JUDICIAL PENSIONS AND SUPERANNUATION

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The Significance of Judicial Pensions

Remuneration packages and recruitment

A pension entitlement forms a significant part of a judge's remuneration package. Nearly all appointees to judicial office who have the skills and experience needed for service as a judge will have been earning much more than a judge receives by way of salary. Without the assurance of substantial entitlements on retirement, many suitable candidates would not be willing to accept appointment to judicial office. It would involve too great a sacrifice.

Most judges, if not all, are appointed at a stage in their careers when, had they not accepted appointment, the next 10 or 15 years would have been the most lucrative years of their professional practices, and thus the years in which financial provision could most easily have been made for retirement.

There are many non-financial considerations relevant to the decision whether or not to accept appointment as a judge. The satisfaction of rendering public service, and the prestige associated with the status of a judge are often considered significant. Because of the former factor, some very suitable individuals would accept appointment notwithstanding an inadequate remuneration package. Because of the latter factor, there is never likely to be a shortage of individuals willing to accept appointment. But if the remuneration package offered by a government is inadequate or unattractive, there are likely to be times when the collection of individuals willing to accept appointment will not include any that are particularly suitable. It should not be overlooked that there are a number of disincentives to the acceptance of judicial office unrelated to remuneration, particularly the risk of unfair public criticism, and the loneliness of judicial life in comparison to life at the bar.

Increasingly, judges will be appointed from sources other than the bar, and sources other than the private sector. Most, if not all, appointees from other branches of the law will at least have the capacity to earn high incomes in the private profession.

Judicial independence

Judicial pensions serve a very important role in preserving judicial independence. A defined benefit pension eliminates what might otherwise be seen as a temptation for judges to tailor their approach to their post-retirement interests. Judicial independence will not be promoted if a judge needs to have an eye on his or her next career move. If it is likely to be in a judge's financial interests to move from a state court to a federal one, or vice versa, or to favour a particular firm from whom a substantial post-retirement income might be derived, it is inevitable that suspicions or apprehensions as to a lack of impartiality will arise.

Reluctance to retire

Under the existing pension schemes, judges who become disabled are able to retire and receive full pensions. If pensions were not available in such circumstances, there would be a risk that judges who are no longer physically or mentally fit to do their work may be tempted to stay on when it would be in the public interest for them to retire. A judge without sufficient income protection, and without the means for a comfortable retirement, might stay on out of financial necessity. The quality and timeliness of that judge's decisions would be unacceptable. The public would suffer. There would be likely to be appeals. In an extreme case, steps might have to be taken for the purpose of removing a judge from office, or forcing a judge's resignation through threat of removal.

Premature resignations

Without judicial pensions, or similarly valuable retirement arrangements, it is likely that some lawyers would seek appointment to the bench with the intention of remaining only for a few years. By doing that, they could enhance their reputations, and boost their earning power in the private profession. This would have an impact on the quality and experience of the bench, and on the reality and appearance of judicial independence.

Inadequate pension arrangements would be likely to lead capable judges to retire early and return to the private profession. The poorer the performance of a judge's superannuation fund, the stronger the incentive to return to private practice would be. In extreme cases, the only sensible course might be for a judge to take advantage of his or her earning power in the

private sector before it is too late. Once again, the quality and experience of the bench would be reduced, and the reality and appearance of judicial impartiality adversely affected.

The convention that retired judges do not appear before courts of which they were members is an important one. If that convention were not in place, and ex-judges appeared as counsel in their former courts, any decision or ruling in favour of an ex-judge's client would be likely to foster, at least in the mind of the unsuccessful party, an apprehension that the presiding judge was biased in favour of his or her former colleague. The greater the turnover of judges, and the more they retire to resume private practice, the more likely it is that this important convention will be eroded.

Minor reforms

A major objection to the existing defined benefit schemes is that their cost is difficult to predict. The only answer to that criticism is that a defined benefit scheme is the only way of making appropriate reliable and predictable provision for a judge's retirement income.

However there are a number of minor changes that could be made to existing schemes in order to overcome some of the criticisms of them. For example, under some of the present schemes, a judge who serves for the requisite number of years and becomes entitled to retire on a pension does not accrue any greater pension benefits by remaining in office. (In fact the superannuation surcharge has the opposite effect.) There is room for improvement in that situation. That situation is dealt with in some schemes by means of a provision whereby a judge who continues to work after becoming entitled to a pension receives a slightly higher pension for every subsequent year of service. In South Australia, for example, a judge who retires in his or her 60s having completed exactly 10 years' service is entitled to a pension of 50% of the salary, but the same judge would be entitled to an extra 1% of the salary for each additional 6 months' service that he or she completes, up to a maximum of 60% of the salary.

The Tasmanian Situation

Judges appointed in Tasmania after 1 July 1999 will not be eligible for judicial pensions, but instead will receive the benefit of 9% superannuation contributions paid by the government. Salary sacrifice arrangements are possible.

Tasmania is the only Australian jurisdiction to have decided to phase out judicial pensions. Particulars of the pension rights of judges in the Commonwealth and each state are set out in appendices to this paper. The appendix relating to the states was prepared for the Judicial Conference of Australia.

The position before the 1999 amendments

The *Judges' Contributory Pensions Act* 1968 (Tas) provided for a judicial pension scheme. It was the least generous in Australia. It had the following features:

- Each judge was required to pay 5% of his gross salary by way of contributions to the scheme.
- On retiring after at least 15 years' service, a judge became entitled to a pension equal to half the salary of a serving judge.
- A judge's widow was entitled to a pension equal to one third of the salary of a serving judge.

The 1999 amendments

These arrangements were changed by the *Superannuation (Parliament, Judiciary and Statutory Legal Officers) Reform Act* 1999 Act (Tas). It amended various statutes which provided for pensions for judges, the Master, the Director of Public Prosecutions, the Solicitor-General, the Governor, and Members of Parliament. Each relevant statute was amended to provide that, in respect of individuals appointed or elected after 1 July 1999, the government would pay superannuation contributions at the rate of 9% of gross salary. Amendments were made to permit the relevant individuals to make salary sacrifice arrangements. No other superannuation or pension arrangements apply to such individuals.

Prior to the election of the Labor government in Tasmania in 1998, the then Minister for Finance obtained a report entitled "Review of Parliamentary and Judicial Superannuation in Tasmania" from Dr Vince FitzGerald of the Allen Consulting Group Pty Ltd. His recommendations included the following:

- The closure of the defined benefits scheme under the 1968 Act.

- The establishment of an accumulation scheme for new judges.
- The grossing up of new judges' salaries by payment to them of a retirement income allowance equal to 25% of their gross salary, which they could elect to receive in the form of "employer" superannuation contributions.
- The closure of the existing Parliamentary pension scheme and its replacement by a new accumulation scheme, and the grossing up of new Parliamentarians' salaries by the payment of a retirement income allowance set at 15% of gross salaries, able to be taken in the form of "employer" superannuation contributions.

Dr FitzGerald's report included a table showing what percentage of gross salary would need to be contributed to provide benefits equivalent to those available under the old judges' scheme. The appropriate percentage would vary according to the age of the appointee and the number of years he or she would serve. The table appears below:

	Service Period 15 years	20 years
45 year old appointee	33%	18%
50 year old appointee	27%	17%
55 year old appointee	26%	n/a

In 1999, the Labor government obtained a further report in relation to Parliamentary superannuation (but not judges' superannuation) from a committee comprising the President and two Commissioners of the Tasmanian Industrial Commission ("The Westwood Committee"). It recommended that new Parliamentarians should not receive a 15% retirement income allowance, but should only receive 9% "employer" superannuation contributions.

The 1999 Act followed. It had bipartisan support. There is nothing in the second reading speech to indicate why the government did not follow Dr FitzGerald's recommendation as to the level of its contributions in respect of judges. I understand that the judges were consulted, and chose not to oppose the changes, which of course had no impact on their own pension arrangements. Otherwise, I do not know what consultations, if any, the government undertook as to this point.

The individuals appointed or elected since 1 July 1999, to whom the new arrangements apply, comprise Tasmania's former Governor (Mr Butler), Members of Parliament elected for the first time in the 2002 election, the Master, the Director of Public Prosecutions (Mr Ellis SC) and myself. I anticipate that a significant portion of the State's six judges might retire in 2006 and 2007, with the result that the government might well face a recruitment problem. Until fairly recently the state of the Tasmanian economy was such that barristers and legal practitioners generally did not earn more than judges received by way of salary. That seems no longer to be the case.

The Political Context

Political threats to the future of judicial pension arrangements are likely to emerge not so much from Attorneys-General, but from the holders of other portfolios with less connection to the judiciary and the legal profession. Judges and lawyers are somewhat used to liaising with, and in some places being treated with enormous respect by, Attorneys-General. However pressure for superannuation reform is likely to come from Treasurers and their departments They will often have more political power, and less concern for the interests of the judiciary, the legal profession, and those they serve, than Attorneys-General and their departments.

As happened in Tasmania, changes to judicial retirement arrangements are likely to be made at the time of changes to Parliamentary superannuation arrangements. The interest of the Federal Opposition in judges' pension arrangements has apparently emerged in the same context. If judges' retirement income arrangements are linked to those of politicians and/or public servants, it will be very difficult to achieve the restoration of separate arrangements for judges.

There are no votes in judicial independence, nor in maintaining the quality of the judiciary, nor in generous judicial remuneration arrangements. There are votes in reducing the incomes of "tall poppies". The negotiated salaries of senior public servants are often kept confidential for commercial reasons. In order to ensure judicial independence, judicial salaries are fixed pursuant to legislation and made the subject of public knowledge. One disadvantage of that arrangement is that judicial remuneration arrangements can become the subject of political point scoring.

Because of the current poor performance of superannuation funds, the cost of replacing judicial pension schemes by equally valuable salary increases and/or superannuation contributions would almost certainly be so great as not to be politically acceptable.

The pressure for the abolition of defined benefit schemes will be relentless for years to come. Political figures, chief justices, and other protagonists will come and go. Lobbying to prevent or reverse unwelcome changes will need to be started again from scratch whenever there is a change of government or a relevant shuffle of portfolios. Lobbying before a minister or political leader makes a public announcement is far more likely to be effective than lobbying after a public announcement. There is a risk that pressures for unwelcome change will be successful at times when those who should be opposing such change robustly happen to be individuals whose strengths do not lie in the political sphere.

Reviewing of Pension Arrangements — Principles

The Governing Council of the Judicial Conference of Australia has resolved that certain important principles should be adhered to in any review of judicial pension arrangements. In my view all of those principles are sound and important. I therefore set them out in full:

(i) Changes to pension arrangements should never be retrospective, both for constitutional and other reasons. However, if new arrangements are introduced, serving judges should have the option of participating in them should they choose to do so.

(ii) New arrangements should not be introduced otherwise than on the basis of recommendations made by a genuinely independent and properly resourced body. Such a body should have terms of reference that leave it open to recommend the retention of existing pension arrangements and allow for the **impartial** assessment of those arrangements. The body should also be required to consult with interested persons, including judges and the JCA.

(iii) Any changes to judicial pension arrangements should accept that the pension constitutes an integral part of judicial remuneration. To consider changes to one

element of judicial remuneration, in isolation from the total "package", invites reduction of judicial remuneration with consequential adverse affects on the ability of courts to recruit qualified persons.

(iv) Any changes to pension arrangements should not result in diminution of the total remuneration of judges. Otherwise, difficulties would be created not only for recruitment of judges, but for courts whose members are differently remunerated for performing the same tasks.

(v) Any scheme must provide adequate benefits where retirement is occasioned through disability or illness. If it does not, there is unacceptable danger of incapacitated judges remaining in office for want of security in their retirement.

(vi) Any changes to federal pension arrangement should be broadly consistent with the position in the Australian States. If there are marked differentials, the consequences for recruitment to the federal judiciary are obvious. At present, with the exception of Tasmania, the arrangements in the States are similar to those applying to federal judges.

(vii) Any pension or superannuation arrangements should provide for defined benefits. If the risk of investment performance falls on judges, the perceived independence of the judiciary may be impaired and other practical disadvantages referred to in this report are likely to become apparent.

Conclusion

Any substantial changes to judicial retirement arrangements could very easily have adverse impacts on the quality of the judiciary, on public confidence in the impartiality of the judiciary, and possibly even on the actual impartiality of the judiciary. Whilst minor refinements to existing pension schemes may be desirable in some jurisdictions, it is important that judicial retirement benefits not be eroded.

APPENDIX

COMMONWEALTH JUDICIAL PENSIONS

Legislation

Judges' Pensions Act 1968 (Cth)

Retirement

(a) A judge who has attained 60 years or more, and served for not less than 10 years, is entitled to a pension of 60% of the salary that he or she would receive if still serving as a judge.

(b) A judge who ceases to hold office by reason of attaining the age of 70 years, and who has served for at least 6 years but less than 10 years, is entitled to a pension at the rate of 0.5% of salary for each month of service.

(c) A former judge with no entitlement to a pension under the *Judges' Pensions Act* is entitled to the superannuation guarantee minimum benefits payable to Commonwealth employees under the *Superannuation (Productivity Benefit) Act* 1988 (Cth).

Infirmity/disability

Pensions of 60% of the salary that a judge would receive if still serving are payable on the ground of invalidity if the Attorney-General certifies that a judge's retirement is due to permanent disability or infirmity.

Other provisions

(a) When a judge dies in office or in retirement, a surviving spouse or de facto spouse is entitled to a pension equal to 37.5% of the salary the judge would have received if still alive and serving. The spouse is also entitled to additional benefits for eligible children, at the rate of 7.5% of the appropriate judicial salary per child, up to a maximum of 22.5%.

(b) The benefits for children are not payable in respect of the children of a marital relationship entered into by a retired judge, aged 60 or over, less than 5 years before death.

APPENDIX A

JUDICIAL PENSIONS IN THE STATES

1. New South Wales

1.1 Legislation

Judges' Pension Act 1953.

1.2 Retirement

(a) Judges who have attained the age of 60 years and have completed less than 10 years of service are entitled to a pension of 25% of their "notional judicial salary at that time", with an additional 5% of the final salary for each completed year of service over 5 years.

(b) Judges who have attained the age of 60 years and have completed more than 10 years of service are entitled to a pension of 60% of their final salary as adjusted from time to time.

1.3 Infirmity/disability

Judges who retire or resign after more than 5 years of service due to infirmity or disability (and who are not in ill health within the period of 3 months before appointment as a judge, or within the period of 3 months after that appointment) are entitled to the pension they would have been eligible had they served until they were 72 years old and then retired.

1.4 Other provisions

A retired judge or other person who is entitled to a pension may elect to have part of the pension commuted to a lump sum for the purposes of payment of a liability for superannuation contributions surcharge.

2. Victoria

2.1 Legislation

Constitution Act 1975.

2.2 Retirement

(a) A judge who retires or resigns after attaining 65 years and has served for not less than 10 years, or a judge who has served for 20 years, is entitled to a pension of 60% of the annual salary applicable for the time being to the office which he or she held immediately before retirement.

(b) If a judge was appointed after reaching 60 years and has attained the age of 70 years, he or she is entitled to a pension of 60% of that annual salary.

2.3 Infirmity/disability

A judge who retires due to a permanent incapacity is entitled to a pension at the rate of 60% of annual salary.

2.4 Other provisions

A retired judge or other person who is entitled to a pension may elect to have part of the pension commuted to a lump sum for the purposes of payment of a liability for superannuation contributions surcharge.

3. South Australia

3.1 Legislation

Juges' Pensions Act 1971.

3.2 Retirement

(a) A judge who attains 70 years, or who has attained 60 years and completed more than 10 years service, is entitled to a pension of 40% of his or her salary, plus 1% of the salary for each completed 6 months over 5 years of service. This pension can not exceed 60% of salary.

(b) A judge who retires before he or she attains 60 years, but who serves more than 15 years, is not entitled to a pension immediately, but he comes entitled to a pension of 60% of the salary upon attaining 60 years.

3.3 Infirmity/disability

A judge who resigns due to disability or infirmity is entitled to a pension not exceeding 60% of salary calculated on the basis that the judge retired on the day that the resignation took effect. However, the judge's judicial service includes the period from the resignation until the date upon which the judge would have retired had he or she attained the age of retirement. The pension is calculated on the basis of the judge's salary immediately before the resignation.

4. Western Australia

4.1 Legislation

Judges' Salaries and Pensions Act 1950.

4.2 Retirement

(a) A judge who has attained 60 years or more, and served for more than 10 years, is entitled to a pension of 60% of his or her judicial salary adjusted from time to time.

(b) A judge who has attained 55 years or more, and served for more than 10 years, is entitled to a pension of 50% of judicial salary with an additional 2% of salary for each year of service after having attained 55 years, but not exceeding 60% of salary in all.

4.3 Infirmity/disability

(a) A judge who resigns due to infirmity or disability before completing 6 years of service is entitled to a pension of 50% of judicial salary.

(b) A judge who resigns due to infirmity or disability after completing 6 years of service is entitled to a pension of 50% of judicial salary with an additional 2% of salary for each complete year of service over 5 years, but not exceeding 60% of salary in all.

4.4 Other provisions

A judge's pension is reduced if the judge receives another Crown pension or another judicial pension.

5. Queensland

5.1 Legislation

Judges (Pension and Long Leave) Act 1957.

5.2 Retirement

(a) A judge who attains 70 years and serves for more than 5 years, is entitled to a pension of 6% of the salary (adjusted from time to time) for every completed year of service, not exceeding 60% of salary in all.

(b) A judge who retires after attaining 60 years but before attaining 70 years and who serves for more than 10 years is entitled to a pension of 60% of salary.

5.3 Infirmity/Disability

If a judge resigns due to infirmity or disability before serving 5 years on the bench, he or she is entitled to a pension of 75% of the maximum pension that would have been payable had he or she not resigned. If the judge has served more than 5 years on the bench, he or she is entitled to an additional 5% of that maximum pension entitlement for each year of service in excess of 5 years, but so that the rate of pension does not exceed 60% of salary.

6. Tasmania

6.1 Legislation

Judges' Contributory Pensions Act 1968 (for judges appointed on or before 30 June 1999) and *Public Sector Superannuation Reform Act 1999* and *Retirement Benefits Act 1993* (for judges appointed after 1 July 1999).

6.2 Judges appointed on or before 30 June 1999

(a) A judge appointed on or before 30 June 1999 who retires on attaining 70 years, or who retires after having served as a judge for not less than 15 years, is entitled to a pension at the rate of one half of the judicial salary.

(b) A judge who retires by reason of disability or infirmity as certified by the Minister is likewise entitled to a pension at the rate of one-half of the current judicial salary.

(c) A judge must pay 5% of salary as contributions toward pension.

(d) A judge retiring after 1 July 2003 may elect to commute the whole or a part of his or her residual pension in accordance with gazetted conversion factors.

(e) The widow or widower of a judge entitled to a pension is entitled on the death of the judge to a pension equal to one-third of the current judicial salary. (This is subject to adjustment if the judge commuted part or all of his or her pension.)

6.3 Judges appointed after 1 July 1999

(a) A judge appointed after 1 July 1999 is a member of the accumulation scheme unless he or she elects, after commencing employment, to become a member of another complying superannuation scheme.

(b) The Government is required to make employer contributions of 9% of the judicial salary and the judge may elect to make contributions.