



Shane Rattenbury MLA

Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

Our ref: PRO23/4078

The Hon Dr Jim Chalmers MP

Commonwealth Treasurer

PO Box 6022

Parliament House

Canberra ACT 2600

superannuation@treasury.gov.au

CC: The Hon Mark Dreyfus MP KC

Attorney-General

PO Box 6022

Parliament House

Canberra ACT 2600

Dear the Hon Dr Jim Chalmers MP,

I am writing on behalf of the ACT Government in relation to the consultation process that the Commonwealth Treasury is conducting on the *Treasury Laws Amendment (Better Targeted Superannuation Concessions) Bill 2023* (the Bill), for the new \$3 million superannuation tax measure.

I note that the Bill, together with the *Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023*, seeks to reduce the tax concessions for individuals with a total superannuation balance (TSB) above \$3 million by imposing an additional 15 per cent tax on certain earnings under a new Division 296 of the *Income Tax Assessment Act 1997*.

The Bill also amends several Acts to include provisions relating to the calculation of earnings, withdrawals and contributions, modifications for earnings of certain constitutionally protected interests, debt deferral provisions for defined benefit interests in the pre-end benefit phase, and changes to the definition of TSB. Special rules for modified treatment of defined benefit and some retirement phase interests, including the valuation of such interests, will be addressed through specific provisions in subsequent regulations.

ACT Legislative Assembly London Circuit, GPO Box 1020, Canberra ACT 2601

+61 2 6205 0005

rattenbury@act.gov.au

[@ShaneRattenbury](https://twitter.com/ShaneRattenbury)

[shanerattenburymla](https://www.facebook.com/shanerattenburymla)

[shanerattenbury](https://www.instagram.com/shanerattenbury)

Of particular concern to the ACT, subdivision 296-E excludes State and Federal judges (covered under the *Judges Pension Act 1968*) from taxation earnings from superannuation interests, yet **ACT judges are explicitly included** in the list. As a result, ACT judges will be subjected to higher taxation on their superannuation than their State and Federal colleagues. In this sense, the Bill exacerbates the problems that arose from division 293 tax liability for the ACT and its judges.

It is my strong view that differential treatment of state and federal judges (on the one hand) and the judiciary in the ACT (on the other) is inequitable and unwarranted. It is also contrary to the established practice that the self-governing territories are generally treated in a similar manner to the states.

As per the principles in *Austin v Commonwealth* (2003) 215 CLR 185, the imposition of the 293 tax and the proposed 296 tax creates a clear disadvantage for territory judges and could impact on the ACT's ability to attract and retain high quality judicial officers.

Consistent with my recent communications with the Commonwealth Attorney-General, the Honourable Mark Dreyfus KC, I also reaffirm the ACT Government's concerns with division 293 of the *Commonwealth Income Tax Assessment Act 1997* (ITAA).

Division 293 of the ITAA, and now potentially Division 296 of the Bill, creates apparent discrimination in treatment between state and territory judges. This is despite the general requirement in s 59 of the *Australian Capital Territory (Self-Government) Act 1988* (Self-Government Act), that the Commonwealth 'shall conduct its financial relations with the Territory so as to ensure that the Territory is treated on the same basis as the States and the Northern Territory, while having regard to the special circumstances arising from the existence of the national capital and the seat of government of the Commonwealth in the Territory'.

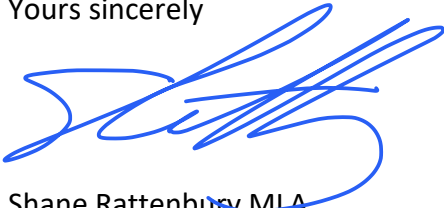
As I advised the Federal Minister for Finance, the Honourable Katy Gallagher in September 2022, the former Attorney-General of the ACT received a letter from the then Assistant Treasurer in 2015 that indicated the Division 293 tax should apply as broadly as possible. While the Constitution prevents remuneration being reduced for justices of courts created by Parliament during their period in office, the Commonwealth, on the basis of a policy decision, exempted Federal judges appointed after the commencement of the tax, despite this not being a diminution of their remuneration, thus creating further inequitable treatment between State and Territory judges.

The existing exemption, limited to state and federal judges, places the ACT at a clear disadvantage in attracting, recruiting and retaining experienced judicial officers. This issue was also raised repeatedly with the former Government.

The ACT Government strongly urges the Commonwealth to amend the ITAA and the Bill, or provide an exemption in regulation, to remove the current imposition of Division 293 tax liability and the potential tax liability of Division 296 on judges of the Australian Capital Territory. These necessary changes will ensure equity and consistency between judicial officers across jurisdictions.

Accordingly, I would appreciate your consideration of the issues raised in this submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'SR', with a large, sweeping flourish underneath.

Shane Rattenbury MLA
Attorney-General

24 October 2023