *Defence Act*. The preamble to that Act reads:

> An Act to provide for the Naval and Military Defence and Protection of the Commonwealth and of the several States

The preamble to an Act, as well as its own terms, sets the scene or identifies the purpose of the enactment. Often times the purpose of a statute can be used to identify how it is to be interpreted. A fundamental aspect about the *Defence Act* is to make laws for the proper defence of Australia. It is one of the obligations of the Federal government to protect its citizens from attack by our nation's potential enemies. Such protection can also broadly mean assisting our nation's allies.

Long titles and preambles can be used to interpret an Act in order to identify its purpose.[9]

Part IIIA of the *Defence Act* deals with remuneration, allowances and other benefits, with its provisions running from s 58A through to s 58Y inclusive. Within Pt IIIA there are important matters, such as s 58B providing for Ministerial determinations, which is the first, but not primary, limb of how remuneration determinations are made for members of the ADF. More importantly, the DFRT is established in Div 2 of Pt IIIA of the Act, by s 58G.

FUNCTIONS OF THE TRIBUNAL

The functions of the DFRT, found in s 58H, relevantly set out the second limb as to how military pay matters are determined:

> (2) The Tribunal shall, as provided for by this section:
>
> (a) inquire into and determine the salaries and relevant allowances to be paid to members; and
>
> (b) inquire into and make determinations in respect of prescribed matters that have been referred to the Tribunal.
>
> …
>
> (5) The Tribunal shall, within 2 years of the commencement of this section or within such shorter period as the Minister, by notice in writing given to the President, determines, inquire into and make a determination in respect of the salaries and relevant allowances to be paid to members.
>
> (6) Where a determination of the Tribunal in respect of the salaries and relevant allowances to be paid to members is in force, the Tribunal shall inquire into and make a further determination in respect of those salaries and allowances:
>
> (a) within 2 years of the first-mentioned determination taking effect; or
>
> (b) if the Minister, by notice in writing given to the President, requests the Tribunal to make a further determination in respect of those salaries and allowances within a shorter period of the first-mentioned determination taking effect – within that shorter period.
>
> (7) A determination of the Tribunal shall be in writing and shall take effect, or shall be deemed to have taken effect, on such day as the Tribunal specifies for the purpose in the determination.

PROCEDURES OF THE TRIBUNAL

The procedure of the Tribunal is dealt with by s 58K of the Act. In making a determination, the Tribunal shall have regard to these factors:

> (7) The Tribunal shall, in making a determination, have regard to:
>
> (a) any decision of, or principles established by, the FWC that is or are relevant to the making of the determination; or
>
> (b) if the FWC has not yet made any such decision or established any such principles, any decision of, or principles established by, the AIRC that is or are relevant to the making of the determination.
>
> (8) In the performance of the functions of the Tribunal:
>
> (a) the Tribunal may regulate the conduct of its proceedings as it thinks fit and is not bound to act in a formal manner; and
>
> (b) the Tribunal may inform itself on any matter in such manner as it thinks fit and is not bound by the rules of evidence.

[9] DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 150ff.

A proper regard to the statutory context and purpose of the *Defence Act* is important in order to interpret and understand the powers and duties of the DFRT. In my opinion, the DFRT is not bound by the decisions or principles of the FWC or its predecessor, the AIRC. It only needs to have regard to their precedents. The DFRT has drawn upon principles from the federal arbitration system, but has steadily developed its own jurisprudence. It is vital for the DFRT to consider the history of salary or allowance setting for a group within the ADF, and though it will be guided by its previous decisions, it is not bound by them.

There is no appeal from any merits' decision of the DFRT, although it may be asked to reconsider a determination (s 58H(10)). A challenge to a DFRT decision might be for a possible failure by it to exercise its jurisdiction, or by it making a decision in excess of its jurisdiction. Although I know of no such instance.

The DFRT is not bound by the rules of evidence, but that does not mean that it ignores the rules of evidence. Like other industrial arbitration bodies, the DFRT needs to act in good conscience and equity – that is, ensure fairness and natural justice is accorded to all the parties. Proceedings before the DFRT are essentially, but not exclusively, adversarial in nature: between the role of DFA in appearing for the Chief of the Defence Force and the members of the ADF, as against the contradictor, which is the Commonwealth as represented by the Commonwealth Advocate. The Commonwealth is represented by an advocate as a contradictor, and interested bodies such as the Returned Services League or the Defence Force Welfare Association, for example, may intervene if they are able to establish a relevant interest in seeking to be involved in proceedings, that is in cross-examining witnesses and making submissions regarding a particular matter.

Even though the procedure in s 58K(7) refers to principles established by the Fair Work Commission, the Fair Work Commission's principles under the *Fair Work Act* do not have as much relevance as the principles formerly established by its predecessor organisation, the Australian Industrial Relations Commission. This is so because the Fair Work Commission operates on a different basis to previous Acts such as the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) and the *Industrial Relations Act 1988* (Cth). The *Fair Work Act*, in the formulation of wages and conditions at an enterprise level, has a focus on bargaining and permits protected industrial action, two matters which are contrary to military discipline.

SUPPORTING AND MAINTAINING ADF CAPABILITY

One matter which has fallen into disuse under the federal bargaining regime is the work value principles. Work value came under the national and State wages case principles. Industries and jobs were evaluated to determine whether the nature and skill of work had changed so as to represent a significant net addition to the value of the work being performed. Circumstances such as jobs being given more duties or being required to have more training were used to justify an increase in remuneration based on work value. Other issues in civilian wage fixation, such as comparative wage justice, the disabilities of working in an unpleasant environment or at inconvenient times, relativities between classifications, potential for flow-on of increases to other industries and classifications (colloquially described as "leapfrogging"), market forces, inflation, labour market conditions and the overall economy, have also been used by civilian tribunals in assessing wage rates and allowances. Some of these principles have fallen out of favour for employee wage fixation but are all to a greater or lesser degree available to the DFRT in determining fair remuneration for members of the military. Work value principles are often engaged by the DFRT to approve increases in remuneration.[10]

One matter which civilian industrial tribunals have generally been firmly against, has been adjusting wage rates or allowances upwards for dangerous work.[11] There is a general acceptance that

[10] *Special Forces Salaries: Special Forces Support Staff and Commando*, matter 5/2014, 17 December 2014, [21].

[11] *Federated Gas Employees' Industrial Union v Geelong Gas Co (Gas Employees' Case)* (1919) 13 CAR 437, at 465 Higgins J said it was not "… in the community's interest … that the Court sanctions the putting of human life in danger if certain extra rates are paid."

some ADF service is inherently dangerous, and that despite every reasonable precaution being taken some service men and women are placed in extreme danger.[12]

An important if not crucial matter taken into account by the DFRT is to assess salary and allowances in a way that permits the capability of the ADF to be supported and maintained. Some categories of service can be at critical and perilous levels. The perilous nature of numbers of persons serving in a particular category or categories could lead to vital assets or platforms, needed for the defence of Australia, not being used to a desirable level or at worst not being able to be deployed. In such circumstances the DFRT has approved allowances designed to attract and retain experienced and trained personnel.[13]

THE "ART" OF REWARDING "COURAGE, EXPERIENCE, AND SKILL"

There is clearly an art to the fair determination of salaries and allowances for our military personnel. The DFRT, the DFA, the Commonwealth Advocate and all of us here from the Directorate of Military Remuneration, Defence People Group and Services IR cells have a part to play in such artistry. Our service men and women perform crucial and superlative work in the defence of our country. They are courageous, experienced, and skilled. They are often away from friends and family for long periods; they can be moved around in postings to far flung parts of the country and the world. They put up with conditions and hazards to which members of the community are rarely exposed or even understand.

On one view, no amount of money can compensate them adequately for what they do and endure. However, the money allocated to the ADF is finite and must be managed effectively and wisely. It is all our task in the valuable work we do to strike the right balance. That is developing a fair remuneration package to attract and retain the best people, to reward skill and qualifications, give the Commonwealth value for money, and gain for our service men and women the opportunity to enjoy a good lifestyle for their efforts.

To return to the historical analogies made at the outset and using a Biblical reference, in my time as DFA the many men and women whom I have had the honour to meet across the three services of the ADF are the salt of the earth[14] and truly worth their salt.

Such persons are worth a lot more than the King's, or Queen's, Shilling.

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[12] *Special Action Forces Allowance*, matter 03/2002, 9 May 2002, 1

[13] *Submarine: Capability Assurance Payment*, matter 14/2015, 29 January 2016, [43], [46]; *1st Recruit Training Battalion – Recruit Instructor*, matter 2/2015, [26]ff.

[14] *Matthew* 5:13