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 SUBMISSIONS IN REPLY

Filed on behalf of the Appellant by
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1. These submissions are suitable for publication on the internet.

Payment into the CRF[1] is not *conclusive* of whether a tax imposed for public purposes

2. First, contrary to the Attorney-General's submission,[2] the fact that the proceeds of the SG charge are paid into the CRF does not conclusively establish that it is imposed for public purposes.

   (1) In *Luton v Lessels*,[3] this Court had regard to the payments made by the Commonwealth, as well as payments made to the Commonwealth, in concluding that the exaction was not a "tax".

      (a) The Appellant submits that the proper analysis of *Luton v Lessels* is that the exaction in that case was not imposed for public purposes, even though proceeds were paid into the CRF (see further below).[4]

      (b) The Appellant's argument therefore does not depend on establishing that a payment made for the benefit of an employee under Part 8 of the SGAA is the "same" money as money paid into the CRF by an employer.[5] Rather, consistently with *Luton v Lessels*, the Applicant contends that the SG charge takes its character from the whole of the superannuation guarantee scheme.

   (2) The Appellant submits that *Luton v Lessels* is an example of a broader principle – that an exaction will not be for "public purposes" if its purpose is to confer a private and direct benefit on a person or group.[6] That private and direct benefit can only be determined by considering the nature of payments out of CRF.[7] For that reason, the SG charge should be analysed on the footing that Part 8 of the SGAA is valid.[8]

3. The Attorney-General cites several Canadian authorities for the proposition that the "public purposes" requirement merely emphasises that taxation involves exacting money to service the ends of government.[9]

   (1) So much may be accepted; however, this is a very different proposition from saying that payment into the CRF conclusively establishes that an exaction is for public purposes. An exaction that has the purpose of conferring a private and

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1 The Appellant uses the same abbreviations as in its summary of argument dated 1 February 2011 (**Appellant summary**).

2 Submissions of the Attorney-General dated 15 February 2011 (**A-G summary**), para 38.

3 (2002) 210 CLR 333 at [60] (Gaudron and Hayne JJ), [178] (Callinan J); Appellant summary, para 44.

4 Appellant summary, para 30.

5 Appellant summary, para 44. However, the Appellant does contend that the payments by the Commonwealth can be seen, in substance, as having come from the employer: cf A-G summary, para 28.

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

7 Cf A-G summary, paras 6 and 25.

8 Cf A-G summary, para 29.

9 See A-G summary, paras 31-36, particularly *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357.

direct benefit on a person or group by compulsory transfer of money from one person for the benefit of another is not servicing the ends of government.[10]

(2) It should also be noted that this line of cases in Canada establishes a different proposition – in Canada, an exaction is only a "tax" if it has the purpose of raising revenue.[11] Thus, for example, Canadian cases distinguish between a "tax" and a "regulatory fee" (which has a principal purpose of guiding behaviour, rather than raising revenue).[12]

(3) In *Tape Manufacturers*,[13] the majority of this Court rejected the approach taken in the Canadian and United States cases, including the case of *Massey-Ferguson Industries Ltd v Government of Saskatchewan*[14] cited by the Attorney-General.

Appellant's argument depends on more than "revenue neutrality"

4. The Appellant accepts that there is nothing unconstitutional about revenue-neutrality *per se*;[15] however, the Appellant does not rely simply on the direct correspondence between the amount of SG charge paid into CRF and the amounts paid out under Part 8 of the SGAA. In addition, the Appellant relies on the facts that: (a) the payment made for the benefit of an employee reflects his or her individual circumstances (and is not calculated or disbursed at a group level); (b) the obligation to pay arises out of, and from, a pre-existing private relationship (here, an employment relationship); and (c) an employee can enforce a payment for his or her benefit.[16]

5. The legislative schemes referred to in footnote 93 of the A-G summary do not have these additional features – unlike those Acts, the SG charge is not simply funding a "specific category" of spending. In any event, the fact that the SG charge does not have a revenue-raising purpose is a relevant factor, favouring the view that it is not a tax.[17]

Purpose of creating incentive for employers only goes to public interest, not public purposes

6. Secondly, the fact that the SG charge creates an incentive for employers to make superannuation contributions to their employees only establishes that it is in the public interest, whereas the concept of "public purposes" is narrower.

7. The Appellant contends that an exaction will not be for "public purposes" if its purpose is to confer a private and direct benefit on a person or group. Although this argument is

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10 Appellant summary, para 41. See SGAA, s 63B(1). As in *Luton v Lessels*, the interposition of the CRF between the employer and employee does not alter the character of the scheme.

11 See eg *Re Eurig Estate* [1998] 2 SCR 565 at [19]-[20], explaining the "public purposes" requirement from *Lawson*. See also *Luton v Lessels* (2002) 210 CLR 333 at [117] (Kirby J).

12 See eg *Connaught Ltd v Canada (Attorney-General)* [2008] 1 SCR 131 at [22]-[23]; *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134 at [17].

13 (1993) 176 CLR 480 at 503.

14 [1981] 2 SCR 413; A-G summary, para 36.

15 Cf A-G summary, para 50.

16 Appellant summary, para 42.

17 Appellant summary, paras 49 and 50.

contrary to statements by the majority in *Tape Manufacturers*,[18] it is supported by *Luton v Lessels*.[19]

8. Moreover, the Appellant's argument is wholly consistent with *Northern Suburbs*.[20]

   (1) The statutory scheme in that case was different from the SGAA and the SG Charge Act, because there was no direct correlation (or, indeed, any correlation[21]) between the amounts paid by an employer, and the benefit received by any employee.

   (2) It is immaterial that in *Northern Suburbs* these features went to whether the training guarantee charge was a "fee for service", and not to whether it was imposed for "public purposes".[22]

      (a) First, there is a clear overlap in the factors that are relevant to whether an exaction is for "public purposes" and whether it is a "fee for service" – for example, the presence or absence of a revenue-raising purpose is clearly relevant to both questions.

      (b) Secondly, the Appellant relies on a difference in the statutory scheme (which is described in the High Court's discussion of fees for service), to explain why the SG charge is not imposed for a public purpose while the training guarantee charge is. The fact that this aspect of the training guarantee legislation was discussed in the context of fees for services is simply a product of the different arguments put in that case.

9. If the Attorney-General's approach were correct, the "public purposes" requirement would have no useful to role to play – by definition, the Parliament would consider that every exaction it imposes is in the public interest.[23]

A "tax" must be imposed for *public* purposes

10. Thirdly, the Appellant maintains that an essential element of the definition of a tax is that it is imposed for public purposes, for the reasons given in its summary.[24]

11. The Attorney-General misunderstands the Appellant's reliance on s 51(xxxi) of the Commonwealth Constitution in this context – clearly, an exaction that is supported by s 51(ii) will stand outside s 51(xxxi).[25] It is for that reason that the definition of "tax" must exclude exactions that confer a private and direct benefit on a person or group by

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18 But see (1993) 176 CLR 480 at 524.3-524.8 (Dawson and Toohey JJ) and 529.3-529.7 (McHugh J).

19 Appellant summary, paras 37 and 38; contra A-G summary, para 43.

20 (1993) 176 CLR 555.

21 *Northern Suburbs* (1993) 176 CLR 555 at 568.3 (Mason CJ, Brennan, Deane and Gaudron JJ).

22 A-G summary, para 47; *Roy Morgan Research* (2010) 184 FCR 448, [80]. **AB [XXX]**

23 Appellant summary, paras 37- 39.

24 Appellant summary, paras 20 to 24 and 40-41; contra A-G summary, paras 51 to 54.

25 A-G summary, para 54; Appellant summary, para 24(2)(a).

compulsory transfer of money from one person for the benefit of another — these exactions should be subject to s 51(xxxi) and the requirement of "just terms".[26]

Appellant's argument is supported by *Luton v Lessels*

12. Finally, the Appellant reiterates that the proper analysis of *Luton v Lessels* (putting aside the divergent approach of Kirby J) is that the exaction in that case was not a tax, because it was not imposed for public purposes.[27]

    (1) The impost in *Luton v Lessels* satisfied the other positive attributes of a tax. No judge (apart from Kirby J) held that it was imposed for public purposes.[28]

    (2) If the Court were intending to create a new category of impost that has all the positive attributes of a tax, and none of the negative attributes, but is not a "tax", it could be expected that the Court would say so.

13. In the alternative, however, if *Luton v Lessels* is an example of an impost that has all the positive features of a tax (and none of the negative attributes) but is nevertheless not a "tax", it is submitted that the SG charge is another example of such an impost.

    (1) The Attorney-General would seek to restrict this new category of imposts that are not taxes to the situation where an impost replaces a pre-existing liability.[29] The Appellant accepts that the SG charge does not replace a pre-existing obligation in exactly the same way as the impost in *Luton v Lessels*.

    (2) The Appellant contends, however, that the relevant category is broader, and extends to any impost that confers a private and direct benefit on a person or group by compulsory transfer of money from one person for the benefit of another. Such imposts are not taxes, either because they are not imposed for "public purposes", or because they are a separate category of imposts that have the positive attributes of a tax but are not "taxes".

    (3) Crucially, the Appellant does not simply rely on the direct correlation between the amounts of SG charge paid into CRF and the amounts paid out for the benefit of employees under Part 8: see para 4 above.[30]

14. The Appellant maintains that *Luton v Lessels* does overtake *Tape Manufacturers* on some points of principle, even though the latter decision was distinguished in *Luton v Lessels* and not formally overruled.[31] In particular, *Luton v Lessels* does cast doubt on the broad statement in *Tape Manufacturers* that equates "public purposes" with the public interest.[32]

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

27 Appellant summary, para 30. Kirby J alone held that the exaction was for public purposes, but held that it was not a tax because it did not have a revenue-raising purpose: (2002) 210 CLR 333 at [109], [121].

28 *Cf* A-G summary, para 59 footnote 102.

29 See A-G summary, para 59.

30 Appellant summary, paras 16(2) and 42 to 45; cf A-G summary, paras 56 and 57.

31 Appellant summary, paras 31 and 32.

32 (1993) 176 CLR 480 at 504-505 (Mason CJ, Brennan, Deane and Gaudron JJ).

(a) Gleeson CJ held in terms that the fact that an exaction was considered to be in the public interest did not mean it was for "public purposes".[33] The Attorney-General's attempted re-characterisation of this passage (that Gleeson CJ relied upon the distinction between public interest and public purpose simply to establish that the mere fact that a law was referable to a head of power did not establish the existence of public purposes) is simply not open.[34]

(b) Gaudron and Hayne JJ held that the fact that an exaction was of public benefit did not establish that it was a tax.[35] However, their Honours' grounds for distinguishing *Blank Tapes*[36] show that the impost in *Luton* conferred a private and direct benefit on a person or group, which in turn (properly analysed) means that it was not imposed for public purposes.

15. There are grounds for overruling *Tape Manufacturers*,[37] if that becomes necessary.

(1) On this point the Court was closely divided and the result was not worked out over a succession of cases.

(2) The Appellant's argument would only affect those legislative schemes where a purported tax conferred a private and direct benefit on a person or group by compulsory transfer of money from one person for the benefit of another.[38] Thus, the potential for fiscal inconvenience should not be overstated.

(3) In any event, the decision in *Ha v New South Wales*[39] demonstrates that the potential for fiscal inconvenience will not prevent this Court from correcting constitutional error. The legislative response to that decision[40] indicates that there would be means of preventing any fiscal dislocation.

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33 *Luton v Lessels* (2002) 210 CLR 333 at [12].

34 A-G summary, para 63.

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

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

37 See the discussion of overruling in constitutional cases in: *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 189 CLR 513 at 609-613 (Gummow J); *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [65]-[71] (French CJ).

38 Thus the renewable energy (electricity) legislation, referred to in A-G Summary, fn 109, would not be affected, as it does not provide for payment of an amount directly correlating to the charge to an individual with a pre-existing legal relationship to the entity that paid the charge. Nor would the proposed flood levy, referred to in A-G Summary, fn 93, be affected, for the same reason.

39 (1997) 189 CLR 465 at 503 (Brennan CJ, McHugh, Gummow and Kirby JJ).

40 See *British American Tobacco v Western Australia* (2003) 217 CLR 30 at [32]-[33] (McHugh, Gummow and Hayne JJ).