IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M177 OF 2010**

BETWEEN

ROY MORGAN RESEARCH PTY LTD
Appellant

COMMISSIONER OF TAXATION
First Respondent

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

1. These submissions are suitable for publication on the internet.

PART II: ISSUES

2. The issue is whether ss 5 and 6 of the *Superannuation Guarantee Charge Act 1992* (Cth) (**Charge Act**) and Pt 3 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**Administration Act**) are laws with respect to taxation within the meaning of s 51(ii) of the Constitution.

PART III: SECTION 78B NOTICES

3. The Appellant's amended notice of a constitutional matter under s 78B of the *Judiciary Act 1903* (Cth) dated 10 January 2010 (AB XX) provides sufficient notice of the constitutional matter to be decided by this Court.

PART IV: FACTS

4. The facts at [5]-[8] of the Appellant's submissions are sufficient and correct.

PART V: APPLICABLE PROVISIONS

5. Subject to the addition of s 71 of the Administration Act annexed to these submissions at Annexure A, the Appellant's statement of applicable constitutional and statutory provisions is complete. While minor variations to the Administration Act occurred between 2001 and 2007, those variations are not material to the issue before this Court.

PART VI: ARGUMENT

6. The Appellant's argument turns entirely on the meaning of the words "public purpose" in the classic statement of the characteristics of a tax by Latham CJ in

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Matthews v Chicory Marketing Board (Vic) (***Matthews***).[1] The Appellant contends that the superannuation guarantee charge (**SGC**) imposed by ss 5 and 6 of the Charge Act is not a tax within the meaning of s 51(ii) of the Constitution because it is not imposed for "public purposes". That is said to follow from the fact that the shortfall component paid out of the Consolidated Revenue Fund (**CRF**) for the benefit of employees under Pt 8 of the Administration Act closely corresponds to the charge imposed by ss 5 and 6 of the Charge Act (as determined by Pt 3 of the Administration Act). The argument therefore depends on treating the way moneys are spent as controlling the character of the charge pursuant to which equivalent moneys were raised.

7. The Second Respondent (**Commonwealth**) submits that the SGC is a tax within the meaning of s 51(ii) of the Constitution for the following reasons:

7.1. The SGC bears all the positive attributes of a "tax" within the meaning of s 51(ii) of the Constitution and does not possess any of the recognised countervailing factors (such as being a fee for services rendered, a penalty or a charge imposed in substitution for an antecedent obligation) that would disqualify it from being a "tax" for the purposes of s 51(ii).

7.2. The SGC is imposed for "public purposes" because:

a) it is received into the CRF, and the receipt of funds into the CRF conclusively establishes that an exaction is imposed for public purposes (even though it does not conclusively establish that an exaction is a tax, because countervailing factors may demonstrate that a charge does not have that character even if all of the positive attributes of a tax are present);

b) further or alternatively, the SGC has the purpose and effect of providing an incentive to employers to make superannuation contributions at the prescribed rate to approved superannuation funds, and to raise revenue from employers who choose not to make such contributions. That public purpose is closely analogous to that of the training guarantee scheme, upheld by this Court in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth*[2] (***Northern Suburbs***), which provided the model for the SGC.[3]

7.3. Even if the SGC does not have a public purpose, it is nevertheless properly characterised as a tax for the purposes of s 51(ii) of the Constitution. The "public purpose" criterion is not essential in order to provide a conceptual distinction between a law with respect to taxation and a law with respect to the acquisition of property on just terms.[4]

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1 (1938) 60 CLR 263.

2 (1993) 176 CLR 555.

3 As the Full Federal Court accepted at AB XX at [78]. Compare Charge Act ss 5, 6 and Administration Act s 16 with the *Training Guarantee Act 1990* (Cth) ss 5, 6, 11; Senate Select Committee on Superannuation, Commonwealth Parliament, *Super Guarantee Bills: Second Report* (1992) [2.2].

4 Appellant's submissions, paragraphs 2(2) and 24(2)(c).

7.4. *Luton v Lessels*[5] (***Luton***) is distinguishable, because the critical factor that led to the conclusion that the scheme in issue in that case did not impose a tax was that the scheme imposed a charge in substitution for an antecedent obligation to make child support payments. *Luton* did not depend upon the correlation between the amounts collected pursuant to the charge and the amounts paid out to individual parents. The SGC is not dependent on an antecedent liability to pay superannuation.

7.5. Further, contrary to the Appellant's contentions,[6] *Luton* does not overrule *Australian Tape Manufacturers Association Ltd v Commonwealth*[7] (***Tape Manufacturers***).

A. LEGISLATIVE REGIME

8. The superannuation guarantee scheme is established by the Charge Act and the Administration Act, which must be read together.[8]

9. Section 5 of the Charge Act imposes the SGC on any "superannuation guarantee shortfall" of an employer for a quarter.[9] The amount of the SGC is an amount equal to the amount of the superannuation guarantee shortfall.[10] The SGC is payable by an "employer"[11] to the Commissioner of Taxation.[12] It forms part of the CRF in accordance with s 81 of the Constitution.[13]

10. Section 17 of the Administration Act provides that a "superannuation guarantee shortfall" is the sum of an employer's "individual superannuation guarantee shortfalls" for the quarter, together with a nominal interest component[14] and an administration component.[15] Section 19 provides that the "individual superannuation guarantee shortfall" is 9% of the total "salary or wages"[16] paid by

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5 (2002) 210 CLR 333.

6 Appellant's submissions, paragraphs 32 and 38.

7 (1993) 176 CLR 480.

8 Charge Act s 3. For the effect of such a section see *Moore v Commonwealth* (1951) 82 CLR 547 at 565; *State Chamber of Commerce and Industry v Commonwealth* (*Second Fringe Benefits Tax Case*) (1987) 163 CLR 329 at 344.8-345.2; *Northern Suburbs* (1993) 176 CLR 555 at 595.8-596.2.

9 Prior to 1 July 2003, the SGC was imposed in relation to a year, rather than on a quarterly basis.

10 Charge Act s 6.

11 Administration Act s 16. "Employer" is defined in Administration Act s 12.

12 *Superannuation Guarantee (Administration) Regulations 1993* (Cth) reg 9.

13 As is implicit in s 71 of the Administration Act (See Annexure A). See *Northern Suburbs* (1993) 176 CLR 555 at 580.5-581.10 (Brennan J), 599.3 (McHugh J).

14 Calculated in accordance with s 31 of the Administration Act. The nominal interest component represents an estimation of fund earnings foregone by the failure to provide the prescribed minimum superannuation contribution. Regulation 7A of the *Superannuation Guarantee (Administration) Regulations 1993* (Cth) sets the applicable rate at 10% per annum. The combined effect of ss 31 and 46 of the Administration Act is that interest at that rate may be payable for a period of over 5 months in a quarter where there is a shortfall component.

15 Calculated in accordance with s 32 of the Administration Act. The administration component represents services to recover the expenses associated with administering the charge.

16 "Salary or wages" is defined in s 11 of the Administration Act and includes, amongst other things, commissions.

the employer to the employee for the quarter, unless the 9% charge percentage is reduced in accordance with ss 22 or 23.[17]

11. The principal effect of s 23 of the Administration Act is that the charge percentage is reduced from 9% if, in a quarter, an employer contributes for the benefit of an employee to a retirement savings account (**RSA**)[18] or superannuation fund other than a defined benefit superannuation scheme.[19]

12. Before 1 July 2008, the charge percentage was reduced by reference to the amount of contributions made in an income year or a quarter expressed as a percentage of the employees' "notional earnings base".[20] In simplified terms, if:[21] (1) an employer was required by an industrial award, a law of the Commonwealth, State or Territory, or an occupational superannuation arrangement to contribute to a superannuation fund or RSA; and (2) the employer made contributions in accordance with that award, law or occupational arrangement; then the charge percentage would be reduced by reference to that contribution expressed as a percentage of the employee's notional earnings base specified under the award, law or arrangement for the relevant period. If there was more than one earnings base (i.e., more than one award, law or superannuation arrangement) applicable in the relevant period in respect of an employee, the total of contributions made by reference to each of those bases would count towards reducing the charge percentage. In certain circumstances, if the notional earnings base specified in a law, agreement or superannuation scheme was less than the employee's ordinary time earnings then the employee's notional earnings base was deemed to be the employee's ordinary time earnings.[22]

13. Since 1 July 2008, with the commencement of Schedule 1, item 8 of the *Superannuation Laws (Amendment) (2004 Measures No 2) Act 2004* (Cth),[23] the charge percentage has been reduced by reference to standardised "ordinary time earnings".[24] The effect is that, if an employer pays an amount equal to at least

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17 This summary leaves out of account possible increases in the individual superannuation guarantee shortfall as a result of an employer making contributions that are not in compliance with the "choice of funds" requirements: see Administration Act ss 19(2A), (2B), 19A and 21.

18 Under the *Retirement Savings Accounts Act 1997* (Cth).

19 For defined benefit schemes, see s 22 of the Administration Act.

20 As defined principally in s 14 of the Administration Act as then in force, although also see ss 13, 13A and 13B. An employee's 'ordinary time earnings' (as defined in s 6(1)) was the default earnings base for the purpose of calculating the charge percentage reductions where there was no other acceptable basis upon which to determine the 'notional earnings base': see s 23(5)

21 These provisions were considered by this Court in *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* (2003) 201 ALR 271 at [13]-[14] (McHugh, Gummow, Callinan and Heydon JJ), stating that the effect of s 23(2) was that "an employer may satisfy its obligations under the Acts if it complies with the obligation with respect to superannuation which an award imposes on it". See also at [59] (Kirby J) and [103]-[105] (Hayne J).

22 Administration Act s 13(4) and 14(3)

23 That Act repealed ss 23(2) to (5) and (9) of the Administration Act, and substituted new ss 23(2) and (3).

24 "Ordinary time earnings" is defined in s 6(1) of the Administration Act to exclude certain lump sum payments payable upon termination but to include over-award payments and commissions. It does not include overtime.

9% of each of its employees' ordinary time earnings into a complying superannuation fund or an RSA, the amount of the SGC is reduced to nothing.

14. At no time has liability to pay SGC depended on the existence of a liability to make superannuation contributions under an award, law or occupational arrangement. Even when such a liability has existed, there has been no necessary correlation between its amount and the amount of SCG payable. There could, for example, remain a liability to pay SGC[25] even if the employer's obligations under the relevant award, law or occupational arrangement were satisfied. Similarly, even where there is no liability to make superannuation contributions under an award, law or occupational arrangements (as appears to have been the case in relation to the interviewers engaged by the Appellant), there remains a liability to pay the SGC.

15. Under Pt 8 of the Administration Act, where an SGC payment has been made by an employer with respect to one or more employees, the Commissioner of Taxation is required to pay an amount – called the "shortfall component" – for the benefit of that employee or those employees.[26] If a SGC payment has been made by an employer with respect to more than one employee, separate shortfall components are worked out for each employee.[27] Such payments are made out of the CRF, which is appropriated accordingly.[28]

16. There are three major incentives for employers to make superannuation contributions directly rather than pay the SGC:

16.1. direct superannuation contributions are tax deductible,[29] whereas payments of the SGC are not;[30]

16.2. where the employer makes superannuation contributions directly, the employer avoids the charges imposed under ss 17(b) (the nominal interest component) and 17(c) (the administration component) of the Administration Act;

16.3. the amount of the shortfall calculated under s 19 will ordinarily result in an employer paying a higher dollar amount as superannuation

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25 Adjusted to take account of contributions made in compliance with the relevant award, law or occupational arrangement

26 Administration Act s 63B(1).

27 Administration Act s 64B(1).

28 Administration Act s 71. The exception is where s 65(1)(c) applies and an amount is credited to an account kept under the *Small Superannuation Accounts Act 1995* in the name of the employee. In that case the money would not be paid out of the CRF, but would remain within it.

29 *Income Tax Assessment Act 1997* s 290-60, (prior to 1 July 2007, *Income Tax Assessment Act 1936*, former s 82AAC).

30 *Income Tax Assessment Act 1997* s 26-95, (prior to 1 July 2006, *Income Tax Assessment Act 1936*, former s 51(9)).

guarantee shortfall than would have been paid had the employer made superannuation contributions directly.[31]

17. To the extent these incentives are effective, the SGC results in superannuation payments being made directly by employers for the benefit of employees, and not in the receipt of any amount into the CRF. When such direct payments are made, there is no occasion for any payments to be made into or out of the CRF. As was the case with the legislative regime upheld in *Northern Suburbs*, the SGC therefore serves a public purpose quite independently of any revenue that is actually collected pursuant to the Charge Act.

B. SGC HAS ALL POSITIVE ATTRIBUTES OF A 'TAX'

18. In *Matthew* Latham CJ said that the levy then before the Court was a tax because it was:[32]

> a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered.

19. That statement is regularly applied by this Court.[33] However, in *Air Caledonie International v Commonwealth* (***Air Caledonie***), the Court unanimously pointed out that the positive and negative attributes identified in that statement:[34]

> should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public ...

20. The Court in *Air Caledonie* also emphasised that:[35]

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31 There is no direct equivalence between the shortfall amounts calculated in accordance with s 19 and the reduction in the charge percentage calculated in accordance with s 23 because the wages component in s 19 is "total salary or wages", whereas the wages component in s 23 is "ordinary time earnings" (both after the amendments that commenced on 1 July 2008, and prior to those amendments by reason of s 23(5) in situations where no other earnings base was relevant, as was the case in relation to the Appellant). The definitions of "total salary or wages" and "ordinary time earnings" have the effect that an employee's "salary or wages" may be equal to or higher than, but never lower than, the employee's "ordinary time earnings". If the employer fails to make direct superannuation contributions of at least 9% of ordinary time earnings in accordance with ss 22 or 23 of the Administration Act, then in any case where "salary or wages" exceeds "ordinary time earnings" the result will be that the amount of the SGC that is payable by the employer (as calculated under s 19) will be greater than the amount that would have been payable under ss 22 or 23 to reduce the charge percentage to nil.

32 (1938) 60 CLR 263 at 276.

33 See, e.g., *Luton v Lessels* (2002) 210 CLR 333 at 342 [10] (Gleeson CJ), 352 [49] (Gaudron and Hayne JJ) and 365 [94] (Kirby J); *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, 189-190 [132] (Gaudron J); *Tape Manufacturers* (1993) 176 CLR 480 at 500.7 (Mason CJ, Brennan, Deane and Gaudron JJ) and 521.5 (Dawson and Toohey JJ).

34 (1988) 165 CLR 462 at 467. That passage was approved in *Northern Suburbs* (1993) 176 CLR 555 at 567; *Luton v Lessels* (2002) 210 CLR 333 at 352 [50] (Gaudron and Hayne JJ), 382-383 [176] (Callinan J); *Tape Manufacturers* (1993) 176 CLR 480 at 501.1 and 504 (Mason CJ, Brennan, Deane and Gaudron JJ), cf 521.7 and 522.8 (Dawson and Toohey JJ) and 529.3 (McHugh J).

35 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467 (emphasis added). See also *Luton v Lessels* (2002) 210 CLR 333 at 342 [10] (Gleeson CJ, with whom McHugh J agreed), 353 [50] (Gaudron and Hayne JJ) and 361 [80] (McHugh J).

> [T]he negative attribute – "not a payment for services rendered" – should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes.

21. The emphasised words demonstrate that the charges identified as not being taxes do not fall outside the *Matthews* definition because they are not imposed for "public purposes". The point being made is that, even if they exhibit all of the positive attributes of a tax, some charges nevertheless are not taxes because there are countervailing considerations that show that they are not properly characterised as taxes.[36] For reasons developed further below, *Luton* is properly understood as having been decided on this basis,[37] the imposition of a charge in substitution for an antecedent obligation being identified as a consideration that demonstrated that that charge was not properly characterised as a tax notwithstanding the fact that the positive attributes of a tax were present.[38]

22. The SGC has all the positive attributes of a tax. It is:

22.1. a compulsory exaction levied on employers who do not make superannuation contributions at a level sufficient to reduce the charge percentage to nil under ss 22 and 23 of the Administration Act;

22.2. imposed by the Commonwealth;

22.3. for the public purpose of encouraging employers to contribute to the financial needs of all Australian employees in old age or infirmity thus reducing the burden on the public purse for the maintenance of older persons, and for the purpose of raising revenue from employers who do not make such contributions;[39]

22.4. enforceable at law, being a debt due to the Commonwealth under s 255-5(1)(a) of Schedule 1 to the *Taxation Administration Act 1953* (Cth).[40]

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36 In addition, for example, laws with respect to taxation must not be "arbitrary", meaning in this context that taxation must be "imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject-matter of the tax:" *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639.5 (Gibbs CJ, Wilson, Deane and Dawson JJ). See also *Federal Commissioner of Taxation v Hipsleys Ltd* (1926) 38 CLR 219; *Deputy Federal Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678; *Austin v Commonwealth* (2003) 215 CLR 185 at 269-271 [182]-[186] (Gaudron, Gummow and Hayne JJ); *W R Carpenter Holdings Pty Ltd v Commissioner of Taxation* (2008) 237 CLR 198 at 204 [9] (the Court).

37 See, in particular, *Luton v Lessels* (2002) 210 CLR 333 at 354 [55], recognising that although the public purpose element was satisfied, the charge was not a tax.

38 *Luton v Lessels* (2002) 210 CLR 333 at 344 [14]-[17] (Gleeson CJ, with whom McHugh J agreed), 355 [60] (Gaudron and Hayne JJ).

39 As found by the Full Court below (AB XX at [74]).

40 Section 255-1 of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (Taxation Administration Act) defines a "tax-related liability" as a pecuniary liability under a "taxation law". A "taxation law" is defined in

C. PUBLIC PURPOSES

23. The Appellant accepts that the SGC has each of the positive attributes identified above except that concerned with "public purposes". Consequently, if the Appellant fails to make good its contention that the SGC is not imposed for public purposes, the appeal must fail.

24. The Appellant contends that the SGC is not exacted for public purposes because, in those cases where the SGC is paid by an employer to the Commissioner of Taxation (as opposed to the majority of cases where an employer makes superannuation payments directly to a superannuation fund or RSA for the benefit of employees), a payment will be made out of the CRF under Pt 8 of the Administration Act for the benefit of individual employees in an amount that closely corresponds to the amount of the SGC paid by an employer. There are three answers to that argument.

(i) Payment into CRF

25. The "public purposes" requirement is not concerned with the purpose for which moneys are to be applied, at least where the moneys raised are paid into the CRF.

26. The Consolidated Fund was first established in the United Kingdom in 1787,[41] following the recommendation of the "Thirteenth Report of the Commissioners appointed to examine, take and state the Public Accounts of the Kingdom",[42] to do away with the past practice of assigning "specific taxes to specific charges".[43] The fund created by ss 47 and 48 of the 1787 Act was replaced in 1816 by a new fund, being the Consolidated Fund of the United Kingdom of Great Britain and Ireland, and the 1787 Consolidated Fund was merged into the new fund. The *Consolidated Fund Act 1816*[44] is still in force today. The Consolidated Fund in the United Kingdom was the inspiration for s 81 of the Constitution.[45]

27. Moneys received into the CRF are available to be appropriated for any purpose for which the Parliament may lawfully spend money, whatever the purpose for

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s 995-1 of the *Income Tax Assessment Act 1997* (Cth) as an Act for which the Commissioner has general administration. Section 43 of the Administration Act provides that "[t]he Commissioner has the general administration of this Act." Items 60 and 65 of s 250-10(2) of Schedule 1 to the Taxation Administration Act provide that the charges imposed under s 46 (superannuation guarantee charge) and s 47 (additional superannuation guarantee charge) are tax-related liabilities. Section 255-5(1)(a) of Schedule 1 to the Taxation Administration Act provides that a tax-related liability that is due and payable is a debt due to the Commonwealth. Section 255-5(1)(b) of Schedule 1 to the Taxation Administration Act provides that the debt is payable to the Commissioner. Section 255-10(2) empowers the Commissioner (and others) to sue for recovery of the debt in a court of competent jurisdiction.

41 27 Geo III c 13 (the 1787 Act), ss 47 and 48.

42 'Thirteenth Report of the Commissioners appointed to examine, take and state the Public Accounts of the Kingdom', in *The New Annual Register or General Repository of History, Politics and Literature for the year 1787.*

43 See *Northern Suburbs* (1993) 176 CLR 555 at 579 (Brennan J), see also 575 (plurality), 591.3 (Dawson J) and 598 (McHugh J); Anson and Berriedale Keith, *The Law and Custom of the Constitution* (4th edn, 1935) Vol 2, pp 150-151, 179.

44 56 Geo III c 98 (the 1816 Act).

45 *Northern Suburbs* (1993) 176 CLR 555 at 575 (Mason CJ, Deane, Toohey and Gaudron JJ); Harrison Moore, *Constitution of the Commonwealth of Australia* (2nd edn, 1910) at 522.

which those moneys were raised.[46] As Latham CJ explained in the *First Uniform Tax Case*:[47]

> It is doubtful whether Commonwealth revenue can be earmarked except at the point of expenditure (i.e., not as revenue) by an appropriation Act ... All taxation moneys must pass into the Consolidated Revenue Fund (sec. 81), where their identity is lost, and whence they can be taken only by an appropriation Act. An appropriation Act could provide that a sum measured by the receipts under a particular tax Act should be applied to a particular purpose, but this would mean only that the sum so fixed would be taken out of the general consolidated revenue. Thus there can be no earmarking in the ordinary sense of any Commonwealth revenue.

28. The Appellant's argument depends upon the proposition that payments of the SGC by an employer can be traced through the CRF such that any payments made to employees under Pt 8 of the Administration Act are properly viewed as having come from the employer.[48] That would involve earmarking of the very kind that the operation of the CRF prevents. Such earmarking is antithetical to the decoupling of revenue and expenditure brought about the establishment of the Consolidated Fund in the eighteenth century. The better view is that, when the SGC is paid by a particular employer into the CRF, its "identity is lost". The funds raised by the charge are thereafter available to be spent on <u>any</u> purpose for which the Commonwealth may lawfully spend money.

29. That conclusion is not altered by the fact that Pt 8 of the Administration Act has the effect that "a sum measured by the receipts under a particular tax Act should be applied to a particular purpose". Despite the method by which it is calculated, the money paid out to employees under Pt 8 is taken from general consolidated revenue, via the standing appropriation provided by s 71 of the Administration Act. Payments are not sourced from the contributions paid by employers. It is for that reason that, even if the provisions concerning payments under Pt 8 had entirely failed, moneys raised pursuant to the SGC would have remained available for any purpose for which the Commonwealth can lawfully expend money.[49]

30. It is because all Commonwealth revenue loses its identity once it enters the CRF that:[50]

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46 *Moore v Commonwealth* (1951) 82 CLR 547 at 561 (Latham CJ), 572 (McTiernan J); *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 258 (Dixon J); *R v Barger* (1908) 6 CLR 41 at 82 (Isaacs J).

47 *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373 at 414.2 (Latham CJ).

48 In the Full Federal Court, the Appellant went so far as to contend that "the SGC is stamped with a trust when received into the Consolidated Revenue Fund to be paid out pursuant to the provisions of Pt 8 for the benefit of an individual employee." The Full Court found that that proposition was "untenable": AB XX at [95].

49 *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373 at 415 (Latham CJ); AB at XX [95] and [97]. See also *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177 at 186.9-187.2 (Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ).

50 *Tape Manufacturers* (1993) 176 CLR 480 at 503 (Mason CJ, Brennan, Deane and Gaudron JJ, emphasis added).

> In Australia, the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes.

While the Court was closely divided as to the result in *Tape Manufacturers*, the accuracy of the proposition reflected in the above quotation was accepted by the entire Court.[51]

31. The conclusion that a public purpose will be present whenever funds are received into the CRF is supported by an examination of the historical development of the concept "public purposes" as a consideration relevant to whether exactions amounted to "taxation". The authorities in which the public purpose criterion was identified all concerned charges not paid into the CRF, but instead collected and used by local municipal agencies or committees. In that context, the public purposes criterion emerged from a concern on the part of courts to articulate the principle that taxation is imposed by a public body to serve the ends of government.[52] The public purposes criterion is no more than a shorthand means of emphasising that taxation involves exacting money in order to service the ends of government.

32. The first relevant case is *Cité de Montreal v Ecclésiastiques du Seminaire de St Sulpice*,[53] a decision of the Privy Council, which concerned whether an assessment made by the City of Montreal for the cost of constructing a drain running in front of the Seminary of St Sulpice was a municipal tax. The Privy Council held that it was, because the power was "entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise".[54]

33. The second relevant case is *Lawson v Interior Committee of Direction*[55] where the Supreme Court of Canada followed *Cité de Montreal* to hold that, where powers to impose a compulsory levy are vested in a public body by legislation, "the purposes for which they are given are conclusively presumed to be public purposes."

34. *Cité de Montreal* and *Lawson* were relied upon in argument before the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*,[56] where the Privy Council held that levies imposed in order to transfer a portion of the returns obtained by traders in the fluid milk market to traders in the manufactured milk products market (by means of requiring payments to the Committee, which distributed them to farmers in the manufactured milk market)

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51 *Tape Manufacturers* (1993) 176 CLR 480 at 522.2 (Dawson and Toohey JJ) and 529.8 (McHugh J).

52 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p. 550, stating that: "Taxation may now be defined as any exaction of money or revenue, by the authority of a State, from its subjects or citizens and others within its jurisdiction, for the purpose of defraying the cost of government, promoting the common welfare, and defending it against aggression".

53 (1889) 14 App Cas 660.

54 (1889) 14 App Cas 660 at 663.

55 [1931] SCR 357 at 362-363; [1931] 2 DLR 193 at 197.

56 [1933] AC 168.

were properly characterised as imposing a tax.[57] Having identified one of the features that supported that conclusion as being that "the imposition of these levies is for public purposes",[58] the Privy Council said:[59]

> Their Lordships are of the opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes ... The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordship's opinion, affect the taxing character of the levies made. The district here affected is a considerable part of the whole Province, but the Act might have still wider application within the Province. While not saying that these elements are exhaustive of the elements which might be found in other cases to point to the same conclusion, their Lordships are of opinion that they are sufficient to characterize the adjustment levies in the present case as taxes....

35. In *Matthews* Latham CJ relied upon *Lower Mainland Dairy* in support of the inclusion of the "public purposes" requirement in his formulation of the attributes of a tax.[60]

36. In *Tape Manufacturers*,[61] the majority referred to a more recent Canadian authority, *Massey-Ferguson Industries Ltd v Government of Saskatchewan*,[62] as an example of a levy-based scheme that was not a tax. There were two factors in that case that were "indicative of absence of public purpose", one being the imposition of the levy to provide compensation to a circumscribed category of farmers, but the other being that the levy was not paid into the CRF.[63] The Supreme Court of Canada said:[64]

> There is here no collection of money to go into a consolidated revenue fund which is then chargeable with satisfying awards of compensation. Although the scheme is a public one, created under a public statute, its beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged.

37. Plainly enough, when funds are received into the CRF they can thereafter only lawfully be used to serve the ends of government, which in the Australian constitutional context are determined by the Commonwealth's capacity to spend.[65] It is therefore not surprising that the "public purposes" criterion has long been regarded as conclusively established once funds are paid into the CRF.[66]

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57 [1933] AC 168 at 173-174.

58 [1933] AC 168 at 175.7.

59 [1933] AC 168 at 175.9 (emphasis added).

60 (1938) 60 CLR 263 at 276.

61 Referred to in the majority's reasons in *Tape Manufacturers* at (1993) 176 CLR 480 at 503.

62 [1981] 2 SCR 413; (1981) DLR (3d) 513.

63 *Tape Manufacturers* (1993) 176 CLR 480 at 503 (Mason CJ, Brennan, Deane and Gaudron JJ).

64 [1981] 2 SCR 413 at 432; (1981) DLR (3d) 513 at 528.

65 *Pape v Commissioner of Taxation* (2009) 238 CLR 1.

66 Going back at least to *R v Barger; The Commonwealth v McKay* (1908) 6 CLR 41 at 82 (Isaacs J), stating "[T]he imposition of a tax on any person or thing for the benefit of the Consolidated Revenue is taxation, and taxation within the meaning of the Constitution". That aspect of the decision in *Barger* has not since been questioned.

38. If funds raised pursuant to a charge are received into the CRF, while that does not conclusively establish that the charge is a tax[67] (because some other positive attribute of a tax may be missing, or because a countervailing consideration means that a charge should not be characterised as a tax even though all the positive attributes of a tax are present), it does conclusively establish that the charge is imposed for "public purposes".[68]

(ii) The SGC is imposed for public purposes

39. Further or alternatively, whether or not the fact of payment into the CRF conclusively establishes that the SGC is imposed for public purposes, the SGC is in fact imposed for such purposes. It serves the public purposes of providing an incentive for employers to make superannuation contributions to their employees at a level that will, over time, relieve pressure on the Federal budget caused by an ageing population, increase standards of living in retirement and increase Australia's domestic savings, and to raise revenue if employers fail to make such contributions.[69]

40. In *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation*, which concerned the interaction of s 23 of the Administration Act in its form prior to 1 July 2008 with a Queensland Award, Kirby J (who dissented as to the result) explained the purpose of the Charge Act and the Administration Act as follows:[70]

> The passage of the Administration Act followed two major concerns of Federal Parliament to which the Act (and cognate measures including the Charge Act) gave effect. The first was the need to reduce the dependence of wage-earners in Australia upon the age pension as the main source of their retirement income. The second was to broaden the attraction of superannuation so that it would become accessible to a wider class of non-wealthy wage earners and financially attractive to employees who had previously been disadvantaged so far as superannuation was concerned... The Administration Act must be construed in the context of these significant changes to employment practice and federal law, stimulated and sanctioned by tax implications for superannuation and tax charges for non-complying employers, aimed, in effect, at shifting a large part of post-retirement income support from government pensions to personal savings (necessarily and substantially derived from employment income).

41. As His Honour went on to state:[71]

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67 *Luton v Lessels* (2002) 210 CLR 333 at 344 [13] (Gleeson CJ), 355 [58] (Gaudron and Hayne JJ) and 361 [80] (McHugh J). See also s 53 of the Constitution.

68 *Tape Manufacturers* (1993) 176 CLR 480 at 503 and 522.2. The observations in *Luton v Lessels* (2002) 210 CLR 333 at 354 [55] (Gaudron and Hayne JJ) and 370 [111] (Kirby J), while expressed in less emphatic language, are not inconsistent with that view.

69 See Annexure B.

70 *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* (2003) 201 ALR 271 at [65]-[66]. See also at [8] (Gleeson CJ) and [92] (Hayne J) (both dissenting as to the result, but not the description of the legislative scheme).

71 *Australian Communication Exchange Ltd v Deputy Federal Commissioner of Taxation* (2003) 201 ALR 271 at [70].

> So far as the Administration Act is concerned, it is clear that its purpose was to ensure that minimum employer superannuation contributions were paid in relation to *all* employees, subject only to limited exceptions, none of which was applicable to the present case.

42. Similarly, the Full Federal Court below said (AB XX at [74]):

> [E]ven if it be accepted than an exaction must be for public purposes if it is properly to be characterised as a tax, the exaction effected by s 5 and s 6 of the [Charge Act] is for public purposes in so far as it provides an incentive to all employers to contribute to the superannuation needs of their employees.

43. The Appellant does not directly answer the conclusion that the SGC has a public purpose in providing such an incentive, even if no revenue is raised. Instead, the Appellant focuses on the correlation between the amount of the SGC and amounts paid out under Pt 8 of the Administration Act into superannuation or equivalent funds for the benefit of individual employees. For the reasons explained in paragraph 10 above, that correlation is not exact. However, even if there was an exact correlation between amounts paid into the CRF under Pt 3 of the Administration Act and the amounts paid out of the CRF under Pt 8 of that Act, that would not demonstrate that the SGC was not imposed for public purposes. Even if the SGC was properly characterised as transferring funds from one group (employers who do not make the minimum level of superannuation contributions) to another (employees of such employers), it would not follow that the SGC is not imposed for public purposes. The Full Federal Court correctly accepted (AB XX at [93]) that the Appellant's submission to the contrary is inconsistent with *Tape Manufacturers*[72] and *Northern Suburbs*,[73] and is not supported by *Luton*.[74]

44. In *Tape Manufacturers*, in which judgment was delivered on the same day as *Northern Suburbs*, Mason CJ, Brennan, Deane and Gaudron JJ held that a "royalty" imposed on vendors of blank tapes, which required specified amounts to be paid to a "collecting society", was a tax. The collecting society was a company limited by guarantee that was declared by the Attorney-General to be the collecting society. The members of that company were copyright owners.[75] The "royalty" was imposed in order to recompense copyright owners in respect of home copying of sound recordings.[76] The fact that the "royalty" was imposed to recompense one group at the expense of another did not prevent it from being characterised as a tax. Mason CJ, Brennan, Deane and Gaudron JJ said that *Air Caledonie* is "at odds with the notion that a law which levies an exaction on one group in the community to be expended for the benefit or advantage of another group in the community is not a law imposing taxation".[77] Their Honours went on to state that:[78]

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72 (1993) 176 CLR 480.

73 (1993) 176 CLR 555.

74 (2002) 210 CLR 333.

75 *Tape Manufacturers* (1993) 176 CLR 480 at 496.5.

76 *Tape Manufacturers* (1993) 176 CLR 480 at 499.3.

77 *Tape Manufacturers* (1993) 176 CLR 480 at 504.6 (while this passage suggests that such an exaction is a tax even though it is not imposed for a public purpose, the passage quoted below indicates that the

> The only possible reason, apart from those already rejected, for holding that the provision in question in this case is not a law imposing taxation is that an expropriation from one group for the benefit of another as an incident of legislative regulation of interests on a subject matter within power, with a view to bringing about what is conceived to be an equitable outcome, is not an exaction for public purposes and is therefore not a tax. In one sense it may be said that the purpose is private in that it concerns the interests of the two groups only. But, in truth, the legislative solution to the problem proceeds on the footing that it is imposed in the public interest. Indeed, the purpose of directing the payment of the levy to the collecting society for ultimate distribution of the net proceeds to the relevant copyright owners as a solution to a complex problem of public importance is of necessity a public purpose.

45. After discussing *Attorney-General (NSW) v Homebush Flour Mills Ltd*,[79] their Honours said:[80]

> The question in that case, as in this case, was whether the purpose on which the moneys raised were to be expended was to be characterized as a public purpose. Just as, in that case, the relief of necessitous farmers was a public purpose so, in this case, the compensation of relevant copyright owners arising out of what has been a complex problem of public importance is a public purpose.

46. *Northern Suburbs* upheld the validity of the *Training Guarantee Act 1990* (Cth) and the *Training Guarantee (Administration) Act 1990* (Cth), upon which the Charge Act and the Administration Act had been based.[81] The training guarantee scheme defined a minimum amount that each employer was notionally required to expend in training its workforce. The *Training Guarantee Act 1990* (Cth) imposed a charge corresponding to the amount by which the employer's actual expenditure on training fell short of that minimum amount. The employer was liable to pay that amount to the Commissioner of Taxation (that is, into the CRF), and an equivalent amount was appropriated from the CRF into a trust account,[82] and then expended on workforce training (particularly by way of payments made pursuant to training guarantee agreements between the Commonwealth and the States).[83]

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majority held that the public purpose requirement was satisfied) and 506.7-507.4. See also *Luton v Lessels* (2002) 210 CLR 333 at 355 [60] (Gaudron and Hayne JJ) and 370 [113]-[114] (Kirby J); *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, 189 [132] (Gaudron J).

78 *Tape Manufacturers* (1993) 176 CLR 480 at 504.8-505.1 (emphasis added). In taking this approach, the Court declined to follow decisions of the United States Supreme Court and the Supreme Court of Canada that held that regimes that provided for the expropriation of money from one group for the benefit of another did not impose taxation. See, e.g., *Massey-Ferguson Industries Ltd v Government of Saskatchewan* [1981] 2 SCR 413 at 432; (1981) DLR (3d) 513 at 528; *United States v Butler* 297 US 1 at 61 (1936).

79 (1983) 56 CLR 390 at 408 (Starke J).

80 *Tape Manufacturers* (1993) 176 CLR 480 at 505.7 (emphasis added).

81 Above footnote 3. Given that the SGC was modelled on the *Training Guarantee Act 1990* (Cth), it was from its inception designed as a tax. Contrary to the Appellant's submission at paragraph 41, ensuring that moneys received as a result of the operation of the SGC are received into the CRF is neither a "colourable" nor "circuitous" device for avoiding the operation of s 51(xxxi) of the Constitution. On the contrary, it is mandated by s 81 of the Constitution.

82 (1993) 176 CLR 555 at 572.4.

83 (1993) 176 CLR 555 at 564.3. See also 585-586 (Dawson J, with whom McHugh J relevantly agreed at 596.4).

47. The only significant difference between the legislative scheme at issue in *Northern Suburbs* and the present is that, under the training guarantee scheme, there was no requirement that funds collected pursuant to the charge be expended on training employees of the particular employers who had been obliged to pay the charge.[84] That fact was significant to the Court's conclusion that the charge was not properly characterised as a fee for a service.[85] It was not significant to any other aspect of the Court's reasons for concluding that the charge was a tax.[86] That difference in the legislative regimes therefore does not provide a basis for distinguishing *Northern Suburbs*,[87] given that the SGC is clearly not a fee for service. The Court regarded it as clear that the expenditure of funds on training was a "public purpose", even though that training would, of necessity, benefit only some employees.[88]

48. Further, and inconsistently with the Appellant's argument that the SGC is imposed for a private purpose and not for the purpose of raising revenue,[89] the plurality in *Northern Suburbs* considered it not to the point that the charge would not have raised any revenue if employers acted to provide the specified minimum levels of training, because:[90]

> Plainly enough, one object of the legislative scheme ... is to impose on an employer who does not expend on quality employment related training an amount equal to its minimum training requirement a liability to pay the charge. In this respect, the imposition of the liability to pay the charge is a secondary object of the scheme, albeit one to be implemented only in the event that an employer does not expend on quality employment related training an amount equal to its minimum training requirement. But the fact that the revenue-raising burden is merely secondary to the attainment of some other object or objects is not a reason for treating the charge otherwise than as a tax. One might as well suggest that a protective customs duty is not a tax because its primary object is the protection of a particular local manufacturing industry from overseas competition.

49. The plurality concluded that:[91]

> The fact that the legislature has singled out those who do not spend the minimum training requirement as the class to bear the burden of the charge and to quantify the amount of the liability by reference to the shortfall does not deprive the charge of the character of a tax.

50. Those remarks are equally applicable to the SGC, the primary operation of which is to provide an incentive to employers to make superannuation payments

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84 (1993) 176 CLR 555 at 568.3.

85 (1993) 176 CLR 555 at 568.4. See also at 588.4 (Dawson J).

86 (1993) 176 CLR 555 at 566.9-567.1 (Mason CJ, Deane, Toohey and Gaudron JJ), with whom Brennan J agreed at 584.7.

87 Cf Appellant's submissions, paragraph 28.

88 See, e.g., *Northern Suburbs* (1993) 176 CLR 555 at 587.5 (Dawson J).

89 Appellant's submissions, paragraphs 40 to 46.

90 (1993) 176 CLR 555 at 569.3 (emphasis added). To the same effect see 589.1 (Dawson J). See also *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at 179-180; *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 13 (Kitto J), 18 (Windeyer J).

91 (1993) 176 CLR 555 at 571.5. See also 587.6 (Dawson J).

directly. To the extent that they make those payments, no revenue will be raised. However, that does not change the fact that revenue will be raised from those employers who choose not to make superannuation payments directly.[92] The fact that a corresponding amount will then be spent does not change the characterisation of the amount raised as revenue (just as in *Northern Suburbs* the amount received did not cease to be revenue simply because it was expended on the provision of training). In short, there is nothing unconstitutional about revenue neutrality.[93] The juxtaposition between exactions arising from the operation of the SGC on the one hand with payments made for the benefit of individuals under Pt 8 of the Administration Act on the other establishes nothing more than that the scheme was designed to be substantially revenue neutral.

(iii) Public purposes not required

51. Alternatively, even if the SGC is not imposed for public purposes, it does not follow that it is not a tax for the purpose of s 51(ii) of the Constitution. As made clear in the passage from *Air Caledonie International v Commonwealth* quoted in paragraph 19 above, there is no reason why the compulsory exaction of money under statutory powers cannot properly be seen as taxation notwithstanding that it was for purposes which could not be described as public.

52. The SGC is a compulsory exaction of money by force of a law of the Commonwealth Parliament. It is not a fee for service, a fee for a privilege or a penalty, nor does it replace an antecedent liability. Its proceeds are available to be expended only on purposes for which the Commonwealth may lawfully spend money. It is appropriately characterised as a tax even if it is not imposed for "public purposes".

53. The Appellant contends that the "public purpose" criterion is necessary in order to prevent s 51(ii) from being used to circumvent the limits of the power to acquire property pursuant to s 51(xxxi) of the Constitution.[94] That is not so. The distinction between a law with respect to taxation and a law with respect to the acquisition of property does not depend on any "public purpose" criterion.

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92 For example, in the 2008-09 financial year, the superannuation guarantee shortfall assessed amounted to $301 million, together with $10.9 million of administrative component and $46 million of nominal interest component. Other penalties and interest assessed relating to the SGC amounted to $40.4 million: see *Inspector-General of Taxation Review into the ATO's administration of the Superannuation Guarantee Charge: A report to the Assistant Treasurer* (March 2010). For the income years between and including 2000-01 to 2009-10, the Commissioner of Taxation has collected (in net terms) approximately $1.995 billion under the superannuation guarantee system, and distributed approximately $1.901 billion of employee superannuation guarantee entitlements: see *Commissioner of Taxation Annual Report 2009-2010* at 38 (Table 3.3.1) and 42 (Table 3.3.3).

93 Commonwealth taxation laws are often revenue neutral: see, e.g., *Dairy Industry Adjustment Act 2000* (Cth), inserting Schedule 2, cl 83 to the *Dairy Produce Act 1986* (Cth); *Primary Industries and Energy Research and Development Act 1989* (Cth) ss 5 and 108, read with *Primary Industries (Excise) Levies Act 1999* (Cth); *Plant Health Australia (Plant Industries) Funding Act 2002* (Cth) ss 4, 5 and 7(3); *Stevedoring Levy (Imposition) Act 1998* (Cth) and *Stevedoring Levy (Collection) Act 1998* (Cth) ss 6, 18; *Air Passenger Ticket Levy (Imposition) Act 2001* (Cth) and *Air Passenger Ticket Levy (Collection) Act 2001* (Cth) ss 5, 7, 22. If passed, the flood levy recently introduced into Parliament will provide another example of a tax imposed for the purpose of funding a specific category of spending: see Tax Laws Amendment (Temporary Flood Reconstruction Levy) Bill 2011 and Income Tax Rates Amendment (Temporary Flood Reconstruction Levy) Bill 2011.

94 Cf Appellant's submissions, paragraphs 2(2) and 24(2)(c).

54. Exactions that fall within the terms of s 51(ii) are, by definition, not laws with respect to s 51(xxxi).[95] Accordingly, if a law falls within s 51(ii) it is "unnecessary ... [to] consider whether, if it were not a tax, its imposition would be invalid as an unconstitutional "acquisition of property" on other than just terms".[96]

D. LUTON V LESSELS

55. The Appellant contends that the operation of the superannuation guarantee scheme, and in particular the correlation between amounts raised by the scheme and amounts paid out of the CRF to individuals, is sufficiently similar to the scheme challenged in *Luton*[97] so as to bring it within the ratio of that decision and thereby to establish that the SGC is not a tax.

56. In fact, *Luton* does not suggest that a correlation between amounts raised by the SGC and amounts paid to individual employees means that the SGC is not properly characterised as a tax. As Gaudron and Hayne JJ explained:[98]

> Imposing a financial burden on one group in society for the benefit of another group in society will often constitute a tax. Pointing to some identifiable relationship between the group of payers and the group of recipients or even to some relationship between a particular payer and a particular recipient will not usually require some different conclusion.

57. Kirby J's reasoning was to like effect. His Honour pointed out that an attempt had been made to distinguish *Tape Manufacturers* on the basis that:[99]

> [T]he legislation in *Tape Manufacturers* imposed its monetary exaction upon one group in the community for the benefit of another group, whereas the legislation in question here imposed liability on a particular individual, interposed the Commonwealth as a conduit of obligations, and provided for the payment of the exact amount recovered to the other individual concerned.
>
> This argument is also unconvincing. Whilst the exaction of moneys in the legislation considered in *Tape Manufacturers* did, in one sense, address "groups" in the community, so does the present legislation. Legislation, of its nature, is normally concerned with the general and not, as such, with individuals. The obligation to pay the "royalty" in issue in *Tape Manufacturers* eventually fell upon the individual purchaser of a single blank tape. Ultimately, payments were contemplated by the legislation there considered from the collecting society to an individual member who was a relevant copyright owner or that member's agent. The feature of a conduit was equally applicable. The only difference was that, in the present case, the conduit led into and out of the constitutional Consolidated Revenue Fund, thereby enhancing the character of the present laws ... as ones imposing a "tax", when compared with the law under consideration in *Tape Manufacturers*.

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95 *Tape Manufacturers* (1993) 176 CLR 480 at 508.9 (Mason CJ, Brennan, Deane and Gaudron JJ).

96 *Tape Manufacturers* (1993) 176 CLR 480 at 509.2 (Mason CJ, Brennan, Deane and Gaudron JJ). See also *Federal Commissioner of Taxation v Barnes* (1975) 133 CLR 483 at 494-495; *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638, 649.

97 (2002) 210 CLR 333.

98 *Luton v Lessels* (2002) 210 CLR 333 at 355 [60] (emphasis added).

99 *Luton v Lessels* (2002) 210 CLR 333 at 370 [113]-[114].

58. Finally Gleeson CJ (with whom McHugh J agreed) said:[100]

> The impost in the *Australian Tape Manufacturers Association* case involved raising revenue from one group for the purpose of its application for the benefit of another group. The majority held that revenue was raised for a public purpose of compensating the second group. The group who were to be compensated had no prior legal right against the group from whom the revenue was to be raised. That is a point of distinction from the Registration and Collection Act.

59. These remarks make it clear that it was not the existence of a relationship between "a particular payer and a particular recipient" that led to the conclusion in *Luton* that the charge in issue in that case was not a tax. The critical feature of the legislative scheme in *Luton* was that the private child support debt that became payable to the Commonwealth replaced an antecedent obligation to pay the same amount to a child's carer. The statutory charge was imposed simply as a mechanism to aid the enforcement of that antecedent obligation.[101] It was for that reason that, while the child support scheme involved a compulsory exaction of money by the Commonwealth for a public purpose,[102] it did not impose a tax. As Gaudron and Hayne JJ put it:[103]

> The combination of these features – the substitution of a new obligation to the Commonwealth equal to an existing obligation which is terminated, coupled with the substitution of new rights in the carer against the Commonwealth equal to the extent to which the payer performs his or her obligation to the Commonwealth – takes this compulsory exaction outside the description of "taxation".

60. There is no antecedent obligation terminated and substituted by the SGC in the superannuation guarantee scheme. While many employers no doubt have contractual, award or enterprise agreement obligations to pay superannuation to their employees, those obligations are relevant to the SGC only to the extent that, if an employer complies with any such obligations, that will reduce the charge percentage in accordance with ss 22 or 23 of the Administration Act.

61. Unlike the legislation at issue in *Luton*, under the Administration Act the obligation to pay the charge arises whether or not there is any antecedent obligation to pay superannuation, and the amount of the charge is determined under s 19 of the Administration Act independently of the amount of any antecedent obligation to pay superannuation that may exist. That was the case even when s 23 took its pre-July 2008 form, when the discharge of existing superannuation obligations was more directly relevant to any reduction of the charge percentage.

62. Further, unlike the legislation in *Luton* that created an enforceable obligation to make child support payments, and then allowed that obligation to be transformed

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100 *Luton v Lessels* (2002) 210 CLR 333 at 343-344 [13].

101 *Luton v Lessels* (2002) 210 CLR 333 at 344 [14]-[15] (Gleeson CJ, with whom McHugh J agreed at 361 [79]), 355 [59]-[60] (Gaudron and Hayne JJ), 384 [177] - 385 [179] (Callinan J). For Kirby J, the critical factor was that the impugned Acts did not perform a revenue raising function for the purpose of government: at 373 [121].

102 *Luton v Lessels* (2002) 210 CLR 333 at 352 [48] and 354 [55]) (Gaudron and Hayne JJ), 369 [108]-[109] (Kirby J).

103 *Luton v Lessels* (2002) 210 CLR 333 at 355 [60].

into an amount recoverable from the Commonwealth, the Charge Act and the Administration Act do not create any obligation on an employer to make superannuation contributions for the benefit of employees. The difference between the legislative regime in this case and that at issue in *Luton* is not simply one of "form". It is the difference between the creation of a legal obligation and the creation of an incentive.

63. Contrary to the Appellant's contentions[104] the reasoning of Gleeson CJ (with whom McHugh J agreed) and Gaudron and Hayne JJ in *Luton* with respect to "public purposes" does not overrule *Tape Manufacturers*. Read in context, Gleeson CJ's distinction between "public interest" and "public purpose" in *Luton* was directed simply to establishing that the mere fact that a law was referrable to a head of legislative power did not establish the existence of public purposes.[105] His Honour expressly distinguished, rather than disapproved, *Tape Manufacturers*.[106]

64. Further, no other members of the Court drew a distinction between "public purposes" and the "public interest" of the kind the Appellant now urges on this Court. In particular, Gaudron and Hayne JJ did not posit such a distinction in the passage relied upon by the Appellant.[107] Rather, their Honours used the term "public benefit" in a way clearly intended to be synonymous with "public purpose". Read in context, the principal concern in the relevant passage was to establish that a law may bear all the positive attributes of a tax (including having a "public purpose") but nevertheless not fall within s 51(ii). As their Honours said in the passage immediately following that upon which the Appellant relies:[108]

> All of the features ... identified in *Matthews* ... are important. The presence or absence of none of them, however, is determinative of the character of the legislation said to impose a tax. It is necessary, in every case, to consider all the features of the legislation which is said to impose a tax.

65. There is no substance in the submission that *Luton* has already overruled *Tape Manufacturers*. Nor has any basis been advanced that should lead this Court either to grant leave to re-open, or to overrule, that decision.[109]

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104 Appellant's submissions, paragraphs 32 and 38.

105 (2002) 210 CLR 333 at 343 [12].

106 (2002) 210 CLR 333 at 343.9 [13].

107 Appellant's submissions, paragraph 37; *Luton v Lessels* (2002) 210 CLR 333 at 352 [48] (Gaudron and Hayne JJ).

108 *Luton v Lessels* (2002) 210 CLR 333 at 352 [49] (Gaudron and Hayne JJ) (emphasis added).

109 The Appellant invites the Court, if it cannot distinguish *Tape Manufacturers*, to overrule that decision: see Appellant's submissions, fn 62. However, the Appellant has not established any basis for re-opening or overruling prior decisions of this Court: see *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439; *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311. Not only has the Commonwealth Parliament relied on *Tape Manufacturers* (and the model subsequently upheld in *Northern Suburbs*) as supporting the superannuation guarantee scheme (as noted above at paragraph 7(2)(b)) and other legislative schemes (for example the *Renewable Energy (Electricity) Act 2000* (Cth) and *Renewable Energy (Electricity) Charge Act 2000* (Cth)), the economic consequences of overruling those decisions to invalidate the SGC would be enormous.

E. COSTS

66. In the event the appeal is dismissed, the Attorney-General does not seek costs. The Attorney-General's status as a party to the appeal arises directly from his intervention below. Consistently with the approach to costs adopted by interveners, the Attorney-General does not seek costs and submits that no order as to costs should be made against him in the event the appeal is allowed.

Dated: 15 February 2011

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ANNEXURE A: SECTION 71 OF THE ADMINISTRATION ACT

Superannuation Guarantee (Administration) Act 1992 (Cth)

71 Appropriation

Amounts that the Commissioner is required to pay under this Part are payable out of the Consolidated Revenue Fund, which is appropriated accordingly.

ANNEXURE B: THE IMPACT OF THE SUPERANNUATION GUARANTEE SCHEME ON THE NATIONAL ECONOMY

Managing the cost of an ageing population: Superannuation reduces aged pension public expenditure. Age-related pension payments in Australia are projected to increase from 2.7 per cent of GDP in 2009-10 (around $35 billion) to 3.9 per cent of GDP in 2049-50 (around $370 billion).[110] This compares favourably with most OECD countries. For example, gross public pension expenditure for the EU15 Member States is projected to rise from 10.4 per cent of GDP in 2010 to 12.9 per cent in 2050.[111]

Investment: Employer superannuation contributions were $72.027 billion in 2009-2010.[112] Successive ABS Employment Benefits Surveys show that superannuation coverage of employees has more than doubled since the introduction of the superannuation guarantee charge.[113] Superannuation guarantee contributions are a major source of Australian funds available for investment, with superannuation assets under management exceeding $1,225 billion as at June 2010.[114] Almost three quarters of these investment funds are invested in Australia.[115]

Saving: In 1997, the superannuation guarantee was projected to increase national saving by 2.3 per cent of GDP by 2004-05 (around $20 billion) and 3.6 per cent by 2019-20 (around $80 billion).[116] The Commonwealth Treasury and the Reserve Bank of Australia have estimated that for each $100 raised by the superannuation guarantee, private saving is on average $60 to $70 higher than it would have been in the absence of compulsory superannuation.[117]

Reduction in dependence on foreign investment: The rise in national saving is likely to have been reflected primarily in a substantial reduction in the need to call on foreign capital to finance domestic investment. Research by Econtech estimates that a 2 per cent of GDP increase in national savings reduces projected foreign liabilities as a share of GDP by 15 percentage points in

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110 Australian Government (2010), *Australia to 2050: future challenges*, Commonwealth of Australia, Canberra.

111 Economic Policy Committee and European Commission, 'The impact of ageing on public expenditure: projections for the EU25 Member States on pensions, health care, long-term care, education, and unemployment transfers (2004-2050)', European Economy Special Report No. 1/2006, (February, 2006).

112 Australian Prudential Regulation Authority, Annual Superannuation Bulletin, June 2010, at 28.

113 See the presentation by Phil Gallagher to the ANU Master of Economics course at http://econrsss.anu.edu.au/Staff/gregory/pdf/ANU_MECO_IGR.ppt Slide 48.

114 Australian Prudential Regulation Authority, Annual Superannuation Bulletin, June 2010, Table 9 at 28.

115 Australian Prudential Regulation Authority, Annual Superannuation Bulletin, June 2010, Table 18 at 40.

116 Gallagher, P, 'Assessing the National Savings Effects of the Government's Superannuation Policies – Some Examples of the New RIMGROUP National Saving Methodology', The Fifth Colloquium of Superannuation Researchers, University of Melbourne, Conference Paper 97/3 (1997).

117 See for example, Connolly, E. and M. Kohler, 'The Impact of Superannuation on Household Saving', RBA Research Discussion Paper No 2004-01 (2004); Gallagher, P, 'Assessing the National Savings Effects of the Government's Superannuation Policies – Some Examples of the New RIMGROUP National Saving Methodology', The Fifth Colloquium of Superannuation Researchers, University of Melbourne, Conference Paper 97/3 (1997).

the long-run, reducing the risk of capital flight and the associated macroeconomic consequences.[118]

[118] Econtech, 'The Economic Impact of Increased National Saving', Report to the Investment and Financial Services Association (2008).