IN THE HIGH COURT OF AUSTRALIA

MELBOURNE DISTRICT REGISTRY No. M177 of 2010

On appeal from the Full Court of the Federal Court

ROY MORGAN RESEARCH PTY LTD

Appellant

THE COMMISSIONER OF TAXATION

First Respondent

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THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

APPELLANT'S SUMMARY OF ARGUMENT

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF ISSUES

2. This appeal raises the following issues:

   (1) Whether the superannuation guarantee charge (the **SG charge**) imposed by the
20 *Superannuation Guarantee Charge Act 1992* (Cth) (the **SG Charge Act**) and the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the **SGAA**) is a "tax" within s 51(ii) of the *Commonwealth Constitution.*

   The Appellant contends that the SG charge is **not** a "tax" and is not supported by any other head of power.

   (2) Whether an essential element of a "tax" within s 51(ii) of the *Constitution* is that the exaction is for public purposes.

   The Appellant contends that being imposed for public purposes **is** an essential element of an exaction being a "tax" within s 51(ii), both as a matter of history and in order to distinguish "taxes" from acquisitions of property that are subject
30 to s 51(xxxi) of the *Constitution.*

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(3) The relevance or otherwise of the following factors in determining whether an exaction is for "public purposes":

(a) the exaction is imposed in the public interest;

(b) the proceeds of an exaction are paid into the Consolidated Revenue Fund (**CRF**); and

(c) the exaction does not have a revenue-raising purpose.

The Appellant contends that:

(d) the concept of "public purposes" is narrower than the public interest, and therefore is not satisfied simply by showing that the exaction is in the public interest;

(e) payment into the CRF is a relevant, but not decisive factor. Here, the SG charge confers a private and direct benefit on the employees of an employer liable to pay the SG charge, which means that the SG charge is not imposed for public purposes even though it is paid into CRF; and

(f) although the presence or absence of a revenue-raising purpose is not a universal determinant of whether an exaction is a "tax", it is still highly significant. Here, the fact that the SG charge does not have a revenue-raising purpose assists the conclusion that it is not imposed for public purposes.

PART III: SECTION 78B NOTICES

3. The Appellant has served a notice of constitutional matter dated 23 December 2010 and an amended notice of a constitutional matter dated 10 January 2011 and considers that no further notice is necessary.

PART IV: REPORTED REASONS OF COURT BELOW

4. The reasons of the Court below are reported in (2010) 184 FCR 448.

PART V: RELEVANT FACTS

5. On 13 September 2007 the Respondent issued notices of amended superannuation guarantee charge assessments and superannuation guarantee default assessments to the Appellant for periods between 1 July 2000 and 30 June 2006 (the **assessments**).[1]

6. The Appellant filed an objection against the assessments, which the Respondent disallowed. The Appellant sought review of that disallowance decision in the Administrative Appeals Tribunal (**AAT**), which affirmed the decision.[2]

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1 *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (***Roy Morgan Research***) (2010) 184 FCR 448, [2]. **AB [XXX]**

7. The Appellant brought an appeal against the Tribunal's decision in the Court below, under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). The Appellant contended that:

(1) the relevant service providers (in respect of whom the Appellant was assessed as liable) were not "employees" as defined in s 12 of the SGAA; and

(2) the SG charge is invalid, because:

(a) it is not imposed for a public purpose, and therefore is not supported by s 51(ii) or any other head of power;

(b) the payments provided for by Pt 8 of the SGAA are invalid, and form an inseverable part of the legislative scheme. Therefore (it was argued) the SGAA and the SG Charge Act are invalid in their entirety.[3]

8. On 26 May 2010, the Court below rejected each of these arguments.[4] In this proceeding, the Appellant is pressing only the argument that the SG charge is not a tax.

PART VI: APPELLANT'S ARGUMENT

Outline of SG Charge Act and SGAA

9. Before turning to the detail of the Appellant's argument it is necessary to outline the basis for the payment of superannuation contributions by employers and the operation of the SG Charge Act and the SGAA.

Basis for payments of superannuation contributions by employers

10. There is no general legislative regime that *requires* the payment of superannuation contributions by private employers for the benefit of their employees. Rather, an obligation to pay superannuation contributions *may* arise in one of two ways:

(1) first, a State or federal award[5] or certified agreement[6] may provide for the payment of superannuation contributions;

(2) second, there may be a contractual obligation to pay superannuation contributions.

11. Since the 1980s superannuation has become "an integral feature of almost all the awards of the [Australian Industrial Relations Commission]" and relevant State tribunals.[7] According to ABS statistics, by November 1991 78% of employees[8] had

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2 *Roy Morgan Research* (2010) 184 FCR 448, [2]. **AB [XXX].** The AAT's reasons are reported in *Roy Morgan Research Pty Ltd and Commissioner of Taxation* (2009) 76 ATR 150, and appear at **AB [XXX]**

3 See the Further Amended Notice of Appeal dated 9 April 2009. **AB [XXX]**

4 *Roy Morgan Research* (2010) 184 FCR 448, [70], [110]. **AB [XXX]**

5 See, eg, clause 23.2.1 of AP827717CRV - Market Research Industry - Consolidated Award 2003.

6 See, eg, clause 16.2.1 of the NUW and AMSRO Market Research Industry Agreement 2005-2008.

7 Parliament of the Commonwealth of Australia, Senate Select Committee on Superannuation, Safeguarding *Super: The Regulation of Superannuation* (June 1992) at [2.27].

superannuation coverage. By November 1993, the percentage of employees with superannuation coverage was 89%; and by July 2007 it was 94%.

12. However, it is not the case that every employer is obliged, either under an award or by reason of a contractual arrangement, to make superannuation contributions in relation to each of its employees.

The SG Charge

13. The SG charge was introduced in 1992 by the SG Charge Act and the SGAA. The Treasurer, describing the regime prior to its implementation, described it as a levy that would facilitate:[9]

- a major extension of superannuation coverage to employees not currently covered by award superannuation; [and]
- an efficient method of encouraging employers to comply with their obligation to provide superannuation to employees.

14. During the period covered by the assessments the SG charge was imposed by the SG Charge Act on an employer's "superannuation guarantee shortfall".[10] This shortfall was calculated by reference to liabilities incurred in respect of each individual employee of the employer.[11]

(1) The superannuation guarantee shortfall was the sum of:[12]

(a) the total of the employer's "individual superannuation guarantee shortfalls" for the quarter;

(b) the employer's nominal interest component for the quarter;[13] and

(c) the employer's "administration component" for the quarter.[14]

(2) An "individual superannuation guarantee shortfall" was incurred in respect of each individual employee, and calculated under s 19 of the SGAA.

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8 Among 15–74 year olds who had left school (excluding those living in an institution): see Australian Bureau of Statistics, *Australian Social Trends* (March 2009), "Trends in Superannuation Coverage" http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features70March%202009.

9 Parliament of the Commonwealth of Australia, Senate Select Committee on Superannuation, *Safeguarding Super: The Regulation of Superannuation* (June 1992) at [2.29]; and see [2.30].

10 The SG charge is imposed on any "superannuation guarantee shortfall" of an employer for a quarter (SG Charge Act, ss 5 and 6). The SG charge is payable by the employer (SGAA, s 16).

11 SGAA, s 19. And see, for example, Notification of Audit Decision and calculation sheets dated 27 September 2007 **AB [XXX]**; Superannuation guarantee default assessment for year ended 2001. **AB [XXX]**

12 SGAA, s 17.

13 An employer's "nominal interest component" is calculated by reference to the employer's total individual superannuation guarantee shortfalls for the quarter: SGAA, s 31. Unlike the position in relation to income tax, the Commissioner has no power to waive payment of the interest component.

14 An employer's "administration component" is a base amount, plus a per capita amount for each employee (currently $20; previously a base of $50 plus $30 per employee): SGAA, s 32.

(a) In summary, the individual superannuation guarantee shortfall was the employee's wages for the quarter multiplied by the "charge percentage".[15]

(b) The charge percentage was 9.[16]

(3) The charge percentage was reduced by certain superannuation contributions in fact made by the employer in relation to an employee.

(a) Section 22 of the SGAA provided for a reduction of the charge percentage by reason of payments made to defined benefit superannuation schemes within 28 days of the end of the relevant quarter.

(b) Section 23 of the SGAA provided for a reduction of the charge percentage by reason of payments made to a retirement savings account or a superannuation fund other than a defined benefit scheme within 28 days of the end of the relevant quarter.

(4) Section 23A of the SGAA made provision for a limited class of late payments of superannuation to be offset against the employer's liability to pay the SG charge if the late payments were made within two months of the end of the quarter.[17]

(5) The debt due to the Commonwealth in relation to the SG charge and the debt due in relation to an employee to whom an employer has superannuation obligations under an award or contract are different debts. On decided authorities, payment of the SG charge does not extinguish any liability an employer may have to make superannuation contributions for the benefit of an employee.[18] However, once the SG charge is paid and the Commissioner has made payments under s 65 of the SGAA, an employee claiming payment of those superannuation contributions in addition to the SG charge might not be able to enforce a contractual claim to the extent that he or she could not establish any loss. Moreover, if both the SG charge and the superannuation contributions were paid, the employer may have an entitlement to claim restitution of payments made to the superannuation fund.[19]

Payment of a shortfall component by the Commissioner for the benefit of employees

15. Under Pt 8 of the Administration Act, the Commissioner is required to pay an amount (the **shortfall component**) for the benefit of a benefiting employee, calculated individually for each named employee.

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15 SGAA, s 19(1).

16 SGAA, s 19(2).

17 In 2008 s 23A was amended to make more generous allowance for offsetting by the *Tax Laws Amendment (2008 Measures Act No 2) Act 2008*, and amended again in 2009 by the *Tax Laws Amendment (2008 Measures Act No 6) Act 2009* to again limit the possibility of offsetting.

18 *Re Master Painters Association of Victoria Ltd v Rathner (**Master Painters**)* (2004) 211 ALR 316 at [33]-[34]; *DP Excavation & Haulage v Commissioner of Taxation (**DP Excavations**)* (2005) 190 FLR 198 at [27]-[32].

19 *Master Painters* (2004) 211 ALR 316 at [34].

16. The shortfall component is calculated under either s 64A (if there is only 1 benefiting employee) or s 64B (if there is more than 1 benefiting employee). In each case:

(1) the shortfall component for an employee is calculated by reference to the individual superannuation guarantee shortfall for the employee, any general interest charge in respect of that shortfall, and any nominal interest component for the quarter;[20] and

(2) the shortfall component is the lesser of the amount paid by the employer as the SG charge and the amount of employee entitlement calculated at the time the payment was made (in other words, the Commissioner never pays an amount for the benefit of an employee greater than the amount received from the employer in respect of that employee).[21]

17. Subject to limited exceptions,[22] the Commissioner must deal with the shortfall component in one of the following ways under s 65(1):

(1) in any case, pay the amount for the benefit of the employee to a retirement savings account,[23] or complying superannuation fund,[24] or complying approved deposit fund,[25] that is held in the name of the employee and that is determined by the Commissioner to belong to the employee (s 65(1)(a));

(2) if an employee has nominated a retirement savings account or a complying fund in accordance with the regulations, pay the amount or make arrangements to pay the amount to the RSA or fund for the benefit of the employee (s 65(1)(b));

(3) if an employee has not made a nomination, credit the amount to an account kept under the *Small Superannuation Accounts Act 1995* (Cth) in the name of the employee (s 65(1)(c)).

18. Amounts that the Commissioner is required to pay under Part 8 are appropriated from the CRF by s 71.

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20 SGAA, s 64A(3); s 64B(4).

21 SGAA, s 64A(2); s 64B(2).

22 During the periods covered by the assessments the exceptions to s 65(1) were: the employee is over 65 (the amount is paid directly to the employee: s 65A); the employee has retired due to permanent incapacity or invalidity (the amount is paid to the employee: s 66); or the employee is deceased (the amount is paid to the legal personal representative of the employee: s 67). The *Tax Laws Amendment (2009 Measures No 1) Act 2009* (Cth) added a further exemption: the employee is a former temporary resident (new s 65AA).

23 That is, an account (relevantly) provided by an authorised deposit-taking institution, a life insurance company, or a prescribed financial institution: see *Retirement Savings Account Act 1997* (Cth), s 8(1)(b), s 11(2).

24 A "complying superannuation fund" means a fund approved under s 45 of the *Superannuation Industry (Supervision) Act 1997* (Cth) (the **SIS Act**) (see definitions in s 7 of the SG AA; s 995-1 of the *Income Tax Assessment Act 1997* (Cth)).

25 A "complying approved deposit fund" means a fund approved under s 47 of the SIS Act (see definitions in s 7A of the SG Administration Act; s 995-1 of the *Income Tax Assessment Act 1997* (Cth)).

A "tax" must be imposed for public purposes

19. The Appellant contends that the SG charge is not a "tax" within s 51(ii) of the *Constitution* because it was not imposed for public purposes; rather, it was imposed for the purpose of conferring a "private and direct benefit"[26] on named individuals.

20. For the following reasons the requirement that an exaction is for public purposes is an essential element of a "tax".

21. This Court has accepted the following as a general statement of the positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax:

> a compulsory exaction of money by a public authority **for public purposes**, enforceable by law, and ... not a payment for services rendered.[27]

22. "Public purposes" should be understood as meaning for *the benefit of* the CRF[28] — that is, that such moneys are able to be spent for any purpose for which the Commonwealth may lawfully appropriate money,[29] rather than conferring a private and direct benefit on a person or group.

23. The Appellant contends that the *obiter dicta* suggestion in *Air Caledonie*[30] that a compulsory exaction of money might still be a tax, even though it was for purposes that could not be described as public, should not be accepted. This suggestion is contrary to the result in *Luton v Lessels*[31] – as explained below, the proper analysis of *Luton v Lessels* is that the exaction in that case was not a "tax" because it was not imposed for public purposes.

24. As a matter of principle, the requirement that a "tax" be imposed for a public purpose is further supported by two factors.

    (1) First, historically a "tax" is something that can only be authorised by Parliament, since at least the *Bill of Rights 1688*. The Bill of Rights prohibited "levying of

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26 *Australian Tape Manufacturers Association Ltd v The Commonwealth (**Tape Manufacturers**)* (1993) 176 CLR 480 at 509.

27 See eg *Air Caledonie International v The Commonwealth (**Air Caledonie**)* (1988) 165 CLR 462 at 467 (the Court) referring to *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 276 (Latham CJ). As Gleeson CJ observed in *Luton v Lessels* (2002) 210 CLR 333 at 342, "[p]ayments for services rendered are not the only exactions that stand outside the concept of a tax. Others include 'a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation'" (citing *Air Caledonie* (1988) 165 CLR 452 at 467). The exceptions to the definition of a tax are not presently relevant.

28 (1908) 6 CLR 41 at 82 (Isaacs J) (quoted with approval in *Tape Manufacturers* (1993) 176 CLR 480 at 503 fn 91).

29 *Moore v The Commonwealth* (1951) 82 CLR 547 at 561 (Latham CJ) (quoted with approval in *Tape Manufacturers* (1993) 176 CLR 480 at 503 fn 91). See further para 41, below.

30 (1988) 165 CLR 462 at 467 (the Court).

31 (2002) 210 CLR 333.

money for the use of the Crown by pretence of prerogative, without grant of Parliament".[32] The effect of the Bill of Rights is that:

> if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorised the particular charge.[33]

(2) Secondly, the "public purposes" requirement distinguishes "taxes" from acquisitions of property that are subject to s 51(xxxi) of the *Constitution*.

(a) A "tax" is an acquisition of property that falls outside s 51(xxxi) of the *Constitution*.[34]

(b) In *Tape Manufacturers*[35] the majority held that it was necessary to distinguish between a tax and an exaction that had the purpose of "confer[ring] a private and direct benefit on a person or group", because otherwise the protection of property given by s 51(xxxi) would be largely illusory.

(c) The requirement that a tax be imposed for "public purposes" ensures that measures which confer a private and direct benefit on a person or group are not "taxes", and are therefore subject to the just terms requirement in s 51(xxxi) of the *Constitution*.

Key authorities –*Tape Manufacturers, Northern Suburbs* and *Luton v Lessels*

25. Before turning to the errors the Appellant contends were made by the Court below, it is convenient to set out briefly the key authorities relevant to a determination of whether the SG charge is a tax: *Tape Manufacturers, Northern Suburbs*[36] and *Luton v Lessels*.

Tape Manufacturers

26. In *Tape Manufacturers* this Court held, by majority, that a "royalty" imposed on vendors who first sold, let for hire or otherwise distributed blank tapes in Australia was a tax.

(1) The "royalty" considered in *Tape Manufacturers* imposed a levy on one group in society (vendors of blank tapes) for the benefit of another group in society (copyright owners). The money exacted pursuant to the levy was paid to a private association representing copyright owners, for distribution to copyright owners; it was not paid into the CRF. There was no necessary correspondence

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32 See *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247 at 258 (Dixon CJ).

33 See eg *McCarthy & Stone Developments Ltd v Richmond upon Thames London Borough Council* [1992] 2 AC 48 at 67 (Lord Lowry), citing *Attorney-General v Wilts United Dairies Ltd* (1921) 37 TLR 884 at 886. See also *Congreve v Home Office* [1976] QB 629 at 652 (Denning MR).

34 See eg *McCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 638 (Gibbs CJ, Wilson, Deane and Dawson JJ), 649 (Brennan J).

35 (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

36 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth (**Northern Suburbs**)* (1993) 176 CLR 555.

between a copyright holder and the purchaser of a blank tape, who might not even use the tape to copy copyright material.[37]

(2) By contrast, the SGAA and SG Charge Act do not involve a mere earmarking of funds, or the imposition of a liability on one group generally for the benefit of another group generally (as was the case in *Tape Manufacturers*). Rather, there is a direct correlation between the amount that an employer is liable to pay in respect of an individual employee, and the amount paid by the Commonwealth for the benefit of that individual employee.[38]

Northern Suburbs

27. In *Northern Suburbs*[39] this Court held that a "training guarantee charge" imposed on employers who did not voluntarily make certain payments towards training their employees was a tax and hence supported by s 51(ii) of the *Constitution*.

28. Like the SG charge, the training guarantee charge created an incentive for employers to make voluntary payments. However, the training guarantee legislation was different in the manner in which the charge was calculated and the manner in which the proceeds were applied.

(1) The training guarantee was calculated as a percentage of the employer's total payroll, not by reference to individual employees.[40] Moreover, there was no obligation on the Commonwealth to apply the amount received under the training guarantee regime in a way connected to or for the benefit of the employees of the employer, or indeed for the benefit of any named individual. Money raised by the training guarantee charge could be applied for the purposes of:

(i) reimbursing the Commonwealth for the costs of administering the relevant Act, or for monitoring the operation of the Act;

(ii) making payments under training guarantee arrangements (with a State or Territory); or

(iii) reimbursing any overpaid amounts or amounts paid in error.[41]

It was against that background that Mason CJ, Deane, Toohey and Gaudron JJ held that the amounts collected were applied for "public purposes".[42]

(2) By contrast, as explained above, the SG charge is calculated by reference to individual employees and money raised by the SG charge is paid under Pt 8 of the

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37 See *Luton v Lessels* (2002) 210 CLR 333 at [178] (Callinan J).

38 See para 16 above; and para 43 below.

39 (1993) 176 CLR 555.

40 See *Northern Suburbs* (1993) 176 CLR 555 at 564, referring to s 15 of the *Training Guarantee (Administration) Act*.

41 See *Northern Suburbs* (1993) 176 CLR 555 at 565-566, setting out s 34 of the *Training Guarantee (Administration) Act*.

42 *Northern Suburbs* (1993) 176 CLR 555 at 567.

SGAA for the benefit of those individual employees. Unlike the training guarantee legislation, there is a direct correlation between the amount of SG charge paid by an employer in respect of an individual employee, and the amount paid for the benefit of that individual employee.

Luton v Lessels

29. In *Luton v Lessels*[43] this Court held that Commonwealth child support legislation[44] did not impose a tax. Briefly, that legislation imposed in certain circumstances an obligation on a "liable parent" to pay an amount to the Commonwealth equal to the amount of a registered child support assessment.[45] That amount was paid into the CRF. The Commonwealth made payments of a corresponding amount to the "eligible carer".[46] The effect of registration was that the carer was no longer entitled to enforce payment of the liability against the parent; in effect, the debt to the Commonwealth replaced the debt to the carer.[47]

30. The Appellant contends that the proper analysis of the judgments in *Luton v Lessels* (with the exception of that of Kirby J[48]) is that the exaction in issue was held not to be a tax only because it was not imposed for public purposes.

(1) It is clear that the impost considered in *Luton v Lessels* was (i) a compulsory exaction (ii) by a public authority, (iii) enforceable by law, and (iv) not a fee for service, nor a penalty, nor a fee for a privilege. The only element of the classic definition of a tax that was not satisfied in *Luton v Lessels* was the requirement that an exaction be for "public purposes".

(2) While this classic definition of a tax is not exhaustive,[49] *Luton v Lessels* did not indicate any departure from the classic definition. If *Luton v Lessels* were intending to create a new category of impost that satisfied all the positive features

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43 (2002) 210 CLR 333.

44 The *Child Support (Assessment) Act 1989* (Cth) and the *Child Support (Registration and Collection) Act 1988* (Cth) (the **CS Collection Act**).

45 Under Pt III of the CS Collection Act, liabilities arising under a child support assessment could be (and ordinarily were required to be) registered by the Child Support Registrar. On registration, amounts due under a child support assessment became debts payable to the Commonwealth, and the original payee (the eligible carer) could not enforce payment of those amounts.

Under Pts IV and V of the CS Collection Act, the Commonwealth could recover this debt from the original payer (the liable parent); for example, by arranging deductions from wages, by garnisheeing wages, or by deducting amounts from social security pensions or payments.

46 Under Pt VI of the CS Collection Act, the Commonwealth made payments of child support to the eligible carer, equivalent to the amounts due to be recovered from the liable parent.

47 *Luton v Lessels* (2002) 210 CLR 333 at 341.

48 Kirby J held that the impost in *Luton v Lessels* was imposed for public purposes, but was not a tax because it did not have a revenue-raising purpose: (2002) 210 CLR 333 at [109], [121].

49 *Air Caledonie* (1988) 165 CLR 462 at 467 (the Court); *Luton v Lessels* (2002) 210 CLR 333 at [10] (Gleeson CJ, with McHugh J agreeing), [50] (Gaudron and Hayne JJ).

of a tax and none of the negative features, but was still not a tax, it could be expected that the Court would say so expressly.[50]

31. *Luton v Lessels*, this Court's most recent decision dealing with the question of when an exaction is a tax, supports the following points of principle:

(1) An exaction is not for "public purposes" simply because it is imposed in the public interest;[51]

(2) The fact that the proceeds of an exaction are paid into CRF is relevant, but not decisive, in determining whether it is imposed for public purposes;[52]

(3) The fact that an exaction does not have a revenue-raising purpose is relevant to whether it is imposed for "public purposes";[53]

(4) In determining the character of an exaction, it is relevant if the statutory scheme also involves payments by the Commonwealth to a third party, particularly if there is a close correlation between the amounts paid into CRF in respect of a person, and the amounts paid to that person by the Commonwealth.[54]

32. Points (1), (2) and (3) from *Luton v Lessels* cast doubt on the reasoning in *Tape Manufacturers*,[55] although not necessarily on the result in that case.

33. Importantly, *Luton v Lessels* did not purport to describe exhaustively what kinds of compulsory exactions are not imposed for public purposes – the regime in issue in *Luton*, where a private debt was replaced by a debt to the Commonwealth, is merely one specific example of an impost that was not imposed for public purposes and was therefore not a tax.

Errors in reasoning of Court below

34. The Court below held that the SG charge was imposed for a public purpose because:

(1) the SG charge had the purpose of encouraging Australian employers to contribute to the financial needs of Australian employees;[56] and

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50 For an example of where a court expressly held an exaction not to be a tax even where it satisfied all the positive features of a tax and did not come within the existing exceptions, see *Qureshi v Minister for Immigration* (2005) 142 FCR 444 (Kenny J).

51 *Luton v Lessels* (2002) 210 CLR 333 at [12] (Gleeson CJ, with McHugh J agreeing), [48] (Gaudron and Hayne JJ).

52 *Luton v Lessels* (2002) 210 CLR 333 at [13] (Gleeson CJ), [55] (Gaudron and Hayne JJ), [111] (Kirby J); see also [80] (McHugh J).

53 *Luton v Lessels* (2002) 210 CLR 333 at [16] (Gleeson CJ, with McHugh J agreeing), [121] (Kirby J), [177] (Callinan J).

54 *Luton v Lessels* (2002) 210 CLR 333 at [60] (Gaudron and Hayne JJ), [178] (Callinan J).

55 Contra *Roy Morgan Research* (2010) 184 FCR 448, [92]. **AB [XXX]** In *Luton v Lessels*, McHugh J remained of the view that *Tape Manufacturers* was wrongly decided: (2002) 210 CLR 333 at [80].

56 *Roy Morgan Research* (2010) 184 FCR 448, [74]. **AB [XXX]**

(2) the SG charge was paid into the CRF which, in the absence of any countervailing consideration, established that it was imposed for a public purpose.[57]

35. It is submitted that each step in this reasoning is in error.

A. Public purpose different from, and narrower than, public interest

36. First, the fact that the SG charge has the purpose of encouraging Australian employers to contribute to the financial needs of Australian employees (as noted by the Court below) only establishes that it is imposed **in the public interest**. That is different from whether it is imposed for "public purposes".

37. In *Luton v Lessels*, four members of this Court held that asking whether an exaction is for "public purposes" is different from asking whether it is in the public interest.

(1) Gleeson CJ (with McHugh J agreeing) stated that "[a] law which imposes on one person an obligation to pay money to another, or to the government, will, by hypothesis, be enacted in pursuance of some policy or purpose which is regarded by the Parliament as in the public interest. **The concept of 'public purposes' in the present context is narrower than that**".[58]

(2) Gaudron and Hayne JJ stated "it may readily be assumed that the scheme for which the [relevant Act] provides is a scheme which is seen as being of public benefit ... . It by no means follows, however, that the [relevant Act] as a whole, or particular provisions of it, are properly described as a law imposing taxation".[59]

38. The apparently contrary statement by the majority in the *Tape Manufacturers*[60] (relied on by the Court below[61]) is, it is submitted, overtaken by these later statements in *Luton v Lessels*.[62]

39. That is not to say that the concept of public interest is antithetical or irrelevant to whether an exaction is imposed for "public purposes"; rather, the point is that "public purposes" is a narrower concept than the public interest. Accordingly, to show that an exaction is in the public interest (which presumably would be Parliament's intention

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57 *Roy Morgan Research* (2010) 184 FCR 448, [92]-[93]. **AB [XXX]**

58 *Luton v Lessels* (2002) 210 CLR 333 at [12], emphasis added. This is consistent with the remarks of Barwick CJ in *Victoria v Commonwealth and Hayden (AAP Case)* (1975 134 CLR 338 at 298 in relation to the meaning of the term "purposes of the Commonwealth" in s 81 of the Constitution, where his Honour stated that "to say of a matter that it was of national interest or concern did not attract power to the Commonwealth"; and see *Pape v Commissioner of Taxation (Pape)* (2009) 238 CLR 1at [92], [113] (French CJ).

59 *Luton v Lessels* (2002) 210 CLR 333 at [48].

60 (1993) 176 CLR 480 at 504-505 (Mason CJ, Brennan, Deane and Gaudron JJ). The majority justices held in that case that a "royalty" imposed on the vendors of blank tapes was a tax, and invalid.

61 *Roy Morgan Research* (2010) 184 FCR 448, [76]. **AB [XXX]**

62 If the Court considers that *Tape Manufacturers* cannot be distinguished from the present case then the Appellant seeks leave to reopen *Tape Manufacturers* and contends that it should be overruled.

with every exaction) does not establish that it is imposed for public purposes as required.

B. Private nature of SG charge means it was not exacted for public purposes

40. Secondly, it is submitted that the SG charge is a mechanism for adjusting the financial incidents of a private relationship between employer and employee.[63] As the Commonwealth argued in *Luton v Lessels*, "this case is much closer to the mere imposition of a liability on one citizen to pay another, as opposed to the taxation of one citizen for the benefit of society".[64] The SG charge is in substance private in nature and thus cannot be regarded as an exaction for public purposes, even though it is paid into the CRF.

41. Under the scheme of the SG Charge Act and the SGAA it cannot be said the payment of the SG charge into the CRF is "for the benefit of" the CRF[65] when essentially same amount (other than the administration component of the SG charge) is to be paid out of the CRF for the benefit of the employee in relation to whom the SG charge was levied. In other words, the "colourable" [66] or "circuitous"[67] device of interposing of the CRF between the employer and the employee is not sufficient to transform the SG charge from a private payment into a payment for public purposes. Under the SGAA:[68]

> the Commissioner is cast ... in the role of a collecting and paying authority or clearing house through which sums that could have been paid by employers into superannuation funds for the benefit of employees are levied by compulsion upon those employers and directed to destinations of the kind to which employers would have directed them.

SG charge confers private and direct benefit on employees

42. The SG charge confers a "private and direct benefit" on the employees of an employer that is liable to pay the charge. That conclusion follows from the combination of the following factors:

(1) the direct correlation between the amount paid into CRF by an employer in respect of its individual employees, and the amounts paid by the Commissioner for the benefit of those individual employees under Pt 8 of the SGAA;

(2) the fact that an employee could compel the Commissioner to make a payment for the employee's benefit under Pt 8 of the SGAA once the employer has made payment of the SG charge;

(3) the fact that the SG charge does not have a revenue-raising purpose.

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63 See argument by the Commonwealth in *Tape Manufacturers* (1993) 177 CLR 480 at 492.

64 *Luton v Lessels* (2002) 210 CLR 333 at 336.

65 See discussion at para 22, above.

66 *Tape Manufacturers* (1993) 176 CLR 480 at 524 (Dawson and Toohey JJ).

67 *Tape Manufacturers* (1993) 176 CLR 480 at 510 (Mason, Brennan, Deane and Gaudron JJ).

68 *DP Excavations* (2005) 190 FLR 198 at [27].

Each of these factors is discussed in turn.

Direct correlation between employer's liability and employee's benefit

43. There is a direct correlation between the amounts paid by an employer to the Commonwealth under the SG Charge Act and the SGAA in respect of an employee, and the amounts paid by the Commonwealth for the benefit of that employee.

    (1) The major component of the SG charge is the sum of "individual superannuation guarantee shortfalls" for individual employees, calculated by reference to the salary or wages of that employee and the amount of superannuation already privately paid for the benefit of that employee. In this sense, the SG charge is imposed in respect of employees individually.

    (2) Payments made by the Commissioner under Pt 8 are made to or for the benefit of individual employees. The "shortfall component" for an employee takes account not only of the employer's individual guarantee shortfall for that employee, but also any general interest charge or nominal interest component (distributed proportionately when there is more than one employee).

    (3) The only element of the SG charge in relation to an employee not ultimately passed through to the employee is the administration component; but this does not remove the direct correlation between the SG charge and the amounts paid by the Commonwealth for the benefit of the employee.

44. This direct correlation between the liability incurred by an employer in respect of an employee, and the amount paid for the benefit of that employee, favours the conclusion that the SG charge provides a "private and direct benefit" to employees. It is clear from *Luton v Lessels* that a direct correlation between amounts paid in to CRF, and amounts paid out, can be relevant to whether an exaction is a tax.[69] That is so, even though strictly money paid <u>from</u> the CRF can never be the "same" money as money paid <u>*into*</u> *CRF.*[70] (This did not prevent the exaction in *Luton* from being characterised as conferring a private benefit, rather than being characterised as a tax.)

45. The Appellant accepts that it is not sufficient (to disqualify an exaction from being a "tax") that an exaction is levied on one group in the community for the ultimate benefit of another group in the community.[71] It is a question of degree whether the connection is sufficiently close that the exaction provides a private and direct benefit, taking account of the statutory scheme as a whole.

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69 See *Luton v Lessels* (2002) 210 CLR 333 at [60] (Gaudron and Hayne JJ) (referring to the fact that the Commonwealth legislation created a right in the eligible carer to receive an amount equal to that paid to the Commonwealth by the liable parent), [178] (Callinan J) ("the amounts payable under this scheme are paid to the Commonwealth by a particular debtor in relation to a particular child or children, and an equivalent amount is paid to the particular person entitled to that amount of child support").

70 *Victoria v The Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373 at 414 (Latham CJ).

71 Cf *Luton v Lessels* (2002) 210 CLR 533 at [60] (Gaudron and Hayne JJ).

(1) Here, the connection between the amount of SG charge paid by an employer, and the amount of payments made for the benefit of employees under Pt 8 of the SGAA, is especially close and precise: the amount paid out of CRF is calculated by reference to the amount paid into CRF in relation to the employee in question.

(2) Moreover, the imposition of liability to pay the SG charge occurs because of a pre-existing employment relationship between the employer and the employee to whom the funds are ultimately paid. Indeed, one purpose of the SG charge was to address the problem of employers not complying with pre-existing obligations to provide superannuation benefits to their employees.[72] Thus while there is no replacement of any pre-existing debt with a new debt to the Commonwealth, there is a pre-existing private contractual relationship between the person who pays the SG charge and the ultimate recipient of the money.

Accordingly, the SG charge can be seen to confer both a "private" and a "direct" benefit on employees.

46. Certainly there is a much closer connection between the exaction and its application here than in the cases concerning "group relief schemes"[73], where exactions were held to be taxes in the absence of any pre-existing relationship between the payer and any ultimate recipient or any correlation between the amounts exacted and the amounts paid to the ultimate recipients.

(1) In *Tape Manufacturers* the first vendor of a blank tape paid a "royalty" calculated per minute of tape to a collecting society, which distributed amounts to copyright owners.[74]

(2) In *Northern Suburbs*[75] the training guarantee levy was calculated as a percentage of payroll,[76] and the proceeds of this levy were applied for training purposes generally.[77]

(3) In *Attorney-General (NSW) v Homebush Flour Mills Ltd*[78] the *Flour Acquisition Act 1931* (NSW) required owners of flour to sell their flour to the Crown and repurchase it at a higher price, with the difference being put into a fund for the relief of necessitous farmers.[79]

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72 Parliament of the Commonwealth of Australia, Senate Select Committee on Superannuation, *Safeguarding Super: The Regulation of Superannuation* (June 1992) at [2.30]; see also [2.27].

73 A term used in argument in *Luton v Lessels* (2002) 210 CLR 333 at 338.

74 See *Tape Manufacturers* (1993) 176 CLR 480 at 496 (Mason CJ, Brennan, Deane and Gaudron JJ).

75 (1993) 176 CLR 555.

76 *Northern Suburbs* (1993) 176 CLR 555 at 564, referring to s 15 of the *Training Guarantee (Administration) Act 1990* (Cth)

77 *Northern Suburbs* (1993) 176 CLR 555 at 565-566, setting out s 34 of the *Training Guarantee (Administration) Act.*

78 (1937) 56 CLR 390.

79 The *Flour Acquisition Act* expropriated flour coming into existence in NSW and vested it in the Crown. The rights of the expropriated owner were converted into a right to receive the "fair and reasonable

(4) In *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd*[80] the "adjustment levy" imposed by the *Dairy Products Sales Adjustment Act 1929* (British Columbia) had the effect of transferring a portion of the returns obtained by traders in the fluid milk market to traders in the manufactured products market.[81]

(5) In *Parton v Milk Board (Vic)*[82] the *Milk Board Act 1933* (Vic) imposed a levy on "dairymen", calculated per gallon of milk sold, which was used for marketing and compensation purpose.[83]

Employee could enforce payment for his or her benefit under SGAA, s 65

10 47. A second factor supporting the SG charge regime as one for the purpose of conferring a private and direct benefit on particular individuals is that an employee could enforce the right to have a payment made for his or her benefit under s 65 of the SGAA once the employer has made payment of the SG charge.

(1) As noted, s 65(1) provides that the Commissioner "is required to deal with" the amount of the shortfall component in one of the ways set out in that sub-section, subject to the exceptions in ss 65AA, 65A, 66 or 67.

(2) It is submitted that s 65(1) imposes a duty on the Commissioner to make a payment in accordance with that provision (provided the employee does not come within any of the exceptions to s 65(1)). An employee could bring proceedings to
20 enforce this duty, because he or she would have a sufficient interest in seeing this duty performed.[84]

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price" (a price fixed by a committee under the Act without regard to grade or quality). The expropriated owner was given the first option to purchase the flour from the Crown, and was required to pay the "standard price" (fixed by the Governor in Council, which was 30 shillings higher: see 56 CLR 390 at 409). If the expropriated owner sold the flour, this was taken to be an exercise of the right to purchase from the Crown – the owner paid the difference between the fair and reasonable price and the standard price into a special fund. That fund was required to be applied for the relief of necessitous farmers: see 56 CLR at 410.

80 [1933] AC 168.

81 See *Lower Mainland* [1933] AC 168 at 174. A separate "expenses levy" was imposed to recover the expenses of an Adjustment Committee: at 173.

82 (1949) 80 CLR 229.

83 The *Milk Board Act* established a fund out of which the Milk Board met its expenses of administration – including a liability to pay compensation, and an authority to spend money on promoting milk: at 254. The Fund was constituted by contributions under s 30 of the *Milk Board Act*. Relevantly, "dairymen" who were not owners of a milk shop were required to make a contribution at a rate determined by the Board, not exceeding 1/4d gallon of milk sold or distributed in the metropolis: at 255. The rate was fixed by regulations and determinations at 1/8d per gallon: at 257.

84 See, by analogy, *Pape* (2009) 238 CLR 1, which held that the tax bonus payable under the *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (the **Bonus Act**) could be recovered as a debt. Section 5 of that Act provided that a taxpayer "is entitled" to a tax bonus in certain circumstances. Section 7 provided that the Commissioner "must pay" a person the tax bonus if satisfied that the person is entitled.

French CJ held that "a right of recovery would lie on the basis of the Commissioner's duty": at [38]. Gummow, Crennan and Bell JJ held that s 5 "states an entitlement" and s 7 "imposes a duty or obligation upon the Commissioner": at [140]. Their Honours held further that, when an Act creates a duty or

No revenue-raising purpose

48. The third factor is that the SG charge does not have a revenue-raising purpose.

49. The Appellant accepts that an exaction can still be a tax, even though its principal purpose is not to raise revenue.[85] However, the absence of a revenue-raising objective will often be significant in determining the character of an exaction,[86] and it was a relevant factor in *Luton v Lessels* in concluding that the relevant exaction was not a tax.[87]

(1) In this context, "revenue-raising purpose" means a purpose of increasing the revenues of the Commonwealth.[88]

(2) *Luton v Lessels* demonstrates that it is permissible to have regard to whether a statutory scheme provides for payments **by** the Commonwealth (as well as payments to the Commonwealth), in determining whether an impost has a revenue-raising purpose.[89] Thus an impost may not have a "revenue-raising purpose", even though by definition an impost will involve a person paying money to the government.[90]

50. The SGAA ensures that the Commonwealth must make payments under Pt 8 that are exactly the same in amount as the sum of the individual superannuation guarantee shortfall and interest components paid by the employer to the Commonwealth under the SG Charge Act and SGAA. While an employer's superannuation guarantee shortfall also includes an administration component, which is not included in the amount paid by the Commonwealth, the administration component is not set at a level where it raises revenue for the Commonwealth generally.[91] Therefore this component does not alter the fundamentally private nature of the obligation imposed on the employer.

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obligation to pay money, an action will lie for its recovery, unless the Act contains some provision to the contrary: at [140].

85 See, eg *Northern Suburbs* (1993) 176 CLR 555 at 569 (Mason CJ, Deane, Toohey and Gaudron JJ), 589 (Dawson J); *Austin v Commonwealth* (2003) 215 CLR 185 at [171] (Gaudron Gummow & Hayne JJ); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 11-13 (Kitto J); *Pape* (2009) 238 CLR 1 at [382] (Hayne & Kiefel JJ).

86 *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [91] (Gleeson CJ and Kirby J).

87 (2002) 210 CLR 333 at [16] (Gleeson CJ, with McHugh J agreeing), [121] (Kirby J, who relied on this factor), [177] (Callinan J).

88 *Luton v Lessels* (2002) 210 CLR 333 at [13], [15] (Gleeson CJ, with McHugh J agreeing), [177] (Callinan J); see also [117] (Kirby J); *Tape Manufacturers* (1993) 176 CLR 480 at 529 (McHugh J, dissenting in the result); see also 522 (Dawson and Toohey JJ, dissenting in the result).

89 See (2002) 210 CLR 333 at [14]-[16] (Gleeson CJ, with McHugh J agreeing), [60] (Gaudron and Hayne JJ), [177] (Callinan J).

90 Cf *Northern Suburbs* (1993) 176 CLR 555 at 589 (Dawson J).

91 In this case, the administration component was less than 10% of the assessment: see [notice of assessment at {XXX}]. **AB [XXX]**

C. *Payment into the CRF not conclusive of whether exaction imposed for public purposes*

51. *Luton v Lessels* establishes that the fact that the proceeds of an exaction are paid into CRF is relevant, but not decisive, in determining whether the exaction is for "public purposes".

(1) Gleeson CJ held that the fact that proceeds were paid into the CRF was "not decisive" of whether an exaction was a tax,[92] while McHugh J held that a compulsory exaction is not a tax simply because the proceeds are paid into CRF.[93]

(2) Gaudron and Hayne JJ held that the destination of money "may well be significant" in deciding whether it is exacted for public purposes.[94] To similar effect, Kirby J held that payment of the proceeds into the CRF is "relevant" to whether an exaction is for public purposes.[95]

Certainly the result in *Luton v Lessels* is inconsistent with any absolute proposition that the payment of proceeds into CRF conclusively establishes that an exaction is for "public purposes".

52. Again, these statements in *Luton v Lessels* overtake apparently contrary statements in *Tape Manufacturers*.[96]

53. The Court below erred in its approach to the relevance of payments into the CRF. It held that payment into the CRF will establish that an exaction is for public purposes "in the absence of a countervailing consideration".[97] The Appellant contends that this does not accurately reflect the task with which a court is confronted when determining whether a particular exaction is or is not a tax. The task is to characterise the law by reference to the rights, duties, powers and privileges which it changes regulates or abolishes;[98] and the fact that the exaction is paid into the CRF is one factor relevant to characterisation, but it does not establish, in effect, a presumption that an exaction is for public purposes.

54. In this case, where the regime in question confers a private and direct benefit on particular individuals, the imposition of the SG charge cannot be said to be for public purposes and hence the SG charge is not a tax, regardless of the fact that it is paid into the CRF.

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92 *Luton v Lessels* (2002) 210 CLR 333 at [13].

93 *Luton v Lessels* (2002) 210 CLR 333 at [80].

94 *Luton v Lessels* (2002) 210 CLR 333 at [55].

95 *Luton v Lessels* (2002) 210 CLR 333 at [111].

96 See (1993) 176 CLR 480 at 503 (Mason CJ, Brennan, Deane and Gaudron JJ): the fact that a levy is directed to be paid into the CRF "has been regarded as a conclusive indication that the levy is exacted for public purposes".

97 *Roy Morgan Research* (2010) 184 FCR 448, [92]. **AB [XXX]**

98 See further paragraph [58] below.

55. In the alternative, if the Court below was correct in the way it approached the relevance of payments into the CRF, then the Appellant contends that the Court below erred in concluding that the **only** countervailing consideration that would alter the character of an exaction was if the exaction replaced a pre-existing liability, as was the case in *Luton v Lessels*.[99] That case was but a specific example of one possible "countervailing consideration"; it did not identify such considerations exhaustively.

56. Replacement of a pre-existing liability is not the only possible "countervailing consideration". The fact that the purpose of the exaction in question was to confer a private and direct benefit on a particular person is another countervailing consideration that will displace the significance of payment into the CRF.[100] Such a purpose is not a "public purpose", and an exaction that has this purpose is not a "tax".

The SG Charge Act and the SGAA are not laws with respect to taxation

57. As a consequence of the foregoing, the Appellant contends that the SG Charge Act and the SGAA are not properly characterised as laws with respect to taxation.

58. A law is to be characterised be reference to the nature of the rights, duties, powers and privileges which it changes regulates or abolishes;[101] and consideration of the practical operation of the law is appropriate.[102] As Brennan CJ and McHugh J observed in *Kartinyeri v Commonwealth*, "to ascertain the nature of the rights, duties, powers and privileges which an Act changes, regulates or abolishes, its application to the circumstances in which it operates must be examined".[103]

59. In this case, the practical operation of the SG Charge Act and the SGAA is to confer a duty on an employer to pay an amount to the Commissioner in relation to an identified employee and a duty on the Commissioner to pay that amount, less the administration component, to the benefit of the identified employee, who obtains a corresponding right to have payment made for his or her benefit. It can be seen that, as a matter of substance and by reference to the rights and duties created by the SG Charge Act and the SGAA, the Acts in question effectively require payment of money from the employer to the benefit of the employee, albeit with the interposition of the Commissioner and the CRF between employer and employee. The legislation confers a "private and direct benefit" on particular individuals. Such a law is not a law properly characterised as a law with respect to taxation.

60. The fact that the government may have a retirement income policy and that the SG charge may be an aspect of that policy may explain the motives of the legislators in

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99 See *Roy Morgan Research* (2010) 184 FCR 448, [92]. **AB [XXX]**

100 See *Tape Manufacturers* (1993) 176 CLR 480 at 509 (Mason CJ, Brennan, Deane and Gaudron JJ).

101 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 (Kitto J); *Pape* (2009) 238 CLR 1 at [386] (Hayne and Kiefel JJ), [451] (Heydon J, dissenting).

102 See, eg, *ICM Australia Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [138] (Hayne, Kiefel and Bell JJ); *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

103 195 CLR 337 at [7].

enacting the SG Charge Act and the SGAA, but that motive cannot assist in the characterisation of the legislation.[104]

61. Finally, the Appellant contends that there is no other head of power to support the SG Charge Act and the SGAA. The legislation is thus invalid.

PART VII: APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

62. The applicable constitutional and statutory provisions are provided as a Annexure.

PART VIII: ORDERS SOUGHT BY THE APPELLANT

63. The Appellant seeks orders that:

(1) the appeal to this Court be allowed with costs; and

(2) the orders made by the Full Court of the Federal Court be set aside, and in substitution order:

(a) the appeal to that Court be allowed with costs; and

(b) the amended notices of assessment issued by the Respondent on 13 September 2007 to the Appellant for periods from the year ending June 2001 to the quarter ending 30 June 2006 be set aside;[105] and

(3) such further or other orders as this Court thinks fit.

Date: 1 February 2011

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Kristen L Walker

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Graeme Hill

104 See *Pape* (2009) 238 CLR 1 at [385] (Hayne and Kiefel JJ).

105 The dates in para 3(2)(b) of the Notice of Appeal dated 22 December 2010 do not reflect the orders sought below, and the Appellant will be seeking to amend its Notice of Appeal to conform with the orders sought in these submissions.

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE DISTRICT REGISTRY No. M177 of 2010

On appeal from the Full Court of the Federal Court

ROY MORGAN RESEARCH PTY LTD

Appellant

THE COMMISSIONER OF TAXATION

First Respondent

10

THE ATTORNEY-GENERAL OF THE COMMONWEALTH

Second Respondent

ANNEXURE TO APPELLANT'S SUBMISSIONS – CONSTITUTIONAL AND KEY STATUTORY PROVISIONS

Commonwealth Constitution

51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

20 ...

(ii) taxation; but so as not to discriminate between States or parts of States;

...

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

...

53 Powers of the Houses in respect of legislation

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or

30 appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

...

Filed on behalf of the Appellant by: Date: 1 February 2011
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81 Consolidated Revenue Fund

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Superannuation Guarantee Charge Act 1992 (Cth) (as at 13 September 2007)

5 Imposition of charge

Charge is imposed on any superannuation guarantee shortfall of an employer for a quarter.

6 Amount of charge

The amount of superannuation guarantee charge payable on a superannuation guarantee shortfall of an employer for a quarter is an amount equal to the amount of the shortfall.

Superannuation Guarantee (Administration) Act 1992 (Cth) (as at 13 September 2007)

6 Interpretation—general

(1) In this Act, unless the contrary intention appears:

...

approved deposit fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

...

RSA has the same meaning as in the *Retirement Savings Accounts Act 1997*.

...

7 Interpretation: complying superannuation fund or scheme

A superannuation fund or scheme is a complying superannuation fund or scheme (as the case may be) in relation to a period for the purposes of this Act if it is a complying superannuation fund in relation to that period for the purposes of the *Income Tax Assessment Act 1997*.

7A Interpretation: complying approved deposit fund

An approved deposit fund is a complying approved deposit fund at a particular time for the purposes of this Act if it is a complying approved deposit fund in relation to the year of income in which that time occurred for the purposes of the *Income Tax Assessment Act 1997*.

...

16 Charge payable by employer

Superannuation guarantee charge imposed on an employer's superannuation guarantee shortfall for a quarter is payable by the employer.

17 Superannuation guarantee shortfall

If an employer has one or more individual superannuation guarantee shortfalls for a quarter, the employer has a superannuation guarantee shortfall for the quarter worked out by adding together:

(a) the total of the employer's individual superannuation guarantee shortfalls for the quarter; and

(b) the employer's nominal interest component for the quarter; and

(c) the employer's administration component for the quarter.

19 Individual superannuation guarantee shortfalls

(1) An employer's ***individual superannuation guarantee shortfall*** for an employee for a quarter is the amount worked out using the formula:

$$\text{Total salary or wages paid by the employer to the employee for the quarter} \times \frac{\text{Charge percentage for the employer for the quarter}}{100}$$

where:

charge percentage, for an employer for a quarter, means:

(a) the number specified in subsection (2) (unless paragraph (b) applies); or

(b) if the number specified in subsection (2) is reduced in respect of the employee by either or both sections 22 and 23—the number as reduced.

(2) The charge percentage is 9.

Note: This might be reduced under section 22 or 23.

(2A) If an employer makes one or more contributions (the ***no choice contributions***) to an RSA or a complying superannuation fund other than a defined benefit superannuation scheme, for the benefit of an employee during a quarter and the contributions are not made in compliance with the choice of fund requirements, the employer's ***individual superannuation guarantee shortfall*** for the employee for the quarter is increased by the amount worked out in accordance with the formula:

$$25\% \times \left[\text{Notional quarterly shortfall} - \text{Amount worked out under subsection (1)}\right]$$

where:

notional quarterly shortfall is the amount that would have been worked out under subsection (1) if the no choice contributions had not been made.

Note 1: See also subsection (2E) and section 19A.

Note 2: Part 3A sets out the choice of fund requirements.

(2B) If:

(a) a reduction of the charge percentage for an employee for a quarter is made under subsection 22(2) in respect of a defined benefit superannuation scheme; and

(b) there is at least one relevant day in the quarter where, if contributions (the ***notional contributions***) had been made to the scheme by the employer for the benefit of the employee on the day, the notional contributions would have been made not in compliance with the choice of fund requirements; and

(c) section 20 (which deals with certain cases where no contributions are required) does not apply to the employer in respect of the employee in respect of the scheme for the quarter;

the employer's ***individual superannuation guarantee shortfall*** for the employee for the quarter is increased by the amount worked out in accordance with the formula:

$$25\% \times \left[\text{Notional quarterly shortfall} - \text{Amount worked out under subsection (1)}\right] \times \frac{\text{Number of breach of condition days}}{\text{Relevant days in quarter}}$$

where:

notional quarterly shortfall is the amount that would have been worked out under subsection (1) if no reduction were made under subsection 22(2) in respect of the scheme.

number of breach of condition days is the number of relevant days in the quarter on which, if a contribution had been made to the scheme by the employer for the benefit of the employee, those contributions would have been made not in compliance with the choice of fund requirements.

Note 1: See also subsection (2E) and section 19A.

Note 2: Part 3A sets out the choice of fund requirements.

(2C) The following days in a quarter are ***relevant days*** for the purposes of subsection (2B):

(a) if the value of ***B*** in the formula in subsection 22(2) for the quarter is 1—every day in the quarter; or

(b) in any other case—every day in the quarter that is in the shorter of the scheme membership period or the certificate period referred to in subsection 22(2).

(2D) A reference in subsections (2A) and (2B) to an employer's individual superannuation guarantee shortfall being increased includes a reference to the shortfall being increased from nil.

(2E) The Commissioner may, after taking account, wherever appropriate, of the operation of section 19A, reduce (including to nil) the amount of an increase in an employer's individual superannuation guarantee shortfall for an employee for a quarter under subsection (2A) or (2B).

Note: The Commissioner must have regard to written guidelines when deciding whether or not to make a decision under this subsection: see section 21.

(3) If the total salary or wages paid by an employer to an employee in a quarter exceeds the maximum contribution base for the quarter, the total salary or wages to be taken into account for the purposes of the application of subsection (1) in relation to the quarter is the amount equal to the maximum contribution base.

22 Reduction of charge percentage where contribution made to defined benefit superannuation scheme

(1) This section applies only in relation to defined benefit superannuation schemes.

(2) If:

(a) a benefit certificate in relation to one or more complying superannuation schemes has effect for the whole or part of a quarter; and

(b) a scheme in relation to which the certificate has effect is operating for the benefit of a person as an employee of an employer; and

(c) the certificate specifies a figure as the notional employer contribution rate in relation to a class of employees (being a class that includes the employee referred to in paragraph (b)) as members of the scheme or schemes (as the case may be);

the charge percentage for the employer, as specified in subsection 19(2), in respect of an employee in the class for the quarter, is reduced, in addition to any other such reduction made under this section or section 23, by the amount worked out using the formula:

$A \times B$

where:

A is the figure referred to in paragraph (c).

B is:

(A) 1; or

(B) if, in relation to the quarter, the employment period is greater than the scheme membership period or the certificate period—either the fraction that represents the scheme membership period as a proportion of the employment period or the fraction that represents the certificate period as a proportion of the employment period or, if one fraction is smaller than the other, the smaller fraction.

(3) For the purposes of subsection (2):

the employment period means the period, or the aggregate of the periods, in the quarter for which the employee is employed by the employer.

the scheme membership period means the period, or the aggregate of the periods, in the quarter for which the employee is a member of the superannuation scheme.

the certificate period means the period, or the aggregate of the periods, in the quarter for which the benefit certificate has effect in relation to the scheme.

(4) The charge percentage for an employer for a quarter cannot be reduced below 0.

(5) For the purposes of a calculation under this section in relation to an employer and an employee:

(a) a period of leave of absence without pay granted by the employer to the employee is not to be taken into account as a period for which the employee is employed by the employer; and

(b) a benefit certificate is taken not to have effect in relation to the employee in respect of such a period.

23 Reduction of charge percentage if contribution made to RSA or to fund other than defined benefit superannuation scheme

(1) This section applies only in relation to RSAs and to superannuation funds other than defined benefit superannuation schemes.

[Reduction of charge percentage where contribution made under industrial award or law]

(2) Subject to subsections (6) and (7), if, in a quarter:

(a) an employer is required by an industrial award or a law of the Commonwealth, a State or a Territory to contribute for the benefit of an employee to a superannuation fund or an RSA; and

(b) the requisite contribution is a specified percentage of the employee's notional earnings base or a percentage of that base calculated in accordance with the award or law; and

(c) the employer contributes to a complying superannuation fund or an RSA for the benefit of the employee in accordance with the award or law;

the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the quarter, is reduced, in addition to any other such reduction made under this section or section 22, by the amount worked out using the formula:

A × B

where:

A is the amount of the percentage figure that expresses the contribution to the fund or the RSA referred to in paragraph (c) as a proportion of the total amount of the employee's notional earnings base:

(A) if the employee is employed under the industrial award or law for the whole of the quarter—for the whole of the quarter; or

(B) if the employee is employed under the award or law for a part of the quarter—for that part of the quarter.

B is:

(A) 1; or

(B) if, in relation to the quarter, the period for which the employee is employed by the employer is greater than the period of employment under the industrial award or law referred to in paragraph (a)—the fraction that represents the period of employment under the award or law as a proportion of the period of employment in the quarter.

Note: In certain cases, the choice of fund requirements provide that the employee's notional earnings base is adjusted: see section 32Y.

[Reduction of charge percentage where contribution made under occupational superannuation arrangement]

(3) Subject to subsections (6) and (7), if, in a quarter:

(a) an employer is required by an occupational superannuation arrangement to contribute for the benefit of an employee to a superannuation fund or an RSA; and

(b) the requisite contribution is a specified percentage of the employee's notional earnings base or a percentage of that base calculated in accordance with the arrangement; and

(c) the employer contributes to a complying superannuation fund or an RSA for the benefit of the employee in accordance with the arrangement;

the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the quarter, is reduced, in addition to any other such reduction made under this section or section 22, by the amount worked out using the formula:

A × B

where:

A is the amount of the percentage figure that expresses the contribution to the fund or the RSA referred to in paragraph (c) as a proportion of the total amount of the employee's notional earnings base:

(A) if the employee is employed under the occupational superannuation arrangement for the whole of the quarter—for the whole of the quarter; or

(B) if the employee is employed under the arrangement for a part of the quarter—for that part of the quarter.

B is:

(A) 1; or

(B) if, in relation to the quarter, the period for which the employee is employed by the employer is greater than the period of employment under the occupational superannuation arrangement referred to in paragraph (a)—the fraction that represents the period of employment under the arrangement as a proportion of the period of employment in the quarter.

Note: In certain cases, the choice of fund requirements provide that the employee's notional earnings base is adjusted: see section 32Y.

[Reduction of charge percentage where contribution made under scheme that specifies notional earnings base]

(4) Subject to subsections (6) and (7), if, in a quarter:

(a) an employer contributes for the benefit of an employee to a complying superannuation fund or an RSA; and

(b) the applicable superannuation scheme specifies a requisite total contribution as a percentage of the employee's notional earnings base; and

(c) the employer's contribution is not taken into account for the purpose of reducing the employer's charge percentage in respect of the employee for the quarter under subsection (2) or (3);

the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the quarter, is reduced, in addition to any other such reduction made under this section or section 22, by the amount worked out using the formula:

$A \times B$

where:

A is the amount of the percentage figure that expresses the contribution to the fund or the RSA, referred to in paragraph (a) as a proportion of the total amount of the employee's notional earnings base:

(A) if the employer contributes for the benefit of the employee to the complying superannuation fund or the RSA for the whole of the quarter—for the whole of the quarter; or

(B) if the employer contributes for the benefit of the employee to the fund or the RSA for a part of the quarter—for that part of the quarter.

B is:

(A) 1; or

(B) if, in relation to the quarter, the period for which the employee is employed by the employer is greater than the period for which the employer contributes for the benefit of the employee to the fund or the RSA referred to in paragraph (a)—the fraction that represents the period for which the employer contributes to the fund or the RSA as a proportion of the period of employment in the quarter.

Note: In certain cases, the choice of fund requirements provide that the employee's notional earnings base is adjusted: see section 32Y.

[Reduction of charge percentage where contribution made under scheme that does not specify notional earnings base]

(4A) Subject to subsections (6) and (7), if:

(a) an industrial award applying throughout a quarter (the ***current quarter***) specifies that an amount (the ***award contribution amount***) must be contributed by employers to a superannuation fund or an RSA for the benefit of the employer's employees in a class; and

(b) the award contribution amount is required, whether by the award or otherwise, to be adjusted by reference to any increase in the earnings of:

(i) the employees (the ***adjustment employees***) in the class; or

(ii) employees (also the ***adjustment employees***) of a particular kind in the class; and

(c) immediately before 21 August 1991 the award was operative and specified an amount in accordance with paragraphs (a) and (b); and

(d) the award has not, on or after that date and before the end of the current quarter, been amended in a way that has the effect of reducing the notional earnings base (see subsection (4C)) of the employees in the class for any quarter; and

(e) during the current quarter, an employer contributes an amount (the ***actual contribution amount***), whether or not equal to the award contribution amount, for the benefit of an employee in the class, to the superannuation fund or the RSA;

the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the current quarter, is reduced in accordance with subsection (4B).

Note: In certain cases, the choice of fund requirements provide that the employee's notional earnings base is adjusted: see section 32Y.

(4B) The reduction is in addition to any other reduction under this section or section 22 and its amount is worked out using the formula:

$$\frac{\text{Actual contribution amount}}{\text{Notional earnings base (see subsection 4C) of the employee in relation to the current quarter} \times \text{Quarter factor of the employee in relation to the current quarter}} \times \text{Employment factor of the employee in relation to the current quarter} \times 100\%$$

(4C) In subsection (4A) or (4B):

employment factor, in relation to an employee in the class for a quarter, means:

(a) if, in the quarter, the period for which the employee is employed by the employer is greater than the period of employment under the award—the fraction that represents the period of employment under the award as a proportion of the period of employment in the quarter; or

(b) in any other case—1.

notional earnings base, in relation to an employee in the class for a quarter, means an amount equal to the lesser of the maximum contribution base (see section 15) for the quarter and:

(a) if the employee is a full-time employee—the earnings of each of the adjustment employees, under the award, in the quarter; or

(b) if the employee is a part-time employee—the amount worked out using the formula:

$$\frac{\text{Number of hours employed}}{\text{Full-time employee's hours}} \times \text{Adjustment earnings}$$

where:

Adjustment earnings means the earnings of each of the adjustment employees, under the award, in the quarter;

Full-time employee's hours means the number of ordinary hours of work for which an equivalent full-time employee would have been employed in the quarter in which the employee is employed under the award;

Number of hours employed means the number of hours for which the employee is employed in the quarter.

quarter factor, in relation to an employee in the class for a quarter, means:

(a) if, in the quarter, the period for which the employee is employed by the employer under the award is less than the whole of the quarter—the fraction that represents the period for which the employee is employed by the employer under the award as a proportion of the whole of the quarter; or

(b) in any other case—1.

(4D) Subject to subsections (6) and (7), if, in a quarter, an employer contributes an amount (the ***actual contribution amount***) for the benefit of an employee to the Aberfoyle Award Superannuation Fund that was established by a trust deed on 18 May 1987, the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the quarter, is reduced in accordance with subsection (4E).

Note: In certain cases, the choice of fund requirements provide that the employee's notional earnings base is adjusted: see section 32Y.

(4E) The reduction is in addition to any other reduction under this section or section 22 and its amount is worked out using the formula:

$$\frac{\text{Actual contribution amount}}{\text{Notional earnings base (see subsection (4F))} \times \text{Quarter factor}} \times \text{Employment factor} \times 100\%$$

(4F) In subsection (4E):

employment factor means:

(a) if, in the quarter, the period for which the employee is employed by the employer is greater than the period for which the employer contributes for the benefit of the employee to the Aberfoyle Award Superannuation Fund—the fraction that represents the period for which the employer so contributes as a proportion of the period of employment; or

(b) in any other case—1.

notional earnings base means:

(a) if the employee is a full-time employee—the notional earnings base of the employee within the meaning of section 13; or

(b) if the employee is a part-time employee—the amount worked out using the formula:

$$\frac{\text{Number of hours employed}}{\text{Full-time employee's hours}} \times \begin{array}{c}\text{Notional earnings base}\\ \text{(within the meaning of}\\ \text{section 13)}\end{array}$$

where:

full-time employee's hours means the number of ordinary hours of work for which an equivalent full-time employee would have been employed in the quarter in which the employee is employed.

number of hours employed means the number of hours for which the employee is employed in the quarter.

quarter factor means:

(a) if, in the quarter, the period for which the employer contributes for the benefit of the employee to the Aberfoyle Award Superannuation Fund is less than the whole of the quarter—the fraction that represents the period for which the employer so contributes as a proportion of the whole of the quarter; or

(b) in any other case—1.

(5) Subject to subsections (6) and (7), if, in a quarter:

(a) an employer contributes for the benefit of an employee to a complying superannuation fund or an RSA; and

(b) the contribution is not taken into account for the purpose of reducing the employer's charge percentage in respect of the employee for the quarter under subsection (2), (3), (4), (4A) or (4D);

the charge percentage for the employer, as specified in subsection 19(2), in respect of the employee for the quarter, is reduced, in addition to any other such reduction made under this section or section 22, by the amount worked out using the formula:

$A \times B$

where:

A is the amount of the percentage figure that expresses the contribution to the fund or the RSA referred to in paragraph (a) as a proportion of the total amount of the employee's ordinary time earnings:

(A) if the employer contributes for the benefit of the employee to the complying superannuation fund or the RSA for the whole of the quarter—for the whole of the quarter; or

(B) if the employer contributes for the benefit of the employee to the fund or the RSA for a part of the quarter—for that part of the quarter;

B is:

(A) 1; or

(B) if, in relation to the quarter, the period for which the employee is employed by the employer is greater than the period for which the employer contributes for the benefit of the employee to the fund or the RSA referred to in paragraph (a)—the fraction that represents the period for which the employer contributes to the fund or the RSA as a proportion of the period of employment in the quarter.

Note: In certain cases, the choice of fund requirements provide that the employee's ordinary time earnings are adjusted: see section 32Y.

Some contributions made after a quarter ends may be taken into account in the quarter

(6) A contribution to a complying superannuation fund or an RSA made by an employer for the benefit of an employee may be taken into account under this section as having been made in a quarter if it is in fact made within the period of 28 days after the end of the quarter.

Certain contributions made before a quarter may be taken into account in the quarter

(7) A contribution to a complying superannuation fund or an RSA made by an employer for the benefit of an employee may be taken into account under this section as if it had been made during a particular quarter if the contribution is made not more than 12 months before the beginning of the quarter.

Contributions taken into account for a quarter not to be taken into account for any other quarter

(8) A contribution to a superannuation fund or an RSA made by an employer for the benefit of an employee that is taken into account under this section in relation to a quarter is not to be taken into account under this section in relation to any other quarter.

[Contribution made when conversion notice has effect not to be taken into account under this section]

(8A) A contribution to a superannuation fund or superannuation scheme made by an employer for the benefit of an employee at a time when a conversion notice has effect in relation to the fund or scheme is not at any time to be taken into account under this section.

[Certain awards, arrangements, laws and schemes taken not to specify requisite contribution as percentage of notional earnings base]

(9) An industrial award, an occupational superannuation arrangement, a law of the Commonwealth, a State or a Territory or a superannuation scheme is to be taken not to specify the requisite employer contribution as a percentage of an employee's notional earnings base if the award, arrangement, law or scheme:

(a) determines the earnings of the employee by reference to which the requisite employer contribution is to be calculated by specifying an amount of money; and

(b) makes no provision for adjustment of that amount by reference to changes in the earnings of an employee.

[Contributions to estate of deceased employee]

(9A) If:

(a) an employee has died; and

(b) the employer would, if the employee had not died, have made a contribution to a complying superannuation fund or RSA for the benefit of the employee; and

(c) the employer pays to the legal personal representative of the employee an amount equal to the amount of the contribution that would have been paid;

the amount paid is taken for the purposes of this section to have been a contribution made by the employer to a complying superannuation fund or RSA for the benefit of the employee.

[Charge percentage not to be less than 0]

(10) The charge percentage for an employer for a quarter cannot be reduced below 0.

[Reduction of notional earnings base if amount excluded from employee's salary or wages]

(11) If an employee's notional earnings base includes an amount of the employee's salary or wages that, because of section 27 or 28, is not taken into account for the purpose of making a calculation under section 19, the employee's notional earnings base for the purposes of this section is taken to be reduced by that amount.

[Reduction of ordinary time earnings if amount excluded from employee's salary or wages]

(12) If, because of section 27 or 28, an amount of an employee's salary or wages is not taken into account for the purpose of making a calculation under section 19, the employee's ordinary time earnings for the purposes of this section are taken to be reduced by that amount.

(13) Subject to subsection (15), if:

(a) an employer makes a deposit under the *Small Superannuation Accounts Act 1995* in respect of an employee before 1 July 2006; and

(b) the deposit form that accompanied the deposit, in so far as the form relates to the deposit, did not contain a declaration that is false or misleading;

this section has effect as if the deposit were a contribution made by the employer for the benefit of the employee to a complying superannuation fund.

(14) Subsection (13) has effect despite section 9 of the *Small Superannuation Accounts Act 1995*.

(15) If:

(a) an employer makes a deposit under the *Small Superannuation Accounts Act 1995* in respect of an employee; and

(b) the employer receives a payment under Part 8 of that Act by way of a refund of the deposit;

this section has effect as if the deposit had never been made.

(16) In subsections (13) and (15):

deposit has the same meaning as in the *Small Superannuation Accounts Act 1995*.

deposit form has the same meaning as in the *Small Superannuation Accounts Act 1995*.

23A Offsetting late payments against charge

(1) A contribution to a complying superannuation fund or an RSA made by an employer for the benefit of an employee is offset under subsection (3) if:

(a) the contribution is made:

(i) after the end of the period of 28 days after the end of a quarter; and

(ii) before the end of the 28th day of the second month after the end of the quarter; and

(b) the employer elects, in the approved form, that the contribution be offset.

(2) The election must be made within 4 years after the employer's superannuation guarantee charge for the quarter became payable. The election cannot be revoked.

(3) The contribution is offset against the employer's liability to pay superannuation guarantee charge to the extent that the liability relates to:

(a) that part of the employer's nominal interest component for the quarter that relates to the employee; or

(b) the employer's individual superannuation guarantee shortfall for the employee for the quarter.

(4) The contribution is offset against that part of the employer's nominal interest component for the quarter that relates to the employee before any remainder is offset against the employer's individual superannuation guarantee shortfall for the employee for the quarter.

(5) A contribution to a superannuation fund or an RSA made by an employer for the benefit of an employee that is taken into account under this section in relation to a quarter is not to be taken into account:

(a) under this section in relation to any other quarter; or

(b) under section 22 or 23.

...

31 Nominal interest component

The nominal interest component in relation to an employer for a quarter is the amount that would accrue by way of interest on the total of the employer's individual superannuation guarantee shortfalls for the quarter if interest were calculated at the rate applicable under the regulations for the purposes of this subsection from the beginning of the quarter in question until the date on which superannuation guarantee charge in relation to the total would be payable under this Act.

32 Administration component

An employer's administration component for a quarter is the amount worked out using the formula:

$$\text{Base amount} + [N \times \text{Per capita amount}]$$

where:

base amount is the amount (if any) prescribed in the regulations.

N is the number of employees in respect of whom the employer has an individual superannuation guarantee shortfall for the quarter.

Per capita amount is $20 or such other amount as is from time to time prescribed.

...

64A The *shortfall component* for one benefiting employee

(1) This section applies if there is only one benefiting employee.

(2) The ***shortfall component*** for the payment is the lesser of the following amounts:

(a) the amount of the payment;

(b) the amount of the employee entitlement, calculated at the time when the payment is made (see subsection (3)).

(3) The ***employee entitlement***, calculated at a particular time, is the sum of the following amounts:

(a) the individual superannuation guarantee shortfall for the employee for the quarter;

(b) any general interest charge, in respect of non-payment of superannuation guarantee charge payable on that shortfall, that has been paid by, or is payable at, the particular time;

(c) any nominal interest component for the quarter that has been paid by, or is payable at, the particular time;

reduced (but not below zero) by the amounts of any previous payments to which this Part applies that relate to the same quarter, employer and employee.

64B The *shortfall component* for more than one benefiting employee

(1) This section applies if there is more than one benefiting employee. In this situation, separate shortfall components are worked out for each of the benefiting employees.

(2) The ***shortfall component*** for a payment, in respect of a particular employee, is the employee's proportion of the lesser of the following amounts:

(a) the amount of the payment;

(b) the amount of the total employee entitlement, calculated at the time when the payment is made.

(3) An ***employee's proportion*** of an amount is the following proportion:

$$\frac{\text{Employer's individual superannuation guarantee shortfall for the employee for the quarter}}{\text{Total of the employer's individual superannuation guarantee shortfalls for the quarter}}$$

(4) The ***total employee entitlement***, calculated at a particular time, is the sum of the following amounts:

(a) the employer's individual superannuation guarantee shortfalls for the quarter;

(b) any general interest charge, in respect of non-payment of superannuation guarantee charge payable on those shortfalls, that has been paid by, or is payable at, the particular time;

(c) any nominal interest component for the quarter that has been paid by, or is payable at, the particular time;

reduced (but not below zero) by the amounts of any previous payments to which this Part applies that relate to the same quarter, employer and employees.

65 Payment of shortfall component

(1) Except in a case covered by section 65A, 66 or 67, the Commissioner is required to deal with the amount of the shortfall component in one of the following ways:

(a) in any case—pay the amount of the component, for the benefit of the employee, to:

(i) an RSA; or

(ii) an account with a complying superannuation fund; or

(iii) an account with a complying approved deposit fund;

that is held in the name of the employee and that is determined by the Commissioner to belong to the employee;

(b) if the employee has nominated an RSA, a complying superannuation fund or a complying approved deposit fund in accordance with the regulations:

(i) pay the amount of the component to the RSA or fund for the benefit of the employee; or

(ii) make arrangements in accordance with the regulations to enable the amount of the component to be paid to the RSA or fund for the benefit of the employee;

(c) if the employee has not made a nomination under paragraph (b)—credit the amount of the component to an account kept under the *Small Superannuation Accounts Act 1995* in the name of the employee.

(2) A payment of the amount of a shortfall component made or arranged by the Commissioner for the benefit of an employee to a superannuation fund is conclusively presumed to be a payment to a complying superannuation fund for the purposes of subsection (1) if, at the time the payment is made, the Commissioner has obtained a written statement, provided by or on behalf of the trustee of the fund, that the fund:

(a) is a resident regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993*; and

(b) is not subject to a direction under section 63 of that Act.

(3) A payment of the amount of a shortfall component made or arranged by the Commissioner for the benefit of an employee to an approved deposit fund is conclusively presumed to be a payment to a complying approved deposit fund for the purposes of subsection (1) if subsection (4) applies.

(4) This subsection applies if, at the time the payment is made, the Commissioner has obtained a written statement, provided by or on behalf of the trustee of the fund, that the fund is operated in accordance with the *Superannuation Industry (Supervision) Act 1993* and regulations under that Act.

(5) If an amount is to be credited under paragraph (1)(c), an amount equal to the credited amount is to be credited to the Superannuation Holding Accounts Special Account.

(6) A payment under paragraph (1)(a) to a particular account is taken to be a payment to the complying superannuation fund or the complying approved deposit fund with which the account is held, for the purposes of this section and any other laws of the Commonwealth that refer to payments under this section.

65A Payment to employee who is over 65

The Commissioner must pay the amount of the shortfall component directly to the employee (whether or not he or she is still an employee) if:

(a) the employee is 65 years or more; and

(b) the employee has requested the Commissioner in the approved form to pay the amount to him or her.

66 Payment to employee retired due to permanent incapacity or invalidity

If:

(a) the employee has retired because of permanent incapacity or permanent invalidity; and

(b) the former employee has lodged with the Commissioner:

(i) written notice of the retirement; and

(ii) a copy of a certificate signed by 2 registered medical practitioners certifying that the former employee is unlikely to be able to work again in a capacity for which he or she is reasonably qualified by education, training or experience;

the Commissioner must pay the amount of the shortfall component to the former employee.

67 Payment where employee deceased

If the employee has died, the Commissioner must pay the amount of the shortfall component to the legal personal representative of the employee.

...

AMENDING PROVISIONS

The provisions set out above have not been amended, except that the SGAA has (relevantly) been amended by the following Acts.

Superannuation Laws Amendment (2004 Measures No. 2) Act 2004 [amending s 23]

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
...		
3. Schedule 1, items 5 to 7	1 July 2008.	1 July 2008
...		

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

...

Schedule 1—Amendments

...

Superannuation Guarantee (Administration) Act 1992

5 Sections 13, 13A, 13B and 14

Repeal the sections.

6 Subsections 23(2) to (5)

Repeal the subsections, substitute:

Reduction of charge percentage where contributions are made by employer

(2) If, in a quarter, an employer contributes for the benefit of an employee to a complying superannuation fund or an RSA, then the charge percentage for the employer (as specified in subsection 19(2)) for the employee for the quarter is reduced by the number worked out using the formula:

$$\frac{\text{Contribution}}{\text{Ordinary time earnings}} \times 100$$

where:

contribution is the number of dollars in the amount of the contribution.

ordinary time earnings is the number of dollars in the ordinary time earnings of the employee for the quarter in respect of the employer.

Example: If the contribution is $60 and the ordinary time earnings are $1,000 then the charge percentage is reduced by 6. If there are no other contributions, and no reduction under section 22, then the charge percentage will be 3 (instead of 9).

(3) A reduction under subsection (2) in respect of a contribution is in addition to:

(a) any other reduction under that subsection in respect of any other contribution; and

(b) any reduction under section 22.

7 Subsection 23(9)

Repeal the subsection.

Corporations Amendment (Insolvency) Act 2007 (Cth), Sch 1 [amending SGAA s 64B]

...

Superannuation Guarantee (Administration) Act 1992

11 Section 52

Repeal the section.

12 Subsection 64B(3)

Omit "An", substitute "Subject to subsection (3A), an".

13 After subsection 64B(3)

Insert:

(3A) The Commissioner may vary an employee's proportion of an amount if the amount of the charge payment has been affected by:

(a) the application of the monetary limit imposed by subsection 556(1A) of the *Corporations Act 2001* in respect of the employee; or

(b) the application of the monetary limit imposed by paragraph 109(1)(e) of the *Bankruptcy Act 1966* in respect of the employee.

14 Application—section 52 of the *Superannuation Guarantee (Administration) Act 1992*

The repeal of section 52 of the *Superannuation Guarantee (Administration) Act 1992* by this Schedule, in so far as it relates to a company that is being wound up under the *Corporations Act 2001*, applies if the relevant date (within the meaning of the *Corporations Act 2001*) is on or after the day on which this item commences.

15 Application—subsection 64B(3A) of the *Superannuation Guarantee (Administration) Act 1992*

(1) Paragraph 64B(3A)(a) of the *Superannuation Guarantee (Administration) Act 1992* applies if the relevant date (within the meaning of the *Corporations Act 2001*) is on or after the day on which this item commences.

(2) Paragraph 64B(3A)(b) of the *Superannuation Guarantee (Administration) Act 1992*, in so far as it relates to a bankruptcy, applies if the date of the bankruptcy is on or after the day on which this item commences.

(3) Paragraph 64B(3A)(b) of the *Superannuation Guarantee (Administration) Act 1992*, in so far as it relates to a personal insolvency agreement, applies if the relevant authority under section 188 of the *Bankruptcy Act 1966* became effective on or after the day on which this item commences.

Tax Laws Amendment (2008 Measures No. 2) Act 2008, Sch 2 [amending SGAA s23A]

Superannuation Guarantee (Administration) Act 1992

1 Paragraph 23A(1)(a)

Repeal the paragraph, substitute:

(a) the contribution is made after the end of the period of 28 days after the end of a quarter; and

2 Subsection 23A(2)

Repeal the subsection, substitute:

(2) The election must be made:

(a) in a statement having effect under section 35 as the employer's assessment for the quarter; or

(b) within 4 years after the employer's superannuation guarantee charge for the quarter became payable.

The election cannot be revoked.

3 After subsection 23A(4)

Insert:

(4A) If the election happens after the employer's assessment for the quarter is made, then, for the offset to take effect, the assessment must be amended accordingly under section 37.

...

8 Transitional—charge remaining payable at commencement

(1) If, for the purposes of the *Superannuation Guarantee (Administration) Act 1992*, superannuation guarantee charge:

(a) became payable under an assessment before the commencement of this Schedule; and

(b) was not fully paid before that commencement;

this item applies in relation to the employer's liability to pay the proportion of the charge (the ***remaining charge***) remaining payable at that commencement.

(2) After that commencement, subsection 23A(2) of that Act applies as if the remaining charge became payable at that commencement.

(3) If it is proposed to amend the assessment to effect a reduction, as a result of an offset under section 23A of that Act, in the employer's liability to pay the remaining charge, then:

(a) subsection 37(3) of that Act applies as if the assessment were made at that commencement; and

(b) paragraph 37(5)(a) of that Act applies as if the remaining charge became payable under the assessment at that commencement.

(4) If the assessment was of superannuation guarantee charge payable in relation to a year (instead of a quarter), then that Act also applies as if references in that Act to a quarter were references to a year.

9 Transitional—charge for a year that becomes payable after commencement

If, for the purposes of the *Superannuation Guarantee (Administration) Act 1992*, superannuation guarantee charge:

(a) is payable in relation to a year (instead of a quarter) happening before the commencement of this Schedule; and

(b) does not become payable until after that commencement;

then that Act applies, in relation to the employer's liability to pay the charge, as if references in that Act to a quarter were references to a year.

Tax Laws Amendment (2008 Measures No. 6) Act 2009, Sch 3 [amending s 23A]

Superannuation Guarantee (Administration) Act 1992

1 Paragraph 23A(1)(a)

Repeal the paragraph, substitute:

(a) the contribution is made:

(i) after the end of the period of 28 days after the end of a quarter; and

(ii) before the employer's original assessment for that quarter is made; and

2 Paragraph 23A(2)(b)

Omit "superannuation guarantee charge for the quarter became payable", substitute "original assessment for the quarter is made".

3 Subsection 23A(3)

After "The contribution is offset", insert ", at the time the employer's original assessment for the quarter is made,".

...

5 Application

The amendments made by this Schedule apply to elections under section 23A of the *Superannuation Guarantee (Administration) Act 1992* made on or after the commencement of this Schedule. [26 March 2009]

Tax Laws Amendment (2009 Measures No 1) Act 2009 (Cth), Sch 2 Pt 2 [adding s 65AA, and consequential amendments]

...

Superannuation Guarantee (Administration) Act 1992

60 Subsection 65(1)

After "section", insert "65AA,".

61 After section 65

Insert:

65AA Shortfall component and former temporary resident

(1) This section applies if the employee is a former temporary resident (within the meaning of the *Superannuation (Unclaimed Money and Lost Members) Act 1999*).

(2) The Commissioner must treat the amount of the shortfall component as if it had been paid to the Commissioner by a superannuation provider in respect of the employee under section 20F of that Act.

62 Section 65A

Omit "The Commissioner must", substitute "Except in a case covered by section 65AA, the Commissioner must".

63 Sections 66 and 67

Omit "If", substitute "Except in a case covered by section 65AA, if".