IN THE HIGH COURT OF AUSTRALIA **NO. S 218 OF 2011**
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF NEW SOUTH WALES

BETWEEN:

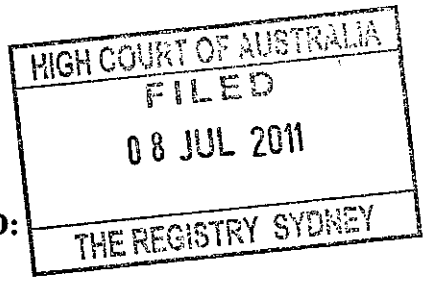
TASTY CHICKS PTY LIMITED
First Appellant

ANGELO TRANSPORT PTY LIMITED
Second Appellant

SOURIS HOLDINGS PTY LIMITED
Third Appellant

MINAS SOURIS
Fourth Appellant

JENNY SOURIS
Fifth Appellant



AND:

CHIEF COMMISSIONER OF STATE REVENUE
Respondent

APPELLANTS' SUBMISSIONS

Part I:

1. The appellants certify that these submissions are in a form suitable for publication on the internet.

Part II:

2. The appeal raises for determination the following five issues, namely:

   (a) whether the right of review under s. 97 of the *Taxation Administration Act*, 1996 (NSW) (***the Administration Act***) by the Supreme Court of New South Wales (**the Supreme Court**), of reviewable decisions of the respondent, is an appeal in its right and proper sense, limited to redressing error by the respondent based on the materials before him at the time of his decision, on the one hand, or a hearing de novo, on the other hand?

   (b) whether the principles of judicial review of discretionary decisions enunciated in *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353 at 360 and 362-363, have any application to the review of those decisions of the respondent which depend on his state of mind by the Supreme Court pursuant to s. 97 of the *Administration Act*?

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(c) whether the Court of Appeal should have overruled *Affinity Health Limited v CCSR (NSW)* 2005 ATC 4637 (***Affinity Health***)?

(d) whether the Court of Appeal was entitled to re-exercise on appeal the respondent's discretion to decline to de-group the appellants under sections 16B, 16C and 16H of the *Payroll Tax Act*, 1971 (NSW) (***the Tax Act***), after the Primary Judge had re-exercised that discretion pursuant to s. 101(1)(b) of the *Administration Act*, without making a finding that the Primary Judge had committed an error of principle in his re-exercise of that discretion consistently with *House v The King* (1936) 55 CLR 499 at 504-505?

(e) whether the determination by the Court of Appeal of those grounds of appeal in the respondent's appeal to that Court (grounds 8-15), relating to the interpretation and application of the de-grouping provisions of the *Tax Act*, miscarried on any of the four grounds addressed in these submissions?

Part III:

3. The appellants gave notice of their intention to serve notices under s. 78B(1) of the *Judiciary Act*, 1903 (Cth) on the Attorneys-General of the States and Territories in their Summary of Argument on the application for special leave to appeal at Part IV [12]. During the hearing of that application, the appellants understand that the Full Court ruled that it was unnecessary to issue such notices: see [2011] HCA Trans 151 p. 6/155. Accordingly, no such notices have been issued by the appellants.

Part IV:

4. The reasons for judgment of the Primary Judge are reported as: *Tasty Chicks Pty Limited v Chief Commissioner of State Revenue* 2009 ATC 20-132; (2009) 77 ATR 394. The reasons for judgment of the Court of Appeal are reported as: *Chief Commissioner of State Revenue v Tasty Chicks Pty Limited* 2010 ATC 20-233.

Part V:

5. The fourth and fifth appellants (**Mr and Mrs Souris**) conduct a chicken meat processing business in partnership (**the Firm**). They own and manage the Firm.

6. The first appellant (**Tasty Chicks**) conducts an administrative services business. It is owned and managed by Sam and Vicki Phylactou. It provided services to each of the other appellants under bilateral service agreements called "deeds of agreement".

7. The second appellant (**Angelo Transport**) conducts a transport business specialising in the carriage of fresh food, primarily chicken meat. It is owned and managed by Michael Souris, who is the son of Mr and Mrs Souris.

8. The third appellant (**Souris Holdings**) owns commercial real estate, including the premises from which each of the other appellants conducts business at Marrickville in Sydney and all of which premises are leased at market rentals under written leases.

9. Mr and Mrs Souris own and manage the Firm and Souris Holdings, so they do not challenge the grouping of those two businesses, nor have they sought any order for their de-grouping for payroll tax purposes.

10. The businesses of the other appellants (Tasty Chicks, the Firm and Angelo Transport) are independently owned and managed by their respective proprietors.

11. The payroll tax grouping regime in New South Wales for the 6 tax years under appeal (the 2002-2007 tax years) are divided into 3 distinct legislative periods:

    (a) 2002-2003: grouping occurs under s. 16C of the *Tax Act* and de-grouping under s. 16H of the *Tax Act* (**the first period**);

    (b) 2004-2005: grouping occurs under former s. 106H of the *Administration Act* and de-grouping under ss. 16B-16C of the *Tax Act* (**the second period**);

    (c) 2006-2007: grouping occurs under former s. 106H of the *Administration Act* and de-grouping under ss. 16B-16C of the *Tax Act* (**the third period**).

12. The appellants challenge the respondent's refusal to de-group Tasty Chicks, Angelo Transport and the Firm for the three periods under the de-grouping provisions.

13. In his Summary of Argument in Part II at [6] the respondent accepted this statement of the relevant facts: see the Application Book on special leave, Vol. 2, p. 427/10.

Part VI:

Issue 1 – the nature of the review by the Supreme Court under section 97

14. The appellants complain (notice of appeal at [2]) that the Court of Appeal erred when it concluded (at [29]-[32]) that, having regard to:

    (i) the operation of s. 97(4) of the *Administration Act*;

    (ii) the engagement by s. 97(4) of sections 19(2)(a) and 75A of the *Supreme Court Act*, 1970 (NSW) (***the Supreme Court Act***); and

    (iii) the contrast between the procedure for undertaking the review of reviewable decisions of the respondent by the Supreme Court pursuant to s. 97 of the *Administration Act,* on the one hand, and the procedure for undertaking the review of such decisions by the Administrative Decisions Tribunal (**the Tribunal**) pursuant to s. 96 of the *Administration Act*, on the other hand,

    the right of review by the Supreme Court of reviewable decisions of the respondent arising under s. 97(1) of the *Administration Act*:

    (iv) "*is an appeal in its 'right and proper sense'* ";

    (v) "*is* a *right to redress error by the Commissioner on the materials that were before him at the time*"; and

    (vi) "*is not a rehearing or a hearing de novo*".

15. At all material times, Part 10 of the *Administration Act* governed the procedure to be adopted by taxpayers to ventilate their taxation disputes with the respondent.

16. Prior to the enactment of the *Administration Act* in 1996, the objection and appeal provisions in relation to a dispute under the *Tax Act* were contained in Part 6 of the *Tax Act* (namely, sections 32, 32A and 32B).

17. The *Administration Act* was enacted as part of a cross-jurisdictional reform to standardise legislation applying to all State taxes, to remedy the unsatisfactory situation of having radically different legislation applying in each State and Territory: see Hansard 30/10/96 p. 5,593; and 13/11/96 p. 5,821.

18. The Minister emphasised, in relation to the objection and appeal provisions, that *"under ... the Bill, neither the appellant nor the Chief Commissioner will be limited to the grounds of objection in pursuing their appeal"*: see Hansard 30/10/96 p. 5,595; and 13/11/96 p. 5,822.

19. In addition, the *Administration Act* introduced a completely new procedure whereby a taxpayer can refer an assessment directly to the Supreme Court where the respondent has failed to make any decision on the taxpayer's objection within 90 days after receipt of the objection: see ss. 97(1)(b) and 99(2) of the Act: see the *Second Reading Speech* at Hansard 30/10/96 pp. 5,594-5,595; and 13/11/96 p. 5,822.

20. In such a situation the Court is required to consider the taxpayer's objection and make a decision without any objection decision of the respondent ever having been made.

21. On enactment of the *Administration Act*, the Tribunal had not been established. The *Administrative Decisions Tribunal Act* 1997 (NSW) (***the ADT Act***) did not commence operation until 6 October 1998.

22. The Tribunal had no revenue jurisdiction until 1 July 2001.

23. On commencement, s.102 of the *Administration Act* was in the same terms as the current s.101, except that it referred to the powers of the Court on "*appeal*".

24. Further, s.102 of the *Administration Act*, on commencement, provided that "*on an appeal, the appellant has the onus of proving the appellant's case*". Former s.32B of the *Tax Act* referred to the onus on the taxpayer to prove that the tax in question was "*incorrectly assessed*". Such a change in language is indicative of an intention by Parliament to allow an expansive review of a taxpayer's "*case*" on an appeal and not to confine the review procedure to proving that the assessment was incorrect by reference to an error or errors having been committed on the part of the respondent.

25. This legislative history demonstrates that the *Administration Act* brought about a significant change in the manner of reviewing decisions of the respondent, in that:

(a) the reference in the former s. 32B of the *Tax Act* to an appeal by way of "*re-hearing*" was changed, and s. 101 of the *Administration Act* now expressly articulates the powers of the Court on a review by it of such decisions;

(b) conformably with the expanded powers of the Court on the enactment of Part 10 of the *Administration Act*, neither the taxpayer nor the respondent is limited to the grounds contained in the objection, that is to say, the *Administration Act* provides scope for the matter to be fully ventilated and for different or additional grounds to be agitated; and

(c) the *Administration Act* provided (s. 97(1)(b)), for the first time, for a dispute to by-pass the respondent altogether where he has failed to determine an objection within the 90 days allowed to him to do so: see the note to s. 91(1).

26. On 1 July 2001, the *Administrative Decisions Tribunal Legislation Amendment (Revenue) Act* 2000 (NSW) commenced. That Act achieved the following objectives:

(a) it established the Revenue Division of the Tribunal;

(b) it amended the *Administration Act* to confer jurisdiction on the Tribunal in respect of certain revenue matters;

(c) it amended the *Administration Act* (whereby the then Part 10 was repealed) and the present provisions were enacted; and

(d) relevantly, the references to "*appeal*" in the *Administration Act* were changed to become references to "*review*".

27. Section 101 of the *Administration Act* conferred precisely the same powers of review on the Supreme Court as on the Tribunal. Section 101(1)(b), in particular, empowers the Supreme Court and Tribunal alike to "*make an assessment or other decision in place of the assessment or other decision to which the application relates*". An example of "*another decision*" is the decision to refuse to de-group a group of employer/taxpayers who have been grouped for payroll tax purposes.

28. When the Revenue Division of the Tribunal was established on 1 July 2001, the powers of the Court did not change.

29. Rather, a parallel procedure was made available to taxpayers wishing to pursue their disputes with the respondent in the Tribunal. The procedure for review in the Tribunal is initiated under s. 96 of the *Administration Act*.

30. In his *Second Reading Speech* (see Hansard 11/10/2000 p. 8,934) on the Bill, the Treasurer said:

> "*It is anticipated that,* ***by conferring concurrent jurisdiction on the Administrative Decisions Tribunal and the Supreme Court,*** *taxpayers who are presently deterred from pursuing a review of the Chief Commissioner's decision past the objection stage because of the complexity, expense and delay associated with Supreme Court proceedings will take advantage of access to the cheap and flexible review mechanisms offered by the Administrative*

Decisions Tribunal. Conversely, those taxpayers who wish to access the judicial expertise of the Supreme Court because their particular matter involves highly technical and difficult legal issues or because the amount of tax in issue is substantial can do so." [Emphasis added by Counsel]

31. The respondent contended before the Court of Appeal that the *State Revenue Legislation Amendment Act*, 2001 (NSW), which inserted s. 97(4) into the *Administration Act*, was intended to make explicit the difference between the "*review*" undertaken by the Tribunal and the "*appeal*" to the Supreme Court.

32. However, a closer reading of the *Second Reading Speech,* which was relied on in the Court of Appeal by the respondent, suggests that, while s. 97 still refers to a "*review*", the legislative purpose was to make explicit that the then Part 51A of the *Supreme Court Rules* applied to such a review. Part 51A did not use the word "*review*". In his *Second Reading Speech,* the Treasurer stated (see Hansard 11/4/2001 p. 13,535) that:

> "*The bill will* ***restore the application of part 51A of the Supreme Court rules, which will avoid the need for new rules*** *to be promulgated regarding reviews.*" [Emphasis added by Counsel]

33. The Court of Appeal found (at [32]) that ss. 75A and 19(2) of the *Supreme Court Act* apply to proceedings under s. 97 of the *Administration Act* and that they do not authorise a review on the merits of the kind undertaken by the Primary Judge.

34. Nothing in s. 75A of the *Supreme Court Act* has the effect of reading down the Court's powers under s. 101 of the *Administration Act* in that manner because:

(a) s. 75A has effect "*subject to any Act*" (see s.75A(4)), relevantly, including s. 101 of the *Administration Act*;

(b) the subject matter of a review under s. 97 of the *Administration Act* is not a matter which has been the subject of a "*hearing*" and, therefore, not the subject of a "*rehearing*" under s. 75A(5): see the repeal of s. 32B of the former *Tax Act* (and its superseded reference to an "*appeal by way of rehearing*");

(c) s. 75A(8) does not relevantly apply either, as the respondent's decision under review is not a "*judgment after a trial or hearing on the merits*"; and

(d) subsections 75A(6) and (10) expressly contemplate the Court exercising the powers of the "*body or other person from whom the appeal is brought*".

35. Section 97(4) of the *Administration Act* achieves no more than the deeming of the right of "*review*" in s. 97(1) to be an "*appeal*" for the limited purpose of facilitating its conduct by the procedures stated in the *Supreme Court Act* and *Rules,* thereby obviating the need to enact a separate body of rules for the conduct of such reviews. The engagement of sections 19(2) and 75A of the *Supreme Court Act* by s. 97(4) of the *Administration Act* should be understood in that purely procedural light.

36. In *B & L Linings v CCSR* (2008) 74 NSWLR 481 the Court of Appeal (Allsop P, Giles and Basten JJA) emphasised that s. 75A of the *Supreme Court Act* operates "*subject to any Act*", and, accordingly, that s.75A does not affect the scope of the appeal rights conferred by the *Administration Act*: Basten JA at [144]-[150]; Allsop P at [74]-[79].

37. In particular, in *B & L Linings* at [148], Basten JA held that "*the purpose of s. 75A is to confer on the Supreme Court particular powers, including the power to hear further evidence, which will result in an appeal subject to its terms being an appeal by way of rehearing*." Basten JA also cited, at [148], the statement by Gaudron J in *CDJ v VAJ* (1998) 197 CLR 172 at [95] that, "*if a right of appeal is conferred by statute, the terms of the statutory grant determine the nature of the appeal and, consequently, the right, if any, to adduce further evidence on the appeal.*" Allsop P observed at [79] that "*s. 75A may widen the powers of the Court to encompass the findings of fact*" even in an appeal limited to a question of law, such as an appeal from the Tribunal under s. 119 of the *ADT Act*, which was the subject matter of the *B & L Linings* appeal

38. In *Paspaley v CCSR* [2007] NSWCA 184 at [34], the Court of Appeal held that s. 97 of the *Administration Act* gave a right of "*full review*" and not merely a right to "*a review limited to jurisdictional error on the face of the record*", albeit so held as *obiter dicta,* as the issue did not squarely arise for determination in that particular appeal.

39. In *Paspaley* the Court also considered the scope of s. 103A of the *Administration Act* and the subject matter of a review under s. 97 of the *Administration Act*. Basten JA held at [28] (with Giles JA agreeing at [1] and Campbell JA agreeing at [70]) that:

> "*... the right of review under s. 97 is given by reference to the operative decision of the Chief Commissioner and not to a ruling made on an objection. Although the existence of an objection is a necessary precondition to the power of review by the Court ... it is the initial decision which is the subject matter of the review... the parties are not limited to the grounds of the objection in ...the ...review: s. 100(2). Further, it is the original assessment or other decision which is confirmed, revoked or replaced: s. 101(1)(a) and (b).*"

40. This conclusion must, with respect, be correct, in light of s. 97(1)(b), when there is no objection decision made by the respondent but a right of review nonetheless.

41. The Court of Appeal's decision in this matter on the nature of the review by the Supreme Court ignores the scope of operation of s. 97 of the *Administration Act* highlighted by this passage by the Court of Appeal differently constituted in *Paspaley*. The subject matter of the "*review*" is the respondent's "*decision*", and not his "*determination of the objection*". By s. 86(1)(b) of the *Administration Act*, a "*decision*" incorporates the broad definition of that term made in s. 6 of the *ADT Act*.

42. This Court has enunciated a doctrine of construing grants of jurisdiction to courts to determine the rights of litigants "*according to their natural and ordinary meaning*", by a process of construction which does not "*impose, by way of implication, a limit upon a wide statutory jurisdiction*", or read down the "*grant of power to a court (including the conferral of jurisdiction) ... as subject to a limitation not appearing in the words of the grant*": see *Knight v FP Special Assets Limited* (1992) 174 CLR 178 at 205; and also see *FAI General Insurance v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [64]; and esp. *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [21] per Gaudron and Gummow JJ (which was applied by the Court of Appeal, as constituted *inter alia* by two of the members (namely, Giles and Handley JJA) who constituted it in this matter, in *Maurici v CCSR* (2001) 51 NSWLR 673 at [49]-[50]; [62]; and [63]).

43. Section 97 of the *Administration Act,* in terms, gives a right of "*review*". The word "*review*" connotes a full review on the merits: see *Tomko v Palasty (No. 2)* [2007] NSWCA 369 at [43], citing *Colpitts v Australian Telecommunications Commission* (1986) 9 FCR 52, 63-64, and *Re Greenhill; Ex parte Pook* (1988) 8 ALR 295 at 296.

44. The conclusion of the Court of Appeal (at [32]), limiting the power of review of the Supreme Court under s. 97 of the *Administration Act* (irrespective of the nature of the decision under review) to "*a right of appeal in its strict sense*", is at odds with this line of authority on the nature of a statutory right of "*review*" by a court.

Issue 2 – inapplicability of the principles stated in *Avon Downs v FCT*

10 45. The appellants complain (notice of appeal at [3]) that the Court of Appeal erred in its treatment of the principles stated by Dixon J in *Avon Downs Pty Limited v FCT* (1949) 78 CLR 353 at 360 and 362-363, and in particular:

(i) when it held that those principles apply to a "*review*" by the Supreme Court under s. 97 of the *Administration Act* against decisions of the respondent which depend on his state of mind; and

(ii) by failing to consider whether the nature of the "*review*" under s. 97 of the *Administration Act* was either the same as, or relevantly similar to, the nature of the review undertaken by Dixon J, sitting at first instance, in *Avon Downs* of an assessment of income tax under sections 187(b), 197, 198(2) and 199 of the
20 *Income Tax Assessment Act,* 1936 (Cth) (***the ITAA36***).

46. The Court of Appeal held (at [33]) that it followed from its earlier conclusion on the nature of the review (at [32]) that the principles stated in *Avon Downs* apply to those appeals under s. 97 of the *Administration Act* from the exercise of powers and discretions which depend on the respondent's state of mind.

47. But the appellants rhetorically ask: If all "*appeals*" to the Supreme Court under s. 97 of the *Administration Act* are appeals "*in the strict sense*", as the finding at [32] makes clear, then surely *every* such appeal will require the application of the principles of strict judicial review enunciated in *Avon Downs,* and not merely that limited class of decisions of the respondent which depend on his state of mind?

30 48. There is nothing in the language of s. 97 of the *Administration Act* to warrant any difference in approach by virtue of the class of decision that is subject to review.

49. Dixon J was hearing an appeal against an objection decision under sections 187(b), 197, 198(2), 199 of the *ITAA36*: see 78 CLR 353 at 354A. Dixon J did no more in *Avon Downs* than recognise that he was precluded from exercising the executive power of the Commonwealth whilst exercising its judicial power: see *MacCormick v FCT* (1945) 71 CLR 283 at 307, where his Honour explained the rationale for the principles of judicial review stated in *Avon Downs* in these terms: "*This Court has ... adopted the general view,* ***in dealing with Federal legislation*** **in pari materia** ..." [Emphasis added by Counsel].

50. The Court of Appeal, having been asked by the respondent to apply the principles in *Avon Downs* to redetermine the review of his decision to decline to de-group the appellants, failed to ask itself the correct question, which was: Can the principles stated in *Avon Downs* have any application at all to *the Supreme Court of a State* when it is exercising *State jurisdiction*?

51. That is, the Court of Appeal failed to ask itself whether the Parliament of New South Wales was indeed empowered to bestow on its Supreme Court the power in s. 101(1)(b) of the *Administration Act* to conclude the review of the respondent's decision without the need for remittal of the decision to him for redetermination.

52. The power of the New South Wales Parliament is not subject to the separation of powers doctrine, when legislating for the jurisdiction of its Supreme Court, in the same way that the Commonwealth Parliament is when legislating for federal courts. Rather, the former has full power "*to make laws for the peace, order and good government of the State of New South Wales*": see s. 2 of the *Australia Act,* 1986 (Cth)

53. That legislative power is, however, subject to such laws being in conformity with the *Commonwealth Constitution*: see s. 5 of the *Australia Act*; and it is also subject to such laws having a sufficient nexus with that particular State: see *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1936) 56 CLR 337 at 375 per Dixon J.

54. The rationale for the principles stated in *Avon Downs*, and before that stated in *MacCormick v FCT* , were addressed in 1976 by Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621:

> "*There are, of course, sound reasons for thinking that in many cases an appeal to a court from an administrative authority will necessarily entail a hearing de novo and* ***I exclude for present purposes the case of an appeal to a federal court exercising the judicial power of the Commonwealth under Chap. III of the Commonwealth Constitution.***" [Emphasis added by Counsel]

55. The appellants' thesis on the inapplicability of *Avon Downs* is that bestowal under s. 101(1)(b) of the *Administration Act* of a limited jurisdiction to re-exercise the powers of the respondent to conclude the appeal to the Supreme Court under s. 97 of that Act, rather than making an order for remittal to the respondent, is a valid bestowal of jurisdiction on that Court as a Chapter III Court. It is valid because the bestowal of jurisdiction is not "*so extensive or of such a nature that the Supreme Court would lose its identity as a court*" which is qualified to exercise the judicial power of the Commonwealth: see *Kable v DPP (NSW)* (1996) 189 CLR 51 at 117.

56. Indeed, relevantly, McHugh J recognised in *Kable v DDP (NSW)* at 117 that:

> "*... a State can invest its Supreme Court with a jurisdiction similar to that which is presently exercised in the federal sphere by the Administrative Appeals Tribunal. The Supreme Court would not lose its identity as the Supreme Court of a State merely because it was given a jurisdiction similar to that of the Tribunal.*"

57. The appellants contend that that is precisely what the Parliament of New South Wales did in 1996 by enacting Part 10 Division 2 of the *Administration Act* – it equated the powers of the Court and Tribunal to review decisions of the respondent.

Issue 3 – the overruling of *Affinity Health Limited v Chief Comm'r of State Revenue*

58. The appellants complain (notice of appeal at [4]) that the Court of Appeal erred when it overruled (at [33]) the decision in *Affinity Health Limited v Chief Comm'r of State Revenue (NSW)* (2005) ATC 4637, insofar as that decision held that the Supreme Court had, *first*, the power to undertake a full review on the merits of all reviewable decisions of the respondent under s. 97 of the *Administration Act,* and *secondly*, the power under s. 101(1) of the *Administration Act* to re-exercise those statutory discretions of the respondent which depend on his state of mind.

59. The Primary Judge, consistently with what he held in *Affinity Health* at [57]-[58], determined to undertake the review of the respondent's decisions at [148]-[150] by:

(a) reviewing evidence which was not limited to the evidence which was before the respondent at the time he made his decision on the de-grouping; and

(b) substituting his own decision for that of the respondent in reliance on that evidence and ordering the de-grouping of the appellants in all three periods.

60. The Court of Appeal held (at [32]) that the powers of the Supreme Court under s. 101 of the *Administration Act* do not determine the "*logically anterior question*", to adopt the phrase it coined, on the nature of the "*appeal*" to the Court under s. 97.

61. The appellants contend that there is no "*logically anterior question*" arising here.

62. Section 101 of the *Administration Act* should be construed according to its clear terms and legislative purpose, as the Primary Judge held at [165]. In this regard the appellants rely on the authorities cited in paragraph 42 above on grants of power.

63. The bestowal on the Supreme Court by s. 101(1)(b) of the power to "*make an assessment or other decision in place of the assessment or other decision*" under review, necessarily informs the nature of the review by the Court under s. 97.

64. The Court of Appeal's conclusion (at [32]) that "*the powers of the Court under s. 101 of the* Administration Act, *once it decides to intervene, do not determine, or in this case throw any light on the logically anterior question concerning the nature of the appeal itself. Those powers are appropriate wether the appeal is one in its strict and proper sense or a rehearing*" is erroneous on three grounds.

65. *First*, the Supreme Court has no discretion to "*intervene*". If the decision under review qualifies for review under s. 97 of the *Administration Act* (*via* s. 86 of the Act, as having been made the subject of an objection, whether the objection has been determined or not) then the Court has a statutory *duty* to exercise jurisdiction.

66. *Secondly*, there is no "*logically anterior question*". The powers which a Court exercises on a "*review*" necessarily determine the nature and extent of that "*review*".

67. *Thirdly*, the power to stand in the shoes of the decision-maker and to re-exercise all of his statutory powers, including his discretionary powers, necessarily characterises that review as a review on the merits, and not an appeal in the nature of strict judicial review, limited to finding errors of principle as determined by reference to an analysis only of the materials that were before the decision-maker.

68. The Primary Judge was, therefore, correct when he held, both in *Affinity Health* in 2005 at [57]-[58], and once again in this matter some 4 years later in 2009 at [165], that "*the powers of review are the same for the Court and the Tribunal.*"

69. The Primary Judge was also correct when he held, in *Affinity Health* (at [56]-[57]), that the prescription of a different procedure for undertaking a review under s. 63 of the *ADT Act* by the Tribunal could not cut down the clear language of s. 101(1) in characterising the nature of the Court's review under s. 97 of the *Administration Act.*

70. The Supreme Court has a power of "*full review*", not limited to establishing error by the respondent, as the Court of Appeal held in *Paspaley* at [34] (and at [1] and [70]).

71. Accordingly, the Court of Appeal fell into error (at [32]-[33]) when it overruled *Affinity Health* and held that the nature of the right of appeal under s. 97 of the *Administration Act* is "*a right of appeal in the strict sense of an appeal*".

Issue 4 – the failure to apply on appeal the principles stated in *House v The King*

72. The appellants complain (notice of appeal at [5]) that the Court of Appeal erred by:

(i) failing to consider, on the appeal from the Primary Judge, whether the principles enunciated in *House v The King* (1936) 55 CLR 499 at 504-505 on the limitations on appellate intervention into judicial decisions of a discretionary nature – apply in an appeal to it from proceedings under s. 97 of the *Administration Act* involving the review by the Supreme Court of a determination by the respondent which depends on his state of mind and which involved a re-exercise of his discretion by the Supreme Court; and

(ii) failing to make a determination that the Primary Judge had committed any errors of principle in his interpretation and application of the *Tax Act* on his re-exercise of the discretion to de-group the appellants under s. 101(1) of the *Administration Act,* as a threshold question for its own re-exercise of that discretion on appeal, in conformity with the principles enunciated in *House v The King* (1936) 55 CLR 499 at 504-505,

notwithstanding that *House v The King* was cited during the appeal, albeit deployed by the respondent to restrain the exercise of power to de-group *by* the Primary Judge. The appellants contend that it was more appropriately applicable to the re-exercise *by* the Court of Appeal on appeal *from* the re-exercise of that discretion by the Primary Judge pursuant to his powers of review under s. 101(1) of the *Administration Act.*

73. In *House v The King* (1936) 55 CLR 499 the Court held at 504-505 that:

> *"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in the exercise of the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."*

74. No process of ascertaining error of the requisite kind by the Primary Judge was undertaken by the Court of Appeal.

75. Having regard to the findings by the Court of Appeal that no error of the requisite kind was made by the respondent, and on the assumption that *Avon Downs,* if it applied at all, applied with equal force to the re-exercise of the discretion to de-group on appeal in the Court of Appeal, the Court of Appeal necessarily had no power on appeal to re-exercise the discretion to de-group either.

76. *In the first period* (the 2002 and 2003 payroll tax years) the Court of Appeal:

(a) analysed the requirements of s. 16H(1) of the *Tax Act* (at [85]]);

(b) analysed the respondent's exercise of his discretion to de-group (at [86], [87], and [89]);

(c) analysed the re-exercise of the discretion to de-group by the Primary Judge (at [88] and [90]-[95]); and

(d) after finding that its conclusion on the re-exercise of the discretion to de-group on appeal was *obiter dicta* or *per incuriam* (because the application of the principles in *Avon Downs* was found to be determinative of the appeal on de-grouping, at [96], [108], [110] and [113]), proceeded to re-exercise the discretion itself (at [96]), without making any finding of error by the Primary Judge of the kind required in *House v The King*, by concluding, in reliance on the Primary Judge's own findings of fact, that:

> *"... findings that the businesses of Tasty Chicks and Angelo Transport were 'carried on independently of ... the carrying on of ... [the] businesses of ... other members of the group' **were not open <u>even</u> on the evidence before Gzell J**"*). [Emphasis added by Counsel]

77. That is, the Court of Appeal did no more than come to a different decision on its re-exercise of the discretion to de-group the appellants based on its view of the evidence as found by the Primary Judge. No errors in the interpretation of s. 16H(1) by the Primary Judge were identified, and no errors of fact on his part were found.

78. *In the second period* (the 2004 and 2005 payroll tax years) the Court of Appeal:

(a) started by reciting the terms of s. 16B(1) and 16C(1)(a), (3) and (4) of the *Tax Act*, and s. 106H(1) of the *Administration Act*, which for that period were the applicable de-grouping provisions (at [98]-[100]);

(b) proceeded to set out the Primary Judge's decision on de-grouping concurrently with making a summary of the terms of the respondent's decision on de-grouping under sections 16B and 16C (at [102]-[107]);

(c) analysed the respondent's exercise of his discretion to de-group relative to that of the Primary Judge based on the same facts (at [109]-[112]); and

(d) after finding that its conclusion on re-exercise of the discretion to de-group on appeal was *obiter* or *per incuriam* (at [108] and [110]), it then proceeded to re-exercise the discretion itself without making any finding of error by the Primary Judge of the kind required of it under the principles stated in *House v The King* (at [112]), by concluding, and again doing so in reliance on the Primary Judge's own findings of fact, that:

> "*... findings that the taxpayers carried on their businesses 'substantially independently of other members of the group' **were not open even on the evidence before Gzell J***".
> [Emphasis added by Counsel]

79. Again, the Court of Appeal did no more than come to a different decision on the re-exercise of the discretion to de-group based on its view of the evidence. No errors in the interpretation of s. 16B or s. 16C of the *Tax Act* by the Primary Judge were identified, and no errors of fact on his part were found. The Court of Appeal merely came to a different conclusion on the application of those same factual findings to sections 16B and 16C. If the Court of Appeal had correctly applied *House v The King* it would have enquired as to whether any error of the requisite kind was made by the Primary Judge and made a positive finding of such error before proceeding.

80. The Court of Appeal (at [115]-[117]), like the Primary Judge (at [123] and [124]), treated the re-exercise of the discretion to de-group for the third period (2006-2007) as following the event of its re-exercise for the second period because of similarity in the legislation (namely, sections 16A-16C of the *Tax Act*) and the identical facts which applied in all three legislative periods, as found by the Primary Judge.

81. By way of conclusion on this ground of appeal, if, as the appellants contend:

(a) the principles stated by Dixon J in *Avon Downs* have no application to the re-exercise of a statutory discretion of the respondent by the Supreme Court on review of those of his decisions which depend on his state of mind under s. 97 of the *Administration Act*; and

(b) the Court of Appeal had no power to purport to re-exercise the discretion to decline to de-group the appellants on appeal to that Court, without first making a positive finding that an error or errors of the kind specified by this Court in *House v The King* had been committed by the Primary Judge in his re-exercise of that discretion under s. 101(1)(b) of the *Administration Act*,

the Court of Appeal fell into error, in purporting to re-exercise that discretion, by exceeding its jurisdiction to determine the respondent's appeal to that Court.

Issue 5 – a miscarriage on appeal in the interpretation and application of the *Tax Act*

82. The appellants have two complaints (pleaded in grounds 6 and 7 of their notice of appeal) which they address together as supporting their contention that the appeal to the Court of Appeal, which resulted in the reversal of the decision at first instance in the appellants' favour, and thereby resulted in the reinstatement of the assessments of payroll tax issued to the appellants that had been set aside by the Primary Judge on review under s. 97 of the *Administration Act*, miscarried to the appellants' detriment.

83. Those two complaints alleging a miscarriage are as follows:

(a) the Court of Appeal erred when it concluded (at [96], [108], [110] and [113]) the appellants were required to establish, in answer to "*the real question*" arising in the "*review*" under s. 97 of the *Administration Act*, that the respondent committed an error or errors of the kind identified in *Avon Downs* in respect of the exercise by the respondent of his discretion to de-group the appellants pursuant to the *Tax Act*; and

(b) the respondent's appeal to the Court of Appeal against the judgment of the Primary Judge miscarried because the Court of Appeal misconceived the nature of the appellant's right of appeal to the Supreme Court under s. 97 of the *Administration Act*, and accordingly, it misconceived its own functions and powers on the appeal to that Court.

84. The respondent's appeal to the Court of Appeal was pleaded in two parts. Those two parts and their subject matter are clearly identified in the bold headings to them in the respondent's amended notice of appeal to the Court of Appeal.

85. Part 1 of the respondent's appeal (amended appeal grounds 1-7) was a challenge to the jurisdiction of the Primary Judge to undertake any review of the respondent's decisions on the merits (because, he said, s. 97 of the *Administration Act* merely gave taxpayers "*a strict right of appeal*") and the making of the contention that any review of those decisions of the respondent which depend on his state of mind is subject to the operation of the principles stated in *Avon Downs*. The respondent's success on Part 1 of his appeal became the *ratio decidendi* of the Court of Appeal's decision.

86. Part 2 of the respondent's appeal (amended appeal grounds 8-15) was a challenge to the interpretation and application of the provisions of the *Tax Act* and *Administration Act* which operated to group the appellants for payroll tax purposes (by force of the statute being engaged by the objective facts relating to the appellants' businesses) or to permit them to be de-grouped. The determination of those grounds of appeal (grounds 8-15) in the respondent's favour was necessarily either *obiter dicta* or *per incuriam*. But the decision on them would ultimately become the *ratio decidendi* of the decision if the appeal to this Court on the nature of the appeal were to be allowed.

87. There are several elements of the respondent's appeal to the Court of Appeal which give rise to its miscarriage to the appellants' detriment which they complain of.

88. *First*, the Court of Appeal erroneously treated the Primary Judge as having exceeded his jurisdiction under sections 97 and 101(1) of the *Administration Act* in his determination of the appellants' application for a review by the Supreme Court of the respondent's decision to exercise his discretion not to de-group the appellants for payroll tax purposes and assessments he raised to give effect to that decision.

89. The conclusion that the principles stated in *Avon Downs* are applicable in a review under s. 97, and that the Primary Judge failed to comply with them by making a finding of error or errors by the respondent, as a precondition to having the necessary jurisdiction to re-exercise himself the discretion to de-group the appellants, was, as has already been observed in paragraphs 85-86 above, the *ratio decidendi* of the Court of Appeal's determination of the respondent's appeal to it. So much is made clear by the very terms of the Court of Appeal's reasons at [96], [108], [110] and [113].

90. Accordingly, if the appeal to this Court under grounds 2-4, relating to the nature of the appeal and the non-application of the principles stated in *Avon Downs*, is allowed, the decision of the Court of Appeal on *the Tax Act* necessarily miscarried.

91. *Secondly*, insofar as the Court of Appeal purported to re-exercise on appeal the respondent's statutory discretion to decline to de-group the appellants, it failed to comply with the requirements of *House v The King* for such intervention, for the reasons given in paragraphs 72-81 above in support of issue 4 (ground 5).

92. Because the requirements stated in *House v The King* for appellate intervention into a discretionary judicial decision are a threshold requirement for the exercise of jurisdiction to make such a decision on appeal, the decision of the Court of Appeal to re-exercise on appeal to that Court the discretion to decline to de-group the appellants was necessarily a miscarriage of justice.

93. *Thirdly*, if one assumes that the Court of Appeal was (contrary to the appellants' preceding contentions) correct in its conclusion on the nature of the appeal to the Supreme Court under s. 97 of the *Administration Act*, then it fell into error by its own stringent standards for undertaking the review by having regard to *all* of the materials admitted into evidence before the Primary Judge (who treated himself as undertaking a full review on the merits) in re-exercising on appeal the discretion to decline to de-group the appellants, rather than remitting the application for review to the Primary Judge to undertake a process of determining what materials were indeed before the respondent when he made his decision and directing the Primary Judge to re-determine the review by having regard only to that body of materials.

94. *Fourthly*, by focusing its attention on the requirement to apply the principles stated in *Avon Downs* in its own re-exercise of the discretion to decline to de-group the appellants, the Court of Appeal made a number of errors of a fundamental nature in its own interpretation and application of the applicable de-grouping provisions of the *Tax Act* to the facts as found by the Primary Judge.

95. Those errors are set out below and they, either alone or collectively, support the complaint that the Court of Appeal's determination, against the appellants, of the respondent's appeal grounds 8-15, resulting in the reversal of the Primary Judge's decision in their favour, was productive of a miscarriage of justice against them.

96. *In the first legislative period* (the 2002 and 2003 payroll tax years): a number of errors in interpretation and application of the grouping and de-grouping provisions were made.

97. Section 16C(b) of the *Tax Act* groups an employer with its clients where, *inter alia,* that employer has an agreement with its clients in respect of the employment of, or the performance of duties by, the employees of *that* employer (hereafter '**the principal employer**'), ordinarily made to facilitate the provision of services to its clients.

98. The Court of Appeal correctly formulated the question for its determination in the first period. It asked whether the bilateral deeds of agreement for the provision of payroll and administrative services ("back office" services) by Tasty Chicks to its clients – the Firm and Angelo Transport – were in respect of the employment of, or the performance of duties by, the employees of *the principal employer*, Tasty Chicks, for the purposes of s. 16C(b) of the *Tax Act.*

99. Yet the Court of Appeal lost sight of the question, which it correctly identified, when it came to actually analyse the evidence and the findings of fact of the Primary Judge on s. 16C(b) (*none* of which it reversed on appeal). In particular, it failed to appreciate that only one term of the deeds ever affected the employment of, or performance of duties by, the principal employer, Tasty Chicks. This was an error in interpretation of the deeds of agreement rather than of the statute.

100. The contractual term which it misconstrued was the term which required that most of Tasty Chicks' employees must perform their duties at business premises at Marrickville, which were adjoining the business premises of each of its clients, a term which owed its rationale to the "back-office" nature of the services provided by Tasty Chicks and the regularity with which those services were to be provided.

101. The Primary Judge held (at [111]) that nothing turned on this term of the deeds, once found to be the *only* term satisfying the statutory test for a grouping to occur.

102. Yet the Court of Appeal reversed the Primary Judge, by concluding (at [79]-[82]), that his Honour overlooked other terms of the deeds which satisfied the statutory test for a grouping to occur by force of the statute. In particular, the Court of Appeal placed great reliance on clauses 11(a) and 11(b) of the deeds (at [79]-[82]).

103. But the terms of these two clauses, which the Court of Appeal set out at [71]-[75], make it clear that they only apply to the employment of, or performance of duties by, employees of *the clients* – namely, the Firm and Angelo Transport – rather than to the employees of *the principal employer*, Tasty Chicks. The "*business*" referred to in each clause is *the client's business*. The Court of Appeal read it otherwise.

104. The Primary Judge made it clear (at [110]), as do the very terms of s. 16C(b) itself (which are reproduced relevantly by the Court of Appeal at [61]), that the statute is *not engaged* by an agreement which regulates the employment of the employees of *the clients* of the principal employer. Rather, the statute is *only engaged* to group employers by the contractual regulation of the employment of, or the performance of duties by, the employees of one of them, namely, *the principal employer*.

105. These grouping errors then led to errors being committed when the Court of Appeal determined whether the de-grouping provision (namely, s. 16H(1) of the *Tax Act,* (reproduced at [83]), was engaged on the same or similar evidence for this period.

106. *First,* it reversed the Primary Judge's findings of substantial independence under s. 16H(1), contrary to various factual findings made by the Primary Judge but without reversing any of those findings or otherwise finding error by the Primary Judge.

107. *Secondly,* it based its conclusion (at [87]-[96]) that there was no substantial independence between the businesses of Tasty Chicks and the Firm, on a finding as to the "*integration*" of the two businesses, but without making any factual findings to support that conclusion (at [88]). "*Integration*" of the two businesses, whatever that descriptive term means, is not a statutory criterion for de-grouping in s.16H(1). Similarly, in relation to Angelo Transport, the Court of Appeal held that that company played "*an integral role in the whole process*", again, without any factual findings being made on appeal to support that conclusion (at [95]).

108. *Thirdly,* the Court of Appeal adopted a concept of "*the nature of the businesses*", operated by the principal employer and its two clients, which is at odds with the terms of s. 16H(1), as enunciated by the Primary Judge (at [129]-[130]), but without finding error in that interpretation by the Primary Judge and reversing it.

109. *In the second legislative period* (the 2004 and 2005 payroll tax years): a number of errors in interpretation and application of the de-grouping provisions were made.

111. The Court of Appeal correctly recited the terms of the applicable provisions for the exercise of the discretion to de-group, namely, sections 16B(1) and 16C(1)(a), (3) and (4) of the *Tax Act* and s. 106H(1) of the *Administration Act* (at [98]-[100]). In doing so, it correctly, with respect, noted that the principal change in the legislation between the first and the second legislative periods was a change in focus *from* the independence of the *businesses* being conducted by the putative grouped taxpayers *to* the independence of *them* as the parties conducting those businesses (at [101]).

111. The Court of Appeal noted (at [106]) that the Primary Judge had made a finding (at [142]) of substantial independence between all three appellants (as the owners and managers of their respective businesses) based on his Honour's factual findings.

112. The errors committed by the Court of Appeal in its purported re-exercise on appeal of the discretion to de-group the appellants in the second legislative period can be distilled into three paragraphs of its judgment, namely, at [110], [111] and [112].

113. The Court of Appeal held (at [110]) that the respondent took into account "*any other matters*" considered relevant by him. They are matters the Primary Judge took no account of at all, as they are not referred to in the statute.

114. The Court of Appeal also held (at [110]) and that neither the Supreme Court nor the Court of Appeal could disregard those "*other matters*" merely because either Court has a different opinion to the respondent as to the relevance of the "*other matters*".

115. That conclusion cannot, with respect, be correct. "*Any other matter*" in s. 16C(4) of the *Tax Act* must be "*construed* ejusdem generis *with those [specific criteria] which precede it*": see *Gregory v Fearn* [1953] 1 WLR 974 at 976, namely, the nature and degree of ownership of the businesses and the nature of the businesses themselves.

116. To permit the respondent to determine criteria for de-grouping taxpayers for payroll tax assessment purposes, and so to determine the very basis for their assessment to payroll tax, would, it is contended, be an invalid exercise of the executive power of the State of New South Wales: see *Giris Pty Ltd v FCT* (1969) 119 CLR 365, 371-373 per Barwick CJ; 375-376 per McTiernan J; 378-385 per Kitto J; 387-398 per Owen J; *DCT v Brown* (1958) 100 CLR 32 at 40-41 per Dixon CJ; *DCT v Hankin* (1959) 100 CLR 566 at 576-577 per Dixon CJ, Fullagar, Kitto, Windeyer JJ).

117. The Primary Judge found there was independence in the statutory sense. He limited his consideration of the qualification for "*independence*" to the statutory criteria. In particular, at [128] his Honour found that the businesses of the principal appellants were controlled by their respective owners and not by the other group members. (Indeed, satisfaction of this criterion is an agreed fact: see paragraphs 5-7, 10 and 13 above). That is a statutory criterion. At [129] the Primary Judge found that "*the businesses are separate and distinct*" because they each involve the carrying on of unrelated commercial activities (namely, chicken meat processing, administrative services provision and refrigerated transport), albeit carried on in relation to each other as parallel aspects of the chicken meat industry. That is a statutory criterion.

118. But the Court of Appeal held (at [112]) that Tasty Chicks and Angelo Transport alike derived 99% of their income from "*the group*" (in reliance on the factual findings of the Primary Judge recorded by the Court of Appeal at [34] and [68]). But that objective fact is not a relevant criterion for the determination as to whether the owners of those two businesses are "*independent*" of each other according to ss. 16C(3) and (4) of the *Tax Act* (which are extracted by the Court of Appeal at [99]).

119. The Court of Appeal also held that the appellants all conduct business "*in the same building*" (at [112]). This is an irrelevant criterion under sections 16B(1) and 16C(1)(a), (3) and (4) of the *Tax Act*, assuming that it were factually sound.

120. Furthermore, this factual finding, which was only made on appeal, is incorrect, based on un-contradicted evidence (leases and photographs). Each appellant occupies its own distinct premises under written leases at commercial rents: see the Primary Judge's findings at [5], [23], [47] and [132], each of which was left intact on appeal.

121. The Court of Appeal held (at [122]) that the appellants used the services of the same external firm of accountants for preparation of their financial statements and tax returns (Philis & Co) and the same bank (St George Bank). This is irrelevant.

122. The Court of Appeal also held (at [112]) that the (bilateral) deeds of agreement (under which Tasty Chicks provided its "back office" services to the Firm and to Angelo Transport, in consideration for a monthly service fee that was renegotiated annually and was based on the costs of providing those services) "*created other links between Tasty Chicks, the Firm and Angelo Transport*". This is irrelevant.

123. The Court of Appeal then relied on those factual findings (at [112]) to reverse the Primary Judge's re-exercise of the discretion to de-group the appellants by finding on appeal that they were not substantially independent of each other.

124. But this conclusion is flawed. *First*, none of these criteria for the reversal of the finding of substantial independence are specified in sections 16C(3) or (4) of the *Tax Act*. *Secondly*, the conclusion that the "*deeds of agreement created other links between*" the appellants treats bilateral agreements as being tripartite agreements, contrary to their terms and the Primary Judge's findings. *Thirdly*, as observed in paragraphs 78(d) and 79 above, it relied on the Primary Judge's own findings of fact.

125. *In the third legislative period* (the 2006 and 2007 payroll tax years): for the reasons given in paragraph 80 above the Court of Appeal (at [117]) (like the Primary Judge) treated the outcome for the third period as following the event for the second period.

126. This miscarriage of justice, if established, necessitates the remittal of grounds 8-15 of the respondent's appeal to the Court of Appeal to a differently constituted Court of Appeal for re-determination in accordance with the decision of this Court.

Part VII:

127. Accompanying these submissions is a paginated folder entitled: '*Appellant's Submissions Part VII: Legislation*', containing all of the legislation referred to in these submissions as detailed in the following paragraphs.

128. *Tab 1* contains the text of Part 10 of the *Taxation Administration Act,* 1996 (NSW) addressed in these submissions as being the applicable provisions.

129. *Tab 2* contains the text of Part 10 of the *Taxation Administration Act,* 1996 (NSW) addressed in these submissions as being the superseded provisions.

130. *Tab 3* contains the text of the *Administrative Decisions Tribunal Legislation Amendment (Revenue) Act* 2000 (NSW) referred to in these submissions.

131. *Tab 4* contains the text of sections 19 and 75A of the *Supreme Court Act*, 1970 (NSW) addressed in these submissions as being the applicable provisions.

132. *Tab 5* contains the text of the superseded Part 51A of the *Supreme Court Rules* made pursuant to the *Supreme Court Act* referred to in these submissions.

133. *Tab 6* contains the text of the superseded sections 32, 32A and 32B of the *Payroll Tax Act*, 1971 (NSW), which contained the former objection and appeal procedures for payroll tax assessments until their replacement on 1 January 1997.

134. *Tab 7* contains the text of s. 6, Chapter 5 and s. 88 the *Administrative Decisions Tribunal Act*, 1997 (NSW), which are referred to in these submissions.

135. *Tab 8* contains the text of the s. 16C of the *Payroll Tax Act*, 1971 (NSW), which regulates the grouping of taxpayers for payroll tax assessment purposes in the first legislative period (2002-2003).

136. *Tab 9* contains the text of s. 16H of the *Payroll Tax Act*, 1971 (NSW), which regulates the de-grouping of taxpayers for payroll tax assessment purposes in the first legislative period (2002-2003).

137. *Tab 10* contains the text of s. 106H of the *Taxation Administration Act,* 1996 (NSW) which regulates the grouping of taxpayers for payroll tax assessment purposes in the second legislative period (2004-2005).

138. *Tab 11* contains the text of sections 16B and 16C of the *Payroll Tax Act*, 1971 (NSW), which regulates the de-grouping of taxpayers for payroll tax assessment purposes in the second legislative period (2004-2005).

139. *Tab 12* contains the text of s. 106H of the *Taxation Administration Act,* 1996 (NSW) which regulates the grouping of taxpayers for payroll tax assessment purposes in the third legislative period (2006-2007).

140. *Tab 13* contains the text of sections 16B and 16C of the *Payroll Tax Act*, 1971 (NSW), which regulates the de-grouping of taxpayers for payroll tax assessment purposes in the third legislative period (2006-2007).

141. *Tab 14* contains the text of sections 2 and 5 of the *Australia Act*, 1986 (Cth), which are addressed in these submissions as being the applicable provisions.

Part VIII:

142. The appellants seek the orders prayed for in paragraphs 8-11 of their notice of appeal filed on 22 June 2011 without amendment.

Dated: 7th July 2011

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