



## HIGH COURT OF AUSTRALIA

Manager, Public Information

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### RALPH DESMOND CLARKE v COMMISSIONER OF TAXATION & ANOR [2009] HCA 33

The Commonwealth's attempt to impose a surcharge tax on members of State parliaments, based on their notional entitlements under defined benefit superannuation schemes, was constitutionally invalid, the High Court held today.

Ralph Clarke was elected to the South Australian Parliament in 1993. He served as a member of parliament from 11 December 1993 until 8 February 2002. Mr Clarke was a member of three state superannuation schemes: the Parliamentary Superannuation Scheme (PS Scheme); the Southern State Superannuation Scheme (SSS Scheme); and the State Superannuation Benefit Scheme which was rolled into the SSS Scheme under South Australian superannuation scheme merger legislation.

Between February 2000 and February 2005 the Commissioner of Taxation issued superannuation contribution surcharge assessments to Mr Clarke, pursuant to the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Imposition Act 1997* (Cth) (the Imposition Act) and the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997* (Cth) (the Assessment Act). Mr Clarke's objections to the assessments were disallowed by the Commissioner. He applied to the Administrative Appeals Tribunal (AAT) for review of the Commissioner's decisions and the AAT referred questions of law, including a question about the constitutional validity of the Imposition Act and the Assessment Act, to the Full Court of the Federal Court. The Full Court held that both Acts were valid. The High Court granted special leave to Mr Clarke to appeal the decision of the Full Court.

The Imposition Act and the Assessment Act applied to "constitutionally protected funds" which included the schemes of which Mr Clarke was a member. Liability was imposed on a fund member if the member's adjusted taxable income exceeded a defined threshold amount. (South Australian state parliamentarians fell within this group.) The two Acts obliged fund members to pay amounts calculated on the basis of notional contributions that bore no necessary relation to the pension he or she would actually receive. Potentially the benefits received could be less than the amounts assumed in the calculation of the surcharge. Also, the tax accrued, compounding at market interest rates, until the member actually received his or her superannuation benefits. Potentially the tax due could approximate the whole of the pension due in the first year of receipt. To ameliorate these potential effects the South Australian government passed legislation whose general aim was to ensure that persons with an accumulated surcharge debt with the Australian Taxation Office had at retirement a method of obtaining a lump sum to expunge the debt with the ATO.

The High Court concluded that the Constitution recognises the States as independent entities and will not support laws which impair or interfere with the capacities or functions conferred on the States or which inhibit the execution of their constitutional powers. The Court found that the Imposition Act and the Assessment Act were not laws of general application, but rather laws which placed a special disability or burden on the States in relation to the way in which they remunerated members of State parliaments. Remuneration of members of parliament, as one aspect of the capacity to fix terms and conditions of those elected to parliament, is critical to each State's capacity to function as a government. The Court determined that for these reasons, both the Imposition Act and the Assessment Act were beyond the legislative power of the Commonwealth and made orders reflecting that determination.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*