

Submission on the Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023

30 October 2023

1 The Australian Judicial Officers Association (**AJOA**) appreciates the opportunity to make submissions concerning the Exposure Drafts of the *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* and the *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Imposition Bill 2023 (the **Draft Bills**)*.

2 The AJOA is grateful for the extension of time it has been allowed. However, it must be observed that the timeframe afforded is extraordinarily short for consideration of draft legislation of such complexity and importance. Accordingly, the AJOA seeks the opportunity to supplement or amend these submissions in the coming weeks.

3 Membership of the AJOA is open to all serving and retired judges and magistrates in Australia. The AJOA's membership currently stands at over 800 judges and magistrates. The AJOA's objects are concerned with the public interest in maintaining a strong and independent judiciary within a democratic society that adheres to the rule of law.

4 The Draft Bills propose that from 2025/26, under Div 296 of the *Income Tax Assessment Act 1997* (Cth) (the **ITAA 1997**), an individual taxpayer with superannuation balances exceeding \$3 million may become liable to tax (**Div 296 tax**) in respect of the taxpayer's "taxable superannuation earnings" at the rate of 15%. The tax is to be imposed directly on the individual.

5 Special rules for working out Div 296 tax are proposed to apply (in summary) to "superannuation funds" consisting of statutory pension benefits for the following categories of judicial officers:

- "State higher level office holders" to be prescribed by regulation, but whom it is assumed will include at least judges of the State Supreme Courts and County or District Courts irrespective of interests in "constitutionally protected funds" (**State judges**);

- judges of the High Court of Australia, the Federal Court of Australia and the Federal Circuit and Family Court of Australia (Division 1) (**Commonwealth judges**) in respect of interests under the *Judges' Pension Act 1969* (Cth) (the ***Judges' Pension Act (Cth)***);
- judges of the Australian Capital Territory and the Northern Territory Supreme Courts in respect of interests in their pension schemes (**Territory judges**).

6 The effect of the Draft Bills on State, Commonwealth and Territory judges would be (in summary):

- For all such judges, their pension benefits would be counted towards their total superannuation balance to determine if the balance exceeds the \$3 million threshold; and, if it does, Div 296 tax is imposed in respect of earnings from any unprotected superannuation interests.
- For State judges, Div 296 tax is not imposed on earnings from superannuation interests in constitutionally protected funds (**CPFs**).
- For Commonwealth judges:
 - (a) Div 296 tax will not apply in respect of benefits under the *Judges' Pension Act* (Cth) of currently serving Commonwealth judges who were appointed prior to 1 July 2025;
 - (b) Div 296 tax will apply on such benefits of currently serving Commonwealth judges who were appointed prior to 1 July 2025 once they retire;
 - (c) Div 296 tax will apply on such benefits of Commonwealth judges appointed from 1 July 2025 while they are serving;
 - (d) Div 296 tax will apply on such benefits of already retired Commonwealth judges.
- For Territory judges, current and retired, Div 296 tax will apply in respect of all of their superannuation pension benefits.

7 The “total superannuation balance value” of a superannuation interest, comprising an entitlement to a non-commutable defined benefit pension is to be determined in accordance with regulations (not yet published in the Draft Bills). It is assumed that the total superannuation value of an interest, under the *Judges' Pension Act* (Cth) (and its State and Territory equivalents), being a right to a lifetime defined benefit pension, will be the actuarially

determined value of that right at a particular time. The AJOA would wish to make submissions on the method of calculation, as was foreshadowed at our meeting with Treasury officials on 24 October 2023.

8 The AJOA has profound concerns about the application of Div 296 tax to the statutory pension schemes for Commonwealth and Territory judges and opposes the proposed amendments. The AJOA also proposes to make submissions in relation to the position of State judges, as part of the foreshadowed process of further consultation, following the release of proposed regulations defining “State higher level office holders” and related aspects of the proposed legislative scheme.

9 There are six submissions that the AJOA presently wishes to make. They are, in summary:

(1) The imposition of Div 296 tax on judges’ statutory pension benefits would be contrary to the public interest because the tax would undermine an important rationale for such benefits, namely, the preservation of the independence of the judiciary;

(2) Adverse consequences would result from the differential treatment of State judges, Commonwealth judges and Territory judges;

(3) Adverse consequences would result from differential treatment of Commonwealth judges on the basis of their appointment at different times;

(4) Judges’ statutory pension schemes are not comparable with superannuation funds;

(5) There are potential constitutional implications;

(6) There would be particular adverse effects for the Territory Supreme Courts.

10 Each of these matters will be addressed in turn.

Contrary to the public interest

11 It is understandable that the aim of the Draft Bills is to raise revenue and, to that end, intends to hit as wide a target as possible. However, consideration must be given to the role of judges in our system of democracy and the rationale for all legislatures having enacted legislation providing for non-contributory pensions for judges.

12 In *State Chamber of Commerce & Industry v Commonwealth* (1987) 163 CLR 329, Brennan J observed at [362]-[363] that the existence and nature of government depends upon the

performance of the essential organs of government, including the courts, and that emoluments have an important role.

- 13 In *Austin & Anor v Commonwealth* (2003) 215 CLR 185, Gaudron, Gummow and Hayne JJ observed at [167]:

The circumstances that judicial pensions do not require contributions but are fixed as a proportion of the remuneration of a serving judge and are to be paid at the full rate only upon a substantial period of service as well as attainment of a minimum age, indicates the importance attached by legislatures to such schemes in the remuneration of the judicial branch.

- 14 The importance attached by State, Commonwealth and Territory legislatures to judicial pension schemes is founded in the necessity for an independent judiciary. In *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 Gummow, Hayne and Crennan JJ explained at [76]-[77]:

Further, if attempting to state comprehensively the measures that have been taken to support judicial independence, it would be necessary to take account of not only the arrangements for remuneration of judges while in office but also the provision made for payment of pensions on retirement. The “remuneration”, which s 72(iii) of the Constitution states shall not be diminished during continuance in office, includes non-contributory pension plan entitlements which accrue under the federal judicial pensions statute.

Provision is made for judicial pensions for a number of reasons. One not insignificant reason is to reduce, if not eliminate, the financial incentive for a judge to seek to establish some new career after retirement from office. As was pointed out in argument, it may otherwise be possible to construe what a judge does while in office as being affected by later employment prospects.

- 15 In *Baker v Commonwealth* (2012) 206 FCR 229, Keane CJ, Lander and Perram JJ observed at [37] in respect of s 72(iii) of the *Constitution*:

...[A]s a matter of history, the principal vice at which this provision was aimed was the legislative reduction in judicial remuneration, after a judge had accepted appointment. Such a reduction was viewed as a means of punishing an independently minded judge or of ensuring a more compliant or cooperative attitude on the part of serving judges in the execution of their function as the third branch of government.

16 The role of judicial pensions in the reality and perception of judicial independence is reflected in the *Guide to Judicial Conduct* issued by the Chief Justices of Australia which states:

The benefits of office including pensions or superannuation, should give a comfortable level of financial security for life to obviate the need to augment earnings by activities that might generate a conflict of interest or otherwise pose a potential threat to public confidence.

17 Judges, by convention, voluntarily limit their sources of income in order to preserve their independence and the public perception of their independence. The proposed application of Div 296 tax in respect of judges' pensions is likely to have detrimental effects upon both the independence and quality of the Commonwealth and Territory judiciary. First, it would encourage judges to look towards future sources of earnings after retirement, thereby eroding the independence or perceived independence of the judiciary. Secondly, persons who would make exemplary judges may reject judicial office in favour of the opportunity to earn more elsewhere. In either case, there would be institutional damage to the courts.

18 Thus, the implications of reduction of judicial pensions, through taxation or otherwise, are not merely fiscal, but necessarily involve broader issues concerning the effect upon our system of democracy and government. While, taking a short-sighted view, the proposed Div 296 tax would increase revenue, it will have a broader detrimental consequence on the institutions of our democracy.

Adverse consequences resulting from differential treatment of State judges, Commonwealth judges and Territory judges

19 If the proposed changes are made, they will operate differentially between State judges, Commonwealth judges and Territory judges.

20 This will have the unintended effect of making an appointment to a State Supreme Court a financially more attractive proposition than appointment to the Federal Court or Territory courts. This will adversely affect Commonwealth and Territory courts and, indeed, the Commonwealth and the Territories themselves.

21 First, many experienced, skilled, and talented lawyers will choose appointment to State courts over Commonwealth and Territory courts. Secondly, some persons in private practice are likely to decline judicial appointment, even to the High Court. Thirdly, some judges of Commonwealth and Territory courts are likely to move to State courts, causing a drain of talent.

22 Consequences of this kind are not merely speculative but are demonstrated by history. The legislation considered in *Austin & Anor v Commonwealth*, which introduced a superannuation surcharge for judge's pensions, continued to apply to Commonwealth judges. There are well-known examples of talented judges who left Federal courts for State courts as a result. Division 296 tax would operate to dilute the quality of Commonwealth and Territory courts in favour of State courts when it is desirable to maintain parity of quality between the courts.

Adverse consequences resulting from differential treatment of Commonwealth judges on the basis of appointment at different times

23 Division 296 tax is proposed to be imposed on "earnings" in respect of the pension entitlements of Commonwealth judges appointed from 1 July 2025, even during the period when they are serving. There will be differential treatment of newly appointed judges in comparison to already serving judges.

24 The proposed differentiation has the potential to create division within the cohort of judges in the respective Commonwealth courts. Such differentiation may cause a perception that there are two classes of judges hearing the same kinds of matters. Such a perception would be detrimental for the reputation of the courts and respect for the rule of law. It is unthinkable, for example, that the judges of the High Court, sitting on the same cases, should receive different levels of remuneration (the judicial pension being, as has been emphasised, part of a judge's remuneration).

25 There is an important public interest in ensuring that all judges within the same division of a court are, and are perceived to be, equal.

Incomparability of judges' pensions with superannuation funds

26 While it may have been thought that the application of Div 296 tax to judges' pension schemes is consistent with an announced policy objective of ensuring that defined benefit interests received commensurate treatment to account-based or accumulation superannuation funds, that analysis is flawed.

27 First, the judicial pensions are a creature of statute. They are not funds, let alone defined benefit funds. Indeed, there is no fund or accumulation of funds associated with the pensions.

28 Secondly, these days, defined benefit funds are generally only legacy funds. Public sector defined benefit funds have been closed for quite some time. The maintenance of the judge's pension schemes represents their importance to the rule of law by the maintenance of judicial independence and have an inherently different character to superannuation funds.

29 Thirdly, the statutory pension schemes provide for non-commutable pension benefits which are payable only for the lifetime of the judge, the lifetime of the judge's spouse after the judge's death, or in limited cases the judge's children (on satisfying prerequisite pension conditions), and are therefore dissimilar to defined benefit funds. The pension schemes provide no hereditary benefits.

30 Further, this analysis precedes upon an assumption that the Div 296 tax is a law with respect to taxation within the meaning of s 51(iii) of the *Constitution*. The AJOA should not be taken as making any concession in that respect.

Potential constitutional implications

31 In the time available, it has not been possible to obtain comprehensive advice about the constitutional validity of the proposed Div 296 tax in its application to judicial pensions. However, there are clear indicators that the Draft Bills and the Exposure Draft Explanatory Materials recognise there is doubt about its validity.

32 The Explanatory Materials specifically indicate (at 1.105 – 1.107) that, by reason of s 72(iii) of the *Constitution*, Div 296 tax will not be imposed on pension benefits of current Commonwealth judges while they continue in office. The Explanatory Materials make the assertion (at 1.108) that “the constitutional restrictions do not apply to retired Commonwealth judges and justices”. The fact that the *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Imposition Bill 2023*, unusually, contains a savings clause (proposed s 6) to sever and nullify the imposition of taxation, if that imposition would exceed the legislative power of Parliament, appears to reveal doubt about the accuracy of that proposition in its application to the proposed Div 296 tax.

33 In *Austin & Anor v Commonwealth*, Gaudron, Gummow and Hayne JJ at [72] observed that a Commonwealth judge's “remuneration” which s 72(iii) of the *Constitution* requires not be diminished during continuance in office, “includes non-contributory pension plan entitlements which are accruing under the federal judicial pensions statute”: see also *Forge* at [76]. The Div

296 tax seems, on the face of it, to be merely a device by which a judge's remuneration accruing or accrued while in office is diminished but the practical effect of that diminution is deferred until the judge leaves office. The effect seems to be, as a matter of substance, to enact an immediate diminution of an accruing benefit.

34 As seems to be acknowledged, there is at least an arguable case that the Div 296 tax would be unconstitutional in its application to the pension benefits of current and retired Commonwealth judges. The AJOA would seek to make further submissions upon this crucial issue once it has had an opportunity to obtain comprehensive advice.

35 It is inherently undesirable that a new tax law be enacted which, by its terms, acknowledges the risk that it may be unconstitutional. Good tax policy requires that tax laws should be certain in their operation.

36 While it is not our province to suggest the steps the Commonwealth may take in the light of this aspect of our submission, prudence might suggest that the opinion of the Solicitor General be obtained.

Particular adverse effects will result for the Territory Supreme Courts

37 The effect of Div 296 tax is particularly egregious in its effect on Territory judges because, unlike for State and Commonwealth judges, it will apply to judges who are currently serving.

38 As a matter of public interest, s 73(3A) of the *Australian Capital Territory (Self-Government) Act* (Cth) should not so readily be overridden through a tax that will raise such small amounts of revenue. That provision serves the important role, as already discussed, of protecting the independence and impartiality of ACT judges.

39 The same principles of protection of judicial independence and impartiality apply to Northern Territory judges even though there is no express law preventing the diminution of their remuneration.

40 The application of Div 296 tax to Territory judges will interfere with democracy and self-government in the Territories and undermine the institutional integrity of the Territory Supreme Courts.

Summary

- 41 There is significant doubt as to whether the proposed application of Div 296 tax to judges' statutory pension entitlements is constitutionally valid.
- 42 Even assuming its validity, the application of Div 296 tax, in this way, would cause institutional harm to the Commonwealth and Territory courts. The minor fiscal benefit to the Commonwealth cannot justify such erosion of Australia's system of democracy.

Justice Michael Walton
President of the Australia Judicial Officers Association