

HIGH COURT OF AUSTRALIA

GAUDRON ACJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

LYNETTE SCULLY

RESPONDENT

Commissioner of Taxation v Scully [2000] HCA 6
10 February 2000
M26/1999

ORDER

1. *Appeal allowed.*
2. *Set aside orders 1 to 4 inclusive made by the Full Court of the Federal Court on 19 June 1998 and in place thereof, order that the appeal to that Court be dismissed.*
3. *The appellant pay the respondent's costs in this Court according to the undertaking given in this Court on 12 February 1999.*

On appeal from the Federal Court of Australia

Representation:

B J Shaw QC with J J Batrouney for the appellant (instructed by Australian Government Solicitor)

G J Davies QC with J F Goldberg and J Davies for the respondent (instructed by Coadys)

Intervener:

A Moshinsky QC with S R McCredie intervening on behalf of Victorian WorkCover Authority (instructed by Paul Tipping, Victorian WorkCover Authority)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Commissioner of Taxation v Scully

Income Tax – Income – Eligible termination payment – Whether lump sum payment received by member of superannuation fund for total and permanent disability "consideration ... in respect of ... personal injury".

Practice and procedure – High Court – Criteria for grant of leave to an intervener or amicus curiae.

Words and phrases – "consideration" – "in respect of".

Income Tax Assessment Act 1936 (Cth), ss 27A(1)(n), 27G.

- 1 GAUDRON ACJ, McHUGH, GUMMOW AND CALLINAN JJ. The sole question for determination in this appeal is whether a payment from a superannuation fund for the termination of employment on grounds of total and permanent disablement is an "eligible termination payment" within the meaning of s 27A(1) of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). In the circumstances of this case, determination of that question turns on whether the payment is "consideration of a capital nature for, or in respect of, personal injury to the taxpayer". If it is, it falls within the exclusion contained in par (n) of the definition of "eligible termination payment". In our opinion, the payment was not "consideration of a capital nature for, or in respect of, personal injury to the taxpayer" and was therefore an "eligible termination payment" subject to tax. The appeal should be allowed.

The factual and procedural background

- 2 Ms Lynette Scully ("the respondent") commenced employment with the Royal Automobile Club of Victoria ("RACV") on 25 September 1989. She became a member of the RACV Superannuation Fund ("the Fund") on the same day. On 10 July 1992, she suffered severe brain injury as a result of a car accident, an injury which rendered her permanently incapable of undertaking any form of remunerative employment. A claim of total and permanent disablement was lodged on her behalf with the trustees of the Fund in August 1993. The trustees approved the respondent's claim in November 1993, subject to the respondent resigning from her employment with the RACV. This the respondent subsequently did. On 6 December 1993, the trustees sent a cheque to the respondent for \$162,293.17, being \$164,957.91 less tax of \$2,664.74. The RACV's Manager of Superannuation Administration itemised the composition of this payment in an affidavit which declared:

"The lump sum of \$164,957.91 which [the respondent] was paid from the RACV Superannuation Fund on or about 6 December 1993 in respect of total and permanent disablement, comprised:

- (i) \$161,990.36 calculated in accordance with clause 2.4.1 of the Trust Deed; and
- (ii) \$2,967.55 calculated in accordance with clause 3.5.1 of the Trust Deed."

- 3 A "Statement of Termination Payment" prepared on behalf of the Fund, and sent to the Australian Taxation Office, divided the payment to the respondent into three components for the purposes of the Act:

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(a) "Concessional Component"	\$148,908.97
(b) "Post June 83 Component ... Taxed Element"	\$ 12,452.24
(c) "Undeducted Contributions"	<u>\$ 3,596.70</u>
"Eligible Termination Payment"	<u>\$164,957.91</u>

4 "Concessional component" is defined in s 27A(1) of the Act. In this case it consisted of an "invalidity payment" as defined in s 27G. As the name implies, the "concessional component" is taxed at a concessional rate with only 5% of the component being brought to tax pursuant to s 27C(2) of the Act. The "taxed element" of the "post-June 83 component" is defined in s 27AB and brought to tax as assessable income pursuant to s 27B(1) of the Act. "Undeducted contributions" are defined in ss 27A(1) and (7), and are not taxed as part of assessable income.

5 The Commissioner of Taxation ("the Commissioner") issued an assessment on 27 October 1994. The assessment included \$19,897 as an "eligible termination payment" for the purposes of the Act. This consisted of 5% of the concessional component of \$148,908.97, being \$7,445.44, and the taxed element of the post-June 83 component being \$12,452.24. In February 1995, the respondent sought a "private ruling" from the Deputy Commissioner of Taxation pursuant to Pt IVAA of the *Taxation Administration Act* 1953 (Cth), arguing that no part of the payment made by the Fund was assessable as an "eligible termination payment". The Deputy Commissioner of Taxation issued a "Notice of Private Ruling" in April 1995 which confirmed the Commissioner's original assessment. An objection to the assessment was made on the respondent's behalf on 9 May 1995. On 10 July 1995, the objection was disallowed.

6 Pursuant to s 14ZZ of the *Taxation Administration Act*, the respondent appealed against the disallowance of the objection to the Federal Court. In September 1997, Spender J dismissed the appeal¹. The respondent then appealed to the Full Court of the Federal Court which allowed her appeal and upheld her objection to the Commissioner's assessment². Pursuant to the grant of special

1 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921; 37 ATR 159.

2 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 (Ryan, Tamberlin and Finkelstein JJ).

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leave, the Commissioner now appeals to this Court against the orders of the Full Court of the Federal Court.

The relevant provisions of the Act

7 Subdivision AA ("Superannuation, termination of employment and kindred payments") of Div 2 ("Income") of Pt III ("Liability to Taxation") of the Act (ss 27A-27J) was introduced into the Act by the enactment of the Income Tax Assessment Amendment Bill (No 3) 1984 (Cth). Its express purpose was to provide "a comprehensive set of rules for the taxation of retirement and kindred payments."³ Section 27A(1), the definitions section, relevantly provides:

"eligible termination payment", in relation to a taxpayer, means:

(a) any payment made in respect of the taxpayer in consequence of the termination of any employment of the taxpayer, other than a payment:

(i) made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund;

...

(b) any payment made from a superannuation fund in respect of the taxpayer by reason that the taxpayer is or was a member of the fund, not being a payment:

(i) that is income of the taxpayer;

(ii) to which paragraph (d), (da), (e) or (ga) applies; or

(iii) that is a benefit to which subsection 26AF(1), 26AFA(1) or 26AFB(2) or (3) applies;

3 Australia, House of Representatives, Explanatory Memorandum to Income Tax Assessment Amendment Bill (No 3) 1984 and Income Tax (Companies, Corporate Unit Trusts and Superannuation Funds) Amendment Bill 1984 ("the Explanatory Memorandum") at 4.

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reduced by any amount that has been or will be included in the assessable income of the taxpayer under subsection 26AF (2), 26AFA (3) or 26AFB (5) in respect of the transfer by the taxpayer of a right to receive the payment or any part of the payment;

...

but does not include:

...

- (k) a payment by way of advance or loan ...
- (m) consideration of a capital nature for, or in respect of, a legally enforceable contract in restraint of trade by the taxpayer, to the extent to which the amount or value of the consideration is, in the opinion of the Commissioner, reasonable having regard to the nature and extent of the restraint;
- (n) consideration of a capital nature for, or in respect of, personal injury to the taxpayer, to the extent to which the amount or value of the consideration is, in the opinion of the Commissioner, reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion; or
- (p) a transfer of an amount ..."

8 Section 27A(1) also provides that:

"**concessional component**", in relation to an ETP, means so much of the ETP as consists of, or is attributable to:

...

- (c) an invalidity payment made before 1 July 1994".

9 Section 27G, which defined an "invalidity payment", provided, at the date of the payment:

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<i>McHugh</i>	<i>J</i>
<i>Gummow</i>	<i>J</i>
<i>Callinan</i>	<i>J</i>

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"Where –

- (a) an eligible termination payment is made in relation to a taxpayer in consequence of the termination of any employment of the taxpayer;
- (b) the termination of the employment of the taxpayer occurred –
 - (i) by reason of the taxpayer's physical or mental incapacity to engage in that employment; and
 - (ii) before the last retirement date in relation to the employment,

so much of the eligible termination payment as is equal to the amount ascertained in accordance with the formula $\frac{A \times B}{C}$, where –

- A** is the amount of the eligible termination payment;
- B** is the number of whole days in the period from the date on which the termination occurred to the last retirement date; and
- C** is the aggregate of the number of whole days in the eligible service period in relation to the eligible termination payment and the number of whole days represented by component **B**,

is an invalidity payment in relation to the taxpayer."

The relevant provisions of the Trust Deed

- 10 Clause 1.1 of the Trust Deed, which regulated the Fund, provided for the definition of important terms which included:

"'Disablement' means in respect of a Member his disablement caused through bodily injury, physical or mental illness, disease, infirmity or accident (none of which has been incurred or inflicted for the purposes of obtaining a benefit from the Fund) which the Trustees, after obtaining the advice of a legally qualified and registered medical practitioner, determine will render the Member temporarily or permanently incapable of performing his duties to his Employer, and occasions the termination of his Employment prior to the Normal Retirement Age.

...

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'Total and Permanent Disablement' means in respect of a Member his Disablement to a degree that, in the opinion of the Trustees, after obtaining the advice of a legally qualified and registered medical practitioner, the Member is unlikely ever to be able to undertake any form of remunerative work."

- 11 Clause 2.4 provided for the payment of "Disablement Benefits". Clause 2.4.1 provided for the principal benefit:

"Total and Permanent Disablement. Subject to Clauses 2.4.2 and 2.4.3 in the event of the termination of Employment of a Member on the grounds of Total and Permanent Disablement, the Trustees shall pay to the Member a lump sum equal to seven (7) times the Member's Final Average Salary reduced in the proportion that his Potential Benefit Period bears to thirty (30) years."

- 12 Clauses 2.4.2 and 2.4.3 permitted a member of the Fund to take a pension rather than a lump sum. Clause 2.4.2 provided that:

"Pension Option. A Member may elect, as at the termination of his Employment on the grounds of Total and Permanent Disablement to receive in lieu of the whole or part of the lump [sum] to which he would have been entitled pursuant to Clause 2.4.1 –

- (a) where the Member elects to receive the whole of the lump sum as a Pension, a Pension equal to 75% of the Member's Final Average Salary reduced in the proportion that his Potential Benefit Period bears to thirty years; or
- (b) where the Member elects to receive part of the lump sum as a Pension, a Pension equal to a pro-rated amount of the Pension described in paragraph (a) above."

- 13 Clause 2.4.3 provided:

"Alternative Pension. With the agreement of the Trustees a person entitled to receive a Pension pursuant to Clause 2.4.2 may elect to receive an alternative Pension of equivalent value as determined by the Trustees with the advice of the Actuary."

- 14 The Trust Deed's provisions for "Retirement Benefits" (cl 2.3) and "Death Benefits" (cl 2.5) were similar to the total and permanent disablement benefits. Clause 2.3.1 provided:

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"Retirement. Subject to Clauses 2.3.2 and 2.3.3 in the event of the Retirement of a Member, the Trustees shall pay to the Member a lump sum equal to seven (7) times the Member's Final Average Salary and, if his Membership Period is less than thirty (30) years, reduced in the proportion that his Membership Period bears to thirty (30) years."

The "Pension Option" in cl 2.3.2 and the "Alternative Pension" in cl 2.3.3 were in almost exactly the same terms as cll 2.4.2 and 2.4.3 of the Trust Deed. Clause 2.5.1 provided:

"Death in service of a Member. In the event of the death of a Member while he is an Employee, the Trustees shall pay a lump sum benefit calculated as in Clause 2.4.1 subject to and in accordance with Clause 1.31.1."

Clause 1.31.1 dealt with the proper recipient for the payment of a death benefit. Clause 2.5.2 provided for the payment of a lesser pension to an "eligible spouse", cl 2.5.3 for the treatment of a pension after the death of a pensioner ex-member, cl 2.5.4 for pensions in respect of children, cl 2.5.5 for alternative pensions and cl 2.5.6 for a minimum benefit payable in respect of the above.

15 "Withdrawal Benefit[s]" were governed by cl 2.6 and provided for the payment of benefits after retrenchment, resignation or dismissal. The basic withdrawal benefit was calculated according to cl 2.3.1 and multiplied by a "vesting factor" which reduced the sum depending on period of service.

16 Part 3 of the Trust Deed provided for benefits which had been transferred to the Fund from a previous fund. Clause 3.5.1 provided that:

"Retirement, Death or Total and Permanent Disablement. If a Member –

- (a) retires from the employ of the Employer and from all other Gainful Work on or after attaining age 55;
- (b) dies while in the employ of the Employer; or
- (c) becomes Totally and Permanently Disabled while in the employ of the Employer,

there shall be payable to or in respect of the Member from the Fund a lump sum benefit equal to the sum of –

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- (i) the Member's Total Account Balance as at the date the Member leaves the employ of the Employer; and
- (ii) the proceeds of any Part 3 Insurance effected in respect of the Member and payable in the event of death or Total and Permanent Disablement (as the case may be),

PROVIDED THAT, in the case of Total and Permanent Disablement, if the Member has not retired from all Gainful Work because of permanent incapacity or permanent invalidity in terms of any applicable requirement of a Relevant Law regarding preservation of benefits, then that part of the benefit payable hereunder which must be preserved in order to comply with such a requirement shall, unless transferred out of the Fund pursuant to the Deed, be retained in the Member's Preserved Account until the Deferral Date."

Clause 3.5.2 provided:

"Cessation of Employment in Other Circumstances. If a Member leaves the employ of the Employer other than in the circumstances provided for in Clause 3.5.1 –

- (a) a lump sum benefit equal to the Member's Non-Preserved Account Balance as at the date the Member leaves the employ of the Employer shall be payable to the Member; and
- (b) unless transferred out of the Fund pursuant to the Deed, a lump sum benefit shall become payable to or in respect of the Member on the Deferral Date equal to the Member's Preserved Account Balance as at the Deferral Date."

The issues

17 The parties have agreed that:

- (a) the payment by the Fund falls within par (b) of the definition of "eligible termination payment" in s 27A(1);
- (b) if the payment is within the description in par (n) of the definition, it is not an "eligible termination payment";
- (c) the payment was of a "capital nature";

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- (d) the respondent did sustain "personal injury" within the meaning of par (n) of the definition of "eligible termination payment"; and
- (e) the amount of the payment is, "in the opinion of the Commissioner, reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the [respondent] to derive income from personal exertion".

18 The sole question for determination, therefore, is whether the payment can be properly characterised as "consideration of a capital nature for, or in respect of, personal injury to the taxpayer". The dispute between the parties has revolved around three issues:

- (a) the meaning, in this context, of "consideration";
- (b) the meaning, in this context, of "for, or in respect of"; and
- (c) the relationship between s 27A(1)(n) and s 27G of the Act.

The decisions of the Federal Court

19 At first instance, Spender J said that⁴:

"It was submitted that the use of the word 'consideration' required a link between the payment and responsibility to compensate for the injury and so would encompass a payment in settlement of a negligence action or a payment under a workers' compensation claim.

I agree that the word 'consideration' in para (n) of the definition of 'eligible termination payment' is apt to refer to, for instance, an award of damages for personal injury awarded by a court or a figure agreed in settlement of such a claim or for payments made pursuant to a policy of insurance against the risk of personal injury to the taxpayer."

4 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4925; 37 ATR 159 at 163-164.

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Nevertheless, his Honour did not think that the case turned on the word "consideration". He went on to say⁵:

"If the payment made to the [respondent] is properly to be characterised as a payment 'for, or in respect of personal injury ...', that payment would be no less a 'consideration of a capital nature' than would the payments referred to in those examples just referred to: the link between the payment and an obligation to compensate for the injury, (being the necessary nexus urged on behalf of the Commissioner), would equally apply."

His Honour then said⁶:

"It is clear that it is not a payment *for* personal injury to the [respondent], because the payment is for total and permanent incapacity, as defined by the superannuation deed." (emphasis added)

20 Spender J said that, despite the fact that the words "in respect of" have a wide meaning, they must be construed in the context in which they appear. He thought that the payment in this case fell outside those words, saying⁷:

"Had it been the case that payment under the superannuation deed was confined to total and permanent disability, brought about by personal injury, the payment would properly be characterised in my opinion, as a payment 'in respect of personal injury' because there is a nexus between the payment and personal injury ... Where however, as is the case here, the payment is made for total and permanent disablement howsoever caused ... it is not a payment in respect of personal injury and so, does not fall within para (n) of the definition of 'eligible termination payment'.

There is no necessary connection between the payment and personal injury, although such a connection is a possible one. In those

5 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4925; 37 ATR 159 at 164.

6 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4925; 37 ATR 159 at 164.

7 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4926; 37 ATR 159 at 165.

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circumstances, in my opinion, the payment is not a payment 'in respect of' personal injury."

- 21 The Full Court of the Federal Court upheld the view of Spender J as to the meaning of "consideration". Their Honours said⁸:

"The pars (m) and (n) refer to "'consideration" of a capital nature ... to the extent to which ... the value of the consideration is reasonable'. When reference is made to 'amount or value', as a matter of ordinary English, the expression 'consideration' is appropriate because it includes both a monetary payment and benefits which are not in the form of a payment of money. The expression 'consideration' is used to extend the paragraph to include a benefit which is not strictly a 'payment' but is a benefit in respect of which an estimation or valuation can be made as to its monetary worth.

In the context of the definition of eligible termination payment, the term 'consideration', in our view, was not intended to apply only in the narrower, contractual, sense of a promise given or an act done in exchange for an act or promise by another party. The use of the expression 'consideration' in association with the words 'for or in respect of' indicates a broader meaning ... Superannuation benefits are part of the broader scheme of entitlements which an employee receives in return for rendering services. Employees are bound by the Deed (cl 1.19.4). The members are not volunteers but they have in a very real sense given valuable consideration for their entitlements ... In this context, it is appropriate to refer to the payment as 'consideration' passing from the Trustees to the member in satisfaction of the Trustees' obligations and responsibilities to the member."

- 22 The Full Court also agreed with the trial judge that the payment could not be described as having been "consideration ... *for* ... personal injury". Their Honours held that the word "for" connotes a more immediate connection, such as that of a damages award for personal injury. The Full Court, however, upheld the respondent's appeal because the learned judges thought that the words "in respect of" were wide enough to encompass the payment to her. Their Honours said⁹:

8 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 49-50.

9 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 51-52.

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"In our opinion, there is no requirement that the payment should be proportionate with, or measurable by reference to, the loss or damage suffered in order to be properly characterised as a payment *in respect of* personal injury ... The basis underlying the entitlement to payment here is total and permanent disablement as a consequence of personal injury and that, in our view, is a sufficient nexus ...

In this case, in a real and practical sense, it is evident that the injury suffered by the member gave rise to the entitlement and resulted in payment of the consideration. *There is a real, discernible and rational connection between payment and the personal injuries.* In these circumstances the consideration was 'in respect of' personal injury." (second emphasis added)

23 In our opinion, the Full Court erred in reaching this conclusion.

The payment is not "consideration of a capital nature for, or in respect of, personal injury to the taxpayer"

24 It may readily be accepted that in the present case there is a "real, discernible and rational connection between [the] *payment* and the personal injuries."¹⁰ Paragraph (n), however, does not attach to a "payment" but to "consideration". All the paragraphs in the definition of "eligible termination payment" until the exclusions listed after the words "but does not include" commence "any payment" or "a payment". So does par (k) after that point. Paragraphs (m) and (n), on the other hand, commence with "consideration of a capital nature", and par (p) with "a transfer". This change of language indicates that, in using these different introductory words, the Parliament intended pars (m) and (n) to encompass more than mere payments. The Full Court thought that the reason for the change of language was that "consideration" was simply intended to catch benefits which strictly speaking were not "payments"¹¹. But we cannot accept that this explains the change of language. Sections 27A(8) and (8A) of the Act provide:

"(8) For the purposes of this Subdivision, a transfer of property to, or for the benefit of, a person shall be deemed to be a payment to, or for the benefit of, the person of an amount equal to the value of the property immediately before the transfer.

10 (emphasis added).

11 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 49.

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(8A) Where:

- (a) a transfer of property to, or for the benefit of, a person is deemed by subsection (8) to be a payment to, or for the benefit of, the person; and
- (b) but for this subsection, the payment would be an eligible termination payment under paragraph (a) of the definition of 'eligible termination payment' in subsection (1);

the amount of the payment shall be reduced by the amount or value of any consideration provided, paid or payable by the person in respect of the transfer."

By reason of s 27A(8), there was no need to use the word "consideration" to capture non-monetary benefits. If the Parliament used the term "consideration" merely to cover non-monetary benefits, it is by no means clear why the Parliament was concerned with non-pecuniary benefits in respect of pars (m) and (n) but not in respect of the other paragraphs where payments were made the focus of the section's operation. The existence of ss 27A(8) and (8A) makes it clear that "consideration" was intended to cover more than non-pecuniary benefits.

25 No doubt the Full Court was right in holding that, in the context of par (n), "consideration" should not bear the technical meaning that it has in the law of contract. Indeed, it would be almost absurd to speak of money being paid by one party in "consideration" of another party (voluntarily) suffering personal injury. Nevertheless, the use of the word in this context suggests that the payment or benefit is made to recompense the taxpayer for the injury and is referring to a payment or benefit that compensates or reimburses the taxpayer for the injury suffered, recompense being one of the standard meanings of "consideration"¹². Consideration in par (n) therefore involves the notion of recompense – a payment or benefit to recompense the taxpayer for or in respect of a personal injury.

26 This construction of the word "consideration" is supported by the remaining words of par (n) which form the context in which it appears. In our opinion, the fact that the payment must be "reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion" envisages that the payment has been calculated

12 *The Macquarie Dictionary*, 2nd ed (1991) at 383.

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by reference to the injury. Furthermore, no support for the Full Court's conclusion is given by the reference in pars (m) and (n) to "amount or value" and to reasonableness. Those terms are used for the entirely different purpose of permitting the Commissioner to disallow an excessive or fraudulent claim for an exclusion by a taxpayer.

27 Section 27G, although not decisive of the issue, provides another indicator to the proper construction of par (n). Given that ss 27G and 27A were introduced as part of a presumably coherent set of amendments, they should be given a harmonious construction. The scheme of subdiv AA points to the conclusion that a payment such as that made to the respondent in this case was to be treated as a "concessional" payment pursuant to s 27G, rather than excluded from the definition of "eligible termination payment", and hence from being treated as assessable income, via s 27A(1)(n). No doubt there is a degree of overlap between the provisions. In response to the Commissioner's contention that the respondent's construction of s 27A(1)(n) would effectively render s 27G otiose, the respondent suggested that, on the construction given to s 27A(1)(n) by the Full Court, s 27G would retain a residual role with respect to payments:

- (a) which were of an income nature;
- (b) where there was "no material connection" between injury and payment;
- (c) where the relevant incapacity arose from something other than "personal injury" such as disease, illness or infirmity¹³; and
- (d) where part of the payment fell outside the "reasonableness" requirement in par (n).

28 We see no reason to think that "personal injury" in par (n) excludes disease, illness or infirmity¹⁴, which the respondent's construction of s 27G requires. Nor does there seem to us any reason in principle or policy why "personal injury" should be so limited. If the injury is such that it can ground an action in negligence or under workers' compensation legislation, there is no reason for thinking that it is outside the ambit of par (n). It is beyond doubt that many diseases contracted in the course of employment or otherwise may properly be the subject of such an action. The remaining areas of operation for s 27G may be

13 See *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 52-53.

14 See *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252-253 per Latham CJ.

15.

accepted, but they apply whichever of the competing constructions is given to par (n). The fact that s 27G may have a limited role of operation outside of s 27A(1)(n) does not assist the respondent's case. If anything the existence of s 27G tends to deny the construction placed on s 27A(1)(n) by the Full Court; it certainly does not rebut the factors pointing in the other direction.

29 In this case, it is clear that the payment *is* a form of consideration passing between the member and the trustees of the Fund in that the payment is made by the Fund in satisfaction and discharge of its obligations to the member¹⁵. This does not, of course, answer the question whether such "consideration" is "for, or in respect of, personal injury to the taxpayer". Given that "consideration" in this paragraph involves the notion of recompense, it is not enough that there is a "consideration" which can be said to have a connection with personal injury. The payment must be compensation for or in respect of the particular injury.

30 However, the payment in this case cannot be said to be compensation for or in respect of the personal injury. Clauses 2.4.1 and 3.5.1, pursuant to which the respondent's payment was calculated, make no attempt to place a monetary value on a member's injury. They do not even provide for a formula, roughly comparable to the manner in which a court or tribunal might assess damages in a claim for personal injury, to quantify the amount of the payment. Indeed, the very similarity of the benefits for death, retirement, resignation, retrenchment and dismissal to those for total and permanent disablement deny that the purpose of a payment pursuant to cll 2.4.1 and 3.5.1 is concerned with the value of any injury sustained by an employee.

31 Moreover, ordinarily, it is not the purpose of superannuation schemes to compensate for personal injury, although that may sometimes be the effect of certain payments. This point is recognised in the principle that damages for loss of earning capacity in personal injury claims are not to be reduced by payments received pursuant to a superannuation scheme. In *Watson v Ramsay*¹⁶, Brereton J said:

15 See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597 per Sir Nicolas Browne-Wilkinson V-C; [1991] 2 All ER 597 at 605; *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 601-602 per Waddell CJ in Eq.

16 [1960] NSWR 462 at 463.

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"A superannuation scheme of the type involved here is therefore, to my mind, completely analogous to a policy of accident or sickness insurance taken out in the employee's favour with his employer instead of with an insurer. Whether paid by him wholly, or paid for partly by him and partly by his employer, it is none the less to my mind provided in consideration of his service to his employer; and where superannuation becomes payable [before] the normal retiring age, it is not payable in recognition of any injury which may have caused such retirement, or in order to alleviate any loss of earnings, thereby occasioned, or as a discretionary payment or act of grace; it is payable simply and solely because the employee has by his work bought his entitlement to it; if it were not paid, and he sued for it, the fact that he had recovered damages for his injury from his employer or anyone else could not conceivably be pleaded in bar in that action."

- 32 His Honour's reference to insurance is almost certainly a reference to the decision in *Bradburn v Great Western Railway Co*, where Pigott B stated¹⁷:

"The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it."

- 33 Both these statements of principle were specifically approved by Windeyer J in *The National Insurance Co of New Zealand Ltd v Espagne*¹⁸ where his Honour rejected causation as the means for distinguishing between collateral benefits which should be set off against damages for personal injury and those which should not be set off against damages. His Honour said¹⁹:

"In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if ... they were received or are to be

17 (1874) LR 10 Ex 1 at 3.

18 (1961) 105 CLR 569 at 588, 598.

19 (1961) 105 CLR 569 at 599-600.

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received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have ... [This] description covers accident insurances and also many forms of pensions and similar benefits provided by employers ... [T]he decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined ... by what under his contract the plaintiff had paid for ... The test is by purpose rather than by cause."

34 Similarly, Dixon CJ stated²⁰:

"[T]here may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true that they are conferred because he is intended to enjoy them in the events which have happened. Yet they have this distinguishing characteristic, namely they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him."

35 Fullagar J agreed with the reasons of the Chief Justice and those of Windeyer J²¹. These two statements of principle have since been expressly approved in this Court²² and in the House of Lords²³.

36 The respondent contends, however, that cases regarding set-off of superannuation payments against damages for personal injury are irrelevant because they arise in a different context from that presented by this case which

20 (1961) 105 CLR 569 at 573.

21 (1961) 105 CLR 569 at 576.

22 *Redding v Lee* (1983) 151 CLR 117 at 137-138 per Mason and Dawson JJ; *Kars v Kars* (1996) 187 CLR 354 at 361-363 per Dawson J.

23 *Parry v Cleaver* [1970] AC 1 at 28-31 per Lord Morris of Borth-y-Gest, 37 per Lord Pearce, 42 per Lord Wilberforce; *Smoker v London Fire Authority* [1991] 2 AC 502 at 540-541 per Lord Templeman (Lords Mackay of Clashfern LC, Bridge of Harwich and Brandon of Oakbrook agreeing).

concerns the construction of a taxing statute. The respondent relies heavily on the words "in respect of" in par (n). She contends that the words "in respect of" are of the widest possible scope and intend to convey some connection or relation between the two subject matters to which they refer. She argues that the connection can be direct or indirect, as long as it is a "material connexion" or a "discernible and rational link" as opposed to "a merely coincidental or extraneous connexion"²⁴.

37 The respondent contends that, on the facts of this case, there is both a "material connection" and a "causal nexus" between the personal injury and the payment. She points out that her injury was a *causa sine qua non* of her inability to work. That being so, her injury was a *causa sine qua non* of the payment to her. Moreover, given the terms of the Trust Deed, she argues that there was a material connection between the injury and the payment. The respondent argues that it is immaterial that the calculation of the benefit was not "proportional" to the injury. She relies on that passage in the judgment of the Full Court which states that par (n) "does not refer to proportionality but specifies terms of reasonableness, having regard to the specified matters."²⁵ Furthermore, the respondent denies that "consideration" imported any requirement of proportionality into the calculation of the benefit as would be the case when assessing damages for personal injury. Counsel for the respondent summarised the respondent's case in the following way:

"The payment of the \$164,000 was the consideration the respondent received for the discharge or satisfaction of her entitlements under clauses 2.4.1 and 3.5.1(c) of the trust deed. That sum of money was consideration in respect of each of the matters which under the trust deed gives rise to those entitlements."

38 In our opinion, however, the set-off cases, while not conclusive in the present context, are not relevantly distinguishable. Once "consideration" is construed to require something in the nature of recompense so that it is sensible to speak of a payment or benefit as recompense ("consideration") for the injury, the set-off cases become immediately applicable. Any payment which satisfies par (n) would be a payment which would be set off against damages for personal injury. If the word used was "payment", rather than "consideration", then a

24 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47-48 per Brennan, Deane and Gaudron JJ, 51 per Dawson J.

25 (1998) 84 FCR 41 at 52.

"rational connection" or factual causation would be enough. The use of "consideration", however, connotes something different and additional: to use the criteria of Dixon CJ and Windeyer J in *Espagne*²⁶ it is the "character" and "purpose" of the payment, rather than the "cause", which is relevant.

39 We do not think that the words "in respect of" enlarge the class of payments to the extent for which the respondent contends. It is well accepted that such words take their meaning from their context. Thus, in *Workers' Compensation Board (Q) v Technical Products Pty Ltd* Deane, Dawson and Toohey JJ said²⁷:

"Undoubtedly the words 'in respect of' have a wide meaning, although it is going somewhat too far to say, as did Mann CJ in *Trustees Executors & Agency Co Ltd v Reilly*²⁸, that 'they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer'. The phrase gathers meaning from the context in which it appears and it is the context which will determine the matters to which it extends."

40 In our opinion, the words "in respect of" are principally concerned with payments such as those for loss of earnings consequent on personal injury. That that is the effect of that phrase appears from the words of par (n) itself – the consideration must be "reasonable having regard to the nature of the personal injury and its likely effect on the *capacity of the taxpayer to derive income* from personal exertion" (emphasis added). That meaning is also confirmed by the Explanatory Memorandum which stated that: "[p]ayments being excluded from the definition by paragraphs (k), (m) and (n) are sums paid as loans or under covenants in restraint of trade or *by way of compensation for loss of income through personal injury*."²⁹ In their context, the words "in respect of" do not cut down the requirement that the payment must be a payment to compensate for the injury.

41 In our opinion, the payment in this case cannot be characterised as "consideration ... in respect of, personal injury". The fact that the payment is not calculated by reference to the nature and extent of the injury or likely loss to the

26 (1961) 105 CLR 569.

27 (1988) 165 CLR 642 at 653-654.

28 [1941] VLR 110 at 111.

29 At 67 (emphasis added).

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McHugh *J*
Gummow *J*
Callinan *J*

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respondent and the fact that the other benefits are similar to that for total and permanent disablement point inevitably to the conclusion that the payment was "consideration ... for, or in respect of" the respondent's termination of employment and her rights under the Trust Deed and was not "consideration ... for, or in respect of" her injury.

Orders

42 We would make the following orders:

1. Appeal allowed.
2. Orders 1 to 4 inclusive made by the Full Court of the Federal Court on 19 June 1998 be set aside and in lieu thereof order that the appeal to that Court be dismissed.
3. The appellant pay the respondent's costs in this Court according to the undertaking given in this Court on 12 February 1999.

- 43 KIRBY J. Justice Benjamin Cardozo once wrote to Robert H Jackson, later himself to become a Justice of the Supreme Court of the United States, with the warning that much of the work of that Court concerned statutory construction, "which no one can make interesting"³⁰. This appeal from the Full Court of the Federal Court of Australia³¹ concerns the construction of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). The complexity of the Act has long been the subject of comment and complaint³². In resolving the question before it, this Court should adopt an approach which avoids undue refinement and gives effect to the apparent purposes of the Act in the words which the Parliament has used³³.

The facts

- 44 Ms Lynette Scully (the respondent) was employed by the Royal Automobile Club of Victoria ("RACV"). As such, she was entitled to apply for membership of the RACV Superannuation Fund ("the Fund"). Such entitlement arose pursuant to a Trust Deed³⁴. On 25 September 1989, the respondent exercised her entitlement and became a member of the Fund. On 10 July 1992, whilst driving to her place of employment, she was involved in a serious car accident. As a result, she became totally and permanently disabled within the meaning of the Trust Deed³⁵. In order to receive the payment provided, the respondent was required, by cl 2.4.1 of the Trust Deed³⁶, to resign from her employment with the RACV. This she did.

- 45 There was no contest that, as a result of the motor vehicle accident in which she was involved, the respondent had become "totally and permanently disabled" under the Trust Deed. Nor was there any contest concerning the fact of her termination of employment by the RACV, the amount of the payment to her and that such payment conformed to the requirements of the Trust Deed.

30 Cardozo J cited in Spillenger, "Cloistered Cleric of the Law", (1999) 66 *University of Chicago Law Review* 507 at 507.

31 *Scully v Commissioner of Taxation* (1998) 84 FCR 41.

32 Tran-Nam, "Tax Reform and Tax Simplification: Some Conceptual Issues and a Preliminary Assessment", (1999) 21 *Sydney Law Review* 500 at 505-506.

33 cf *Commissioner of Taxation v Ryan* [2000] HCA 4 at [79-84].

34 cl 1.19.

35 cl 1.1; see reasons of Gaudron ACJ, McHugh, Gummow and Callinan JJ at [10].

36 See reasons of Gaudron ACJ, McHugh, Gummow and Callinan JJ at [11].

46 On 6 December 1993, the respondent was paid \$162,293.17 from the Fund. This represented her entitlement to superannuation (\$164,957.91) less tax acknowledged (\$2,664.74). The payment was made up of two components. These were \$161,990.36 calculated in accordance with cl 2.4.1 of the Trust Deed and \$2,967.55 calculated in accordance with cl 3.5.1³⁷. The former benefit comprised seven times the respondent's final average salary of \$23,141.48. The latter comprised the return of the member's contributions repayable where a member "retires from the employ of the Employer [RACV] and from all other Gainful Work on or after attaining age 55"³⁸.

47 The "Statement of Termination Payment" completed on behalf of the Fund indicated that, for the purposes of the Act, the payment made to the respondent was made up of the following elements:

(a) A "concessional component" (consisting of an "invalidity payment" defined in s 27G of the Act and taxed pursuant to s 27C(2))	\$148,908.97
(b) Taxed element of post-June 1983 component (defined in s 27AB and taxed pursuant to s 27B of the Act)	\$ 12,452.24
(c) "Undeducted contributions" (defined in ss 27A(1) and 27A(7) and not included in assessable income)	<u>\$ 3,596.70</u>
Total	<u>\$164,957.91</u>

48 As a result of the receipt of the Statement of Termination Payment, the Commissioner of Taxation ("the Commissioner") issued an assessment to the respondent which included in her assessable income for the financial year ending 30 June 1994 a sum of \$19,897. That sum was based on the assumption that the payment which had been made to the respondent was an "eligible termination payment". The assessment was made up as follows:

5% of \$148,908.97	\$ 7,445.44
Taxed element of post-June 1983 component (as above)	<u>\$12,452.24</u>
Total	<u>\$19,897.68</u>

37 See reasons of Gaudron ACJ, McHugh, Gummow and Callinan JJ at [16].

38 cl 3.5.1(a).

- 49 The respondent first sought a "private ruling"³⁹. This was given by a Deputy Commissioner of Taxation who ruled (relevantly) that the lump sum payment of \$164,957.91 was not excluded from the definition of an "eligible termination payment" under s 27A(1)(n) of the Act; was not assessable under s 25(1) of the Act; and was exempt from the application of Pt IIIA of the Act in accordance with s 160ZZJ. To this ruling, and the assessment which it confirmed, the respondent lodged an objection. This was disallowed on 10 July 1995. The relevant reason for the disallowance, and for the finding that the lump sum payment was an "eligible termination payment", was that "[t]he payment was made from a superannuation fund in respect of [the respondent] by reason that she is or was a member of the fund". The respondent lodged an "appeal" to the Federal Court of Australia. This was dismissed by Spender J in September 1997⁴⁰. However, in June 1998, the Full Court unanimously allowed the respondent's further appeal⁴¹. That Court ordered that her objection be allowed. By special leave, the Commissioner now appeals to this Court.

Provisions of the Act

- 50 Provisions for the taxation of superannuation, termination of employment and kindred payments, are contained in subdiv AA of Div 2 of Pt III of the Act (ss 27A-27J). Subdivision AA was inserted by the enactment of the Income Tax Assessment Amendment Bill (No 3) 1984 (Cth). There have been no material amendments to that subdivision since the introduction of those provisions. The explanatory memorandum provided to the Parliament with the Bill stated that it "provides for the introduction of a comprehensive set of rules for the taxation of retirement and kindred payments". The legislative scheme covers payments made in connection with the termination of employment (such as severance payments), payments from superannuation funds and approved deposit funds (in the form of annuities or amounts in commutation of annuities), death benefits, invalidity payments, bona fide redundancy payments and approved early retirement scheme payments. A suggested theory behind the inclusion of superannuation payments in the taxpayer's assessable income is that, of their character, they amount to a kind of postponed increment of the taxpayer's income derived from years of employment. To that extent, even if capital in nature, they are notionally akin to an income payment. Whatever may be the theoretical justification of including such payments in taxable income to the extent provided, the Act was amended to give effect to the provisions of the Bill. As amended, its terms must be given effect by the courts.

39 See Pt IVAA of the *Taxation Administration Act* 1953 (Cth).

40 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921; 37 ATR 159.

41 *Scully v Commissioner of Taxation* (1998) 84 FCR 41.

- 51 The critical provision of the Act as amended, and the one defining the scope of the operation of subdiv AA⁴², is that in s 27A(1) which defines an "eligible termination payment". The key parts of the definition are contained in the reasons of the majority⁴³.
- 52 Certain matters represented common ground between the parties or issues determined below which were not in dispute for the purposes of this appeal. First, the respondent accepted that the payment which she had received otherwise fell within par (b) of the definition of "eligible termination payment" in s 27A(1). However, it was her case that the payment was not an "eligible termination payment" within the Act because it fell within par (n) of the definition and was thus "not include[d]"⁴⁴. Secondly, the payment was otherwise capital in nature⁴⁵. Thirdly, the respondent had sustained "personal injury" within the meaning of that expression as used in par (n) of the definition of "eligible termination payment"⁴⁶. Fourthly, the amount of the payment was "in the Commissioner's opinion, reasonable, having regard to the nature of the injury and its likely effect on the derivation of income from personal exertion"⁴⁷.
- 53 It was in this way that the question before this Court was reduced to a relatively narrow one of statutory construction. This was whether the payment made to the respondent fell within par (n) of the definition of "eligible termination payment" in s 27A(1) (and by reason of that fact is not included in that classification and thus not liable to taxation under the Act). Justice Cardozo thought that no one could make such a problem interesting. Whilst there are doubtless puzzles known to humanity of greater fascination, the resolution of this controversy is not without its own passing interest. This is because, as in many problems of statutory construction, there are arguments that can be arrayed for each side.

42 See the Act, ss 27B and 27C.

43 See reasons of Gaudron ACJ, McHugh, Gummow and Callinan JJ at [7-8].

44 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4924; 37 ATR 159 at 162.

45 (1997) 97 ATC 4921 at 4924; 37 ATR 159 at 163.

46 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4922; 37 ATR 159 at 160; *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 43.

47 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 51. This was conceded in the appellant's written submissions in this Court.

54 Courts today rarely pretend that only one construction is, objectively, possible in such cases⁴⁸. The function of a court is to choose the construction which it regards as preferable. In part, this may be no more than an *ex post* rationalisation of the decision-maker's impression, and reaction to the words in contest. In part, it involves the explanation of the considerations which lead one judicial mind in a particular direction when others have gone off in the other direction. My impression of the provisions of the Act applied to the present problem is the same as that of the Full Court. I must therefore consider whether that impression is justified by closer analysis. I recognise that no single element in the reasons that follow is sufficient. It is the combination of a number of points that brings me to my conclusion and confirms the initial impression.

55 In problems of this kind, the mind of the decision-maker may be focussed more precisely if he or she recognises for their full worth the strength of the considerations which, it is urged, should cause the rejection of the initial contrary impression and the acceptance of the logic of competing arguments. So I will start my analysis with an acknowledgment of the points advanced by the Commissioner in support of the construction of the Act which he urged.

The Commissioner's arguments

56 First, the Commissioner argued that the Full Court had fallen into error in atomising the provisions of par (n) of the definition of "eligible termination payment" in s 27A(1) of the Act. Instead, he submitted, it was necessary to consider the context in which the provisions appear, their purposes and the meaning of the paragraph when read as a whole. So far as the context and purposes of par (n) are concerned, the Commissioner argued that they should be derived from an understanding of the object of subdiv AA. He suggested that this could be assisted by reference to the terms of the explanatory memorandum which had accompanied the Bill. That document identified the legislative objectives as being to subject payments made from superannuation funds upon retirement through age or invalidity to the new provisions; to exclude from such payments "capital sums paid ... as compensation for loss of income through personal injury"⁴⁹; and, where a premature termination of employment gave rise to an eligible termination payment occurring "by reason of the taxpayer's

48 cf *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 140; *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407 at 441; *Cannane v J Cannane Pty Ltd (In liq)* (1998) 192 CLR 557 at 589-591; *Marks v GIO Australia Holdings Ltd* (1998) 73 ALJR 12 at 35; 158 ALR 333 at 366.

49 Explanatory memorandum to the Income Tax Assessment Amendment Bill (No 3) 1984 and the Income Tax (Companies, Corporate Unit Trusts and Superannuation Funds) Amendment Bill 1984 ("explanatory memorandum") at 5.

physical or mental incapacity to engage in that employment", to accord concessional taxation treatment to such payment⁵⁰. It was argued that the interpretation urged for the respondent, and accepted by the Full Court, would frustrate the achievement of these purposes, so explained. In giving effect to par (n) it was essential to do so in the context of the entire scheme of the subdivision. In that context, the existence of a personal injury was not simply a contemporaneous event. It was a necessary or essential precondition to attracting the effective exclusion ("but does not include") provided by the paragraph.

57 Secondly, the Commissioner placed emphasis on the choice of the word "consideration" in par (n), especially when contrasted with the use of the word "payment" or "payments" in most of the other paragraphs of the definition. In the context, and read with par (m), the use of the word "consideration" must be taken to have been deliberate. It would have been easy to have simply repeated the word "payment". In the context, the phrase "consideration ... in respect of ... personal injury" must therefore (so it was argued) mean something given in exchange "for ... or in respect of" the "personal injury" referred to. The word, it was submitted, indicated a necessary relationship between the "personal injury" and the "consideration" so that the latter was assessed by reference to the former. Although the happening of the "injury" was a relevant "trigger" to occasion the steps necessary to enliven the respondent's rights under the Trust Deed, there was no necessary or essential relationship in this case between the "consideration" and the "personal injury". On the contrary, the payment made was not assessed in proportion to the "personal injury" and bore no relationship at all to the extent of the injury suffered. Instead, it was calculated by reference to the Trust Deed and specifically the respondent's final average salary, together with a return of her own contributions. These facts, it was submitted, made plain that the payment received was not "consideration" of the type envisaged.

58 Nor was the payment received consideration "for, or in respect of, personal injury to the taxpayer". Instead, it was consideration for or in respect of the respondent's membership of the Fund, her resignation from her employment and her claim to entitlements in accordance with the Trust Deed. That was the proper characterisation. In the context, the word "consideration" pointed to a closer connection between the personal injury and the sum that the taxpayer received. It would thus be apt to include a verdict in a damages action brought for or in respect of personal injury. But it would not be appropriate to apply it to the payment made in the present case which, from first to last, was one made from a superannuation fund by reason that the taxpayer was a member of such fund, just as par (b) contemplated.

50 Explanatory memorandum at 5-6.

59 Thirdly, the Commissioner accepted that the words "in respect of" had a wide meaning⁵¹. However, he contended that they possessed "a chameleon-like quality in that they commonly reflect the context in which they appear"⁵². When that context was examined, in the language used in par (b), it suggested the requirement that the payment should be proportionate with, or measurable by reference to, the loss or damage suffered in order to be characterised as a payment "in respect of ... personal injury". That, it was said, was another element missing in the present case. The reference point in the Trust Deed which attracted the respondent's entitlement to the suggested "consideration of a capital nature" which she received was not the "personal injury" which she suffered. That was merely the occasion giving rise to the series of steps necessary for her receipt of payment pursuant to the Trust Deed. Although the definition of "total and permanent disablement" in the Trust Deed incorporated the definition of "disablement" and although this, in turn, referred to disablement "caused through bodily injury" (which could be taken as equivalent to "personal injury" in par (n) of the statutory definition), the definition in the Trust Deed was not so confined. It referred also to "physical or mental illness, disease, infirmity or accident". To characterise the payment made pursuant to a clause so widely expressed as being "consideration ... in respect of ... personal injury" was to attempt to squeeze the payment into an inappropriate category, bearing a different label the other elements of which were being ignored.

60 The Commissioner therefore argued that it was incorrect to regard the payment as being consideration "for" or "in respect of" any "personal injury to the taxpayer". Its proper characterisation was a payment in accordance with the Trust Deed of the Fund. The Commissioner's counsel, warming to his own arguments, went so far as to say that the payment had "nothing to do" with "personal injury to the taxpayer" as such. At most, the "injury" was only connected temporally with the entitlement to the payment. It could not, therefore, be classified as having been made "for ... or in respect of" personal injury as that phrase was understood in the entire context of par (n) and in its place in the definition of "eligible termination payment" in s 27A(1) of the Act.

61 Fourthly, the Commissioner relied on the provisions of s 27G of the Act dealing specifically with "invalidity payments". He argued that the construction urged for the respondent, and accepted by the Full Court, would leave no work for s 27G to perform. It is an accepted principle of statutory construction that courts will approach the meaning of legislation so as to avoid capricious or

51 cf *Workers' Compensation Board (Q) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-654.

52 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47.

irrational results or results which would deprive an enacted provision of any practical operation⁵³. If at all possible, a construction of par (n) in the definition of "eligible termination payment" in s 27A(1) should not be accepted which would leave s 27G without a field of operation. The Full Court had agreed to this principle⁵⁴, which had also been relied on by the primary judge⁵⁵. However, it sought to explain the scope that would remain for the operation of s 27G as illustrated by the present case. If payment were made from a superannuation fund on the ground of the other bases of entitlement in the definition of "total and permanent disablement" in the Trust Deed – such as the physical or mental illness, disease or infirmity of the member – this would, in some cases, fail the test of "consideration ... in respect of ... personal injury to the taxpayer". However, it would come within the test afforded by the definition of "invalidity payments" and, at the relevant time, have attracted the concessional rate of tax under s 27G⁵⁶. If it were a "personal injury", whether in the general sense of a "bodily injury" as stated in the Trust Deed, or in an extended sense of "physical or mental illness, disease, infirmity or accident" which qualified as a "personal injury"⁵⁷, no tax would be paid. The payment would amount to "consideration" that was not included in the definition of an "eligible termination payment". It would thus not be brought to tax. If, however, there was no "personal injury", yet payment in the nature of consideration in respect of some other eligible condition, only concessional tax was (at the relevant time) to be paid.

- 62 The Commissioner suggested that this was not a sensible application of s 27G; nor one which should be adopted by an artificial characterisation of the "consideration" received by a taxpayer in circumstances such as the present. Quite properly, the Commissioner conceded that his argument based on s 27G was not conclusive. It is comparatively easy, in complex legislation criticised in this respect for its drafting⁵⁸, to arrive at results which, in particular

53 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321; *AMP Inc v Utilux Pty Ltd* [1972] RPC 103 at 109 (HL) per Lord Reid; *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 574 per Gummow J.

54 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 53.

55 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4924; 37 ATR 159 at 162.

56 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 53.

57 cf *Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252-253; *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 332, 352.

58 *Scully v Federal Commissioner of Taxation* (1997) 97 ATC 4921 at 4924; 37 ATR 159 at 163.

circumstances, are less than wholly satisfying. However, the Commissioner submitted that the result accepted by the Full Court was out of harmony with the scheme of the Act. It failed to afford real scope for the operation of s 27G in a way compatible with the interpretation of par (n) of the definition of "eligible termination payment" accepted by the Full Court. So far as possible, the meaning of par (n) should reflect the symmetry that would be imputed to the Parliament as its purpose in enacting subdiv AA containing both the definition in s 27A(1) and the provision for concessional rates of tax for invalidity payments in s 27G.

63 I trust that this summary of the principal arguments for the Commissioner does justice to his submissions. Certainly, those submissions demonstrate that the construction of the Act urged by him is one which is available and has some attractions. Nevertheless, I am not convinced that the alternative construction is erroneous as to oblige this Court to set aside the orders of the Full Court. On the contrary, both as a matter of overall impression, and of analysis, I believe that the respondent's construction is to be preferred.

The payment is not an "eligible termination payment"

64 First, the construction urged for the respondent is not inconsistent, but accords with the explanatory memorandum provided with the Bill that contained the disputed provisions. There is nothing in the statement that subdiv AA has a purpose or objective to exclude capital sums paid as compensation for loss of income through personal injury that would apply to the sum paid to the respondent here. The Commissioner accepts that such sum is of a capital nature. He concedes that the amount is reasonable "having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income from personal exertion". The last-mentioned requirement, being contained in par (n) of the definition, adds emphasis to the purpose of the "non-inclusion" (the "exclusion"). The fact that the Commissioner is empowered to apportion the amount or value of the consideration paid "for, or in respect of, personal injury", according to its "likely effect on the capacity of the taxpayer to derive income from personal exertion", provides a check on artificially inflated payments which are not truly "for, or in respect of, personal injury". It also gives a clue to the purpose of the "non-inclusion" or "exemption" contained in par (n).

65 By inference, the Parliament concluded that consideration of a capital nature paid for or in respect of a "personal injury" will, to the extent that the Commissioner is of the opinion that it is reasonable on the stated criteria, not be deemed an "eligible termination payment" of the ordinary kind from a superannuation fund which must be brought to tax. Why should this be so? There must be a relevant legislative purpose or object. The reason for such a legislative judgment is actually not difficult to find. Subdivision AA introduces provisions of general application concerning superannuation and kindred payments, out of recognition of the rapid expansion of such payments in recent

decades⁵⁹. Whereas it has been judged appropriate to levy tax upon the generality of such payments, the Parliament has held back where the payment made represents (relevantly) "consideration ... for, or in respect of, personal injury". At least it has done so to the extent that the Commissioner regards such "consideration" as reasonable by the stated criteria. This view of the purpose and operation of par (n) is reinforced when regard is had to par (m). There too the payment is not within the ordinary scope of the superannuation and kindred payments brought to tax by subdiv AA. It represents "consideration" which has, as a component (to the extent judged reasonable by the Commissioner), an element extraneous to the ordinary features of superannuation. There it is "consideration ... for, or in respect of, a legally enforceable contract in restraint of trade by the taxpayer". Thus, far from supporting the arguments of the Commissioner, I consider that the explanatory memorandum supports the respondent by directing attention to the overall objects of subdiv AA. Paragraphs (m) and (n) are within exceptions to the general provision, recognised by the Parliament.

66 Secondly, I cannot accept the construction of the word "consideration" as appearing in par (n) urged by the Commissioner. Neither at first instance nor in the Full Court was such a narrow view adopted. Whilst it is true that some weight should be given to the differential use of the word "consideration" in par (n) (as in par (m)), too much should not be attached to this difference. This is so because the "consideration" is, within the structure of the definition of "eligible termination *payment*", necessarily an exemption from earlier paragraphs in the definition, all of which refer to "any *payment*"⁶⁰ or "a *payment*"⁶¹. Thus the "consideration" must itself be a "payment". The attempt to impose on the word, in this statutory context, notions derived from the special sense in which "consideration" is used in the common law of contract (ie as a promise given or an act done in exchange for an act or promise of another party) gains little support from the statutory context which surrounds the word, relevantly in par (n).

67 In particular, the phrase "in respect of", and especially in juxtaposition with the use of the word "for", makes it clear that the "consideration" is not intended to contain a notion of particular proportionality between the "consideration" paid and the "personal injury" suffered. The fact that the Commissioner is

59 For a general description of the growth of superannuation and federal regulation of it see *Attorney-General (Cth) v Breckler* (1999) 73 ALJR 981 at 984-986, 993-996; 163 ALR 576 at 580-582, 592-595.

60 Pars (a), (aa), (b), (ba), (c), (ca), (d), (e), (f), (g), (h) and (j).

61 Pars (da), (db), (ga) and (gb).

empowered to adjust the "amount or value of the consideration" by reference to the stated criteria indicates that the drafter addressed attention to the kind of exchange which the paragraph contemplated. The Parliament provided a mechanism to ensure that the relationship deemed necessary to the context between the "consideration" and the "personal injury" could be established. In any case, I agree with the conclusion of the Full Court that it is "accurate to speak of the benefits provided under the scheme as having been earned by the members. It is in that sense that the payment is a form of 'consideration' moving to the member ... from the Trustees ... in satisfaction of the Trustees' obligations and responsibilities to the member."⁶² Such a finding accords with judicial descriptions of the nature of superannuation funds and the relationship which they typically establish between their trustees and their members⁶³. As a member of the Fund, the respondent was bound by the Trust Deed. She was required to pay her contributions to the Fund, as she did. In return, she received the right to payment of a sum of money under the Trust Deed, relevantly in accordance with cll 2.4.1 and 3.5.1(c). The sum paid to her was received in discharge or satisfaction of that right. In such circumstances, the payment sufficiently attracts the statutory description as "consideration". It is "something given in payment"⁶⁴. It is a word used outside its special, technical, and presently irrelevant context in the law of contract⁶⁵.

68 Thirdly, it is necessary to meet the Commissioner's argument about the characterisation of the "consideration" in this case. There are several answers to this argument. The words "in respect of" are indisputably very wide words of connection. They signify "some discernible and rational link" between the subjects postulated⁶⁶. Whilst, like any other statutory phrase, they take their

62 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 50.

63 See eg *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1610; [1991] 2 All ER 513 at 537; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 at 597; [1991] 2 All ER 597 at 605-606; *Lock v Westpac Banking Corporation* (1991) 25 NSWLR 593 at 601-602; *Uncle v Parker* (1994) 55 IR 120 at 123.

64 *The Oxford English Dictionary*, 2nd ed (1989) at 769, meaning 5.

65 See eg *Macquarie Dictionary*, 3rd ed (1997) at 467, meaning 4: "a recompense for service rendered, etc; a compensation. 5. *Law* in a contract, or other legal transaction, the promise by which some right or benefit accrues to one party, in return for which the party who receives the benefit promises or conveys something to the other."

66 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47-48.

meaning from the context⁶⁷, here the context does little to cut back the potential width of the relationship. This is especially so because of the contrasting use of the preposition "for". It is not sufficient to point to a connection which is "merely coincidental or extraneous"⁶⁸. Nor is it inherent in the phrase that the link must be causal. To adapt language used to describe an equally wide phrase ("with respect to"), the connection "can be direct or indirect, close or distant"⁶⁹ provided that the consideration can fairly be described as "in respect of ... personal injury to the taxpayer". It is not to the point to say that the "consideration" is paid "in respect of" the taxpayer's entitlements under the superannuation deed. It is a necessary postulate of the application of par (n) that there has been (relevantly) a "payment made from a superannuation fund in respect of the taxpayer". Otherwise the exclusion would have no operation. Therefore, a postulated connection, even a close and direct one, between the consideration and the member's rights under the Trust Deed is a given. It cannot affect, one way or the other, the further task of characterisation which the words "in respect of ... personal injury" call forth.

69 The construction urged by the Commissioner is not one apt to a provision in subdiv AA dealing with the entire class of superannuation and kindred payments. Whereas on its face par (n) appears to be an exclusion of the specified consideration "in respect of ... personal injury", the construction favoured by the Commissioner would confine its operation to an extremely narrow category. Substantially it would be that of a damages verdict or settlement "in respect of ... personal injury". It is not self-evident as to why par (n) should be so confined, given that the context is that of superannuation payments generally. Furthermore, the other broad categories of exclusion such as payments made for a legally enforceable covenant in restraint of trade, do not suggest a narrow operation of par (n).

70 Even if some of the Commissioner's criticisms of the construction urged for the respondent hit their mark, his own preferred construction involves artificialities. It contemplates borderline cases which invite the complaint that the operation of the Act postulated by him also lacks symmetry. All legislation, applied to variable facts, involves the drawing of lines. The fact that a Trust Deed might require payment of "consideration of a capital nature" in respect of

67 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 51.

68 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 51, see also at 47.

69 *Abebe v The Commonwealth* (1999) 73 ALJR 584 at 592 per Gleeson CJ and McHugh J; 162 ALR 1 at 11.

disease, illness or infirmity not amounting to "personal injury" is scarcely to the point. The Act in question here can hardly be described as a pristine model of symmetry and internal cohesion. All that can be done is to apply the language of the Act to the facts of the particular case. If those facts fairly fall within the exclusion invoked, the "consideration" received by the taxpayer as a payment from a superannuation fund will not be an "eligible termination payment". The distinction between a disablement which constitutes a "personal injury" and one which does not is not unknown to the law⁷⁰. Arguments about the meaning and operation of this Act are not advanced by complaining about the artificialities of the distinctions required by its terms.

71 Fourthly, as the Full Court noted, the respondent's argument still leaves an appropriately large field of operation for s 27G⁷¹. That section may operate where, in the particular case, the relevant payment is of an income nature⁷². It may operate where, although incapacity is the cause of the termination of employment, there is no material connection between the payment and a personal injury to the taxpayer⁷³. It may operate where the incapacity to derive income is caused by a condition other than a "personal injury" such as a "disease, illness or infirmity" falling outside that classification. And it may operate to the extent that the Commissioner is not of opinion that the amount or value of the consideration, for or in respect of personal injury, is "reasonable having regard to the nature of the personal injury and its likely effect on the capacity of the taxpayer to derive income"⁷⁴.

72 A payment from a superannuation fund may thus amount to consideration of a capital nature but not, to that extent, attract the exclusion contemplated in par (n). Indeed, the enactment of s 27G, with the concessional tax treatment applied to an "invalidity payment" within that section prior to 1 July 1994, itself suggests that par (n) of the definition of "eligible termination payment" should have a broad and not a narrow or restricted meaning. Since 1 July 1994, invalidity payments under s 27G have been exempt from income tax under the Act⁷⁵. In these circumstances, it would be a curious result, if the provisions of the Act with respect to an "eligible termination payment" made as "consideration

70 cf *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 332-334, 352.

71 The Act, s 27CB.

72 cf par (n) of the definition and s 25(1) of the Act.

73 *Scully v Commissioner of Taxation* (1998) 84 FCR 41 at 52-53.

74 The Act, s 27A(1)(n).

75 The Act, s 27CB(1).

... for, or in respect of, personal injury" were given a narrow or restricted operation. The scheme of the Act, as it now stands, suggests a general legislative purpose to treat receipts by the taxpayer from a superannuation fund beneficially and protectively where they are "in respect of ... personal injury to the taxpayer", or in circumstances where the employment of the taxpayer has been terminated "because of ... physical or mental incapacity to engage in that employment"⁷⁶. There are many reasons why the Parliament should have adopted this course in subdiv AA. Not all of them are based on such nebulous reasons as sentiment or warm-hearted compassion.

Approach to construction: general considerations

73 Conceding that the arguments for and against the construction adopted by the Full Court are finely balanced, there are two considerations of a general character that should be placed in the scales to help resolve this controversy. The first is that par (n) of the definition of "eligible termination payment" is in the nature of an exemption from general provisions of the Act designed to bring to tax, relevantly, payments made to a taxpayer from a superannuation fund. Given the generality of the operation of the definition to achieve the purposes of the new subdiv AA of the Act and the generality of the exemptions, of which par (n) is but one, it would be normal to construe such an exemption so as to avoid an unduly narrow or restricted field of operation. This is, in part, because the Parliament has gone to the trouble of enacting the exemption as an exception to the general rule. In part, it is because of the wide variety of the provisions of the Trust Deed to which the paragraph must apply. In part, it is because of the protective idea which lies behind an exemption expressed in the ample language of "consideration ... in respect of ... personal injury". Where the Parliament has afforded this benefit or advantage to a class of taxpayers who have suffered a "personal injury" which is "likely" to have an "effect on the capacity of the taxpayer to derive income from personal exertion", it is not for the courts to cut back the applicable exemption. This is especially so because the Parliament has enacted a substantial practical check against abuse of, or disproportion in, claims to such an exemption. That check is afforded by the discretion given to the Commissioner to determine the "amount or value of the consideration" which, in his opinion, is "reasonable".

74 The second consideration of a general character brings me back to Justice Cardozo's comments with which these reasons opened. Questions of statutory construction are generally thought uninteresting because, upon many of them, it is perfectly legitimate for different decision-makers to reach opposite opinions. The present may be such a case. The problem here arises in an appeal from the construction favoured by the Full Court. This Court has said several times that,

76 The Act, s 27G(b).

normally, it is for the Full Court to settle contested matters of construction affecting the Act⁷⁷. Of course, when special leave is granted, this Court must perform its own appellate function. But it should do so with due recognition of the function of the Full Court, and with an appreciation that it ought not to disturb that Court's orders unless it can be demonstrated affirmatively that the reasoning on which those orders are based is wrong. Even if differing views may be held about the meaning of par (n) in the definition of "eligible termination payment" in s 27A(1) of the Act, I am not convinced that the construction preferred by the Full Court was wrong. Indeed, in my view it was right. It should stand.

Application of an intervener

75 It is necessary once again to refer to the ruling of the Court of an application to intervene in an appeal. The Victorian WorkCover Authority⁷⁸ ("the Authority") moved the Court for leave to intervene. Alternatively, it asked leave to be heard as an *amicus curiae*. By majority, the application was granted but the right to be heard orally was rejected. The Authority was permitted to leave its written submissions with the Court. They were then adopted by the Commissioner to supplement his own submissions.

76 In two recent decisions I have expressed my opinion that this Court should adapt its procedures to permit, in appropriate cases and subject to appropriate conditions, leave to be given to persons and organisations that seek to intervene or act as an *amicus curiae* before the Court⁷⁹. I will not repeat what I said there.

77 There were, in my view, particular reasons why the Authority should have been given unrestricted leave to intervene in this appeal. First, neither party to the appeal objected. Secondly, the Authority, in support of its motion, had filed written submissions which were concise, precisely argued and, in part at least, concerned with matters not addressed in the submissions for the Commissioner. Thirdly, the Authority (unlike many organisations making such applications) had an actual legal interest of its own in the outcome of these proceedings. The respondent had commenced separate proceedings in the County Court of Victoria in Melbourne against the Authority and another defendant in respect of the

77 eg *Federal Commissioner of Taxation v Westfield Ltd* (1991) 22 ATR 400 at 402; cf Hill, "What Do We Expect from Judges in Tax Cases?", (1995) 69 *Australian Law Journal* 992 at 999-1000.

78 Established by *Accident Compensation Act* 1985 (Vic), s 18.

79 *Levy v Victoria* (1997) 189 CLR 579 at 651-652; *Attorney-General (Cth) v Breckler* (1999) 73 ALJR 981 at 1004-1006; 163 ALR 576 at 607-610.

injuries received in the motor car accident which initiated the payment from the Fund. The Authority contended that the "proper characterisation of the superannuation lump sum payment" the subject of this appeal, and whether or not it was an "eligible termination payment", would, in fact and in law, determine the Authority's liability to the respondent in the County Court proceedings. This was because of a provision of Victorian law suspending for a specified period the entitlements of a person otherwise qualifying for payment if that person had received an "eligible termination payment" within the meaning of the federal Act⁸⁰. Before that question was determined, the Authority asked to be heard by this Court. The Authority did so in circumstances where its interests were potentially adversely affected in proceedings before a court that would be bound by this Court's decision on the point. Even if the somewhat broader view which I favour in these matters were rejected and the test applied which Brennan CJ expressed in *Levy v Victoria*⁸¹, it is plain that this was a case where "[a] declaration of a legal principle or rule by this Court will govern proceedings that are pending or threatened in any other Australian court to which an applicant to intervene is or may become a party".

78 Fourthly, during the special leave hearing, one ground which attracted this Court to the grant of special leave in a matter which would otherwise ordinarily terminate in the Full Court of the Federal Court was expressed to be the "considerable importance" of the case and, "as the submissions of the 'intervener' show, [its] ramifications outside the scope of the Act"⁸². If these were factors pertinent to opening the door of this Court to the appeal, it seems unreasonable, that door having been opened, to exclude their full argumentation to assist this Court, including with oral submissions.

79 Fifthly, it was not as if, the written submissions being furnished in advance, oral supplementation would have taken long or extended the hearing beyond the day assigned to the appeal. Either the Authority had no entitlement to be heard or, if it had such an entitlement, it should have been heard fully. To receive its written submissions but to exclude short oral elaboration (counsel being present and willing to provide it) seems, with respect, difficult to reconcile with principle.

80 Sixthly, this Court was on notice that the Commissioner and the Authority had agreed (whatever the outcome of the application for leave to intervene) that

80 See *Accident Compensation Act*, s 96(2).

81 (1997) 189 CLR 579 at 602.

82 Special leave transcript of proceedings, 12 February 1999, at 3 per McHugh J.

they would share equally the respondent's costs of the appeal⁸³. On the grant of special leave, this Court ordered that such costs should be paid, whatever the outcome of the appeal, given that it was accepted that the case was in the nature of a test case on a "question of public interest"⁸⁴. Although an applicant to intervene cannot by such arrangements purchase an entitlement to be heard as an intervener, the legal and practical interest of the Authority, reflected by such arrangements, warranted acceding to its application. That is why I would have made the order which the Authority sought and which no party opposed. In my opinion, the Authority should have been given unrestricted leave to intervene and to present its arguments.

81 The written submissions for the Authority, which I have read, do not, however, cause me to change the opinion which I have expressed in this appeal. In particular, I do not consider that it is legitimate to construe federal legislation, such as the Act, by reference to a derivative use made in State legislation (such as the *Accident Compensation Act* 1985 (Vic)) of expressions used in a federal Act (such as the definition of "eligible termination payment" in the Act). The federal Act must be construed in accordance with its own terms and for its own purposes and to achieve its own objectives. Different State legislatures might well have different purposes in enacting laws that relate in some way to a federal Act. The impact of that Act on State law must take its course in the normal way provided by the Constitution. It is true that the interpretation of "eligible superannuation fund" for the purposes of the federal Act will have significant consequences for the operation of the Victorian Act. But that is because, by the choice of the Victorian Parliament, it has incorporated reference to that phrase in its own enactment. It must consequently be taken to accept whatever meaning is ultimately assigned to that phrase as appearing in the federal Act. Its use of it in its own legislation cannot control that meaning in any way.

Order

82 The appeal should be dismissed with costs.

83 Transcript of proceedings, 7 September 1999, at 4.

84 Special leave transcript of proceedings, 12 February 1999, at 3.