

CONFIDENTIAL

[Name withheld]

[Details removed]

24 May 2006

[Details removed]

Same-Sex Inquiry
Human Rights Unit
Human Rights & Equal Opportunity Commission
GPO Box 5218
SYDNEY. NSW 2001

Submission Same-Sex: Same Entitlements

In response to the inquiry into discrimination against same-sex couples, I hereby make a submission for recognition of my partner [Name withheld] as beneficiary for the purpose of superannuation benefits in the event of my death.

I am a retired RAAF Squadron Leader receiving a service pension under the DFRDB Act. On 22 January 1999, I corresponded with the Commonwealth Superannuation Administration (COMSUPER) requesting that [Name withheld] be listed as beneficiary in the event of my death (Enclosure 1). In essence, I was requesting that [Name withheld] be eligible to receive five eighths of my pension upon my death, an entitlement automatically given to opposite sex partners, both married and de-facto. My request was subsequently rejected by COMSUPER on 20 September 1999 (Enclosure 2).

As a result of the foregoing response, I initiated a ministerial based on what I believed to be an unfair and discriminatory decision. Firstly, I approached then Senator Meg Lees, receiving no acknowledgement whatsoever to my correspondence. Next, I approached Senator Marise Payne and because there was no acknowledgement I assumed that my request was also set aside. Finally, I approached Teresa Gambaro MP (Enclosure 3) receiving prompt feedback (Enclosure 4). Nevertheless, the outcome of my ministerial was unsuccessful (Enclosure 5).

I am therefore taking this opportunity to resurrect this case as part of your inquiry call for submissions. My particular situation may be referred to openly with one proviso, that being, the removal of any identifying references to both my partner and myself. Thanking you for your interest.

Yours faithfully

[Name withheld]

- Enclosures:**
1. Letter to Commonwealth Superannuation Administration
 2. Reply from COMSUPER
 3. Letter to Teresa Gambaro MP
 4. Acknowledgement from Teresa Gambaro MP
 5. Decision on my Ministerial – Teresa Gambaro MP

CONFIDENTIAL

[Name withheld]

[Details removed]

22 January 1999

[Details removed]

Commonwealth Superannuation Administration
PO Box 22
BELCONNEN
ACT 2616
Attn: Chief Executive Officer

Nominated Beneficiary - Superannuation Fund

I hereby request that [Name withheld] of [Details removed]
be listed as my partner for the purpose of
superannuation entitlements in the event of my death.

This request is made under the banner of two treaties, the International Covenant on Civil and Political Rights and the International Labour Organisation Convention on Discrimination (Employment and Occupation) which prohibit discrimination on the ground of sexual preference. The recent report by Chris Sidoti into federal superannuation legislation has found that both the DFR&DB Act 1973 and the Military Superannuation and Benefits Act 1991 are gender-specific which is inconsistent with Australia's human rights obligations under the two mentioned treaties.

Please reply in writing at the earliest.

Yours faithfully

[Name withheld]



Briefings on Employment Matters

WORK alert



Health Sciences Library
Redcliffe Hospital

No 10/1999
23 June 1999

Superannuation law and same sex couples

In a report examining federal superannuation legislation, the Human Rights Commissioner, Chris Sidoti, has found that Australia is in breach of its international treaty obligations relating to discrimination on the ground of sexual preference.

The report, *Superannuation Entitlements of Same-Sex Couples*, recommends that federal superannuation laws be amended to eliminate gender-specific terms and replace them with gender-neutral terminology. These changes would ensure that benefits under superannuation schemes apply equally to opposite-sex and same-sex partners.

The foci of the report are the *Superannuation Act 1976* and the *Defence Force Retirement and Death Benefits Act 1973*. In two complaints lodged under the

Continued on page 2

HR, prove thyself...

Being able to prove that the HR function adds value to the organisation and provides "value for money" in general, is a key challenge facing HR practitioners, and was one of the central themes at last month's Australian Human Resources Institute (AHRI) National Convention, held in Adelaide.

As well as confirming this statement, Mr Neville Lake, Manager of the Lake Group, Consultants, added that the HR function needed to keep "doing more with less". There is a need to focus on the deliverables of work rather than the process of it, that is creating mechanisms which "deliver" HR activities in a way that business results quickly follow. Mr Lake argued that most businesses achieve only about 80% of their potential because they focus mainly on efficiency and effectiveness and overlook a third factor which he described as "optimisation". For example, what would the organisation be like if all sales representatives performed at the level of the most successful one? He suggested using a model which should enable HR to optimise its own performance and demonstrate its value to the business. This model has the following ingredients:

- A mission that directly connects HR with the business – find out where HR skills and activities have the highest pay-off and design the HR infrastructure

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self in good hands



phaned wombats to have found a surrogate family at the Healesville
ent since her mother was hit by a car.

Picture: SIMON O'DWYER

olders Jabiluka

the threat it poses to cultural and environmental values.

The shareholders' group, which owns a total of \$1,025,000 in shares, wants a set of principles for responsible development incorporated into North's constitution in the hope of preventing "contentious and costly mistakes like Jabiluka from occurring again".

North's managing director, Mr Malcolm Broomhead, said the group was a minority of 122 out of 67,000.

"But we are always happy to discuss Jabiluka," Mr Broomhead said. "It is a very small mine — a hole in the side of the hill, a freshwater dam and a carpark, essentially."

"It is a continuation of a mine operating for 18 years with a record of environmental excellence, and we are happy to make those points again."

"Jabiluka, in addition to creating wealth for North shareholders, will make a contribution to the Australian economy and provide \$200 million in royalties to the Aboriginal traditional owners."

Wrong arm treated by hospital

An injured worker who believed he received improper medical treatment could not sue the hospital for negligence because the Kennett Government removed the common law rights of WorkCover claimants, the Opposition said yesterday.

The Opposition's upper house leader, Ms Monica Gould, told Parliament that Mr Colin Bowers fell at work, injuring both arms, but the wrong arm was put in plaster at the Knox Private Hospital.

Mr Bowers, 57, an office worker at Pacific Dunlop Engineered Products, said his left arm was set in plaster, while his right arm was put in a sling last month.

After more tests at the hospital, Mr Bowers said he was told his right arm was broken but it was too late to do anything about it.

Three days later, Mr Bowers saw a specialist who found his tendon had snapped, but tried to give him an injection in the wrong shoulder.

The director of emergency services at Knox Private Hospital, Dr Dominic Campion, denied the hospital was negligent.

MEAGHAN SHAW

Same-sex super ban faces axe

A landmark report finds no justification for denying entitlements to same-sex couples.

By GERVASE GREENE
CANBERRA

The Federal Government is expected to legislate in favor of same-sex couples enjoying the same Commonwealth superannuation rights and entitlements as heterosexual couples, after a landmark report tabled in Parliament yesterday.

The Human Rights Commissioner, Mr Chris Sidoti, found that the denial of superannuation entitlements to a same-sex partner contravened at least two international treaties and that the distinction was in any event unjustifiable.

Mr Sidoti found that Commonwealth superannuation laws relied on out-of-date terms that did not take into account the changed nature of the family in Australia.

"There is no justification for discriminating against same-sex partners," he said.

"Superannuation laws need to acknowledge that marriage is no longer the defining nature of long-term relationships."

The Human Rights and Equal Opportunity Commission report found that the use of terms such as sex, marital status and marriage might have traditionally defined a relationship of dependence, "but relationships in Australia today are more varied and complex".

"Marriage is no longer the defining characteristic of a family or a permanent domestic relationship," it said.

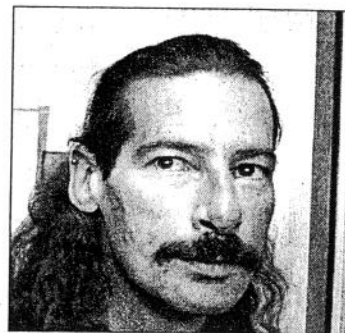
The commission's report found that barring same-sex couples from superannuation entitlements contravened the International Covenant on Civil and Political Rights and the International Labor Organisation Convention on Discrimination (Employment and Occupation).

The report was tabled without comment by the Attorney-General, Mr Daryl Williams, QC, in Parliament yesterday and will be considered by the Treasurer, Mr Peter Costello, and his assisting minister, Mr Rod Kemp.

Amendments to superannuation legislation "are already being" considered by Parliament, and Mr Sidoti said it would cause few problems for his recommendation to remove sexuality-specific terms from the act.

While Mr Sidoti considered that the proportion of same-sex couples in the Public Service was small, the wider implications were important.

The private superannuation



Greg Brown: degraded in court.

At last, hope the law will respect gays

Greg Brown's private life has been dragged through the courts and picked apart for more than five years.

In that time, he's watched friends die from AIDS without legal recognition of their relationships. Now things might be "made right". But he says: "It's not over yet".

His partner of 10 years, Robert, died in August 1993 of an AIDS-related illness and Mr Brown describes the legal battle, during which his relationship was reduced to a "dictionary definition", as the most "degrading thing I have gone through in my life".

Mr Brown, 39, has been HIV-positive for 15 years.

He says his fight has never been for money, but to free himself and others from discriminatory laws that treat them as less-than-worthy members of society.

His hope now is that politicians will stop dragging their feet and act quickly to make the necessary changes to the Superannuation Act.

LYALL JOHNSON

industry is highly unlikely to defy arrangements available to Commonwealth public servants, and preserving the present ban on same-sex partners' entitlements would also be open to legal challenge.

The president of Homo De Factos, Mr Greg Brown, has long lobbied for the about-face. His late partner was a Commonwealth public servant, and the Administrative Appeals Tribunal had no option but to rule against his gaining access to his partner's superannuation.



ENCLOSURE 2

Reference
Number:

R223277

Contact
Officer:

[Name withheld]

Telephone:

[Details removed]

20 September 1999

[Name withheld]

[Details removed]

Dear [Name withheld]

RE: YOUR DEATH BENEFIT NOMINATION FOR BENEFIT PURCHASES

I refer to your letter dated 22 January (sic July) 1999 received by this Office on 26 July 1999 in which you request that [Name withheld] be considered as your "spouse" for purposes of the *Defence Force Retirement and Death Benefits Act 1973* ("the DFRDB Act") so that she may be entitled to a spouse's pension upon your death. The delay in replying is regretted.

2. For the following reasons, this Office is not able to accede to your request. The DFRDB Authority, the body legally responsible for the administration of the DFRDB scheme, is under a statutory duty to administer the scheme in accordance with the terms of the DFRDB Act. The Act does not presently permit a contributing member to make a binding nomination of another person as beneficiary in the event of the member's death and there is no discretion to depart from these statutory provisions.

3. To be entitled to spouse benefits upon a scheme member's death, a person must satisfy the definition of "spouse" in subsection 6B(2)(a) of the DFRDB Act. This subsection provides that a person is a "spouse who survives a deceased person" if that person had a "marital relationship" with the deceased person at the time of the death of the deceased person. A "marital relationship" is defined in subsection 6A(1) to be a permanent and bona fide domestic relationship between a scheme member and their "husband" or "wife". It is not necessary for these persons to be legally married to each other, thus a de facto relationship falls within the definition of "marital relationship". Copies of sections 6A and 6B is enclosed.

4. In the matter of *Re Brown and Commissioner for Superannuation* (1995) 38 ALD 344 the Administrative Appeals Tribunal ("the Tribunal") held that sections 8A and 8B of the *Superannuation Act 1976*, which are identical to sections 6A and 6B of the DFRDB Act, were designed to include only persons of the opposite sex who lived in marriage-like relationships regardless of whether they were legally married. The fact that the persons must be of the opposite sex is inherent in the use of the words "husband" and "wife". A copy of the decision is also enclosed.

Commonwealth Superannuation Administration

Administering superannuation for members of the Australian Public Service and other participating employers, and members of the Australian Defence Force

P O Box 22, Belconnen ACT 2616 •

[Details removed]

Fax: (02) 6253 1116 • Telephone: (02) 6252 7911 • TTY: (02) 6253 2911 Internet: <http://www.comsuper.gov.au>

5. In your letter dated 22 July 1999 you have stated that the DFRDB Act and the *Military Superannuation and Benefits Act 1991* ("the MSB Act") are "gender-specific" which is "inconsistent with Australia's human rights obligations" under the International Covenant on Civil and Political Rights and the International Labour Organisation Convention on Discrimination (Employment and Occupation). In *Re Brown* the Tribunal discussed in paragraphs 53 to 57 (inclusive) Australia's treaty obligations to not discriminate against individuals on the grounds of their sexual preference. Although the Tribunal noted at page 354 "that, where possible, an interpretation which is consistent with Australia's treaty obligations must prevail when one is determining the ambit of Commonwealth legislation", it held that "the words of an enactment must be given their natural and ordinary meaning unless to do so would lead to an absurdity". The Tribunal found at page 354 that "[t]he natural and ordinary meaning of section 8A [was] clearly to allow spouse benefits under the Act to be available for persons of the opposite sex who are living in a marriage or marriage-like relationship". Although the legislation does not specify that the husband and wife need be a person of the opposite sex, "it was unnecessary for it to do so, for that concept is inherent in the words themselves."

6. This Office notes your reference to the HREOC Report entitled "Superannuation Entitlements of Same-Sex Couples" issued earlier this year. HREOC recommends that terms such as "husband", "wife" and "spouse" used to determine eligibility for a spouse's benefit in the public sector superannuation schemes should be replaced with gender neutral terminology so that the benefits apply equally to opposite-sex and same-sex partners. However, this is a recommendation only and there is no discretion to depart from the statutory provisions until such time as the legislation is amended. Indeed, the Authority would be in breach of its statutory duty to pay benefits in accordance with the DFRDB Act if it were to accede to your request.

7. This Office also notes that the *Superannuation (Entitlements of Same-Sex Couples) Bill 1998* is currently being considered by Federal Parliament. This Bill aims to remove discrimination against same sex couples in respect of superannuation benefits through an amendment to the *Superannuation Industry (Supervision) Act 1993* ("the SIS Act"). The DFRDB Act, however, is not covered by the SIS Act. Whether or not the DFRDB Act will be amended when the Bill is enacted into law is largely speculative at this stage.

8. In light of the above, your partner cannot be nominated as a spouse pursuant to the DFRDB scheme. Your partner will also not be entitled to benefits as your "spouse" upon your death. Until such time as the legislation is amended this Office is unable to reconsider this position.

Yours faithfully

[Name withheld]

Legal Services Section

Encl.

6A **Marital relationship**

- (1) For the purposes of this Act, a person had a marital relationship with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis at that time.
- (2) For the purpose of subsection (1), a person is to be regarded as ordinarily living with another person as that other person's husband or wife on a permanent and *bona fide* domestic basis at a particular time only if:
 - (a) the person had been living with that other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
 - (b) the person had been living with that other person as that other person's husband or wife for a continuous period of less than 3 years up to that time and the Authority, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person's husband or wife on a permanent and *bona fide* domestic basis at that time;whether or not the person was legally married to that other person.
- (3) For the purposes of this Act, a marital relationship is taken to have begun at the beginning of the continuous period mentioned in paragraph (2)(a) or (b).
- (4) For the purpose of subsection (2), relevant evidence includes, but is not limited to, evidence establishing any of the following:
 - (a) the person was wholly or substantially dependent on that other person at the time;
 - (b) the persons were legally married to each other at the time;
 - (c) the persons had a child who was:
 - (i) born of the relationship between the persons; or
 - (ii) adopted by the persons during the period of the relationship;
 - (d) the persons jointly owned a home which was their usual residence.
- (5) For the purposes of this section, a person is taken to be living with another person if the Authority is satisfied that the person would have been living with that other person except for a period of:
 - (a) temporary absence; or
 - (b) absence because of special circumstances (for example, absence because of the person's illness or infirmity or a posting of the person).

6B **Spouse who survives a deceased person**

- (1) In this section:
deceased person means a person who was, at the time of his or her death, a contributing member, a recipient member or a person in respect of whom deferred benefits were applicable.
- (2) For the purposes of this Act, a person is a spouse who survives a deceased person if:
 - (a) the person had a marital relationship with the deceased person at the time of the death of the deceased person (*the death*); and
 - (b) in the case of a deceased person who was a recipient member at the time of the death:
 - (i) the marital relationship began before the recipient member became a recipient member; or
 - (ii) the marital relationship began after the recipient member became a recipient member but before the recipient member reached 60; or
 - (iii) in the case of neither subparagraph (i) nor (ii) applying - the marital relationship had continued for a period of at least 5 years up to the time of the death.
- (3) In spite of subsection (2), a person is taken to be a spouse who survives a deceased person if:
 - (a) the person had previously had a marital relationship with the deceased person; and
 - (b) the person did not, at the time of the death, have a marital relationship with the deceased person but was legally married to the deceased person; and
 - (c) in the case of a marital relationship that began after the deceased person became a recipient member and reached 60 - the relationship began at least 5 years before the deceased person's death; and
 - (d) in the Authority's opinion, the person was wholly or substantially dependent upon the deceased person at the time of the death.

Re BROWN and COMMISSIONER FOR SUPERANNUATION

ADMINISTRATIVE APPEALS TRIBUNAL

PRESIDENT MATHEWS J, MEMBERS DR D SUTHERLAND and J BRASSIL

15 December 1994, 28 February, 15 May 1995 — Melbourne

Superannuation — Superannuation funds — Entitlement to spouse benefit — Whether the applicant had a marital relationship with an eligible employee within the meaning of the Superannuation Act 1976 — Whether a person in homosexual relationship can be a “husband” or a “wife” — Meaning of the words “husband” and “wife” — Meaning of the phrase “lived . . . as that person’s husband or wife” — (CTH) Superannuation Act 1976 ss 3, 8A, 8B, 81(1) — (INT) International Covenant on Civil and Political Rights.

Statutory interpretation — Admissibility of evidence as to the meaning of ordinary English words — Australian treaty obligations.

Words and phrases — “husband” — “wife” — “lived . . . as that person’s husband or wife”.

The applicant B, was in a homosexual relationship with C until C’s death in 1993. C was a full-time employee of the Commonwealth Defence Department as an Administrative Services Officer and was at all times a member of the Commonwealth Superannuation Scheme. The applicant and C pooled their income and shared all living expenses, including rent, food, clothing, the cost of furniture, appliances, and miscellaneous bills.

B and C were constant companions and lovers and accepted by their friends and families as a couple living in a de facto relationship. At the hearing, the respondent agreed the relationship was both permanent and bona fide.

C subsequently died of HIV/AIDS related complications and bequeathed his estate to the applicant. B applied for spouse benefits pursuant to s 81(1) of Superannuation Act 1976 (Cth) (the Act) which provided for an entitlement to a spouse benefit where an “eligible employee” dies before attaining the maximum retiring age and is survived by a “spouse”. The respondent’s delegate refused the application on the basis that the applicant did not have a “marital relationship” with C as defined by s 8A of the Act, and hence not a spouse surviving a deceased person under s 8B of the Act. The applicant sought a review of the decision.

There was no dispute that C was an “eligible employee” at the date of his death and died well before the maximum retiring age. The only issue before the hearing was whether the applicant was C’s “spouse” at the time of his death.

At the hearing, counsel for the applicant sought to call evidence as to the meaning of the words “husband” and “wife” on the basis that it would be helpful to the tribunal in determining the natural and ordinary meaning of the words.

Held, affirming the decision under review:

(i) To the extent that evidence purported to be relevant to the meaning of the words “husband” and “wife”, these being words of normal parlance and in general use, the evidence was inadmissible. It was for the tribunal to determine the meaning of these words without resort to expert testimony.

Marquis of Camden v Commissioners of Inland Revenue [1914] 1 KB 641; *Thornley v Tilley* (1925) 36 CLR 1; *Australian GasLight Co v Valuer-General* (1940) 40 SR(NSW) 126; *Bendixen v Coleman* (1943) 68 CLR 401; *NSW Associated Blue Metals Quarries Ltd v FCT* (1956) 94 CLR 509; *Brisbane City Council v Attorney-General (Qld)* (1978) 19 ALR 681; *FCT v Hamersley Iron Pty Ltd* (1980) 33 ALR 251, followed.

(ii) It was impermissible to go behind to go behind dictionary definitions and receive evidence as to the assumptions which underlie them. Dictionary definitions do not purport to set trends in the meanings of words. Their role is to reflect existing usage, rather than influence it. Dictionary definitions are to be used as tools to provide assistance when needed, not as straitjackets into which words are to be confined.

(iii) The words "husband" and "wife" were incapable of application to partners in a homosexual relationship. The words connote a relationship which presupposes the existence of the other. There cannot be a "husband" without there also being a "wife". The words presupposed the existence of a marital relationship involving each of them as parties. The fact the persons must be of opposite sex was inherent in the meaning of the words.

(iv) The clear import of s 8A of the Act was to restrict proposed access to proposed spouse benefits to husbands and wives who have lived together on a bona fide basis whether or not they are legally married. Section 8A extends only to husbands and wives, and not to other persons in similar or analogous situations.

Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353, followed.

R Hinkley instructed by *Maurice Blackburn* for the applicant.

P Hanks instructed by the *Australian Government Solicitor* for the respondent.

President Mathews J, Members Dr D Sutherland and J Brassil.

Background

(1) The applicant seeks review of a decision by a delegate of the respondent, dated 6 July 1994, refusing him entitlement to a spouse benefit under s 81(1) of the Superannuation Act 1976 (Cth) (the Act). The decision was based on a finding that the applicant did not have a "marital relationship" with an eligible employee, as defined by s 8A of the Act, and hence was not a spouse surviving a deceased person under s 8B.

(2) At the hearing, the applicant was represented by Robert Hinkley, and the respondent by Peter Hanks, both of counsel.

(3) The tribunal had before it the documents lodged pursuant to s 37 of the Administrative Appeals Tribunal Act 1975 (Cth), together with a statement of agreed facts and each party's statement of contentions. The applicant also sought to call four expert witnesses. However, their proposed evidence was found to be inadmissible for reasons which we shall discuss later.

(4) While the respondent contested the relevance of some facts relied upon by the applicant, there was essentially no dispute as to the facts forming the basis of this application.

(5) The relationship sought to be included within the definition of "marital relationship" was a homosexual one, between the applicant and Robert Corva. Mr Corva was born on 18 June 1958 and the applicant on 5 March 1958. They met in 1982, and lived together from December that year until Mr Corva's death in 1993.

(6) Both the applicant and Mr Corva were working in full-time employment. Mr Corva was employed with the Commonwealth Department of Defence as an Administrative Services Officer from 24 January 1977, and at all times was a member of the Commonwealth Superannuation Scheme. The applicant and Mr Corva pooled their income and shared all living expenses, including rent, food, clothing, the cost of furniture and appliances, and miscellaneous bills.

(7) Mr Corva and the applicant were constant companions and lovers, and were accepted by their families and friends as a couple living together in a de facto relationship. It was agreed by the respondent at the hearing that the relationship was both permanent and bona fide.

(8) In 1985, Mr Corva was diagnosed HIV positive. He continued working until 30 March 1993, and then applied for invalidity benefits under the Act. On 26 August 1993, he died of HIV/AIDS related complications. The applicant nursed Mr Corva until his death. By a will dated 8 July 1993, Mr Corva bequeathed the whole of his estate to the applicant.

(9) In October 1993, the Commissioner for Superannuation approved payment to the applicant of the benefit due to Mr Corva's estate. By letter dated 25 March 1994, the applicant also applied for spouse benefits under the Act.

(10) Section 81(1) in Pt VI of the Act provides for entitlement to a spouse benefit where an "eligible employee" dies before attaining the maximum retiring age and is survived by a "spouse".

(11) There is no dispute that Mr Corva was an "eligible employee" at the date of his death. While he had ceased work and had applied for invalidity benefits pursuant to Pt IVA of the Act, the respondent had yet to reach a decision on his eligibility prior to his death. Accordingly, pursuant to s 3 of the Act, Mr Corva is to be classified as an eligible employee and not a retirement pensioner. It is also beyond dispute that Mr Corva died at the age of 35, well before the maximum retirement age.

(12) Accordingly, the only issue at the hearing was whether the applicant was Mr Corva's "spouse" at the time of his death.

The legislation

(13) The term "spouse" is defined by ss 8A and 8B of the Act. These sections were inserted by the Commonwealth Superannuation Schemes Amendment Act 1992 (Cth). Section 8B(2)(a) of the Act provides:

8B(1) . . .

(2) For the purposes of this Act, a person is a spouse who survives a deceased person if:

- (a) the person had a marital relationship with the deceased person at the time of the death of the deceased person ("the death"); . . .

Section 8A defines "marital relationship" as follows:

8A (1) For the purposes of this Act, a person had a *marital relationship* with another person at a particular time if the person ordinarily lived with that other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time.

(2) For the purposes of subsection (1), a person is to be regarded as ordinarily living with another person as that other person's husband or wife on a permanent and *bona fide* domestic basis at a particular time only if:

- (a) the person had been living with that other person as that other person's husband or wife for a continuous period of at least 3 years up to that time; or
- (b) the person had been living with that other person as that other person's husband or wife for a continuous period of less than 3 years up to that time and the Commissioner, having regard to any relevant evidence, is of the opinion that the person ordinarily lived with that other person as that other person's husband or wife on a permanent and bona fide domestic basis at that time;

whether or not the person was legally married to that other person.

(3) For the purposes of this Act, a marital relationship is taken to have begun at the beginning of the continuous period mentioned in paragraph (2)(a) or (b).

(4) For the purpose of subsection (2), relevant evidence includes, but is not limited to, evidence establishing any of the following:

- (a) the person was wholly or substantially dependent on that other person at the time;
- (b) the persons were legally married to each other at the time;
- (c) the persons had a child who was:
 - (i) born of the relationship between the persons; or
 - (ii) adopted by the persons during the period of the relationship;
- (d) the persons jointly owned a home which was their usual residence.

(5) . . .

(15) For the purpose of these proceedings the respondent concedes that all the requirements of s 8A(1) are fulfilled, except that which requires that the applicant be living

with Mr Corva as his husband or wife. It is this issue which became the focus of debate during the proceedings. The submissions centred around the meaning of the words "husband" and "wife", as well as the scope of the phrase, "lived . . . as that person's husband or wife".

The evidential issue

(16) On the first day of the hearing Mr Hinkley announced his intention to call evidence as to the meaning of the words "husband" and "wife". He was not suggesting that these words had any special or technical meaning, but submitted that the proposed evidence would be helpful to the tribunal in determining the natural and ordinary meaning of these words. Mr Hanks objected to this course, and quoted authority to the effect that it is for the tribunal of fact to determine the natural and ordinary meaning of English words, and that evidence will not normally be admissible on this issue. Nevertheless, Mr Hinkley was given an opportunity to provide witness statements as to the evidence he was seeking to adduce, and four statements were provided to the tribunal before the adjourned second day of the hearing. These statements were by Professor Richard Ball, Dr Don Edgar, Dr Nick Crofts and Dr G Simes. In the event, we declined to allow evidence to be given by any of these proposed witnesses. At the time of making this ruling, we indicated that we would give our reasons in our final decision on the matter. These then are our reasons for rejecting the evidence sought to be adduced by the applicant.

(17) The proposed evidence was divisible into three categories. That of Professor Ball and Dr Edgar could generally be described as sociological evidence and that of Dr Simes as lexicographic, whereas Dr Crofts' evidence went to the incidence of HIV/AIDS in homosexual men, and was relevant to a proposed submission under the Disability Discrimination Act 1992 (Cth). In the event, the applicant decided not to proceed with the latter submission, and Dr Crofts' evidence was thus not pressed.

(18) We turn then to the "sociological" evidence. Professor Ball is a psychiatrist and Dr Edgar a sociologist, each of them extremely prominent in his field. They both described a shift in the nature of relationships, which has corresponded with a trend away from the traditional roles of the man as breadwinner and the woman as homemaker. This shift has meant that gender differences within relationships has markedly decreased and perhaps disappeared. It follows (according to Professor Ball) that the words "husband" and "wife", as traditionally defined, decreasingly reflect the way in which people relate to each other within relationships. According to Dr Edgar, the "social definition" of the words "husband" and "wife" is not fixed but reflects the dominant gender norms in society, and presently could encompass homosexual couples in a lasting relationship. The gender of the parties, he says, is no longer a crucial element in determining whether the relationship of husband and wife exists.

(19) It was not clear from the witness statements whether this proposed evidence was directed to the actual meaning of the words "husband" and "wife" or to the social context in which the words are currently used. There was much in Professor Ball's statement which suggested the latter. In other words, the thrust of his statement was that we in society have progressed beyond the stage where gender differentiations should be seen as relevant in relationships, be those relationships heterosexual or homosexual. The actual gender of the partners is no longer a criterion by which one can determine whether or not a relationship exists. Homosexual relationships are increasingly recognised in our society as being capable of having the same quality and nature as heterosexual relations. To this extent Professor Ball considers that society now recognises that the relationship between male homosexual couples can be like the relationship of husband and wife.

(20) Much if not all of Professor Ball's statement amounts to social commentary with which we generally agree and upon which we think it would be unnecessary to call

evidence. But it does not assist us in the determination we have to make in this case. The question for us is not whether it is socially appropriate or desirable to define relationships in gender based terms; but whether the legislature has done so through the use of the words "husband" and "wife".

(21) Mr Hinkley urges that this "sociological" evidence extends beyond social commentary and is relevant to the actual meaning of the words "husband" and "wife". In particular, he says that it shows the current usage of the words to have extended into gender neutral territory. And there are passages in Dr Edgar's statement which support this proposition. In Dr Edgar's view it is no longer appropriate in Australian society to define relationships in gender-based terms. In so far as the words "husband" and "wife" are still used to describe parties to a relationship, they have now lost their gender connotations and will apply equally to homosexual relationships as to heterosexual ones.

(22) If, as Mr Hinkley suggests, this evidence is relevant to determining the natural and ordinary meaning of the words "husband" and "wife" in s 8A then it is difficult to see how it can be admissible. And although we in this tribunal are not bound by general rules of evidence, we are clearly bound to follow established principles of statutory interpretation.

(23) There is a long line of authority to the effect that it is for the tribunal of fact to determine for itself the normal meaning of ordinary English words, and that expert evidence will not be admissible for this purpose. As Swinfen Eady LJ said in *Marquis of Camden v Commissioners of Inland Revenue* [1914] 1 KB 641 at 649-50:

It is the duty of the court to construe a statute according to the ordinary meaning of the words used, necessarily referring to dictionaries or other literature for the sake of informing itself as to the meaning of any words, but any evidence on the question is wholly inadmissible. . . . in my opinion evidence is not admissible as to the meaning of ordinary English words in a public Act of Parliament; we are not dealing with any private statutes nor with contracts. It is a public Act of Parliament, and the court must take judicial cognisance of the language used without evidence.

(24) This principle has been accepted, apparently without question, in numerous subsequent cases: see *Thornley v Tilley* (1925) 36 CLR 1 per Knox CJ at 7; *The Australian GasLight Co v Valuer-General* (1940) 40 SR(NSW) 126 per Jordan CJ at 137; *Bendixen v Coleman* (1943) 68 CLR 401 per Latham CJ at 415; *NSW Associated Blue Metal Quarries Ltd v FCT* (1956) 94 CLR 509 per Kitto J at 514; *Brisbane City Council v Attorney-General (Qld)* (1978) 19 ALR 681 (Privy Council) at 686; *FCT v Hamersley Iron Pty Ltd* (1980) 33 ALR 251 per Gobbo J at 272; *Korczynski v Wes Loftus (Aust) Pty Ltd* (1985) 62 ALR 225 at 232. It follows that, to the extent that this proposed evidence purports to be relevant to the meaning of the words "husband" and "wife", these being words of normal parlance and in general use, it is inadmissible. It is for us to determine the meaning of these words without resort to expert testimony.

(25) We turn to the statement of Dr Simes. Dr Simes is a professional lexicographer who is presently compiling a dictionary of the language of sex and sexuality. A proof of the relevant sections of that dictionary ("husband", "man", "marital", "marriage", "marry" and "wife") was handed to us during the hearing; and although we rejected his evidence we shall be referring later to some of these definitions.

(26) Dr Simes' statement contains opinions as to the current meaning of the words "husband" and "wife". To this extent his evidence is inadmissible under the principle we have just discussed. In addition, we were told at the hearing that Dr Simes would be in a position to give evidence as to the very substantial time which it takes to produce standard dictionaries, so that dictionary definitions of words which are changing in their meaning are likely to lag behind current usage. Moreover standard dictionaries are compiled upon gender stereotyped assumptions and their definitions in this area are therefore suspect.

(27) We are unable to see how any of this evidence could have any bearing on our determinations in this case. In our view it is impermissible to go behind dictionary

definitions and receive evidence as to the assumptions which underlie them. As for the time which is taken to compile dictionaries, this is similarly immaterial. Dictionary definitions do not purport to set trends in the meanings of words. Their role is to reflect existing usage, rather than to influence it. With words which are changing in their meaning, dictionary definitions might well lag behind current usage. But so far as words of common meaning are concerned, the tribunal of fact, being part of the community in which the words are being used, will be independently aware of any change in their meaning. It will not require expert testimony to inform it of current usage.

(28) Dictionary definitions are to be used as tools to provide assistance when needed, not as straitjackets into which words are to be confined. Indeed this case provides an excellent illustration of this principle. We shall be referring later to the definition of "husband" and "wife" in the *Macquarie Dictionary*. To some extent these definitions are anomalous, but at the end of the day they will play no real part in our determination as to the meaning of these words. For this we will be relying on our own understanding of the general meaning of these words as they are currently used in the community.

"Husband" and "wife"

(29) Extensive submissions were made during the hearing both as to the meaning of the individual words "husband" and "wife" as well as to that of the composite phrase "lived with that other person as that other person's husband or wife". In many respects the issues raised under each were similar. However, for the purposes of the present discussion the obvious commencement point is to examine the meaning of the critical words in s 8A(1) of the Act, namely "husband" and "wife".

(30) These are ordinary words in frequent use in the community. It is common ground that in their traditional sense they refer respectively to the male and female partners in a marriage relationship. This traditional use is reflected in the dictionary definition of the words. In the *Macquarie Dictionary* the primary meaning of "husband" is "the man of a married pair (correlative of wife)". The definition of "wife" is "a woman joined in marriage to a man as husband".

(31) By way of aside, it is interesting to observe the difference between these definitions. One cannot escape the conclusion that they may reflect a lingering sexism on the part of the dictionary compilers. It is difficult to find any other explanation for the element of subjugation which appears in the definition of "wife" but which is singularly absent from that of "husband". This is perhaps one aspect in which the meaning of these words has now moved on since the dictionary was compiled.

(32) Mr Hinkley urges that the meaning of the words has changed in other respects. Indeed he argues that it has changed so far as to include not only unmarried heterosexual couples, but also homosexual couples. The words have now lost their gender connotations, he says.

(33) It is unnecessary for us to determine in these proceedings whether the words "husband" and "wife" now include men and women who live together in a de facto relationship without having undergone a formal marriage ceremony. We are inclined to think that they might. If so, the meaning of the words has indeed moved on since the compilation of the *Macquarie Dictionary*. However any such movement, if it has occurred, reflects changing social attitudes towards the necessity of undergoing a marriage ceremony in order to have a marital relationship. It does not, in our view, reflect any diminution of the gender connotations in these words. For whatever other changes the words, "husband" and "wife", may have undergone over the years they retain, in our opinion, their complementary gender connotations. A "wife" is the female partner of a marital relationship and a "husband" the male partner.

(34) Not only is the gender of the person crucial to the meaning of these words, but also, we think, the complementary nature of the relationship which they denote. To put it another way, each word connotes a relationship which presupposes the existence of the other: there cannot be a "husband" without there also being a "wife".

(35) Mr Hinkley disputes this. He says that there is no reason why s 8A should not extend to husbands who live with husbands or wives who live with wives. He relies upon the history of the legislation as providing support for this contention. In particular he relies upon the definition of "spouse" which was previously contained in s 3 of the Act before it was repealed in 1992 and replaced by s 8A. This distinction included the following provision:

"Spouse" means:

...

- (c) a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of not less than 3 years immediately preceding the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis; ...

(36) Mr Hinkley urges that the deletion of the words "as the case may be" in the current definition supports the proposition that the words "husband or wife" have lost their complementary connotations. Accordingly, s 8A can now extend to husbands and husbands and to wives and wives.

(37) This interpretation involves rejection of a fundamental assumption which has traditionally underpinned the words "husband" and "wife", namely the existence of a marital relationship, whether or not that relationship was preceded by a formal marriage ceremony. While we are wary of quoting old authority in relation to a social institution which has changed so greatly over the years, we must refer to the *The Automobile Fire & General Insurance Co of Australia Ltd v Davey* (1936) 54 CLR 534. The respondent in that case was a woman whose husband had died in a car accident. She claimed under an insurance policy in her own name which provided cover for injuries sustained by "the insured or his wife". No complementary cover was provided for an insured's husband. The High Court, reversing the Victorian Supreme Court, found that the respondent's husband was not covered by the policy.

(38) Latham CJ referred to s 61(d) of the Property Law Act 1928 (Cth), which provided, as a guide to interpretation, that "the masculine includes the feminine and vice versa". The Chief Justice continued (at 538):

In my opinion s 61 is a general provision to be interpreted and applied according to its terms and not to be read down by limiting it to matters affecting property. Section 61(d) applies, however, only to words which are simply masculine or feminine and not to words which in their meaning include a masculine or feminine element but also some other element. "He" and "she" are merely words of gender. "Husband" and "wife" include gender as an element, but they also connote a particular relationship to another person.

(39) Similarly, Starke J said (at 540):

But the words "husband" and "wife" denote much more than gender or sex, they also import a relationship. In order to ascertain the proper interpretation of the word "wife" in the policy now before the court, the subject matter of the policy must be considered, as well as its general scope and language: *Chorlton v Lings* (1); *Viscountess Rhondda's Claim* (2). Here the word "wife" expresses a certain relationship to the insured, and is not merely a mode of denoting gender or sex.

(40) Much has changed since that case was decided. In many ways, the central question we have to determine in this case is how much has changed in those intervening years. But one thing which we think has not changed is that the words "husband" and "wife" still

presuppose the existence of a marital relationship involving each of them as parties. In other words, the complementary nature of the relationship is still inherent in the meaning of the words.

(41) In our view the deletion of the phrase "as the case may be" from the definition in s 8A has not affected the meaning of the section. The phrase itself was meaningless in the previous s 3 and its deletion has been neutral in its effect.

(42) There are, in any event, insurmountable obstacles to Mr Hinkley's submissions as to the meaning of the words "husband" and "wife". For if his arguments were successful, then the question would arise as to how one would categorise the parties in a homosexual relationship. The fact that the partners to the relationship were male would surely not make them both "husbands", any more than female partners would both be "wives". Which, then, would be the "husband" and which the "wife"? The manuscript of Dr Sime's dictionary gives a secondary definition of the words "husband" and "wife" in the context of homosexual relationships, but only in a very restricted way: he defines a "husband" as "a man who takes the 'active' or 'masculine' role in homosexual relations; one who adopts the male role in a quasi-marital homosexual relationship characterised by role playing". Similarly, a secondary definition of "wife" is "a man taking the traditional female role in a quasi-marital homosexual relationship between two men: the effeminate or female-acting partner in a homosexual union characterised by role playing".

(43) The literary quotations used by Dr Sime to illustrate these uses of these words are all relatively old. And this is not surprising. For we consider that these usages would have very limited application in today's social climate. As Mr Hinkley himself has commented, society is moving away from the assignment of gender based roles within relationships, be they heterosexual or homosexual relationships. There is an increasing emphasis on openness, equality and individual growth within all relationships in our society and a move away from traditional assumptions as to the relative roles of men and women. In other words, the old gender-based stereotypes are breaking down. It is no longer seen to be unusual for a woman to be the primary income earner in a relationship, or for a man to be the homekeeper. At the same time, concepts such as "masculinity" and "effeminacy", with their overtones of domination and subjugation, are now repugnant to many people. We venture to think that a great many people in homosexual relationships, be they male or female, would find it deeply offensive to be described in these terms. They would also reject the appellation of "husband" or "wife", but for slightly different reasons. As these words — "husband", "wife" — becoming increasingly neutral in terms of the roles they connote, their use becomes progressively less transferable into other situations. They can no longer be used as metaphors for power imbalances.

(44) But this does not render these words devoid of meaning, although Mr Hinkley's submission would have this effect. For, contrary to his submission, the two connotations which we consider these words to have retained without qualification, relate to the gender of the holder and the existence of a marital relationship. A "husband" remains a married man, and a "wife" remains a married woman. Or, to put it another way, a "husband" and a "wife" are a man and a woman who are married to each other, with or without a marriage ceremony.

(45) It follows from all we have said that we must reject Mr Hinkley's submissions as to the use of these words. They are incapable, in our view, of applying to partners in a homosexual relationship.

"Lived as that person's husband or wife"

The applicant's submissions

(46) This, however, is not the end of the matter. For Mr Hinkley has a further submission based on the composite phrase "lived . . . as that . . . person's husband or wife" in s 8A. He urges that the word "as" means "in the manner of" so that the total phrase means "lived in the manner of that person's husband or wife". When read in this sense the words lose their gender connotations, he says, and the definition is satisfied if the parties lived together as if they were married — a phrase which applies equally to homosexual as to heterosexual couples. This, Mr Hinkley says, is the meaning which was intended by parliament when it enacted s 8A in its present form in 1992. It is consistent with the beneficial nature of the legislation. Moreover, this is the interpretation which accords with Australia's treaty obligations and is thus the one which should be preferred.

(47) This submission is dependent upon the proposition that the word "as" in the phrase "lived . . . as that person's husband or wife" means "in the manner of" and thus permits a broad view to be taken of the words which follow. It involves extending the meaning of the phrase beyond actual husbands and wives so that it encompasses people who live in relationships which are analogous to marriage.

(48) Mr Hinkley accepts that the law as it presently stands requires that the parties to a legal marriage be of the opposite sex: Marriage Act 1961 (Cth) ss 46(1), 69(2); Family Law Act 1975 (Cth) s 43(a); *Hyde v Hyde* (1866) LR 1 P & D 130; *Corbett v Corbett* [1971] P83; *In The Marriage of C and D* (1979) 35 FLR 340. However he urges that there is nothing in s 8A or 8B which requires that the parties be legally married. To the contrary, the word "as" in s 8A extends the section so as to include relationships which are analogous to marriage and in particular to bona fide and permanent homosexual relationships.

(49) Mr Hinkley relies on the judgment of Fitzgerald J in *Lynam v Director General of Social Security* (1983) 52 ALR 128. That was an appeal from the Administrative Appeals Tribunal in which the central issue was whether the applicant (a male) was the "spouse" of a woman with whom he was living within the meaning of the Social Security Act 1947 (Cth). The Administrative Appeals Tribunal had found that he was, having based its decision largely upon the financial relations between the two. Fitzgerald J allowing the appeal, said at 131:

Financial arrangements cannot be taken in isolation and considered of particular importance in determining the nature of relationship. Their materiality, like each of the other elements of the relationship, stems from the impact which they have as part of an overall situation. Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.

It seems futile to deny that subjective views as to what are involved as basic attributes of the marriage relationship will intrude into the assessment called for. However, it is, in my view, important that the departmental officers or tribunals charged with the task at least take into account what is the norm for the peer group of the applicant. Only in this way can the legislation be fairly and justly accommodated to a multi-racial and otherwise diverse society.

(50) Mr Hinkley suggests that the word "gender" can readily be substituted for the phrase "financial arrangements" at the beginning of the quoted passage. It demonstrates

the broad multi-faceted approach which must be taken when assessing whether the relationship of husband or wife, or an analogous relationship exists. He also stresses that the principle underlying the provision of death benefits in superannuation is to provide for persons who would otherwise have benefited from and been dependent upon the superannuation benefits of the deceased but for his/her death. Accordingly, death benefits are based upon issues of relationship, dependency and proximity to the deceased and not upon issues of gender or sexual preference, and the definitions should be interpreted in this light.

(51) Mr Hinkley's primary submission is that the ordinary meaning of the phrase "lived ... as that other person's husband or wife" extends to include a marriage-like relationship between persons of the same sex. At most, he says, the provision is ambiguous. And if there is any ambiguity as to the meaning of the section, then it must be resolved in favour of a liberal interpretation in accordance with the beneficial purposes of the legislation: *Bull v Attorney-General (NSW)* (1913) 17 CLR 370; *Holmes v Permanent Trustee Co of New South Wales* (1932) 47 CLR 113; *Burns v Australian National University* (1982) 40 ALR 707; *Motor Accidents Board v Jovicic* [1985] VR 171.

(52) Furthermore, Mr Hinkley says that the history of the current s 8A supports his contentions. Quite apart from the deletion of the phrase "as the case may be" in the present definition, this was parliament's opportunity to make clear, if this was its intention, that superannuation death benefits should be payable only to surviving spouses of the opposite sex, as the Victorian Superannuation legislation had done. Such a provision would have removed all ambiguities. The failure of parliament to insert it in s 8A must denote an intention to extend superannuation benefits to same sex partners.

(53) Finally Mr Hinkley submits that Australia's treaty obligations require that it not discriminate against individuals on the grounds of their sexual preference. Accordingly, it is a canon of statutory construction that if a meaning is available which is consistent with this obligation, then that is the meaning which should be ascribed to the legislation.

(54) In this respect Mr Hinkley relies upon arts 2.1 and 26 in the International Covenant on Civil and Political Rights. Those articles provide as follows:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex; language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(55) The United Nations Human Rights Committee has expressed the view that the reference to "sex" in arts 2, para 1 and art 26 is to be taken as including sexual orientation: *The Complaint of Nicholas Toonen*, Communication No 488/1992, Human Rights Committee, United Nations, 50th Session, 31 March 1994.

(56) The High Court has recently emphasised the importance of interpreting local legislation in a manner which is consistent with Australia's treaty obligations. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, the court by majority found that if a decision-maker proposes to make a decision which is inconsistent with Australia's treaty obligations, and thus with the legitimate expectations of its citizens, then

procedural fairness dictates that the persons affected should be given notice and be afforded an adequate opportunity of presenting a case against the taking of such a course. Mason CJ and Deane J said at ALR 361-2

It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute (4). This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of parliament, not the executive (5). So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. In this case, it is common ground that the provisions of the Convention have not been incorporated in this way. It is not suggested that the declaration made pursuant to s 47(1) of the Human Rights and Equal Opportunity Commission Act has this effect.

But the fact that the Convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party (6), at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because the parliament, *prima facie*, intends to give effect to Australia's obligations under international law.

It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law (7). The form in which this principle has been expressed might be thought to lend support to the view that the proposition enunciated in the preceding paragraph should be stated so as to require the courts to favour a construction, as far as the language of the legislation permits, that is in conformity and not in conflict with Australia's international obligations. That indeed is how we would regard the proposition as stated in the preceding paragraph. In this context, there are strong reasons for rejecting a narrow conception of ambiguity. If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations(8).

The respondent's submissions

(57) The respondent does not dispute that the approach to the interpretation of s 8A suggested by Mr Hinkley is, in theory, the correct one. Mr Hanks accepts that, where possible, an interpretation which is consistent with Australia's treaty obligations must prevail when one is determining the ambit of Commonwealth legislation. Similarly he concedes that legislation which has a beneficial or remedial purpose is to be interpreted broadly. But all these rules of construction bow before the primary rule that the words of an enactment must be given their natural and ordinary meaning unless to do so would lead to an absurdity. The natural and ordinary meaning of s 8A is clearly to allow spouse benefits under the Act to be available for persons of the opposite sex who are living in a marriage or marriage-like relationship. True it is that parliament did not specify in s 8A that the husband or wife need be a person of the opposite sex. It was unnecessary for it to do so, for that concept is inherent in the words themselves.

Conclusion

(58) We find Mr Hanks' argument a compelling one. As we have already commented, the applicant's submissions as to the broad meaning to be attached to the words in s 8A are very much dependent upon the meaning to be ascribed to the word "as" within the phrase "lived with that other person as that other person's husband or wife". Mr Hinkley relies on the *Shorter Oxford Dictionary's* definition of "as", in the following terms: "in the same way as, as if, as it were; after the manner of; in the likeness of; like." However the

dictionary also contains the following definition of the same word: "in the character, capacity, function, or role of." And it is this latter meaning, we have no doubt, which was intended to be conveyed in s 8A. The clear import of s 8A is to restrict access to spouse benefits to husbands and wives who have lived together on a bona fide basis whether or not they are legally married. It would be stretching the language of the section beyond any permissible bounds to find otherwise, notwithstanding Mr Hinkley's eloquent arguments to the contrary.

(59) The definition in s 8A contains a common legislative device by which a person is designated according to the role, capacity or function which he or she occupies or performs. This is designed to achieve a degree of legislative certainty: only those persons so designated fall within the ambit of one of these provisions. It would confound all principles of certainty and defeat the purpose of much of the legislation in which this device has been used, if the meaning urged by Mr Hinkley were to be adopted. Accordingly, we are compelled to find that s 8A extends only to husbands and wives, and not to other persons in similar or analogous situations. And as a "husband" and a "wife" are, according to our earlier findings, a man and a woman who are married to each other, with or without a marriage ceremony, this cannot encompass partners in a homosexual relationship.

(60) This interpretation accords with the intention of parliament when s 8A was introduced in 1992. The previous definition of spouse contained in s 3 of the Act was in the following terms:

- (a) a person who was legally married to the deceased person at the time of the person's death and who, at that time, was living with the person on a permanent and bona fide domestic basis;
- (b) a person who was legally married to the deceased person at the time of the person's death but who was not living with the person on a permanent and bona fide domestic basis at that time, and who, in the opinion of the Commissioner, was wholly or substantially dependent upon the deceased person at that time;
- (c) a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of not less than 3 years immediately preceding the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis; and
- (d) a person who was not legally married to the deceased person at the time of the person's death but who, for a continuous period of less than 3 years immediately preceding the person's death, had ordinarily lived with the person as the person's husband or wife, as the case may be, on a permanent and bona fide domestic basis, and who, in the opinion of the Commissioner, was wholly or substantially dependent upon the deceased person at the time of the deceased person's death; . . .

(61) This provision discriminated against persons who were living together on a de facto basis in that, if their relationship had lasted for less than 3 years, they had to satisfy the commissioner that they were wholly or substantially dependent upon the deceased person at the time of that person's death. The purpose of introducing s 8A was to remove this discrimination. Mr Duncan, who introduced the bill, said in his second reading speech (Cth Hansard, House of Representatives, 1992, No 14, p 2159):

The purpose of the amendments is to remove discrimination on the basis of marital status from certain provisions of the superannuation schemes. The removal of discrimination in superannuation on the grounds of sex and marital status has been identified in the National Agenda for Women as a priority area for government action. Action has already been taken to review and limit the exemption in the Sex Discrimination Act 1984 for superannuation and to increase superannuation coverage for women.

(62) It is clear, therefore, that the new s 8A was designed to include persons of the opposite sex who lived in marriage-like relationships regardless of whether they were

legally married. The fact that the persons must be of the opposite sex is inherent, as we have said, in the use of the words "husband" and "wife".

(63) It follows that we must affirm the decision under review. It gives us no joy to do so. There is no doubt that the applicant and Mr Corva had a close marriage-like relationship and that they conformed to the requirements of s 8A in all respects except for their gender. Yet the 1992 amendments, which were designed to remove discrimination on the ground of marital status, provide no redress in relation to the form of discrimination which is illustrated by this case.

(64) We affirm the decision under review.

MICHAEL HEATH
BARRISTER

[Name withheld]

[Details removed]

08 March 2001

[Details removed]

Ms Teresa Gambaro M.P.
27 Redcliffe Parade
REDCLIFFE
Q 4020

Dear Ms Gambaro

Recognition of Same Sex Couples for Comsuper Benefits

I am writing to you not only as the local member but because I need fair and just representation. To be honest, this is my third attempt at seeking redress and justice in this matter. I have written to two other Federal representatives and have not even received acknowledgement of my correspondence. My reasons for not approaching you in the first instance are twofold. First, I am not confident of the somewhat conservative view that may be taken by Liberal politics in regard to my problem. Second, after speaking with your office late last year about my dilemma I was left with the distinct impression that I was wrong in my interpretation of the matter which was of no help to me at all.

Enclosed are two (2) letters relating to my Defence Force Retirement and Death Benefits pension. The first letter is a request to Comsuper asking for recognition of my same sex partner as a spouse for the purpose of superannuation benefits in the event of my death. The second letter is the reply from Comsuper rejecting my request. In simple terms, the rejection of my request is nothing short of discrimination.

I have been with my partner for twelve (12) years which has outlasted many conventional marriages and so called defacto (for the purpose of entitlements) relationships. There really are no grounds for justification in saying that a heterosexual marriage is representative of the family unit, and it does not necessarily symbolise a permanent stable relationship in today's environment. I feel quite confident in saying that our partnership and circle of friends represent a more wholesome, happy and stable environment than many others in society. Therefore, I am unable to understand why we have been singled out for rejection.

My request is an attempt to achieve equality for same sex couples in what is currently a discriminatory environment. I ask for your strong support in seeking change via legislation and subsequent amendment to the DFRDB Act, for recognition of same sex couples in the area of superannuation benefits, and in particular the acknowledgement of my partner in this matter.

Yours faithfully

[Name withheld]

Enclosures: 1. Letter to Comsuper
 2. Reply from Comsuper and attachments



ENCLOSURE 4

PARLIAMENT OF AUSTRALIA

HOUSE OF REPRESENTATIVES



TERESA GAMBARO MP
FEDERAL MEMBER FOR PETRIE

27 Redcliffe Parade
(PO Box 964)
Redcliffe Qld 4020

Tel: (07) 3283 4277
Fax: (07) 3284 1379

[Name withheld]

[Details removed]

Dear [Name withheld]

Thank you for your letter dated 8 March 2001 regarding Comsuper Benefits and the nomination of a same sex partner for the death benefit. I apologise for the delay in responding to you.

As the concerns you have raised are primarily within the Defence Force Retirement and Death Benefits Act, I have referred your correspondence to the Minister Assisting the Minister for Defence, the Hon Bruce Scott MP for his information and advice.

I would like to assure you of my personal commitment to eradicating discrimination from Commonwealth legislation.

I will contact you again when I receive a response from the Minister. Once again, thank you for taking the time to bring your personal situation to my attention.

Yours sincerely

TERESA GAMBARO MP
Federal Member for Petrie

1 May 2001
tg:mlh



ENCLOSURE 5

PARLIAMENT OF AUSTRALIA

HOUSE OF REPRESENTATIVES



TERESA GAMBARO MP
FEDERAL MEMBER FOR PETRIE

27 Redcliffe Parade
(PO Box 964)
Redcliffe Qld 4020
Tel: (07) 3283 4277
Fax: (07) 3284 1379

[Name withheld]

[Details removed]

Dear Ms [Name withheld]

Further to your contact with my office earlier this year, regarding superannuation entitlements for same sex couples under the Defence Force Retirement and Death Benefits (DFRDB) Scheme, I have now received the enclosed response from the Minister Assisting the Minister for Defence.

I note that you wrote to Senator Marise Payne, who also made representations to the Minister on your behalf. Minister Scott provided me with a copy of his response to Senator Payne.

I regret that the Minister has not provided you with the response you hoped for, however I assure you that I will continue to raise this matter with my Parliamentary Colleagues for consideration as a whole of Government issue.

Once again, thank you for taking the time to bring your personal situation to my attention.

Yours sincerely

TERESA GAMBARO MP
Federal Member for Petrie

4 July 2001

Encl.
tg:mlh



MINISTER FOR VETERANS' AFFAIRS
MINISTER ASSISTING THE MINISTER FOR DEFENCE

PARLIAMENT HOUSE
CANBERRA ACT 2600

Ms Teresa Gambaro MP
Member for Petrie
PO Box 964
REDCLIFFE QLD 4020

18 JUN 2001

Dear Ms Gambaro *Teresa,*

Thank you for your representation of 2 May 2001 on behalf of [Name withheld] of
[Details removed] concerning superannuation entitlements for same sex
couples under the Defence Force Retirement and Death Benefits (DFRDB) scheme.

Senator Marise Payne has made a representation to me on behalf of [Name withheld] over the
same issue and I enclose a copy of my response to Senator Payne for your information.

Yours sincerely

BRUCE SCOTT MP





MINISTER FOR VETERANS' AFFAIRS
MINISTER ASSISTING THE MINISTER FOR DEFENCE

PARLIAMENT HOUSE
CANBERRA ACT 2600

Senator Marise Payne
PO Box CC18
PARRAMATTA NSW 2123

18 MAY 2001

Dear Senator Payne

Thank you for your representation of 23 March 2001 on behalf of [Name withheld] of [Details removed] concerning superannuation entitlements for same sex couples under the Defence Force Retirement and Death Benefits (DFRDB) scheme.

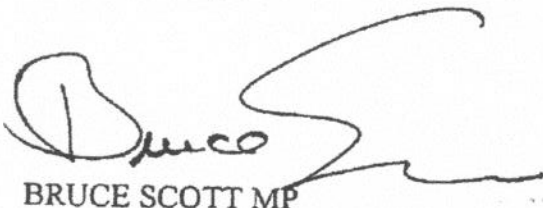
The *DFRDB Act 1973* provides superannuation retirement benefits to DFRDB scheme members and, in the event of a member's death, to the member's eligible dependants. An eligible dependant may include a member's spouse provided certain eligibility criteria are met. The eligibility criteria for recognition as a spouse are set out in Sections 6A and 6B of the *DFRDB Act 1973*. To be recognised as a spouse under the *DFRDB Act*, a person must have been living in a marital relationship as the husband/wife of a scheme member for a period of at least three years. Marital relationships under three years may also be recognised but at the discretion of the DFRDB Authority. For the purposes of the Act, a marital relationship is a permanent and bona fide domestic relationship between a scheme member and another person of the opposite sex.

An eligible spouse is defined the same way in other Commonwealth superannuation legislation. The issue of recognition of same sex partners is a matter that extends beyond superannuation legislation and is thus a matter that must be considered on a whole of Government basis.

I am advised that there are currently no plans to change spouse eligibility criteria in the *DFRDB Act 1973*.

I trust this information will clarify the matter for [Name withheld]

Yours sincerely



BRUCE SCOTT MP