HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

ROY MORGAN RESEARCH PTY LTD APPELLANT

AND

COMMISSIONER OF TAXATION & ANOR RESPONDENTS

Roy Morgan Research Pty Ltd v Commissioner of Taxation [2011] HCA 35
28 September 2011
M177/2010

ORDER

1. *Appeal dismissed.*

2. *The appellant pay the costs of the first respondent.*

On appeal from the Federal Court of Australia

Representation

J J Batrouney SC and K L Walker with G A Hill for the appellant (instructed by Hall & Wilcox)

S P Donoghue for the first respondent (instructed by Australian Government Solicitor)

S J Gageler SC, Solicitor-General of the Commonwealth with S P Donoghue and D F O'Leary for the second respondent (instructed by Australian Government Solicitor)

CATCHWORDS

Roy Morgan Research Pty Ltd v Commissioner of Taxation

Constitutional law (Cth) – Taxation – s 51(ii) – Superannuation guarantee charge imposed upon employers who fail to provide to employees a prescribed level of superannuation – Charge debt due to Commonwealth and paid into Consolidated Revenue Fund for benefit of employees – Whether law imposing charge not a law with respect to taxation because charge is not imposed for "public purposes", and because it confers a "private and direct benefit" on employees of those employers who pay charge.

Words and phrases – "charge", "compulsory exaction", "private and direct benefit", "public purposes".

Constitution, s 51(ii).
Superannuation Guarantee (Administration) Act 1992 (Cth), ss 16, 17.
Superannuation Guarantee Charge Act 1992 (Cth), ss 5, 6.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. In *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation*[1], the Full Court of the Federal Court (Keane CJ, Sundberg and Kenny JJ), on an "appeal" under s 44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth), upheld the validity of the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ("the Administration Act") and the *Superannuation Guarantee Charge Act* 1992 (Cth) ("the Charge Act").

2 By special leave, the appellant appeals to this Court against that decision. The appellant submits, inter alia, that the only available head of power to support the legislation is s 51(ii) of the Constitution, and that the superannuation guarantee charge ("the Charge") provided for in the legislation is not a tax because it is not imposed for "public purposes". For the reasons which follow, the constitutional challenge to the Administration Act and the Charge Act in this Court fails and the appeal should be dismissed.

The legislation

3 Broadly speaking, the effect of the legislation under challenge is that if, as specified in the Administration Act, an employer fails to provide to all employees a prescribed minimum level of superannuation then any shortfall represented by failure to meet that minimum level in full, becomes the Charge. This impost is levied on the employer by the Charge Act. The amount of the Charge is a debt due to the Commonwealth and payable to the respondent, the Commissioner of Taxation: *Taxation Administration Act* 1953 (Cth), Sched 1, s 255-5. The Charge includes a component for interest and an administration cost. The result is to supply an incentive to employers to make contributions to superannuation for their employees without incurring a liability to the Commissioner for the Charge.

4 The revenue raised by the Charge is dealt with as "public money" to which Pt 3 (ss 8-16) and Div 2 of Pt 4 (ss 26-27) of the *Financial Management and Accountability Act* 1997 (Cth) apply. This reflects the operation of s 81 and s 83 of the Constitution. Section 81 states:

> "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be

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1 (2010) 184 FCR 448.

appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

Section 83 provides that money is not to be drawn "from the Treasury of the Commonwealth except under appropriation made by law".

5 As the Full Court noted, in providing separately for the Charge Act and the Administration Act, the Parliament followed the well-established procedure to comply with the requirement of s 55 of the Constitution that laws imposing taxation shall deal only with the imposition of taxation[2]. Thus the Charge Act does no more than impose what is said to be a tax and fix the rate. It is the Administration Act which deals with the incidence, assessment and collection of the Charge. Section 3 of the Charge Act states that the Administration Act is incorporated and to be read as one with the Charge Act.

6 In the argument advanced in this Court by the appellant, an attempt was made to draw support from the linkage between the Charge Act and the Administration Act for the proposition that the Charge Act is not what otherwise it obviously appears to be, namely, a law imposing taxation which complies in form with s 55 of the Constitution, and is not a law supported by s 51(ii).

7 In response, the Attorney-General of the Commonwealth, the second respondent, referred to the rejection of a similar argument in *Logan Downs Pty Ltd v Federal Commissioner of Taxation*[3]. That argument had emphasised the association between the laws imposing taxation[4] and the separate provisions for administration made by the *Wool Industry Act* 1962 (Cth). These required any wool broker who sold shorn wool for another to pay the tax imposed by the taxation laws and authorised recoupment of an amount equal to the tax paid by retention out of the proceeds of sale or by recovery from the purchaser of the wool. Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ[5] observed that the

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2 (2010) 184 FCR 448 at 452. See also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 585; [1993] HCA 12; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 407-412 [38]-[50]; [2004] HCA 53.

3 (1965) 112 CLR 177 at 186; [1965] HCA 16.

4 *Wool Tax Acts* (No 1)-(No 5) 1964 (Cth).

5 (1965) 112 CLR 177 at 186-187.

submission by the plaintiff invited an inference that the taxing legislation had been enacted to raise money to increase the Consolidated Revenue Fund with a view to making partial provision for the appropriations thereout to support the operations of the Australian Wool Board. Their Honours then said[6]:

> "However, even to draw this inference would not lead to the conclusion that the *Wool Tax Acts* were not laws with respect to taxation. It would do no more than reveal why Parliament had imposed the taxation in question."

8 In that regard, it should be added that Pt 8 (ss 63A-71) of the Administration Act is headed "Payments of amounts of shortfall components for the benefit of employees". Part 8 applies to a charge payment in respect of the benefiting employees which is made by or on behalf of an employer (s 63A(1)). Section 63B is headed "Overview of this Part" and states that if a payment to which Pt 8 applies is made, the Commissioner is required to pay or otherwise deal with an amount called "the shortfall component" for the benefit of benefiting employees, as provided in ss 65-67. The "shortfall component", in general terms, is the lesser of the amounts paid by the employer as the Charge, and the amount of employee entitlement calculated at the time the payment was made (s 64A, s 64B).

9 The Commissioner is obliged by Pt 8 to deal with this shortfall for the benefit of the employee by payments, directly to an employee aged 65 years or more and to an employee who has retired due to permanent incapacity or invalidity (ss 65A and 66); or to the legal personal representative of a deceased employee (s 67). Otherwise, the Commissioner is to deal with the shortfall by payment to a retirement savings account, an account with a complying superannuation fund or an account with a complying approved deposit fund, which in each case is held in the name of the employee and that is determined by the Commissioner to belong to the employee (s 65). Amounts which the Commissioner is required to pay under Pt 8 are payable out of the Consolidated Revenue Fund (established by s 81 of the Constitution). This is appropriated in accordance with s 83 of the Constitution by the standing appropriation made by s 71 of the Administration Act.

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6 (1965) 112 CLR 177 at 187.

The appellant's case

10 The Full Court held (and this conclusion is not challenged by the appellant) that Pt 8 of the Administration Act is supported at least by the provision in s 51(xxiii) of the Constitution for the making by the Parliament of laws with respect to "invalid and old age pensions"[7].

11 However, the appellant challenges the validity of the provisions made in the Administration Act and the Charge Act dealing with the Charge itself. It submits, first, that these provisions confer a "private and direct benefit" on the employees of those employers who pay the Charge and that this is effected by the compulsory transfer of money from the employers. The second submission is that by reason of the conferring of a private and direct benefit in this way, the Charge is not imposed for "public purposes". The third submission is that an essential element for the characterisation of a "tax" is that it be imposed for "public purposes". It follows, the appellant submits, fourthly and finally, that neither the Charge Act nor the Administration Act is a law with respect to "taxation" within the meaning of s 51(ii) of the Constitution, and that, there being no other head of supporting power to be found in s 51, the legislation establishing the Charge and providing for its administration is invalid.

12 The first and second submissions should not be accepted in an unqualified form, and, that being so, the final submission fails. In order to demonstrate why this is so, it is necessary to begin with some general considerations.

Taxation

13 The legislative power conferred by s 51(ii) is subject to the restriction in that paragraph "but so as not to discriminate between States or parts of States". Of the term "taxation" as it appears in s 51(ii), Isaacs J said in 1908 that it was "a word so plain and comprehensive that it would be difficult to divine anything to surpass it in simplicity and amplitude"[8]. Subsequently, in *The Commonwealth v*

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7 (2010) 184 FCR 448 at 481 [98]-[100].

8 *R v Barger* (1908) 6 CLR 41 at 82; [1908] HCA 43.

Colonial Combing, Spinning and Weaving Co Ltd[9], Isaacs J emphasised that the executive power does not extend to the levying of taxation and that this requires the exercise of legislative power.

14 There are a number of references in the Constitution to taxation, in addition to that in s 51(ii). Reference has already been made to s 55. Sections 53, 54 and 55 impose particular requirements upon the powers and procedures of the two Chambers of the Parliament with respect to laws and proposed laws imposing or dealing with the imposition of taxation. Failure to observe the requirements of s 55 brought down the legislation at issue in *Air Caledonie International v The Commonwealth*[10] and *Australian Tape Manufacturers Association Ltd v The Commonwealth*[11]. Section 114 is a prohibition directed both to the Parliaments of the Commonwealth and those of the States. Without the consent of the Parliament of the Commonwealth, a State may not impose any tax on property of any kind belonging to the Commonwealth; the Commonwealth, on its part, may not impose any tax on property of any kind belonging to a State.

15 Further, with respect to federal laws, s 51(xxxi) of the Constitution requires just terms for certain acquisitions of property. However, taxation stands outside the guarantee provided by s 51(xxxi)[12]. The result is that some laws which are held not to impose taxes nevertheless may be invalid by reason of s 51(xxxi). In *Tape Manufacturers*, the law under challenge was held not to be a law with respect to the acquisition of property but to be a law imposing taxation which nevertheless was invalid because there had been a contravention of s 55 of the Constitution.

16 It should be added that the discernment of a legislative objective to raise revenue is not necessarily a determinant that the exaction in question bears the

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9 (1922) 31 CLR 421 at 433-434, 443-445; see also at 459-461 per Starke J; [1922] HCA 62. See further *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 44 [80]; [2009] HCA 23.

10 (1988) 165 CLR 462 at 471-472; [1988] HCA 61.

11 (1993) 176 CLR 480 at 507-508; [1993] HCA 10.

12 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 408; [1979] HCA 47.

character of taxation[13]. For example, the objective of the imposition of a customs tariff at a high level may be to protect domestic industry by providing a disincentive to the importation of competing products. The point was made by Kitto J in *Fairfax v Federal Commissioner of Taxation*[14] with reference to the statement in *United States v Sanchez*[15]:

> "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. *Sonzinsky v United States*[16]. The principle applies even though the revenue obtained is obviously negligible, *Sonzinsky v United States*[17], or the revenue purpose of the tax may be secondary, *J W Hampton [Jr] & Co v United States*[18]. Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate".

17 The notion expressed in various other taxation cases of "the purposes of the administration of Government" and variants thereof thus have to be understood as encompassing the considerations just mentioned.

Public purposes

18 This expression, upon which the appellant placed much emphasis for its argument, is used in various legal contexts. These include its use in statutory expressions designed to confer or preserve an immunity from rating and other revenue laws, and in expressions designed to limit the scope of powers of

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13 cf *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 178 [90]; [1999] HCA 62; *Luton v Lessels* (2002) 210 CLR 333 at 343-344 [13]; [2002] HCA 13.

14 (1965) 114 CLR 1 at 12; [1965] HCA 64.

15 340 US 42 at 44 (1950).

16 300 US 506 at 513-514 (1937).

17 300 US 506 at 513-514 (1937).

18 276 US 394 (1928).

resumption[19]. But, as was indicated in *Griffiths v Minister for Lands, Planning and Environment*[20], this statutory usage has reflected longstanding authority which treats "public purposes" as the purposes of the administration of government, a notion associated with the expressions "the use and service of the Crown" and of "the Public Service".

19 These latter expressions were used in the United Kingdom and then in the Australian colonies[21] to identify charges by statute upon the Consolidated Fund. They were used, not as a limitation upon the activities of the executive branch of government, but to encompass the range of those activities it conducted from time to time, whether in exercise of the executive power itself, or in the exercise of functions conferred by statute[22]. This particular source in United Kingdom and colonial constitutional practice should be kept in mind when considering the earlier authorities in this Court which link the expression "public purposes" to the constitutional conception of "taxation". In particular, the phrase "public purposes" is not synonymous with "public interest"[23].

20 Section 81 of the Constitution does not use the expression "public service of the Commonwealth"; the phrase "the purposes of the Commonwealth" was preferred, so as to encompass the return of moneys to the States and thus to broaden, not narrow, the notions of "public service" and "public purposes"[24].

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19 See for example, *Lands Acquisition Act* 1955 (Cth), s 5(1); *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 199-200; [1984] HCA 65; *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 242-244 [23]-[34]; [2008] HCA 20.

20 (2008) 235 CLR 232 at 242 [25].

21 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 78-80 [198]-[202].

22 *Pfizer Corporation v Minister of Health* [1965] AC 512 at 533-534, 566-567.

23 cf *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 504-505.

24 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 41-43 [68]-[75], 80-81 [203]-[204], 86 [226].

21 Against this background it is not surprising that in *R v Barger*[25], Griffith CJ said:

> "The primary meaning of 'taxation' is raising money *for the purposes of government* by means of contributions from individual persons." (emphasis added)

22 However, it became apparent in the early days of this Court that the necessary "purposes of government" might still be served where, pursuant to statute, the entity imposing, collecting and applying the proceeds of a tax was not the Commonwealth or a State itself.

23 The Municipal Council of Sydney, established and continued by the *Sydney Corporation Act* 1879 (NSW) and the consolidating statute, the *Sydney Corporation Act* 1902 (NSW) ("the 1902 Act") respectively, was empowered to levy rates in respect of lands situated within the City of Sydney. Those lands included land which had become vested in the Commonwealth by operation of s 85(i) of the Constitution. It was unsuccessfully contended in *The Municipal Council of Sydney v The Commonwealth*[26] that a municipal rate could not be a tax within the meaning of s 114 of the Constitution. The Court accepted the submission by the Commonwealth that the rates must be regarded as imposed by the State because the legislation operated as a permissible delegation of the taxing power of the State[27]. O'Connor J said[28]:

> "[Section 114] would, indeed, fall short of its object if it prohibited only taxation directly imposed by a State Act of Parliament, and left Commonwealth property open to taxation by a municipality or any other agency which the State Parliament might choose to invest with powers of taxation. But no such restricted interpretation is necessary or reasonable. The State, being the repository of the whole executive and legislative powers of the community, may create subordinate bodies, such as municipalities, hand over to them the care of local interest, and give them

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25 (1908) 6 CLR 41 at 68.

26 (1904) 1 CLR 208; [1904] HCA 50.

27 (1904) 1 CLR 208 at 230, 234, 240.

28 (1904) 1 CLR 208 at 240.

such powers of raising money by rates or taxes as may be necessary for the proper care of these interests. But in all such cases these powers are exercised by the subordinate body as agent of the power that created it."

24 His Honour then referred to what had been said by Field J in *Meriwether v Garrett*[29] with respect to the character of municipal corporations, as "mere instrumentalities of the State for the more convenient administration of local government".

25 It should be noted that the rates levied and received by the Municipal Council of Sydney under the 1902 Act were raised "for the general expenditure of the city" (s 120(1)) and were to be paid not into the treasury of the State, but "into the office of the city treasurer" (s 120(2)). Hence, by parity of reasoning, it is not the case that an impost by federal law cannot be a tax unless it is received by the Commonwealth and so attracts s 81 of the Constitution[30].

The excise cases – "public authorities"

26 Section 90 of the Constitution is directed to what otherwise might have been the concurrent powers of the Parliament of the Commonwealth and other Australian legislatures[31] to impose particular forms of taxation, namely duties of customs and excise. Duties of customs must be uniform (s 88). Section 90 renders exclusive that power of the Parliament of the Commonwealth to impose duties of customs and excise and denies that competency to other legislatures. Many of the cases in which this Court has considered the nature of a law imposing taxation have concerned not federal but State laws. The issues that arose in those matters included, inter alia, whether the challenged impost answered the description of a tax and, if so, whether it answered the further description of a duty of excise.

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29 102 US 472 at 511 (1880).

30 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 503-504.

31 Including those to be established for the Territories: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [1992] HCA 51.

27 The State laws successfully challenged in *Attorney-General (NSW) v Homebush Flour Mills Ltd*[32], *Matthews v Chicory Marketing Board (Vict)*[33] and *Parton v Milk Board (Vict)*[34] involved statutory marketing schemes. These established: in *Homebush*[35], a committee to fix price on flour consisting of a Minister, two officers of his Department, representatives of the flour mills and a representative of the master bakers; in *Matthews*[36], Marketing Boards constituted by one member, appointed by the Governor in Council and by others elected by producers of the commodity; and, in *Parton*[37], a Milk Board, which was a body corporate, whose members were appointed by the Governor in Council.

28 The levy considered in *Matthews* was to be applied in work directed to the improvement of the quality of the commodity[38], in *Homebush* to the relief of necessitous wheat farmers[39], and in *Parton* for the provision of what were regarded by the legislature as benefits to those engaged in the milk industry[40]. In this setting, an issue was presented whether the statutory bodies had the character of public authorities sufficient to give to them the ability to impose, collect and expend moneys which had the character of taxes.

29 In each case it was held that the State legislation imposed a tax (and that this was an excise). This was so notwithstanding the intermediate role of the

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32 (1937) 56 CLR 390; [1937] HCA 3.

33 (1938) 60 CLR 263; [1938] HCA 38.

34 (1949) 80 CLR 229; [1949] HCA 67.

35 (1937) 56 CLR 390 at 409.

36 (1938) 60 CLR 263 at 287.

37 (1949) 80 CLR 229 at 230, 239.

38 (1938) 60 CLR 263 at 269.

39 (1937) 56 CLR 390 at 398.

40 (1949) 80 CLR 229 at 244, 254-255.

relevant committees and boards. In that regard, in *Matthews*, Dixon J[41] remarked:

> "The Chicory Marketing Board is a public authority constituted under the statute by the Executive Government of the State. It is true that s 8(4) provides that a board shall not be deemed to represent the Crown for any purpose whatsoever. But this simply means that it is not a corporate servant or agent of the Crown, so that nothing it does can impose any liability upon the Crown nor, on the other hand, can it claim any of the immunities of the Crown."

30 In *Parton*[42], Dixon J said of the levy imposed upon "dairymen" that it was "clearly a tax", adding:

> "It is a compulsory exaction. It is an exaction for the purposes of expenditure out of a Treasury fund. The expenditure is by a government agency and the objects are governmental. It is not a charge for services."

The Canadian decisions

31 In *Homebush*[43], counsel for the successful party, the defendant, cited as an authority indicating that which constitutes a tax, the recent decision of the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*[44]. The Privy Council held to be taxes the "adjustment levies" imposed as part of a dairy marketing scheme in British Columbia. This involved the fixing of levies by an "adjustment committee" created pursuant to statute, with one member appointed by the Lieutenant-Governor in Council and the other two by local dairy farmers. Their Lordships further held that these were indirect taxes and thus beyond the powers of the Province of British Columbia having regard to ss 91(3) and 92(2) of the *British North America Act* 1867[45].

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41 (1938) 60 CLR 263 at 289.

42 (1949) 80 CLR 229 at 258.

43 (1937) 56 CLR 390 at 393.

44 [1933] AC 168 at 172, 175, 176.

45 30 & 31 Vict c 3.

32 Their Lordships noted, in reaching this conclusion[46], that the adjustment levies were compulsorily imposed by a statutory adjustment committee, that they were enforceable by law and added:

> "Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interest of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s 12, sub-s 2, and s 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made."

33 The Privy Council referred, with apparent approval, to what had been said by Duff J in the Supreme Court of Canada in *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*[47]. The legislation of British Columbia, considered by the Supreme Court in that case, constituted a Committee of Direction with the exclusive power to control and regulate the marketing of all tree fruits and vegetables grown in a particular portion of that Province. Duff J said he had no doubt that the levies imposed by the Committee under the powers conferred upon it by statute were taxes. He noted that the levies were enforceable by law and imposed under the authority of the legislature by a public body, namely a Committee, the chairman of which was appointed by the Lieutenant-Governor in Council. The Committee was invested with wide powers of regulation and control over the fruit and vegetable industry. Duff J added[48]:

> "The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the [L]egislature, the purposes for which they are given are conclusively presumed to be public purposes."

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46 [1933] AC 168 at 175.

47 [1931] SCR 357 at 362.

48 [1931] SCR 357 at 363.

34 It is apparent, when this reference to "public purposes" is understood with an appreciation of its provenance outlined earlier in these reasons, that Duff J had been concerned to emphasise that, notwithstanding the interposition by statute of the Committee of Direction, and the conferral of the power to impose the levies, the levies still answered the basal requirement that a tax be imposed for the purposes of government. The remarks set out above by Dixon J in *Matthews* and *Parton* are of the same tenor.

35 The Canadian authorities were cited in submission in *Matthews*[49] and were taken up by Latham CJ[50], Rich J[51], Starke J[52] and at length by Dixon J[53].

The usual description of a tax

36 In *Matthews*, Latham CJ cited what had been said by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*[54] in support of the proposition that the levy by the Chicory Marketing Board was "plainly a tax"[55]. His Honour added, in a sentence which has been repeated, but not always with acknowledgement of its derivation:

> "It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered." (footnote omitted)

37 The majority in *Tape Manufacturers*[56] suggested that it is not essential to the concept of a tax that the exaction should be by a public authority. That

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49 (1938) 60 CLR 263 at 266.

50 (1938) 60 CLR 263 at 276.

51 (1938) 60 CLR 263 at 281.

52 (1938) 60 CLR 263 at 284.

53 (1938) 60 CLR 263 at 289-291.

54 [1933] AC 168 at 175.

55 (1938) 60 CLR 263 at 276.

56 (1993) 176 CLR 480 at 501.

suggestion would constitute a large and controversial step beyond what was said in *Matthews*. As the reasons of the majority in *Tape Manufacturers* show, whether that step could or should be taken depends, at least in part, upon what meaning would be given to the expression "non-public" authority if "one of its functions is to levy, demand or receive exactions to be expended on public purposes"[57]. It was not necessary to decide that question in *Tape Manufacturers* and the majority in that case did not do so. Nor is it necessary in this case, given the addition of the proceeds of the Charge to the Consolidated Revenue Fund, to pursue that question, or any broader questions about whether it is essential to the concept of a tax that the exaction should be by a public authority.

38 Speaking of the "recoupment tax" imposed by the federal legislation considered in *MacCormick v Federal Commissioner of Taxation*[58], Gibbs CJ, Wilson, Deane and Dawson JJ said[59]:

> "The exactions in question answer the usual description of a tax. They are compulsory. They are to raise money for governmental purposes. They do not constitute payment for services rendered: see *Matthews v Chicory Marketing Board (Vict)*[60], per Latham CJ; *Leake v Commissioner of State Taxation*[61], per Dwyer J. They are not penalties since the liability to pay the exactions does not arise from any failure to discharge antecedent obligations on the part of the persons upon whom the exactions fall: see *R v Barger*[62], per Isaacs J. They are not arbitrary. Liability is imposed by reference to criteria which are sufficiently general in their application and which mark out the objects and subject-matter of the tax: see *Federal Commissioner of Taxation v Hipsleys Ltd*[63]."

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57 (1993) 176 CLR 480 at 501.

58 (1984) 158 CLR 622 at 639; [1984] HCA 20.

59 (1984) 158 CLR 622 at 639.

60 (1938) 60 CLR 263 at 276.

61 (1934) 36 WALR 66 at 67-68.

62 (1908) 6 CLR 41 at 54.

63 (1926) 38 CLR 219 at 236; [1926] HCA 34.

Their Honours added[64]:

> "For an impost to satisfy the description of a tax it must be possible to differentiate it from an arbitrary exaction and this can only be done by reference to the criteria by which liability to pay the tax is imposed. Not only must it be possible to point to the criteria themselves, but it must be possible to show that the way in which they are applied does not involve the imposition of liability in an arbitrary or capricious manner."

39 The source of that last requirement was located by their Honours in what was said by Dixon CJ in *Deputy Federal Commissioner of Taxation v Brown*[65], namely that compliance with the Constitution requires that liability for tax be not imposed, without leaving open to the taxpayer some judicial process by which the taxpayer may show that in truth the tax was exigible or not exigible in the sum assessed.

40 The notion of "compulsory exaction" has received some refinement in the decided cases. The nature of a particular exaction or the end to which revenues raised might be put may be such as to take the exaction outside the constitutional conception of "taxation". As s 53 of the Constitution itself recognises, a law does not impose taxation by reason only that it contains provisions for the imposition or the appropriation of fines or other pecuniary penalties, or for the demand or payment of fees for licenses, or fees for services. Further examples are provided by decisions in *Moore v The Commonwealth*[66], *Clyne v Federal Commissioner of Taxation*[67], *Airservices Australia v Canadian Airlines International Ltd*[68], and *Luton v Lessels*[69].

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64 (1984) 158 CLR 622 at 640. See also *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

65 (1958) 100 CLR 32 at 40; [1958] HCA 2. See also *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 258; [1958] HCA 10.

66 (1951) 82 CLR 547; [1951] HCA 10; cf *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 94 [255].

67 (1958) 100 CLR 246.

68 (1999) 202 CLR 133.

69 (2002) 210 CLR 333.

41 In *Moore*, the money raised from each wool producer was to be applied in satisfaction of its assessed income tax or provisional income tax and otherwise was to be refunded to the producer; the laws in question were supported by s 51(ii) of the Constitution but did not themselves impose a tax so as to have required observance of s 55 by the Parliament[70]. Likewise, it was held in *Clyne* that the liability to pay provisional tax was but ancillary to the liability to pay income tax[71].

42 The charges imposed on the airlines which were considered in *Airservices Australia* were examples of financial burdens placed upon "users" to fund the maintenance of public assets and the provision of public services. Finally, the scheme established by the two statutes considered in *Luton v Lessels* provided a new mechanism for the enforcement of existing obligations to make child maintenance payments. The legislation did so by the substitution of a new obligation to the Commonwealth to be owed by the obligor and a new right against the Commonwealth owed by the obligee, measured by reference to the obligation which was terminated[72].

The present appeal - conclusion

43 The exaction represented by the Charge, contrary to the appellant's submission, is not of a nature which takes it outside the constitutional conception of "taxation". None of the examples considered above are applicable here.

44 The legislation considered in the recent decisions which bears the closest analogy to the Charge Act and the Administration Act is that which was the subject of *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[73].

45 In that case, the Court upheld the validity of the *Training Guarantee Act* 1990 (Cth) and the *Training Guarantee (Administration) Act* 1990 (Cth). The

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70 (1951) 82 CLR 547 at 568-569, 576, 581-582.

71 (1958) 100 CLR 246 at 260-261.

72 (2002) 210 CLR 333 at 355 [60].

73 (1993) 176 CLR 555.

legislation defined a minimum amount which the employer notionally was required to expend in the training of its workforce. A charge was imposed corresponding to the amount by which the actual expenditure on training by each employer fell short of that minimum amount; the employer was rendered liable to pay the amount of the shortfall to the Commissioner and thus into the Consolidated Revenue Fund; an equivalent amount was appropriated from the Consolidated Revenue Fund into a trust account which was expended on workforce training, in particular by payments made pursuant to agreements between the Commonwealth and the States.

46 The appellant in its submissions concerning *Northern Suburbs* emphasised that under the training guarantee scheme upheld in that case, and unlike the situation in the present case, there was no "linkage" in the sense of a requirement that funds collected under the charge be expended on training of the particular employees paying the charge.

47 That consideration was significant for the decision in *Northern Suburbs* but not in the way in which the appellant submitted. The absence of a requirement that moneys disbursed be expended upon eligible training programs by those employers who had incurred a liability to pay the charge was significant. This indicated an absence of a sufficient relationship between the liability to pay and the provision of employment related training, to warrant characterising the liability to pay the charge as a fee for services, or as something akin to a fee for services provided to that employer[74].

48 The Court in *Northern Suburbs* also emphasised a point made earlier in these reasons: that the raising of revenue is secondary to the attainment of some other legislative object is no reason for treating an impost otherwise than as a tax[75]. As Latham CJ pointed out in *Radio Corporation Pty Ltd v The Commonwealth*[76], this is so even if the legislation is designed for the purpose of carrying out a policy affecting matters not directly within the legislative competence of the Parliament of the Commonwealth.

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74 (1993) 176 CLR 555 at 568.

75 (1993) 176 CLR 555 at 569, 589.

76 (1938) 59 CLR 170 at 179-180; [1938] HCA 9.

49 The submission by the appellant that the Charge is invalid because the legislation confers upon employees a "private and direct benefit" cannot be accepted. Nor does this "linkage" indicate that the Charge is not imposed by the Parliament for "public purposes". It is settled that the imposition of a tax for the benefit of the Consolidated Revenue Fund is made for public purposes[77]. That is not to say that the receipt of funds into the Consolidated Revenue Fund conclusively establishes their character as the proceeds of a tax. But it does establish in the present case that the Charge is imposed for "public purposes" and thus, if other necessary criteria are met, as they are in this case, the Charge is a valid tax.

50 Moneys received into the Consolidated Revenue Fund are available to be appropriated for any purpose for which the Parliament may lawfully spend money; this is so, whatever the purpose for which those moneys were raised[78]. In the *First Uniform Tax Case*, Latham CJ explained[79]:

> "It is doubtful whether Commonwealth revenue can be earmarked except at the point of expenditure (ie, not as revenue) by an appropriation Act ...
>
> All taxation moneys must pass into the Consolidated Revenue Fund (s 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."

51 The case presented by the appellant appears to depend upon the proposition that payments of the Charge by an employer can be traced through the Consolidated Revenue Fund with the consequence that any payments made to employees under Pt 8 of the Administration Act are properly viewed as having

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77 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 503, 522.

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

79 *South Australia v The Commonwealth* (1942) 65 CLR 373 at 414.

come from the employer. That would involve earmarking of the very kind that the establishment of the Consolidated Revenue Fund (and its predecessors in the United Kingdom and the Australian colonies) was designed to prevent. When the Charge is paid by a particular employer into the Consolidated Revenue Fund, its identity is lost. The funds raised by the Charge are thereafter available under s 83 of the Constitution for an appropriation to be spent on any purpose for which the Commonwealth may lawfully spend money.

Orders

52 The appeal should be dismissed with costs.

53 HEYDON J. There is no general duty on private employers to pay superannuation contributions to superannuation funds for the benefit of their employees. But particular obligations to pay superannuation contributions can arise in various ways. They may be created by an award or certified agreement. They may be created by contract. This appeal concerns the legislative validity of an indirect method of ensuring the payment of superannuation contributions[80].

The legislation

54 Sections 5 and 6 of the *Superannuation Guarantee Charge Act* 1992 (Cth) impose a superannuation guarantee charge on employers. It is calculated by reference to an employer's "superannuation guarantee shortfall": *Superannuation Guarantee (Administration) Act* 1992 (Cth), s 17. That shortfall is the difference between nine percent of a given employee's total salary or wages for a quarter and what the employer contributed to a retirement savings account or certain types of superannuation fund for the employee's benefit[81], plus a nominal interest component and an administration component[82]. The function of the interest component is to compensate for fund earnings foregone by the failure to pay the nine percent. The function of the administrative component is to recover expenses associated with administering the superannuation guarantee charge. The legislation creates an obligation on the employer to pay that charge to the Commissioner of Taxation which is enforceable as a debt due to the Commonwealth[83]. The superannuation guarantee charge is to be paid into the Consolidated Revenue Fund. A similar sum (but without the administration component) is then to be paid out to a superannuation fund for the benefit of the relevant employee[84].

The appellant's submission in outline

55 The appellant submitted that the superannuation guarantee charge is not a tax within the meaning of s 51(ii) of the Constitution. It contended that the payment into the Consolidated Revenue Fund is directly correlated with the payment out to a superannuation fund for the benefit of the relevant employee. It submitted that the superannuation guarantee charge is not a "tax" because

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80 The relevant circumstances and provisions are described in the joint judgment.

81 See ss 19, 22 and 23 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth).

82 See s 17 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth).

83 See *Taxation Administration Act* 1953 (Cth), Sched 1, s 255-5(1)(a).

84 See Pt 8 of the *Superannuation Guarantee (Administration) Act* 1992 (Cth).

although it might be characterised as an exaction imposed in the public interest, it is not for a public purpose because it confers "a private and direct benefit" on the relevant employee.

56 In *Matthews v Chicory Marketing Board (Vict)*[85] Latham CJ described a tax as follows: "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and … not a payment for services rendered". Inherent in the appellant's submissions was an acceptance of the fact that the superannuation guarantee charge met every requirement but one of that description – the "public purposes" requirement.

The function of the legislation

57 The superannuation guarantee charge provides an incentive to employers to make superannuation contributions at the rate of nine percent of employees' wages. It ensures that in relation to the employees of employers who fail to do so there will be payments into approved superannuation funds equivalent to those which the employers did not make. There are significant factors influencing employers to make superannuation contributions directly to superannuation funds for their employees' benefit rather than pay the superannuation guarantee charge. Direct superannuation contributions are tax deductible[86]; payments of the superannuation guarantee charge are not[87]. Payments of direct superannuation contributions avoid the nominal interest component and the administration component of the superannuation guarantee shortfall. And in other respects the superannuation guarantee charge may be higher than the corresponding direct superannuation contribution. In a perfect world, no superannuation guarantee charge would be levied at all. But it tends to persuade employers to make direct superannuation contributions. This achieves public purposes quite independently of any revenue collected through it. Those public purposes centre on the encouragement of employers to contribute to superannuation funds so as to meet the needs of aged or infirm employees and to reduce the pension burdens which would otherwise have to be funded by the government.

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85 (1938) 60 CLR 263 at 276; [1938] HCA 38.

86 *Income Tax Assessment Act* 1997 (Cth), s 290-60; prior to 15 March 2007, *Income Tax Assessment Act* 1936 (Cth), s 82AAC.

87 *Income Tax Assessment Act* 1997 (Cth), s 26-95; prior to 14 September 2006, *Income Tax Assessment Act* 1936 (Cth), s 51(9).

Some authorities

58 In *Fairfax v Federal Commissioner of Taxation*, Windeyer J said[88]: "Taxes are ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government." Leaving to one side the "administration component" in the superannuation guarantee shortfall, what is paid into the Consolidated Revenue Fund pursuant to the legislative scheme under consideration is not to meet the expenses of government.

59 The difficulty for the appellant is that even if taxes are ordinarily levied to replenish the Treasury, there are authorities illustrating less ordinary instances where financial exactions have not replenished the Treasury but have been held to be taxes. Thus in *Fairfax v Federal Commissioner of Taxation*[89], a law denying tax advantages to employees' superannuation funds unless their trustees invested in Commonwealth and other public securities was held to be supported by s 51(ii) of the Constitution. Kitto J said[90]:

> "it is by no means a settled doctrine that a law which purports to provide for a tax upon behaviour is in substance not a law with respect to taxation if it exhibits on its face a purpose of suppressing or discouraging the behaviour and is to be explained more convincingly as a means to that end than as a means to provide the Government with revenue."

60 The superannuation guarantee charge is modelled on the *Training Guarantee Act* 1990 (Cth) and the *Training Guarantee (Administration) Act* 1990 (Cth). The validity of that legislation was upheld in *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth*[91]. The legislation created a training guarantee scheme. That scheme defined a minimum amount that each employer was notionally required to expend in training its workforce. The legislation 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, ie into the Consolidated Revenue Fund. Provision was made for monies to be taken from the Consolidated Revenue Fund to be expended, among other things, on workforce training pursuant to training guarantee agreements between the Commonwealth on the one hand and the States and Territories on the other on the advice of bodies containing representatives of government, employers and

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88 (1965) 114 CLR 1 at 19; [1965] HCA 64.

89 (1965) 114 CLR 1.

90 (1965) 114 CLR 1 at 11.

91 (1993) 176 CLR 555; [1993] HCA 12.

trade unions. The reasoning of this Court upholding the charge as a tax operated on the basis that industrial training is a public purpose. The provision of workplace superannuation is similarly a public purpose.

61 The appellant did not submit that the *Northern Suburbs* case should be overruled, but did submit that it was distinguishable. The point of distinction relied on was that the scheme in that case did not require the funds that were collected from employers which had not trained their workforces to be spent on training the employees of those particular employers. Instead the funds were, among other things, to be spent by State or Territory governments under training guarantee agreements. That circumstance was used by this Court as the basis for a conclusion that the charge was not a fee for service; it was not crucial in reaching the conclusion that the funds raised were applied for "public purposes"[92]. Accordingly the point of distinction relied on is not available.

62 In all other basic respects the two legislative schemes are materially similar. In particular, each scheme contemplated as the preferable and primary course direct payment by the employers rather than payment only through the charges. The charges are only secondary in the sense that the duty to pay them serves as a means of achieving the preferable course of ensuring direct payment by the employers. As Mason CJ, Deane, Toohey and Gaudron JJ said[93]: "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." The similarity in the two legislative schemes invalidates the appellant's reliance on "private and direct benefit" as pointing against the existence of a public purpose. Even if the superannuation legislation confers a "private and direct benefit", that conferral operates as part of a scheme in which the threat of having to pay the superannuation guarantee charge into the Consolidated Revenue Fund, thereby operating as an indirect source of payments from the Consolidated Revenue Fund in favour of employees' superannuation funds, is essentially a method of vindicating the primary purpose of influencing employers to make payments directly into superannuation funds. That primary purpose is a public purpose.

63 The question, then, is whether the superannuation guarantee charge, considered as an exaction, is a tax. To the extent that employers make payments directly into employees' superannuation funds, there will be no exaction; to the extent that they do not, there will be. The legislative scheme uses the threat of the exaction to prevent the need to pay it from arising. But each occasion when

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92 (1993) 176 CLR 555 at 567-568 per Mason CJ, Deane, Toohey and Gaudron JJ, 584 per Brennan J, 587-588 per Dawson J and 596 per McHugh J.

93 (1993) 176 CLR 555 at 569 (footnote omitted).

the need to pay it arises tends to encourage others later so to arrange their affairs that they do not have to pay it. In the *Northern Suburbs* case the spending of the exaction on training did not prevent the exaction from being a tax. So here, the spending of the exaction on payments into superannuation funds for the benefit of employees does not prevent the exaction from being a tax.

64 The appellant did not submit that the *Northern Suburbs* case should be overruled. It cannot be distinguished. It must therefore be applied. Its application leads to the conclusion that the superannuation guarantee charge is a tax.

Luton v Lessels

65 The appellant contended that *Luton v Lessels*[94] was indistinguishable from the present case. The legislative scheme under consideration in *Luton v Lessels* was directed to persons who had defaulted in their existing obligations to make payments of child maintenance. The legislation terminated those obligations. It substituted for them a new right in the person caring for the child to claim payment from the Commonwealth, and gave powers to an official to collect the relevant amounts from the defaulter, including a power to issue garnishee notices to the defaulter's employer. This Court held that the legislation did not have to comply with s 55 of the Constitution because it did not provide for the imposition of a tax. Instead it created a new mechanism for the enforcement of an existing private obligation by substituting for the obligation of the defaulter to pay a carer for the child's upkeep an obligation of the defaulter to pay the Commonwealth coupled with the creation of new rights in the carer against the Commonwealth. *Luton v Lessels* is distinguishable because there the obligation created in the Commonwealth was created in substitution for a former obligation of another person which was terminated. Here no particular obligations of employers to make payments into superannuation funds for the benefit of their employees are terminated, although compliance with those obligations will reduce the charge, and to the extent that payments are made into superannuation funds from the Consolidated Revenue Fund this will eliminate or destroy the quantum of damages which the employees can claim from their employers for breach of these obligations. The duty to pay the superannuation guarantee charge does not depend on the existence of any obligation to make payments into superannuation funds. And no duty is created on employers to make contributions into those superannuation funds. In *Luton v Lessels* the legislation created a new legal obligation to do something in substitution for an existing one. Here the legislation merely creates an incentive to do something, whether or not there was any obligation to do it.

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94 (2002) 210 CLR 333; [2002] HCA 13.

66 Finally, the appellant relied on *Luton v Lessels* as exemplifying a distinction between "public purposes" as a necessary element in a tax and "the public interest" which was not sufficient to satisfy the "public purposes" element in a tax. The appellant did not demonstrate that the references to "public interest" on which it relied in *Luton v Lessels*[95] were supportive of the proposition that the purposes of the superannuation legislation were matters only of "public interest", not "public purpose".

A single characterisation fallacy

67 There is one other difficulty in the appellant's submissions. They postulate a distinction between characterising legislation as having "public purposes" and characterising legislation as conferring "private and direct benefits", as though an instance falling within the second branch of the distinction necessarily prevented it from also falling within the first. That does not follow. In this case the legislative conferral of what the appellant called "private and direct benefits" vindicates public purposes.

Questions not arising

68 For those reasons the superannuation guarantee charge is a tax. It is therefore not necessary to express a view on other issues which arose in argument, such as whether a tax can include an exaction by a non-public authority[96]; whether an exaction can be a tax even though it is not for public purposes[97]; whether the appellant's argument must fail because it erroneously treats the way the monies spent out of the Consolidated Revenue Fund as controlling the character of the superannuation guarantee charge; whether *Luton v Lessels*[98] overruled *Australian Tape Manufacturers Association Ltd v The Commonwealth*[99]; and whether it is a sufficient definition of a tax that it be a compulsory exaction by reference to criteria of sufficiently general application.

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95 (2002) 210 CLR 333 at 343 [12] and 352 [48].

96 Cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467; [1988] HCA 61; *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 501; [1993] HCA 10.

97 Cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

98 (2002) 210 CLR 333.

99 (1993) 176 CLR 480.

Orders

69 The first respondent (the Commissioner of Taxation) took no active part in the argument. The second respondent (the Attorney-General of the Commonwealth) did. The first respondent sought a costs order. The second respondent did not, for the reason that his status as a party arose directly from his intervention before the Full Court of the Federal Court of Australia. That is a stance highly favourable to the interests of the appellant. In the circumstances the appeal should be dismissed, and the appellant should pay the first respondent's costs.