

From: ROSS, Justice <ross.j@fwc.gov.au>
Sent: Sunday, 1 November 2015 3:24 PM
To: WATSON, Vice President
Subject: RE: Search for legal opinion on WR Act s.63

Graeme,

As to the reference to me in the opening paragraph of the draft letter I would ask that the words 'and approval' be deleted and the words '(who is not one of the affected members)' be added at the end of the relevant sentence. The sentence would then read:

'This correspondence is being sent with the knowledge of the President of the Fair Work Commission, the Honourable IJK Ross AO (who is not one of the affected members)'.

Regards, Iain

THE HON. IJK ROSS AO
President

Fair Work Commission

Tel: +61 3 8661 7829

Fax: +61 3 9655 0401

ross.j@fwc.gov.au

11 Exhibition Street, Melbourne Victoria 3000

GPO Box 1994, Melbourne Victoria 3001

www.fwc.gov.au

From: WATSON, Vice President

Sent: Thursday, 29 October 2015 1:50 PM

To: ROSS, Justice

Cc: LAWLER, Vice President; WATSON, Senior Deputy President; ACTON, Senior Deputy President; HARRISON, Anne Senior Deputy President; DRAKE, Senior Deputy President; O'CALLAGHAN, Senior Deputy President; HAMBERGER, Snr Dep President; RICHARDS, Senior Deputy President; HAMILTON, Deputy President; Ian Watson

Subject: RE: Search for legal opinion on WR Act s.63

Iain,

Further to my earlier note, attached is a draft letter that we propose to send after meeting with the department representatives. It will be necessary for us to use the meeting to carefully obtain certain information only. We do not intend to advance our position by means of such a meeting.

Please let us know if you are content with the reference to you in the opening paragraph.

Regards,

Graeme

Vice President Graeme Watson

Fair Work Commission

**11 Exhibition St
Melbourne,
Victoria 3000**

Tel: 03 8661 7870

Fax: 03 9655 0401

watson.vp@fwc.gov.au

www.fwc.gov.au

Dear Minister,

Fair Work Commission Presidential members – Division 293 Tax

We write on behalf of ten long standing presidential members of the Fair Work Commission (and its predecessor, the Australian Industrial Relations Commission) in relation to the application of Division 293 of the *Income Tax Assessment Act 1997* with respect to beneficial interests in the Judges Pension Scheme under the *Judges Pension Act 1968*. This correspondence is being sent with the knowledge and approval of the President of the Fair Work Commission, the Honourable I J K Ross AO.

As a result of amendments to the *Income Tax Assessment Act 1997* and the *Income Tax Assessment Regulations 1997* the Australian Taxation Office (ATO) has taken the view that the ten members concerned are liable for an additional tax with respect to their potential beneficial interest in the judges pension scheme. In our view, such a position is unlikely to have been intended, inconsistent with legislation and inequitable.

It appears to us that the position adopted by the ATO fails to pay regard to the status provided to us by workplace relations legislation. Further, for those who have an existing Superannuation Surcharge debt under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, the notion of paying an additional tax results in the attribution of super contributions collectively in excess of those required to notionally fund the judges' pension. We attach a briefing paper which explains these and other concerns in further detail.

The position of the ten long standing members appears to be unique and capable of remedy though amendments to the regulations without any implications for other taxpayers. Retired presidential members and presidential members appointed after 1 January 2010 are not affected. Members are not affected once they cease to be accruing members.

We are taking this opportunity of raising the matter with you because the grounds for our position are multi-faceted and we consider that remedy by regulation is preferable to alternative methods of resolving the matter. We apprehend that the Minister for Finance, and potentially the Treasurer and Attorney- General, also have an interest in the matter.

We respectfully request that the government consider an amendment to the regulations to ensure that the ten members are treated in the same manner as judges of Courts, in accordance with our legislative status.

Yours faithfully,

Vice President Graeme Watson and Senior Deputy President Ian Watson

APPLICATION OD DIVISION 293 TAX TO FWC MEMBERS ENTITLED TO BENEFITS UNDER THE JUDGES' PENSION ACT

BACKGROUND

- [1] In late July 2015, members of the Fair Work Commission (FWC), who were Presidential Members of the Australian Industrial Relations Commission (AIRC) received a letter from the Deputy Commissioner of Taxation concerning “additional tax on your super contributions, Division 293 Tax Assessment” to which a Division 293 tax notice of assessment under the *Income Tax Assessment Act 1997* for the year ended June 2014 was attached.
- [2] The assessments arose in respect of beneficial interests in the Judges Pension Scheme (JPS) under the Judges Pension Act 1968 (JPA), which is administered by the Department of Finance (Finance). The application of the JPA arises in respect of the relevant Deputy Presidents of the FWC (affected FWC members), formerly Presidential members of the AIRC, as a result of the application of s.4(b) of the JPA and s.63(2) of the Workplace Relations Act 1996 and the preservation of that entitlement by Schedule 18 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – clause 2 (and sub clause 2(2)(b) in particular).
- [3] Affected FWC members were recently provided with a copy of the Report of the Australian Government Actuary (the Actuary) on “Division 293 New Entrant Contribution Rate for the Judges’ Pension Scheme” by staff of the FWC and an accompanying letter dated 31 August 2015 from the Actuary, authorising the provision of the report to other affected FWC members.
- [4] The taxable super contributions of affected FWC members for the year ended 30 June 2014 were calculated and reported to the ATO on the basis of the Actuary’s Report.
- [5] The primary issue that arises is that the ATO has not given effect to the legal status of the ten affected FWC members under legislation governing their appointments.

Judicial Status

- [6] The affected FWC members each hold their current positions by virtue of Schedule 18 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 which provides:

FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) ACT 2009 - SCHEDULE 18

Institutions

Part 1 -- Initial appointment of FWA Members

1 Appointments to Fair Work Australia

(1) An appointment that is:

(a) to an office of the Commission mentioned in a table item below; and

(b) in force immediately before the commencement time for the table item;

is taken, after that time, to be an appointment, under section 626 of the FW Act, to the office of FWA mentioned in the table item.

Note: The person continues to be appointed to the Commission (see subitem (3)).

Appointments to FWA			
	Column 1	Column 2	Column 3
Item	Office of the Commission	Office of FWA	of Commencement time
1	President of the Commission	President of FWA	The day proclaimed for the purposes of item 2 of the table in subsection 2(1) of the FW Act.
2	Vice President of the Commission	Deputy President of FWA	The first day proclaimed for the purposes of item 3 of the table in subsection 2(1) of the FW Act.
3	Senior Deputy President of the Commission	Deputy President of FWA	The first day proclaimed for the purposes of item 3 of the table in subsection 2(1) of the FW Act.
4	Deputy President of the Commission	Deputy President of FWA	The first day proclaimed for the purposes of item 3 of the table in subsection 2(1) of the FW Act.
5	Commissioner of the Commission	Commissioner of FWA	The first day proclaimed for the purposes of item 3 of the table in subsection 2(1) of the FW Act.

(2) Subitem (1) does not apply to a member of the Commission who:

(a) was appointed as a member of a prescribed State industrial authority (within the meaning of the WR Act) before being appointed as a member of the Commission; and

(b) still holds that appointment as a member of the prescribed State industrial authority.

Dual appointments

(3) Despite any provision of the WR Act or the FW Act, a person who is taken to have been appointed as an FWA Member under this item continues also to hold office under the WR Act.

Note: The terms and conditions of a person who is taken to have been appointed as an FWA Member are the terms and conditions that attach to his or her appointment under the WR Act (see item 2 of this Schedule).

2 Terms and conditions

(1) A person who is taken to have been appointed as an FWA Member under item 1 of this Schedule:

(a) holds office under the FW Act on the same terms and conditions as attach, or attached, to his or her appointment under the WR Act (including under subsections 63(2) and (3) of that Act); and

(b) is entitled to the same designation as he or she is, or was, entitled to in relation to his or her appointment under the WR Act (including the designation the person has, or had, because of subsection 80(2) of the *Industrial Relations (Consequential Provisions) Act 1988*).

(2) To avoid doubt, subitem (1):

(a) has effect despite subsections 633(1) and 644(1) of the FW Act; and

(b) continues the application of the *Judges' Pensions Act 1968* in relation to a person taken to have been appointed under item 1 of this Schedule and to whom that Act applied as a member of the Commission.

(3) For the purposes of determining the remuneration of a person who is taken to have been appointed as an FWA Member under item 1 of this Schedule:

(a) sections 635 and 637 of the FW Act do not apply; and

(b) sections 79 and 81 of the WR Act apply, and continue to apply on and after the WR Act repeal day, in relation to the person's appointment as both an FWA Member and a member of the Commission.

3 Protection of members of the Commission and FWA

Section 609 of the FW Act has effect, in relation to any time at which the President is the only FWA Member, as if the words "After consulting the other FWA Members," were omitted from subsection (1) of that section.

4 Seniority of FWA members who become FWC members

For the purposes of section 619 of the FW Act, the seniority of persons who:

(a) are taken to have been appointed as Deputy Presidents of FWA under item 1 of this Schedule; and

(b) continue to hold office as Deputy Presidents of the FWC under Part 9 of Schedule 3 to the FW Act;

is to be determined in accordance with the precedence assigned to them as members of the Commission under section 65 of the WR Act.

5 Procedural rules

Despite the requirement in subsection 609(1) of the FW Act, the President may make rules under that subsection before the WR Act repeal day without consulting other FWA Members.

6 Directions by President

- (1) The President of the Commission may give directions to a person who is taken to be appointed as an FWA Member under item 1 of this Schedule as to the manner in which the person is to perform his or her functions as a member of the Commission.
- (2) The direction must not relate to a decision by the Commission.
- (3) A person to whom a direction is given must comply with the direction.
- (4) If a direction is in writing, the direction is not a legislative instrument.

[7] Pursuant to item 2(1) of that Schedule the affected FWC members hold office on the same terms and conditions as attach, or attached, to their appointment under the *Workplace Relations Act 1996* (WR Act) (including subsections 63(2) and (3) of that Act). Section 63 of the WR Act provides:

WORKPLACE RELATIONS ACT 1996 - SECT 63

Appointment of Commission members etc.

(1) The [President](#), [Vice Presidents](#), [Senior Deputy Presidents](#), [Deputy Presidents](#) and [Commissioners](#) shall be appointed by the Governor-General by [commission](#) and hold [office](#) as provided by [this Act](#).

(2) Each [Presidential Member](#) has the same rank, status and precedence as a [Judge](#) of the [Court](#).

(3) A [Presidential Member](#) or former [Presidential Member](#) is entitled to be styled "The Honourable".

(4) A [person](#) is not entitled to be styled "The Honourable" merely because the [person](#) is acting, or has acted, as a [Presidential Member](#).

[8] The term "Status" is commonly defined in ordinary and legal dictionaries as "the condition of a person in the eye of the law": Mozely and Whiteley. Osborne defines the terms as "The legal position or condition of a person...The status of a person is an index to his legal rights and duties, powers and disabilities". Case law is consistent with this

meaning. For example in a passage that has been often applied, Griffith CJ in *Daniel v Daniel* (1906) 4 CLR 563 said:

“Without pretending to give an exhaustive definition, I apprehend that the term "status" means something of this sort: a condition attached by law to a person which confers or affects or limits a legal capacity of exercising some power that under other circumstances he could not or could exercise without restriction. That definition, as I have said, may not be exhaustive, but it indicates, at any rate, the sort of thing that is meant.”

[9] Subdivision 293F of the Income Tax Assessment Act 1997 provides that Division 293 tax is not payable by Commonwealth justices and judges in respect of contributions to a defined benefit interest established under the Judges Pension Act 1968. Judges, justices and magistrates of State Courts are exempt from the Division 293 tax regime by virtue of regulation 293 -145.01 of the Income Tax Assessment Regulations (Compilation No. 69 Registered 22/7/15)

[10] The federal exclusion is specifically dealt with in s. 293.190. It is appropriate that we set out Subdivision 293F in full:

INCOME TAX ASSESSMENT ACT 1997 - SECT 293.185

What this Subdivision is about

Division 293 tax is not payable by Commonwealth justices and judges in respect of contributions to a defined benefit [interest](#) established under the [Judges' Pensions Act 1968](#).

Table of sections

Operative provisions

293-190 Who this Subdivision applies to

293-195 ***Defined benefit contributions*** -- modified treatment of contributions under the [Judges' Pensions Act 1968](#)

293-200 High income threshold--effect of modification

Operative provisions

INCOME TAX ASSESSMENT ACT 1997 - SECT 293.190

Who this Subdivision applies to

(1) This Subdivision applies to an individual if the individual is a Justice of the High Court, or a justice or judge of a court created by the Parliament, at any time on or after the start of the individual's 2012-13 income year.

(2) Nothing in this Subdivision limits section 6 of the *Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Act 2013*.

Note: Section 6 of the *Superannuation (Sustaining the Superannuation Contribution Concession) Imposition Act 2013* provides that Division 293 tax is not imposed in relation to a person if the imposition would exceed the legislative power of the Commonwealth.

INCOME TAX ASSESSMENT ACT 1997 - SECT 293.195

Defined benefit contributions--modified treatment of contributions under the Judges' Pensions Act 1968

(1) This section applies for the purpose of working out under section 293-[105](#) the amount of the individual's * low tax contributions for any * financial year.

(2) Despite section 293-[115](#) and subsection 293-150(3), the individual's *defined benefit contributions* for a * financial year for a * defined benefit [interest](#) in a * superannuation fund established under the [Judges' Pensions Act 1968](#) are nil.

INCOME TAX ASSESSMENT ACT 1997 - SECT 293.200

High income threshold--effect of modification

(1) For the purpose of working out the extent (if any) to which the sum mentioned in subsection 293-20(1) for the individual exceeds the \$300,000 threshold mentioned in that subsection, disregard section 293-195.

(2) To avoid doubt, the effect of subsection (1) is that the amount of the individual's * taxable contributions for an income year is the lesser of:

(a) the excess (if any) mentioned in subsection 293-20(1) (worked out disregarding section 293-195) for the income year; and

(b) the individual's * low tax contributions for the corresponding * financial year (worked out having regard to section 293-195).

Guide to Subdivision 293-G

[11] We submit that the legislative grant of judicial status must be applied. On the basis of our status as Judges of the Federal Court we are exempt from the tax in the same way that Judges of Federal Courts are exempt.

[12] Apart from Judges of Courts and the affected FWC members, the only other persons covered by the Judges Pension Act are Judges and Deputy Presidents of the Administrative Appeals Tribunal, who are either judges in any event or appointed for a fixed term and hence unlikely to qualify. We apprehend therefore that the ten affected FWC members are the only persons affected by the interpretation adopted by the ATO. Hundreds of federal and state judges under the judicial pension scheme or similar state schemes are not affected.

[13] We are not aware of any stated intention to subject the ten affected FWC members to differential treatment compared to others of the same judicial status and assume that differential liability to tax is unintended.

- [14] Further, the liability for the tax only applies to persons who are accruing members in a relevant tax year. As members progressively reach the age of 60 and attain ten years' service, they cease to be accruing members. The number of members potentially affected is reducing. Most have either already ceased to be accruing members or will reach that point this financial year. Hence the impact of the tax on those under the judicial pension scheme is small and reducing.
- [15] Further significant equity issues arise from the notion that s. 293 tax is applied to the ten affected FWC members. If the primary ground for excluding the tax is accepted it is not necessary to deal with the additional issues further. Nevertheless they support the taking of remedial action to clarify that the tax is not applicable to the ten affected members. There are further background matters that should be noted in relation to these issues.
- [16] It is evident from the Actuary's report that the taxable super contributions calculation essentially reflects the new entrant rate and, in turn, the new entrant age assumed by the Actuary, in accordance with Schedule 1AA of the *Income Tax Assessment Regulations 1997*. The new entrant age was based on the average age last birthday of members of the Judges' Pension Act 1997 as at 1 July 2007 and the age of 49, which is converted under clause 15(2) of Schedule 1AA to 45 years of age. On that basis the Actuary states;
- “5.8: For the standard benefit category, retirement benefits are assumed to accrue over the period from age 45 (new entrant age) to age 60 (attaining maximum pension accrual for an age 45 new entrant)...we have assumed that employer contributions are notionally payable over the same period. This is consistent with the requirements of the legislation.”
- [17] A further relevant background consideration is the impost of a similar (but differently calculated) impost on some members affected by Division 293 under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*, resulting in significant undischarged surcharge debts in respect to those members.

New Entrant Rate

- [18] Regulation 6 of the *Income Tax Assessment Regulations 1997* relevantly provides:

6 New entrant rate to be based on period of membership needed to reach maximum benefit accrual

(1) If the rules of the defined benefit fund applicable to the benefit category provide for a maximum benefit accrual, the new entrant rate is to be calculated on the basis that the benefit is funded over the period to when maximum accrual is attained.

[(1A) deals with the Governor-General Pension Scheme]

(2) For practical purposes this means that, for the purpose of calculating the present value of future salaries payable to the new entrant, the superannuation salary is to be assumed to be zero at those ages after reaching maximum benefit accrual.

Example : If maximum accrual is attained after 20 years of membership, the superannuation salary for a 30-year-old new entrant will be assumed to be zero at age 50 and above for the purpose of calculating the present value of future salaries payable to the new entrant. (emphasis added)

[19] Whilst the benefit under the Judges' Pension Scheme is not accessible until age 60 (or death in office in respect to dependent benefits), the maximum benefit accrues upon completion of ten years' service. Reg.6(1) provides that "the new entrant rate is to be calculated on the basis that the benefit is funded over the period to when maximum accrual is attained".

[20] The Actuary by assuming that employer contributions are notionally payable over the period from age 45 (assumed new entrant age) to age 60 appears not to have had regard to or applied Reg. 6(2) of Schedule 1AA of the Income Tax Assessment Regulations 1997. The Actuary appears to have conflated eligibility for the pension (reaching age 60 (or death or disability) and ten years' service (for a full pension) with the maximum benefit which can be accrued under the Judges' Pension Scheme which accrues after ten years' service (for a full pension). This confuses the accrual of the maximum benefit (after ten years' service) with qualification (access) to the benefit (reaching age 60 and the requisite ten years' service for a full pension). Service of a person beyond ten years does not enhance the benefit (pension) payable in any way: the maximum benefit is accrued after ten years' service.

Excessive Funding

[21] The basis of the Actuary's calculation upon which the reported defined benefit contribution for the purpose of the Division 293 taxation liability is based, ignores and is inconsistent with the basis upon which superannuation contributions were calculated and applied to those former AIRC Presidential members to which it applied under the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (the 1997 Tax).

[22] For Division 293 purposes, the superannuation contributions have been calculated by the Actuary assuming that employer contributions are notionally payable over the period from age 45 (new entrant age) to age 60. For 1997 Tax purposes the superannuation contributions were calculated on the basis of tables in Part 3 of the *Judges' Pensions Regulations 1998* (separate tables for males and females) for each member. The calculations were based on their (individual) age and years of service up until age 60 for a member with 10 years of service at that age for each tax year (implying the assumption of a superannuation contribution in respect of each year of service).

[23] For Division 293 purposes, the Actuary assumes superannuation contributions necessary to notionally fund the pension of an affected FWC member are paid over the 15 years to age 60. However, for many affected FWC members, these notional superannuation contributions, together with the attribution of notional superannuation contributions for years prior to the 15 years preceding the member turning 60 (for the purpose of the 1997 Tax and the levying of a surcharge in respect to those contributions,

resulting in a substantial surcharge debt in respect to the superannuation contribution in those years) necessarily means that superannuation contributions attributed to affected FWC members in these circumstances for the purpose of taxation levies collectively under each of the 1997 Tax and the Division 293 tax in excess of those required to notionally fund the superannuation benefit (pension).

[24] The short point is that the net effect of the varying assumptions made for calculating notional super contributions under the two different Surcharge Acts results in the attribution of super contributions for those members who were also subject to the 1997 Tax, which are in excess of those required to notionally fund the pension.

The average entry age assumption

[25] The average entry age assumption within Part 2 of the *Income Tax Assessment Regulations 1997 – Schedule 1AA* appears to have been applied as a generic mechanism for determining superannuation contributions for Division 293, without regard to the particular circumstances of persons entitled to benefits under the JPA who are, given Subdivision 293 F of the Act, subject to the Division 293 tax. Whilst the generic approach applied in respect of defined benefit funds may have been appropriate for most defined benefit funds, and administratively easier for fund managers, it ignores the unusual circumstances and nature of the Judges Pension Scheme.

[26] The issue is important given the superannuation contribution determined is predominantly a product of the new entry rate, which is based on the assumed entry age (see Part 1 of the 1997 Regulations – defined benefit contributions reflects the notional employer financed contributions, which is largely a product of the New Entry Rate 1.2 (New Entry Rate x Salary X Days during the financial year a member was an accruing member/365 – member contribution).

[27] At a general level, the average entry age assumption is inconsistent with general taxation principles that taxation (and the application of concessions and reductions in concessions) should be assessed on the basis of the individual circumstances of the tax payer.

[28] There may be a question about the validity of a Regulation which calculates taxable income on the basis of the average circumstances of a group of taxpayers, whose relevant individual circumstances vary significantly, in order to give effect to an Act of Parliament directed to assessing the taxation liability of individual taxpayers based on their individual incomes.

[29] The general point is compounded in the peculiar circumstances of the Judges' Pensions Scheme. In that particular context, the assumed new entrant age is based on the average age of all those joining the Judges' Pension Scheme as at 1 July 2007, i.e. all persons accruing pension entitlement under the Judges Pension Act at that time. In fact

almost all of those persons are not subject to the Division 293 of the Income Tax Assessment Act 1997 tax because of their constitutional protection - see Subdivision 293-F--Modifications for Commonwealth justices. As a result the ten or so persons under the JPA to whom the Division 293 liability applies have their notional superannuation contributions determined on the basis of an assumption based predominantly on the average circumstances of a group of beneficiaries of the JPA who are not subject to Division 293 of the Income Tax Assessment Act 1997.

[30] Given the extremely limited application of the Division 293 tax to persons with a benefit under the JPA, there is no reason why the notional employer superannuation contribution (and the Division 293 liability) could not be calculated by reference to the actual entry age, reflecting proper principles of determining the taxation liability of individuals. Given the limited number of persons subject to both the JPA and Division 293, it is not an onerous task.

Requested Action

An amendment be made to the Regulations to clarify that Division 293 tax is not payable by Presidential members of the Fair Work Commission who have judicial status.