IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No.S218 of 2011

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

RESPONDENT'S SUBMISSIONS

PART I : CERTIFICATION OF SUITABILITY FOR PUBLICATION

1. The Respondent certifies that these Submissions are in a form suitable for publication on the internet.

PART II : THE RESPONDENT'S STATEMENT OF ISSUES

2. The Respondent contends that the only questions for determination in the appeal are those questions of statutory construction by reference to which Special Leave to Appeal was granted on 10 June 2011, namely:

   (a) First: What was the nature of proceedings instituted in the Supreme Court of NSW pursuant to s. 97 of the *Taxation Administration Act 1996* (NSW) ("TAA"), having regard to:

      (i) TAA s. 97(4) and ss. 19(2) and 75A of the *Supreme Court Act 1970* (NSW) ("SCA"); and

Chief Commissioner of State Revenue
C/- I V Knight, Crown Solicitor
Level 5, 60-70 Elizabeth Street
Sydney NSW 2000
DX 19 Sydney

Telephone: (02) 9224 5010
Fax: (02) 9224 5144
Ref: Betty Sarkissian
201100262 T2

(ii) the contrast between TAA s. 97 proceedings in the Supreme Court and those instituted in the Administrative Decisions Tribunal pursuant to TAA s. 96?

(b) Secondly: In particular:-

(i) Were the Appellant taxpayers required to prove that a determination of the Respondent Chief Commissioner under review was attended by error (or was their TAA s. 97 appeal by way of a hearing *de novo*)?

(ii) Did the principles enunciated in *Avon Downs Pty Ltd FCT* (1949) 78 CLR 353 at 360 and *House v The King* (1926) 55 CLR 499 at 504-505 apply in TAA s. 97 proceedings upon the Supreme Court's review of a discretionary determination made by the Chief Commissioner?

(iii) Was the Court of Appeal correct in overruling *Affinity Health Ltd v Chief Commissioner of State Revenue (NSW)* [2005] NSWSC 663; 2005 ATC 4637 (and rejecting the reasoning at [57]-[58] in *Affinity*), applied by the Primary Judge in these proceedings in [2009] NSWSC 1007 at [143], [148] and [162]-[166]?

3. The first three of the five issues identified by the Appellants (in paragraphs 2(a)-(c) of the Appellants' Submissions) restate these issues. The last two (in paragraphs 2(d)-(e) of the Appellants' Submissions) go beyond the Respondent's Statement of Issues and the Appellants' grant of Special Leave.

PART III : THE JUDICIARY ACT, 1903 (Cth), s. 78B

4. In the opinion of the Respondent, the appeal does not involve any question for determination that requires notice to be given in compliance with s. 78B of the *Judiciary Act 1903* (Cth).

5. The Appellants' grant of special leave was limited to questions of statutory construction. It did not extend to any question of a constitutional character.

PART IV : RESPONSE TO THE APPELLANTS' STATEMENT OF FACTS

6. The Respondent takes no issue with paragraphs 5-9, 11 or 12 of the Appellants' Submissions.

7. He takes issue with paragraph 10 of the Appellants' Submissions insofar as it incorporates the Appellants' contention that businesses were "independently ... managed by their respective proprietors". That contention lies at the heart of the appeal. In any event, in refusing to de-group the Appellants' businesses the Respondent found (and was entitled

to find) that the businesses were not carried on substantially independently of one another: [2010] NSWCA 326 at [84].

8. Paragraph 13 of the Appellants' Submissions goes to no issue for determination in the appeal. The Appellants' contention (in [117] of their Submissions) that it is an "agreed fact" that the subject businesses were "controlled" by their respective owners and not by other group members goes beyond the facts agreed. The Respondent adheres to his Statement of Reasons extracted in [2010] NSWCA 326 at [84]. He does not dispute that, so far as corporate vehicles were deployed, the corporate structure of the businesses took the *form* of corporations independently owned and controlled. However, the businesses were not carried on substantially independently of one another, and they were substantially connected with each other.

PART V : THE APPLICABLE LEGISLATION

9. The Respondent contends that the legislation with which this appeal is concerned is limited to the following:

(a) The *Taxation Administration Act 1996* (NSW), ss. 60, 61, 63, 64 and Part 10.

(b) The *Administrative Decisions Tribunal Act 1997* (NSW), ss. 63, 64, 113-115, 118 and 119-120.

(c) The *Supreme Court Act 1970* (NSW), ss. 19(2) and 75A.

(d) In relation to the first legislative period (2002-2003): the *Pay-roll Tax Act 1971* (NSW), s. 16H.

(e) In relation to the second legislative period (2004-2005): the *Pay-roll Tax Act 1971* (NSW), ss. 16B-16C.

(f) In relation to the third legislative period (2006-2007): the *Pay-roll Tax Act 1971* (NSW), ss. 16B-16C.

10. The Respondent takes issue with *Part VII* of the Appellants' Submissions in the following respects:

(a) Paragraph 141 of the Appellants' Submissions is misconceived because (notwithstanding paragraphs 52-53 of those Submissions) no question for determination by the Court in this appeal requires a consideration of the *Australia Act 1986* (Cth).

(b) Paragraphs 135, 137 and 139 of the Appellants' Submissions do not bear directly on the appeal because the appeal is limited to determinations about whether taxpayers should be "de-grouped" for pay-roll tax purposes. No determination that the Appellants should be "grouped" for pay-roll tax purposes is the subject of the appeal.

(c) Paragraphs 129, 130, 132 and 133 of the Appellants' Submissions appear to relate to submissions about the legislative history of TAA Part 10 rather than any legislative provision applicable to the facts of this case.

11. The Respondent takes issue with paragraphs 49 and 54-56 of the Appellants' Submissions insofar as they refer, expressly or by implication, to Chapter III of the Australian Constitution. The Respondent contends that no question relating to the construction or operation of the Constitution arises for determination in the appeal.

PART VI : THE RESPONDENT'S ARGUMENT

(A) The Respondent's Submissions in Narrative Form

12. The central question for determination in the appeal is: What was the nature of proceedings instituted in the Supreme Court under TAA s. 97?

13. The essential difference between the parties on that question is that:

(a) the Appellants (adopting and developing the reasoning of the Primary Judge in *Affinity* and at first instance in these proceedings) contend that s. 97 proceedings constituted a hearing *de novo* – a merits review by another name – in which a taxpayer was not required to establish "error" in a decision of the Respondent under challenge.

(b) the Respondent contends (as the Court of Appeal held) that a taxpayer is obliged to establish "error" before any decision of his can be displaced.

14. The essential reasoning of the Court of Appeal is found in the judgment of Handley AJA: [2010] NSWCA 326 at [32]-[33] and [36].

15. That reasoning is correct, recognising (as it does) that:

(a) establishment of error on the part of the Respondent depended upon the nature of his decision under challenge.

(b) where the decision under challenge was one which depended upon the Respondent's "state of mind" the principles stated in *Avon Downs* (and *House v The King*) had application.

16. Those principles pay due regard to the fact that a decision dependent upon the Respondent's state of mind was, by its very nature, one entrusted to the judgment (and expertise) of the Respondent, not the Court. They are not

confined in their operation to judicial review of administrative decisions under Federal legislation.[1]

17. If a taxpayer wanted a merits review of a discretionary decision of the Respondent, it was open to the taxpayer to apply to the Administrative Decisions Tribunal under TAA s. 96.

18. The Appellants' contentions, if correct, would treat a s. 97 appeal to the Court as if, by implication, the Court had been granted a power similar to that contained in s. 63 of the *Administrative Decisions Tribunal Act 1997* (NSW) ("ADT Act") which is not the case: [2010] NSWCA 326 at [21]-[22]. The Court of Appeal was correct to reject that outcome and the contentions of the Appellants leading to it.

19. Two features of the legislation tell decisively in favour of the Respondent's construction:

    (a) First, the existence and legislative history of TAA s. 97(4).

    (b) Secondly, the contrast between proceedings in the Court under TAA s. 97 and proceedings in the Tribunal under TAA s. 96.

20. As to the first point (TAA s. 97(4)):

    (a) The legislative characterisation of s. 97 proceedings as an "appeal" for the purposes of the *Supreme Court Act 1970* (NSW) – SCA ss. 19(2)(a) and 75A – imports the notion that an "appeal" under s. 97 was a procedure to correct "error" in a decision under review: [2010] NSWCA 326 at [27]-[28]; *Eastman v The Queen* (2000) 203 CLR 1 at [111].

    (b) Insertion of TAA s. 97(4) in the legislation can only sensibly be explained on the basis that:

        (i) the nature of an "appeal" under s. 97 was different from the nature of a "review" unqualified by reference to the word "appeal".

        (ii) having obtained the benefit of advice from the Supreme Court Rules Committee (extracted in the Second Reading Speech, on paragraph [5] of Schedule 4 of the *State Revenue Legislation Amendment Act 2001* (No. 22), in *Hansard*, Legislative Assembly, 28 March 2001, page 12,817), Parliament enacted s. 97(4) to preserve the character of Supreme Court proceedings as an "appeal" and to distinguish

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[1] Eg., Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611 at [104], [105], [122]; South Australia v Totani [2010] HCA 39 (11 November 2010) at [194]; Wilson v MGM (1980) 18 NSWLR 730 at 734G – 735B.

them from a "review" to be conducted by the newly established Administrative Decisions Tribunal under s. 96.

21. As to the second point (the contrast between TAA s. 96 and s. 97): s. 96 proceedings were governed by provisions of the ADT Act that have no counterpart in s. 97 proceedings:-

(a) ADT Act s. 63(1) expressly directed the Tribunal "to decide what the correct and preferable decision is having regard to the material then before it."

(b) ADT Act s. 64(1) subjected the decision-making process of the Tribunal to an obligation, subject to particular qualifications, to "give effect to any relevant Government policy in force at the time" a reviewable decision was made.

22. The policy choice made by Parliament in its enactment of TAA s. 97(4) appears all the more stark when read against the background of the express contrast made (in the Second Reading Speech delivered on 21 June 2000 in support of what became the *Administrative Decisions Tribunal Legislation Amendment (Review) Act 2000* (NSW), No. 72) between:

(a) the cheap, flexible review mechanism then proposed for the Tribunal, without exposure of a taxpayer to a general discretion to make costs orders adverse to the taxpayer; and

(b) resort of a taxpayer to the Court (at the taxpayer's own risk as to costs generally) in cases in which a taxpayer might wish to access the judicial expertise of the Court because the particular controversy involves highly technical and difficult legal issues or a substantial amount of tax at issue.

23. The availability of a choice for taxpayers between a "review" by the Tribunal and an "appeal" to the Supreme Court carried with it important safeguards for the due administration of taxation laws in New South Wales designed to protect both the office of the Respondent (as the statutory officer charged with due execution of taxation laws) and the Court (as the institution charged with supervision of the proper administration of law generally):

(a) A "review" undertaken by the Tribunal provided on occasion for an administrative reconsideration of a decision of the Respondent (ADT Act, s. 63(1)) subject to an imperative obligation on the part of the Tribunal to give effect to current Government policy (s. 64) and rights of appeal that culminated in a right of appeal to the Supreme Court limited to a question of law (ss. 113-115, 118 and 119).

(b) On an appeal to the Court, the Court could not be instructed as to "Government Policy" (absent an equivalent to ADT s. 64); it was not called upon to decide "what is the correct and preferable decision having regard to the material then before it (absent anything

comparable to ADT Act, s. 63); and its function was confined to an application of the law (as was recognised by Dixon J in *Avon Downs*) without having to enter upon the administrative complexities of day-to-day administration of the tax system without the training or experience required to enter that field of expertise.

24. Parliament must be taken to have enacted TAA s. 97(4) with an appreciation that:

(a) in taxation appeals in the Commonwealth arena, the law relating to the nature of an appeal from the Federal Commissioner of Taxation (the Respondent's national equivalent) had long been (as it remains) as summarised by Dixon J in *Avon Downs*;

(b) establishment of the Administrative Decisions Tribunal in New South Wales followed the earlier establishment and successful experience of the Administrative Appeals Tribunal in the Commonwealth sphere; and

(c) under the *Taxation Administration Act 1953* (Cth) a taxpayer dissatisfied with a decision of the Federal Commissioner of Taxation had (as such a taxpayer still has) an election between relatively informal proceedings in the AAT and an appeal to the Federal Court governed by the principles enunciated in *Avon Downs*.

25. The construction of TAA s. 97 (and associated legislation) for which the Respondent contends gives it an operation broadly consistent with the operation of comparable Commonwealth legislation, thereby facilitating the harmonisation and due administration of taxation laws.

26. Nothing in SCA s. 75A (which applied to s. 97 proceedings by virtue of TAA s. 97(4) and SCA ss. 19(2)(a) and 75A(1)):

(a) justified the Primary Judge's view (expressed first in *Affinity* at [55]-[58] and followed in these proceedings in [2009] NSWSC 1007 at [148] and [162]-[166]) that TAA s. 101(1) abrogated differences between ss. 96 and 97 proceedings and that the Court was entitled in s. 97 proceedings to exercise (without any proof of error) any discretion conferred on the Respondent.

(b) detracted, or justified a departure, from: (i) the analytical approach identified by Gray J in *The Ballarat Brewing Company Ltd v Commissioner of Payroll Tax Vic* (1979) 10 ATR 228 at 234-236; 79 ATC 4452 at 4459-4460 in connection with State tax legislation; (ii) the reasoning of the High Court in Federal tax cases such as *MacCormick v FCT* (1945) 71 CLR 283 at 299, 301, 304 and 307; *Kolotex Hosiery (Aust) Pty Ltd v FCT* (1975) 132 CLR 535 at 567-568; and *FCT v Brian Hatch Timber Co (Sales) Pty Ltd* (1972) 128 CLR 28 at 40, 52-53, 56-57, 59-60 and 62; or (iii) the principles enunciated by the High Court in *Avon Downs* and *House v The King*

as governing appeals from discretionary decisions, not limited to tax cases.

27. SCA s. 75A had effect "subject to any Act": s. 75A(4). It must accordingly be construed subject to, and in the context of, the TAA; the ADT Act; and the legislation (relevantly, in these proceedings, the *Pay-roll Tax Act* and the TAA) pursuant to which the Respondent made decisions the subject of review.

28. Although SCA s. 75A(7) authorised the Court to receive "further evidence", it was consistent with the observations of Gray J and the High Court authorities on which he relied. The question whether the Respondent had erred in the making of a discretionary decision must be answered by reference to the evidence before the Respondent at the time he made his decision. "Further evidence" before the Court might be relevant to a consideration of what (if anything) was to be done by the Court in the event of a finding that the Respondent's discretion had miscarried, or (in s. 97 proceedings in which applications were made for the review of both discretionary and non-discretionary decisions) it might be relevant to review of a non-discretionary decision, but it could not affect consideration of whether an exercise of discretion by the Respondent had miscarried.

29. In the context of SCA s. 75A(4) and TAA s. 101(1), nothing turned on SCA s. 75A(10).

(B) The Appellants' Issue 1 (Appellants' Submissions [14]-[44])

30. The Appellants' argument is founded upon an incorrect characterisation of TAA s. 101(1) as "powers of review": Appellants' Submissions [25](a), [27], [34]. The orders that could be made under s. 101(1) at the conclusion of a review under TAA s. 96 or s. 97 did not govern the nature of the decision-making processes which ss. 96 and 97 respectively provided. The Court of Appeal was correct in so holding in [2010] NSWCA 326 at [21]-[22], [27], [29] and [32].

31. That incorrect characterisation leads to an ancillary error on the part of the Appellants in characterisation of TAA ss. 96 and 97 procedures as "parallel": Appellants' Submissions [29]. They are, according to their terms, alternative procedures. A taxpayer can, and must, elect between them. They cannot be pursued in parallel.

32. The Appellants' presentation of Second Reading Speeches in [30] and [32] of their Submissions passes over the facts that: (a) the first related to Act No. 72 of 2000, the second to Act No. 22 of 2001; (b) TAA s. 97(4) was enacted in Act No. 22 of 2001 because of criticism of Act No. 72 of 2000 by the Supreme Court Rules Committee; (c) Act No. 72 of 2000 and Act No. 22 of 2001 commenced operation together, on 1 July 2001; (d) the intendment of TAA s. 97(4) was to preserve the nature of an "appeal" to the Court in light of the introduction of a merits "review" process in the Tribunal.

33. The character and effect of TAA s. 97(4), in the context of SCA s. 19(2)(a) and s. 75A, cannot be discounted as "purely procedural" (Appellants' Submissions [32] and [35]).

34. The absence of any provision in connection with a s. 97 appeal comparable to ss. 63(1) and 64 of the ADT Act on an application for review under TAA s. 96 demonstrates a fundamental difference between ss. 96 and 97 proceedings.

35. The Appellants' reliance on *B & L Linings v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481 (Appellants' Submissions [36]-[37]) is misplaced. That was an appeal on a question of law under the ADT Act, s. 119; not an appeal under TAA s. 97. The Court of Appeal's observations do not bear upon the interaction between TAA s. 97(4) and SCA ss. 19(2)(a) and 75A.

36. The Appellants' reliance on *Chief Commissioner of State Revenue v Paspaley* [2008] NSWCA 184 (Appellants' Submissions [38]-[41]) is also misplaced. The Court of Appeal was there concerned with identification of the decision the subject of a challenge under TAA ss. 96 or 97, not the nature of proceedings under TAA s. 97. It held that the relevant decision was that subject to objection, not a subsequent decision on the objection.

37. The Appellants' Submissions touch upon sundry other matters that have no bearing upon the nature of a TAA s. 97 appeal:

    (a) the fact that, by virtue of TAA s. 100(2), the parties' respective cases in proceedings under TAA ss. 96 or 97 are not limited by a taxpayer's grounds of objection: Appellants' Submissions [18], [25](b).

    (b) TAA ss. 97(1)(b) and 99(2): Appellants' Submissions [19]-[20], [25](c).

38. The Appellants' Submissions refer (at [24]) to earlier forms of the statutory onus borne by a taxpayer (now in TAA s. 100(3)), but that can hardly assist the Appellants. The existence of such an onus is consistent with TAA s. 97 proceedings requiring proof of error.

(C) The Appellants' Issue 2 (Appellants' Submissions [45]-[57])

39. The Appellants' Submissions miss the basic points that: (a) on a TAA s. 97 appeal the taxpayer must establish error on the part of the Respondent; (b) the nature of the case required to be made out will depend on the nature of the decision under challenge; and (c) the Court of Appeal addressed that topic, correctly, in [2010] NSWCA 326 at [33] and [36].

40. They also miss the basic points that the principles enunciated by Dixon J in *Avon Downs* flow from: (a) the character of a decision of the Respondent as one dependent on his state of mind ([2010] NSWCA 326 at [24]-[26], [33]

and [36]); and (b) the fact that that decision was entrusted to the Respondent by statute, not the Court.

41. The absence in proceedings under TAA s. 97 of anything comparable to the ADT Act s. 63(1) reinforces the Respondent's contention that a s. 97 appeal is not a "merits review". The Court of Appeal was correct in its observations in [2010] NSWCA 326 at [21]-[22].

42. This appeal does not involve any question requiring consideration of Chapter III of the *Commonwealth Constitution* (*vide* the Appellants' Submissions [49]-[57]) or the *Australia Act 1986* (*vide* [52]-[53]). No party contends that TAA s. 101(b) or any other provision of the TAA is invalid. The questions for determination by the Court are limited to questions of statutory construction.

(D) The Appellants' Issue 3 (Appellants' Submissions [58]-[71])

43. The Appellants' Submissions do no more than restate contentions advanced in relation to the first two Issues, repeating fallacies in their argument.

44. It is not correct to say that TAA s. 101 governs the nature of an appeal under TAA s. 97: cf, Appellants' Submissions [60]-[68].

45. It is not correct to say that the absence from a TAA s. 97 appeal of anything comparable to s. 63 of the ADT Act is of no consequence: cf, Appellants' Submissions [69].

46. The Court of Appeal's use of the word "intervene" in [2010] NSWCA 326 at [32] did not arrogate to the Court a "discretion" of any sort: cf, Appellants' Submissions [65].

47. TAA s. 101 did not abrogate differences between TAA ss. 96 and 97: cf, Appellants' Submissions [68].

48. Nothing in TAA Part 10 or SCA ss. 19(2)(a) or 75A permits an appeal under TAA s. 97 to be characterised as: (a) a "merits review"; or (b) involving no need for a taxpayer to establish error on the part of the Respondent: cf, Appellants' Submissions [67], [70].

49. The reasoning of the Court of Appeal in [2010] NSWCA 326 at [21]-[22], [27], [29]-[33] and [36] is in substance correct.

(E) The Appellants' Issue 4 (Appellants' Submissions [72]-[81])

50. This Issue stands outside the Appellants' grant of Special Leave, which was limited to the questions identified in paragraph 2 above.

51. It arises only if the Court of Appeal erred in holding that (a) an appeal under TAA s. 97 requires a taxpayer to prove error on the part of the Respondent;

(b) an appeal under TAA s. 97 in respect of a discretionary decision of the Respondent attracts the principles enunciated in *Avon Downs*; and (c) the Appellants failed to establish the existence of such error affecting the Respondent's decisions to refuse to "de-group" them.

52. The Appellants do not contend (and did not in the Court of Appeal contend) that, on an application of *Avon Downs* principles, the de-grouping decisions of the Respondent were attended by error. Their case is that they were entitled under TAA s. 97 to a "merits review".

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53. If (contrary to the Respondent's contentions), the Primary Judge was correct in his characterisation of a TAA s. 97 appeal (in *Affinity* at [57]-[58] and in these proceedings at [143], [148] and [162]-[166]), and if he was accordingly entitled to make his own discretionary decisions as to "de-grouping" in substitution for those made by the Respondent, the Respondent accepts that the appeal to the Court of Appeal from his judgment under SCA s. 75A was governed by *House v The King* (1936) 55 CLR 499 at 504-505.

20 54. Although the Court of Appeal did not, in terms, refer to *House v The King* it plainly found that the reasoning of the Primary Judge was attended by appellable error in terms of that case. In relation to each of the three periods under consideration it found that the pivotal findings of his Honour were not open on the evidence. Such findings constitute at least a mistaking of the facts in terms of *House v The King*.

(a) In relation to the first period (2002-2003), see [2010] NSWCA 326 at [96] (first sentence).

30 (b) In relation to the second period (2004-2005), see [2010] NSWCA 326 at [109] and [111]-[112].

(c) In relation to the third period (2006-2007), see [2010] NSWCA 326 at [116]-[117], read with [109] and [111]-[112].

55. In relation to the second and third periods the Court of Appeal also expressly found that the Primary Judge had acted upon a wrong principle: [2010] NSWCA 326 at [109], [111] and [116]-[117].

40 **(F) <u>The Appellants' Issue 5 (Appellants' Submissions [82]-[126])</u>**

56. The Appellants contend that the Respondent's appeal to the Court of Appeal miscarried for four reasons:

(a) First, they contend that, if their appeal to the High Court as to the nature of a TAA s. 97 appeal and the non-applicability of *Avon Downs* succeeds, the decision of the Court of Appeal as to "de-grouping" necessarily miscarried: Appellants' Submissions [88]-[90].

(b) Secondly, they contend that, because (they say) the Court of Appeal failed to comply with *House v King* requirements before it re-exercised the statutory discretions governing de-grouping decisions, its refusal to direct that the Appellants be de-grouped necessarily miscarried: Appellants' Submissions [91]-[92].

(c) Thirdly, they contend that, if the Court of Appeal was correct about the nature of a TAA s. 97 appeal, it fell into error by having regard to all the materials in evidence before the Primary Judge: Appellants' Submissions [93].

(d) Fourthly, they contend that the Court of Appeal made a number of errors in its own interpretation and application of the de-grouping provisions to the facts as found by the Primary Judge: Appellants' Submissions [94]-[126].

57. The first of the Appellants' four reasons does not follow according to its terms. The Court of Appeal allowed the Respondent's appeal to it on alternative bases: (a) first, because the appeal to the Primary Judge under TAA s. 97 required the Appellants to establish error in accordance with the principles enunciated in *Avon Downs* and they had failed to do so; and (b) even if the appeal to the Primary Judge was governed by his Honour's reasoning in *Affinity*, his judgment miscarried: [2010] NSWCA 326 at [96], [111]-[113] and [116]-[117]. Even if (contrary to the Respondent's contentions) the primary basis for its decision is found to have been wrong, it does not follow that the alternative basis for decision was also wrong. The Respondent contends that the Court of Appeal did not err.

58. The second of the Appellants' four reasons is predicated on a false assumption. The Court of Appeal's alternative basis for decision did comply with the requirements of *House v The King*, as explained in answer to the Appellants' Issue 4.

59. The third of the Appellants' four reasons is unsubstantiated by any particulars of evidentiary materials to which the Appellants allege that the Court of Appeal improperly had regard. It also fails to allow for the fact that, on the premise upon which it is based, they bore the onus of establishing error on the part of the Respondent [2010] NSWCA 326 at [32]-[33], which they have not attempted to do.

60. The fourth of the Appellants' four reasons travels far outside their grant of Special Leave and invites the High Court to review findings of fact in circumstances where the primary findings of fact by the Respondent are not challenged:

(a) In relation to the first period (2002-2003), the Appellants appear to allege factual errors relating to the decision that they be "grouped" as well as errors relating to "de-grouping": Appellants' Submissions [96]-[108]. The Appellants' special leave to appeal does not extend to any "grouping" decision or allegations of factual error.

(b) In relation to the second period (2004-2005), the Appellants appear to allege factual errors relating to de-grouping (Appellants' Submissions [109]-[124]), coupled with an attempt to argue (in [113]-[116] a question of "invalidity" directed to the observations of the Court of Appeal in [2010] NSWCA 326 at [110]) without any indication of how it is contended that the Respondent went beyond the limits of s. 16C(4) of the *Pay-roll Tax Act 1971* (NSW) (however construed).

(c) In relation to the third period (2006-2007), the Appellants repeat their allegations referable to the second period, with (consequentially) the same defects in presentation of their submissions: Appellants' Submissions [125].

61. The fourth of the Appellants' four reasons appears to rise no higher than a contention (manifested in [86], [126] and [142] of the Appellants' Submissions) that grounds 8-15 of the Respondent's Amended Notice of Appeal to the Court of Appeal should be remitted to that Court for re-hearing before a differently constituted Court.

62. Whilst reserving his rights generally in the event that the High Court might (contrary to his contentions) make such a remitter order, the Respondent submits that there is no substance in the allegations of factual error apparently made by the Appellants.

(a) On examination, the Appellants' Submissions do not challenge any findings of primary fact. They are directed, rather, to contentions about inferences to be drawn from those findings and conclusions to be reached on them.

(b) In relation to the first period (2002-2003):

(i) The Appellants' contentions depend upon criticism of the reasoning of the Court of Appeal in [2010] NSWCA 326 at [67]-[82], especially [78]-[79]: Appellants' Submissions [99]-[104]. That criticism is unfounded. The Appellants accept that the Court of Appeal asked itself the correct question in [2010] NSWCA 326 at [67]: Appellants' Submissions [98]. They also accept (indeed contend) that the central provision of the Deeds was clause 2, extracted in [2010] NSWCA 326 at [71]. Their criticism of the Court of Appeal's reasoning boils down to a contention that it should have read clause 2 as if it stood alone and without the context provided by the other provisions of the Deeds, and facts, noted in [2010] NSWCA 326 at [72]-[77].

(ii) Contrary to the Appellants' criticism, the Court of Appeal's analysis was directed to employees of Tasty Chicks in the business of Tasty Chicks, not employees of clients in the

business of clients: [2010] NSWCA 326 at [72], [78], [79], [80]. The Court of Appeal was correct to conclude that clause 2 "in combination" with other provisions of the Deeds attracted s. 16C(b).

(iii) The Appellants' criticism (in Appellants' Submissions [105] – [108]) of the reasoning of the Court of Appeal in [2010] NSWCA 326 at [83] – [96] is unfounded. The expressions "integration" in [88] and "integral" in [95] relate back to use of the expression "integral role" by the Respondent at [84].

(c) In relation to the second and third periods (2004-2005 and 2006-2007 respectively):

(i) The Appellants' Submissions ignore (at [109]-[126]) the errors of principle in the reasoning of the Primary Judge identified in [2010] NSWCA 326 at [109] and [111] and proceed on the assumption that the reasoning of the Primary Judge is correct.

(ii) They fall into the error of the Primary Judge identified in the first sentence of [2010] NSWCA 326 at [109]. They focus on particular factors individually, characterising each of them as "irrelevant" (Appellants' Submissions [118], [119], [121] and [122]), without viewing all the factors relied upon by the Respondent in combination.

(iii) As noted in paragraph 60(b) above, they make an abstract criticism of [2010] NSWCA 326 ([110]) without tying it to any facts: Appellants' Submissions [113]-[117]. Their contention, however, appears to be that the various factors they characterise as "irrelevant" are to be so characterised because they are not expressly mentioned as relevant factors in ss. 16C(3) or (4): Appellants' Submissions [124]. That contention cannot be correct, even if the Appellants' Submissions at [115] are taken at their highest.

The Respondent's primary contention is that his discretion was unconfined except by the subject matter and scope of the legislation which conferred the power of 'de-grouping' upon him: *Water Conservation & Irrigation Commission (NSW) v Browning (1947)* 74 CLR 492 at 504-505. His alternative contention is that, even if his discretion was confined as the Appellants contend, it was sufficiently broad to take into account each and all of the matters characterised by the Appellants as irrelevant.

Section 16C of the *Pay-roll Tax Act 1971* sets out three layers of discretionary judgment to be considered by the Respondent. The first was the making of the determination

in s.16C(1) signalled by the use of the word "may" in that sub-section. The second was the achievement of the "satisfaction" set out in 16C(2) and (3). The third was the consideration of the criteria set out in s.16C(4). The latter two relate to the state of mind of the Respondent. The Respondent contends that each layer was governed by the criteria set out in *Browning*. In purporting to exercise all three layers of judgment on a hearing *de novo*, without reference to the Respondent's state of mind, the Primary Judge failed to provide any adequate reasons.

(iv) As noted in paragraph 8 above, they attribute to the Respondent (in Appellants' Submissions [117]) an "agreed fact" which is not.

(v) By focusing unduly on the concept of the Court of Appeal "reversing" particular findings of the Primary Judge they seek unduly to limit the function of the Court of Appeal on an appeal (by way of re-hearing) from a divisional judge of the Supreme Court under SCA s. 75A(5).

PART VII: NOTICE OF CONTENTION OR NOTICE OF CROSS-APPEAL

63. Not applicable.

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Geoff Lindsay SC
Tel: (02) 9232 6003
Fax: (02) 9233 7416
Email: lindsaygc@wentworthchambers.com.au