

PRELIMINARY SUBMISSION TO THE MEMBERS OF THE SENATE COMMITTEE
ON BEHALF OF RETIRED JUDGES OF FEDERAL COURTS

1. For the Parliament to enact tax laws without a clear understanding of how those laws will affect the persons who are intended to be affected would not be a responsible exercise of the powers of Parliament. The proposed operation of the *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* and the *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023* in respect of pensions payable to retired judges and their surviving partners under the *Judges Pension Act 1968* (Cth), is unstated, unexplained and, it seems, unknown to those called upon to bring the provisions into law.
2. Many retired judges, and their widows, widowers and spouses, have only very recently become aware that the proposed new laws are intended to apply to their judicial pension even though they do not have or control any capital amount upon which the proposed tax on their pension may be notionally calculated. The only amounts that they can or will ever receive is the pension itself. It is already fully taxed in their hands, unlike pensions paid from a superannuation fund with capital, usually at the highest marginal rate, and any further tax must be paid from the pension. It is not known how much will be left on which to live for those who have no other significant income. It is not understood why they must pay much more tax, to guess, twice as much tax, as someone who receives the same pension from an accumulation fund and who has capital too.
3. The retired judges make the following submissions on the very limited information available. They ask, however, that they have explained clearly how the provisions will be applied to them and then be given a meaningful opportunity to make an informed submission to the Senate Economics Legislation Committee,

4. We understand from the limited information available that the proposed Bills will apply to defined benefit entitlements (like the judicial pension) by imposing a tax of 15% on the difference between (a) the “notional” capital amount artificially calculated that would be needed by a recipient to receive the pension amount at the start of a fiscal year and (b) the “notional” capital amount actuarially calculated at the end of a fiscal year.
5. If this understanding is correct, that basis for imposing a tax upon recipients of the judicial pension is flawed for many reasons.
6. The first, and perhaps the most egregious, flaw is that it equates a recipient of the judicial pension with a person who has a superannuation fund with the capital to produce an income of the amount of that pension. The mischief that the Bills seek to address is the ability afforded by Commonwealth tax laws for some people to set aside capital well in excess of \$3 million in a superannuation fund to produce income at a concessional rate. Such a person has access to capital in the fund; the judicial pensioner does not. The application of the proposed law to the judicial pension is not within the mischief and the Bills should not be enacted.
7. The second flaw is that the Bills leave it to regulations which are not even drafted, let alone before the Parliament, to implement how the new tax will apply to judicial pensions. Thus, the proposed tax will operate upon unexplained artificial calculations which will depend upon assumptions that have not been explained anywhere and which you, as Parliamentarians who are asked to enact them have not had explained to you or the public.
8. Actuarial calculations typically depend upon life expectancy and interest rates. In this case, the age expectancy will vary between genders. Female judicial pensioners will be assessable to larger sums in tax and so receive less pension than their male counterparts, notwithstanding performing precisely the same judicial functions in duty and public service.

9. The actuarial calculation will be directed to produce a “notional” capital amount “notionally” needed to produce the pension entitlement. The fact that the calculation is “notional” is fundamental, important and shows why the proposed tax is flawed and inappropriate for defined benefit pensioners: those to whom the provision is to be applied do not have any entitlement to the “notional” capital amount; they cannot elect to receive any part of the non-existent “notional” capital to produce that pension; and, it seems, are not to receive any discount in the notional calculation for the fact that they have no right, direct or indirect, to the notional amount. Those pensioners are, therefore, treated more harshly than those for whom the mischief is intended.
10. The third flaw, as mentioned above, is that the judicial pension is already taxed in the hands of pensioners at the top marginal rate. The imposition of an additional amount of tax will be on top of the top marginal rate currently paid and will cause retired judges to be more highly taxed on their judicial pensions than any of the superannuants who fall within the mischief for whom the proposed laws are directed.
11. It is also not clear from what appears at paras 1.1 and 1.9 of the Explanatory Memorandum whether the additional amount is 15% or 30%. The drafting of paras 1.1 and 1.9 seems to assume that the additional tax burden will be 15% up to an overall cap of 30% but it is unclear how that assumption is to apply to pensions already taxed at the highest marginal rate. In any case the fact that the tax is on a notional amount never received and on capital that does not exist and cannot be realised means that the tax, even at 15% on a notional amount, will be catastrophic.
12. We should also add that there must be considerable doubt that a tax imposed on the judicial pension in this way can be permitted under the Constitution. At a bare minimum it must be highly doubtful that a mere regulation can be used to suspend the operation of the new tax on the contingent entitlement of presently serving judges until their retirement, and, if so, whether it can be constitutionally valid for the tax to be imposed on those judges who have already retired. We ask therefore that your committee ask to be shown such advice as has been obtained in respect of the

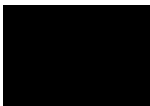
constitutional basis on which this proposed taxation of the judicial pension is proposed
and, if possible, for us to have the opportunity to comment on that advice.

19 February 2024

Signed as the representative committee for concerned retired Federal judges



The Hon Susan Kenny AM KC



The Hon Peter Jacobson KC



The Hon Steven Rares KC



The Hon Julie Dodds-Streeton KC



The Hon Jennifer Davies KC