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When is a government charge a tax?

In two recent decisions, the High Court has considered when an impost levied by legislation will constitute a tax.

In *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35(*Roy Morgan Research*), the High Court upheld the validity of the superannuation guarantee charge on the basis that it was imposed for a public purpose, while in *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40 (*Queanbeyan City Council*), two ACT imposts were upheld because they were found not to be duties of excise.

Roy Morgan Research Pty Ltd v Commissioner of Taxation

In a 7:0 decision (Heydon J writing separately), the High Court upheld the validity of the superannuation guarantee charge (SGC).

Roy Morgan had appealed to the High Court against a Full Federal Court decision upholding the constitutional validity of the provisions imposing a tax known as the SGC, which Roy Morgan was liable to pay in respect of certain employees. The appeal was brought on the ground that there was no head of power to support the imposition of the SGC. In particular, Roy Morgan argued that the SGC is not a tax because it confers 'a private and direct benefit' on an employee, which means it is not imposed for a public purpose, and therefore its imposition is not supported by s 51(ii) of the Constitution. The High Court has generally defined a tax as 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and … not a payment for services rendered'.

Superannuation guarantee scheme

The superannuation guarantee scheme is established by two Acts: the *Superannuation Guarantee (Administration) Act 1992* (Administration Act) and the *Superannuation Guarantee Charge Act 1992* (Charge Act). The scheme applies to 'employers' of 'employees'. Generally speaking, the scheme imposes a tax (the

SGC) on employers (s 5 of the Charge Act), which is paid into the Consolidated Revenue Fund (CRF). The tax includes a component that is calculated by reference to the salary of the employer's employees. The amount of SGC payable is reduced where an employer makes superannuation contributions in respect of an employee. There is, then, for this and other reasons, a practical incentive for employers to make superannuation contributions in respect of their employees (see [57] per Heydon J).

Part 8 of the Administration Act provides for a payment out of the CRF for the benefit of an employee an amount equal to the SGC component that is related to the employee's salary and was paid by their employer into the CRF. In essence, the relevant amount is to be paid for the benefit of the employee into a retirement savings account, superannuation fund, approved deposit fund or superannuation account in accordance with s 65 of the Administration Act. Roy Morgan argued that this arrangement effectively meant that the SGC involved a conferral of a 'private and direct benefit' on the employee and did not involve an exaction for a public purpose.

High Court decision

The joint judgment (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ) rejected the appellant's argument that the SGC was not imposed for a public purpose, holding that '[i]t is settled that the imposition of a tax for the benefit of the Consolidated Revenue Fund is made for public purposes' ([49]) and that the nature of the exaction represented by the SGC did not fall into any of the categories that would take it outside the constitutional conception of 'taxation' (for example, a fee for service) ([43]).

The joint judgment concluded that, ultimately, the appellant's case, characterising the SGC as conferring a 'private and direct benefit', depended upon 'tracing' the SGC through the CRF. However, the SGC paid by a particular employee lost its identity once it formed part of the CRF ([51]). Money received into the CRF is not earmarked and is available to be appropriated for any purpose for which the Commonwealth may lawfully spend money ([50], [51]).

Writing separately, Heydon J also rejected the appellant's argument that the SGC was not imposed for a public purpose, holding that 'it tends to persuade employers to make direct superannuation contributions' and that this 'achieves public purposes quite independently of any revenue collected through it' ([57]).

Queanbeyan City Council v ACTEW Corporation Ltd

In a 7:0 decision, the High Court held that government imposts on certain government bodies are not taxes but are just internal financial arrangements of government.

In these appeals, Queanbeyan City Council argued that imposts levied by the ACT on ACTEW Corporation Ltd (ACTEW) were duties of excise. Under s 90 of the Constitution, the States and Territories may not impose duties of excise (ie taxes on goods). ACTEW is a Territory-owned corporation, governed by the *Territory-owned Corporations Act 1990* (ACT). By virtue of that Act, the ACT executive could exercise significant control over ACTEW's activities.

The High Court held that the imposts on ACTEW were not taxes; it was therefore unnecessary to decide whether the imposts were taxes on goods. The joint judgment of six judges said that ACTEW was an entity 'indistinct from the polity' that levied the imposts (ie the ACT) ([20]-[22]; see also [46]). This indistinctness followed particularly from the control exercisable by the ACT executive over ACTEW's activities. The Court said that an impost on such an entity was an 'internal financial arrangement of government', not a tax ([20-22], [46]). The Court also indicated that, in characterising the imposts, it was not relevant that they applied to entities other than ACTEW, including entities that may have been distinct from the ACT ([16], [55]).

Implications

Each of the decisions dealt with the definition of taxation. *Roy Morgan Research* confirms that an impost paid into the CRF will be for public purposes, although this is not conclusive of whether the levy amounts to a tax. Following *Queanbeyan City Council*, it appears that an impost that is an 'internal financial arrangements of government' will generally not be a tax.

AGS (Kathryn Graham and Danielle Forrester) instructed the Solicitor-General and other counsel for the Commonwealth Attorney-General, who intervened in *Roy Morgan Research*. In *Queanbeyan City Council*, AGS (Andrew Buckland, Danielle Forrester and David Hume) instructed Chief General Counsel, Robert Orr QC, and other counsel for the Commonwealth Attorney-General intervening.

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