

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

7 November 2023

- 1 On 30 October 2023, the Australian Judicial Officers Association (AJOA) provided submissions concerning the impacts of the proposed Div 296 tax in its application to judicial pensions. This document constitutes a further submission by the AJOA.
- 2 The AJOA has received advice from Mr Nicholas Owens SC and Mr Ian Fullerton of counsel. They have not yet had the opportunity to arrive at final opinions concerning other constitutional issues, but they have concluded that, to the extent that it was considered necessary to insert the exemption in item 2 of the table in proposed s 296-305 in order to avoid infringing s 72(iii) of the Constitution, the limited scope of the exemption would be ineffective to achieve its apparent aim in three respects.
- 3 First, the exemption in item 2 of the table in proposed s 296-305 is not effective to avoid the imposition of the tax on a judge’s entitlement to their judicial pension. That is because the value of a judge’s entitlement to a pension under the Judges’ Pensions Act remains an integer in the calculation of the Div 296 tax. In other words, even though that value is excluded from the definition of “superannuation earnings”, it remains a component of the formula by which the percentage of those earnings that are “taxable superannuation earnings” is derived. The result is that a higher proportion of a judge’s “superannuation earnings” will be taxable by reason of the judge’s pension entitlements, or, viewed another way, the judge will pay tax on the value of their pension entitlements.
- 4 Secondly, the limitation of the exemption in item 2 of the table in proposed s 296-205 to judges who are currently serving is not effective to avoid the imposition of tax on a serving judge’s entitlement to their judicial pension. That is because, for the reasons given in the preceding paragraph, there is an immediate impact on a judge’s tax liability.

- 5 Thirdly, the limitation of the exemption in item 2 of the table in proposed s 296-305 to judges who are currently serving does not avoid the postulated issue under s 72(iii) of the Constitution because for a judge who is still serving, the application of the tax following the judge's retirement represents an immediate reduction in the judge's present remuneration, of which future pension rights form a part.
- 6 Additionally, Nicholas Owens SC has advised AJOA that he considers that the limitation of the exemption in item 2 of the table in proposed s 296-305 to judges who are currently serving does not avoid the postulated issue under s 72(iii) of the Constitution for a judge who has already retired, because s 72(iii) prohibits the reduction in remuneration rights (such as pension entitlements) that accrued while the judge held office, whether before or after the judge ceases to hold office.
- 7 The exemption in item 2 of the table in proposed s 296-305 is thus ineffective to avoid the Constitutional issue that presumably motivated its inclusion.
- 8 The issues as to the constitutionality of the proposed Div 296 tax raised by this further submission may suggest that the attainment of an advice from the Commonwealth Solicitor-General in those respects is desirable.

Justice Michael Walton

President of the Australia Judicial Officers Association