

SENATE ECONOMICS LEGISLATION COMMITTEE

The Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 and the Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023

Note

1. This note responds to the Committee's invitation to appear before it on 18 April 2024 and assumes familiarity with the AJOA Submission dated 23 February 2024. The note concerns some issues arising in respect of the application of Div 296 tax to the pension entitlements of retired Commonwealth judges.

Act of Settlement Tenure

2. Central to the rule of law is the independence of the judiciary from other arms of government. The *Act of Settlement of 1701* safeguarded the tenure of judges and protected their salaries. This, taken with earlier rules rendering judges immune from civil suit or criminal prosecution for acts done in their judicial capacity laid the foundation of judicial independence which is a fundamental aspect of the rule of law in Australia.
3. Act of Settlement tenure has been replicated throughout Australia. The remuneration of judges which s 72(iii) of the Constitution states shall not be diminished during continuance in office includes pension entitlements. *Austin & Anor v Commonwealth*

(2003) 215 CLR 185 at [72]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [74]-[76].

4. It is accepted that security of remuneration plays an important part in the recruitment and retention of judges of appropriate skill and experience. *Austin*, at [228].
5. As proposed, the Div 296 tax retrospectively alters the pension entitlements of retired Commonwealth judges.
6. On any consideration of the liability of retired Commonwealth judges to pay Div 296 tax, the security and constitutional protection of their remuneration arises for consideration.

Commonwealth Judicial Pensions and Div 296

7. The substance of Div 296 tax also falls to be considered on any test of the liability of retired Commonwealth judges to pay the tax. Judicial pensions are unfunded, non-contributory and cannot be commuted. Judicial pensions are paid from the resources of the Commonwealth and are not market based. Apart from a small tax offset, pension entitlements are taxed as ordinary income at marginal rates. Structurally, judicial pensions do not raise the problems sought to be addressed by Div 296. No judge accumulates wealth in any government fund from which pension entitlements are paid.
8. In substance, imposing Div 296 tax on pension entitlements which are already taxed at marginal rates raises a question of double taxation.

State Judges

9. State judges are to be declared exempt from Div 296 as members of a constitutionally protected fund. The AJOA Submissions address effects of differential tax burdens on State and Commonwealth judges.
10. A State's body of laws and a State judiciary are part of the State's government.
11. The High Court is the constitutional court, it declares the common law of Australia and it is the nation's court of final appeal in respect of the Commonwealth, the States and the Territories.
12. In relation to the final appellate jurisdiction in respect of the States, it was always envisaged that, from time to time, different States would be represented on the High Court. *Hansard, Judiciary Bill, Second Reading, House of Representatives, 9 June 1903.* An issue of federalism, as in *Austin*, may arise if differential tax burdens on State and Commonwealth judges impede, impair, or discourage State representatives on the High Court.

Women Judges

13. The paradigm of judicial appointment once involved encouraging known leaders of the Bar to take on the duties of judicial office after enjoying remunerative and often long practices at the Bar. With the palpable increase in the numbers of women

entering legal practice in the second half of the 20th century, the paradigm was interrogated and shifted.

14. It is sufficient for present purposes to note that in 1993, the Attorney-General Mr Michael Lavarch produced a discussion paper aimed at reconsidering the paradigm (Judicial Appointments – Procedure and Criteria). The ultimate aim in sight was to ensure the Australian judiciary reflected the Australia community. This was followed up in 2007 by the Attorney-General Mr Robert McClelland who made changes to the judicial appointment process for Commonwealth courts, other than the High Court.
15. These developments and changes were aimed explicitly at widening the pool from which judicial appointments might be made. It is common knowledge that women practitioners from then on were offered judicial appointment earlier in their careers than they might have considered optimal and were encouraged to accept such offers to accelerate the perceived good of a more representative judiciary.
16. The practical upshot is that numerous women judges in the Commonwealth system have had unusually long careers of judicial service. On the actuarial assessments foreshadowed in the draft regulations the cohort of women judges to which reference has been made will bear a higher Div 296 tax burden than male colleagues in similar circumstances.
17. Not every potential candidate with the relevant skills and expertise for judicial appointment will be able to treat pension entitlements as unimportant. Adding Div 296 tax to the taxation at marginal rates already imposed on pension entitlements is

likely therefore to restrict the pool from which judicial appointments might be made contrary to political efforts since 1993 to widen that pool.

Institutional Considerations

18. If the retrospective application of Div 296 is avoided by restricting its application to future Commonwealth judges the considerations set out in paragraph 17 remain relevant.

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