FEDERAL COURT OF AUSTRALIA

Racing Queensland Board v Commissioner of Taxation [2019] FCA 509

File number:	QUD 517 of 2017
Judge:	**LOGAN J**
Date of judgment:	12 April 2019
Catchwords:	**SUPERANNUATION** – liability for superannuation guarantee charge – whether jockeys are employed by the applicant – *Superannuation Guarantee (Administration) Act 1992* s 12(8)(a) – whether applicant is liable to make the payment of riding fees to jockeys – where centralised prizemoney system was established by the applicant to control race-related payments – where racing industry is heavily regulated by statute and national and local rules – where jockeys and trainers are required to be licenced by the applicant – vertical and horizontal contracts – whether applicant made payments on behalf of trainers – whether jockeys actually engaged by trainers. **SUPERANNUATION** – where applicant superseded several other entities as being responsible for racing in Queensland – whether applicant is responsible for liabilities incurred by the other entities – whether liability for superannuation guarantee charge arises when facts giving rise to the liability occur or when an assessment is made – effect of transitional provisions which established the applicant – whether invalidity of assessments may be considered in appeal against objection decision.
Legislation:	*Constitution* s 75(v) *Evidence Act 1995* (Cth) ss 79, 80 *Income Tax Assessment Act 1936* (Cth) s 175 *Judiciary Act 1903* (Cth) s 39B *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 11, 12, 17, 19, 35, 36 *Superannuation Guarantee Charge Act 1992* (Cth) *Taxation Administration Act 1953* (Cth) *Acts Interpretation Act 1954* (Qld) s 36 *Racing Act 2002* (Qld) ss 6, 9, 187 *Racing and Betting Act 1980* (Qld) *Racing and Other Legislation Amendment Act 2012* (Qld) s 11, 73, 447, 453

Cases cited:	*Clarke v The Earl of Dunraven and Mount Earl – The "Santanita"* [1897] AC 59 *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 *Commissioner of Taxation v Futuris Corporation Ltd* (2009) 237 CLR 146 *Commissioner of Taxation v Nash* (2013 211 FCR 520 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 *Finance Facilities v Commissioner of Taxation* (1971) 127 CLR 106 *Lismore City Council v Stewart* (1989) 18 NSWLR 718 *McHugh v Australian Jockey Club Limited (No 13)* (2012) 299 ALR 363 *Mercato Sports (UK) Ltd v The Everton Football Club Co Ltd* [2018] EWHC 1567 (Ch) *NSW Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691 *NT Power Generation Pty Ltd v Power & Water Authority and Ors* (2001) 184 ALR 481 *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445 *Re Finney; Ex parte Official Trustee in Bankruptcy v Finney* (1997) 35 ATR 259 *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 *South Australian River Fishery Association Inc and Warrick v South Australia* (2003) 85 SASR 373
Date of hearing:	26 and 28 June 2018
Registry:	Queensland
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
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Counsel for the Applicant:	Mr P Bickford with Ms F Chen
Solicitor for the Applicant:	Clayton Utz

Counsel for the Respondent:	Mr P Looney QC with Ms C Pierce
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

QUD 517 of 2017

BETWEEN:	**RACING QUEENSLAND BOARD** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

JUDGE: **LOGAN J**

DATE OF ORDER: **12 APRIL 2019**

THE COURT ORDERS THAT:

1. The applicant's appeal against the respondent's objection decision of 17 August 2017 be allowed.
2. The objection decision be set aside and, in lieu thereof, it be ordered that the applicant's objection against the assessments issued by the respondent under the *Superannuation Guarantee (Administration) Act 1992* (Cth) for the 21 quarters from 1 July 2009 to 30 September 2014 be allowed in full.
3. The matter be remitted to the respondent for the taking of consequential administrative action pursuant to the *Taxation Administration Act 1953* (Cth).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1 Changes of government and government policy have resulted, in turn, in a number of changes in the legislative provision for the general administration of the racing industry in Queensland over recent years. The applicant, Racing Queensland Board (**the Board**) is the latest entity charged with that function. By s 6 of the *Racing Act 2002* (Qld) (**Racing Act**), the Queensland All Codes Racing Industry Board, formerly established under that Act, was continued in existence under this Act under the name "Racing Queensland Board". The Board is neither a body corporate nor an emanation of the State of Queensland: s 9, Racing Act. The Board's responsibilities extend to the thoroughbred, harness and greyhound racing industries. This case concerns one aspect of the thoroughbred racing industry.

2 Functions presently undertaken by the Board in relation to the thoroughbred racing industry were, over the periods indicated, undertaken by the following under either the Racing Act or its predecessor, the *Racing and Betting Act 1980* (Qld) (**Racing and Betting Act**):

(a) immediately prior to 1 July 2006 - the Queensland Thoroughbred Racing Board;

(b) from 1 July 2006 to 30 June 2010 - Queensland Racing Ltd ACN 116 735 374;

(c) on and from 1 July 2010 until 30 April 2013 - Racing Queensland Limited ACN 142 786 874; and

(d) on and from 1 May 2013, the Board, initially under the name, the Queensland All Codes Racing Industry Board but continued in existence on and from 1 July 2016 under its present name.

3 One general administration function which the Board has in common with each of the predecessors mentioned is that, in relation to thoroughbred racing, each in its time undertook the role of the "Principal Racing Authority" for Queensland under the Australian Rules of Racing (**ARR**) and the Queensland Local Rules of Racing (**Local Rules**). The Board continues to undertake that function.

4 The ARR are made and administered by Racing Australia Ltd (**Racing Australia**), a company limited by guarantee. The purpose of that company is to promote and manage the thoroughbred racing industry in Australia: ARR 208. The very essence of the nature of the ARR and the

relationships created by those who assent to their application is found in ARR 2, which provides:

> AR.2. Any person who takes part in any matter coming within these Rules thereby agrees with the Australian Racing Board and each and every Principal Racing Authority to be bound by them.
>
> [For the Australian Racing Board one now reads Racing Australia]

5 The Racing and Betting Act and, in turn, the Racing Act (Part 3 of that Act) each empowered the Board or a predecessor to make the Local Rules for the thoroughbred racing industry. This statutory provision assumed the existence for the thoroughbred racing industry of the ARR. The making of the Local Rules was also authorised by the ARR, providing that they were not inconsistent with the ARR: ARR 6(1). Thus, the thoroughbred racing industry in Queensland was, and remains, regulated by a combination of statutory provision, the ARR and the Local Rules, which themselves are deemed to be statutory instruments: s 101, Racing Act. On the evidence in the present case, a description offered by Robertson J in *McHugh v Australian Jockey Club Ltd (No 13)* (2012) 299 ALR 363 (***McHugh v Australian Jockey Club***), at [1396] of the inter-relationship between these is just as apt:

> 1396 As to the relationship between the ARR and the local rules, subject to the question of statutory authorisation of the provision, the proper characterisation of the ARR is not as a template but a set of overarching general rules, unalterable by the [Principal Racing Authorities] except in respect of matters local to each [Principal Racing Authority]. The ARR provide common practices, conditions and integrity standards for racing throughout Australia. The individual state and territory racing administrations may make local rules for specific local conditions provided that they are not inconsistent with the principles established by the Australian Rules.

6 Though this case bridges an era when each of the Board and the predecessors mentioned discharged that function, the origins of the present controversy lie yet earlier in time. Those origins lie during an era when, in relation to the thoroughbred racing industry that function and the administration of thoroughbred racing in Queensland under the Racing and Betting Act was undertaken by a yet further predecessor of the Board, a body known as the Queensland Principal Club (**QPC**).

7 For the QPC, as throughout Australia for the general administration the thoroughbred racing industry, the introduction by the Commonwealth Parliament, on and from 1 July 2000, of a goods and services tax (**GST**) presented something of a dilemma in relation to established practices within the industry for the provision of services by, and the engagement and payment of, jockeys.

8 I had the benefit of evidence from two witnesses as to the nature of that dilemma and the response which came to be adopted within the Australian thoroughbred racing industry, including in Queensland. Those witnesses were Mr Simon Stout, the Board's Acting Chief Executive Officer and Mr Jeremy Turner, who once (2002 to 2004) held the office of Chief Executive Officer of predecessors of the Board, notably including the QPC. Before taking up that appointment, Mr Turner had served (1997 to 2002) as the QPC's Director of Finance, an appointment also termed, "Director of Business Management and Technology". In that earlier role, he was responsible for the corporate operations side of the QPC's operations, which included information technology and human resources. Of these two witnesses, only Mr Stout was required for cross-examination. Certain facts were also agreed between the parties (the statement of agreed facts becoming Exhibit 1).

9 A corollary of the industry response to the introduction of GST has been the emergence of a controversy between the Board and the respondent Commissioner of Taxation in relation to whether the Board has a resultant liability to pay the superannuation guarantee charge. On 25 March 2015, the Commissioner issued a number of superannuation guarantee default assessments, in reliance on s 36 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGAA**), for the 21 quarters from 1 July 2009 to 30 September 2014, inclusive (**Relevant Periods**). The assessments are cast on the basis that the Board has a liability for unpaid superannuation guarantee charges on various payments to individual jockeys who rode races in Queensland between 1 July 2009 and 30 September 2014. The premise of the assessments is that the effect of s 12(8)(a) of the SGAA is that the individual jockeys were employees of the Board during the Relevant Periods. The total amount of the assessments is $949,317.32.

10 The Board objected to these assessments in May 2015. By a letter to the Board dated 17 August 2017, the Commissioner advised that he had disallowed in full the Board's objection. The Board then instituted in the Court's original jurisdiction the present statutory appeal against the Commissioner's objection decision. In this appeal, the Board has the onus of proving the assessments to be excessive.

11 The issues which emerge for determination on the appeal, having regard to the grounds upon which the Board seeks to prove the assessments to be excessive, are:

(a) whether, the Board (or, as the case may be its predecessors) was an employer of employees namely, the jockeys, for the purposes of the SGAA during the Relevant Periods;

(b) whether s 36 of the SGAA conferred on the Commissioner a discretion as to whether to issue the default assessments or whether it was facultative only;

(c) if s 36 of the SGAA conferred a discretion:

(i) whether the exercise of that discretion miscarried such that the assessments concerned are invalid;

(ii) whether such a question of invalidity can be raised in this taxation appeal;

(d) in any event, whether the Board is liable for superannuation guarantee charge for such part of the Relevant Periods as preceded its existence.

12 As to the first of these issues, the foundation of the assessments is the Commissioner's view that s 12(8) of the SGAA is applicable. That subsection relevantly provides:

> (8) The following are employees for the purposes of this Act:
>
> (a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;
>
> (b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment

The assessments are predicated upon the propositions that, during the Relevant Periods, either the Board was the person, who, in terms of s 12(8) was "the person liable to make the payment" to jockeys or that a predecessor was and that the Board is amenable now to assessment in respect of that predecessor's liability.

13 Of the two witnesses mentioned above and by virtue of his contemporaneous, personal involvement, Mr Turner's evidence was the more detailed as to events leading up to the introduction of the GST, the dilemma presented and the industry response to it. I have no reason to doubt the accuracy of Mr Turner's account of those historical events.

14 Mr Stout was not directly involved in these historical events but he does have over 30 years' experience in the racing industry. Over that time, he has undertaken a range of roles, including licenced stable hand, licensed track rider, assistant trainer and trainer in Australia and in Singapore. More latterly, he has assumed managerial roles. Before taking up his appointment with the Board in 2017, he was employed (from 2011 to 2016) in Tasmania as the Senior Racing Manager at "Tasracing" (which I infer undertook a role in that State similar to that of

the Board and its predecessors). I thought Mr Stout gave candid, honest oral evidence when under cross-examination.

15 I am well satisfied that, by virtue of either past or current employment, each of Messrs Turner and Stout has a thorough understanding of the usual practices which prevailed throughout the Australian racing industry both before and after the introduction of GST in relation to the provision of services by, and the engagement and payment of, jockeys

16 Taken collectively, the evidence given by Messrs Turner and Stout offers a useful background in relation to the historical position in the racing industry in relation to the provision of services by, and the engagement and payment of, jockeys, the dilemma presented by the introduction of GST and the response to that dilemma. Each also has an understanding as to the position after that response in relation to the provision of services by, and the engagement and payment of, jockeys. Though I do not doubt that this understanding is honestly held, it is no substitute for any application of the SGAA to arrangements which were put in place in response to the introduction of GST. As I understood it, insofar as it contained elements of understanding, their evidence was tendered only on that basis. Those elements could not be tendered, and I have not treated them, as rising any higher than that.

17 What follows draws upon the evidence of each of Messrs Turner and Stout, as well as the agreed statement of facts. Given the absence of a competing evidentiary case by the Commissioner, I have separately identified the source of the particular findings of fact only to the extent necessary to reveal a particular personal involvement or knowledge of a witness.

18 Over the course of 1999 and into, inferentially, early 2000, in the lead up to the introduction of the GST, the persons in charge of finance in the "Principal Racing Authorities" of each State met as a working group to discuss how the introduction of the GST would affect each of them and how to educate the industry's participants on any resultant changes.

19 Queensland's then Principal Racing Authority was the QPC. Mr Turner represented the QPC at these meetings. Three members of that working group visited in New Zealand for the purpose of liaising with experts and racing industry participants in that country about the industry response to and experience of the introduction there of a GST. I infer that the results of this visit were then reported to the working group.

20 The result of the working group's discussions was a collective recommendation to the various Australian principal racing authorities that each adopt a Centralised Prizemoney System.

Whether to act on that recommendation so as to adopt such a system after the introduction of the GST was a matter for each State's Principal Racing Authority.

21 As far as Queensland was concerned, a sequel to the working group's recommendation was that the QPC, initially by its Finance Committee and then by its governing committee, considered whether to adopt a Centralised Prizemoney System for Queensland after the introduction of the GST. Mr Turner prepared a related paper for the QPC's Finance Committee. That committee came to recommend, and, at a meeting on 31 January 2000, the QPC's governing committee came to adopt, such a system.

22 A dilemma which had been identified by the working group and which, in turn, was recognised when the QPC came to consider the recommendation was that many racing industry participants would find the introduction of the GST difficult and, in particular, struggle with the related requirements to prepare tax invoices, become registered for GST and obtain an Australian Business Number. In response, the working group in making its recommendation and, in turn, the QPC in adopting it sought to minimise the administrative impact that the new tax would have on the thoroughbred racing industry and to ensure that much of the record keeping and documentation, and the compliance burden, associated with prize money, riding fees and GST by taking the role of payment of these off individual race clubs or, as the case may be, owners, trainers and jockeys with the QPC attending to these on their behalf. These were all elements of the Centralised Prizemoney System which was adopted by the QPC after the introduction of the GST.

23 All of these sentiments were taken up and the key features of the Centralised Prizemoney System described in a circular letter, authored by Mr Turner, sent, according to his recollection, between February and April 2000 by the QPC to all licensed jockeys and trainers in Queensland. In that letter, the following statements were made by the QPC:

> The QPC Committee, at its meeting on 31 January 2000, agreed to the introduction of a centralised system of prizemoney distribution, to apply from 1 July 2000.
>
> The decision will mean that the QPC will, from 1 July, make all prizemoney payments to owners, winning percentages to trainers and jockeys, and jockeys riding fees, **on behalf of race clubs** for all meetings conducted in Queensland. It is expected that payments will be made on a fortnightly basis for meetings conducted during the previous two weeks, and will be accompanied by statements that meet the Australian Taxation Office's "tax invoicing" requirements.
>
> The decision was made by the Committee in response to the introduction of the GST on 1 July, with the aim of minimising the administrative impact the new tax will have on the industry. It will mean much of the record keeping and documentation, and the

> compliance burden, associated with prizemoney and riding fees will be taken off race clubs, owners, trainers, and jockeys, and handled by the QPC **on their behalf**.
>
> To facilitate the payment of winning percentages to trainers and jockeys, the following information is required:
>
> - Australian Business Numbers;
> - Advice from trainer and jockey as to whether they are GST registered; and
> - Bank Account details.
>
> [Emphasis added]

24 The following description of the Centralised Payment System was offered by the QPC in its Queensland Racing Calendar published in July 2000:

> Under the new arrangements prizemoney will no longer be paid to owners, trainers, and jockeys by individual race clubs. Prizemoney, QRIS bonuses, and jockeys riding fees for all race meetings conducted in Queensland will be paid by the QPC.
>
> Payments will be made on a fortnightly basis for all meetings conducted during the previous two week period, and they will be accompanied by "Recipient Created Tax Invoices", which will provide details of earnings and GST liabilities and credits. The invoices will provide owners, trainers and jockeys with the information they need to meet their GST obligations, and considerably simplify compliance with the new tax system.
>
> The centralised prizemoney system is an important initiative that is being implemented by Principal Clubs right around the country. A national network of systems has been developed to ensure the payments and invoicing can be handled in the most efficient manner. The system's development work has involved the Registrar of Racehorses in Sydney, where details of Australian Business Numbers and the GST Registration status of owners, on a national basis, will be stored, the Racing Services Bureau in Melbourne, and the systems of the State-based Principal Clubs.
>
> It is one of the most significant initiatives that the racing industry has undertaken on a national basis, and will be a great benefit in easing the difficult transition to GST.
>
> Letters have been forwarded to owners, trainers, jockeys and race clubs over the last month or so explaining how the new system will operate, and providing details on the format of the tax invoices.

I infer that the reference in the final paragraph of this published description to the forwarding of "letters to owners, trainers, jockeys and race clubs over the last month or so" is inherently likely to have been a reference to the letter authored by Mr Turner referred to in the preceding paragraph. Mr Turner's recollection of "between February and April" was imprecise and not informed by an ability to access the Board's records. The published description is also imprecise as to when the circular letter was sent - "over the last month or so". It might perhaps, alternatively, be a reference to the letter to trainers of 23 June 2000, referred to by me below. In any event, nothing turns on to which the reference was as the description of the Centralised Prizemoney System is consistent.

25 The "Queensland Racing Calendar" is a specialist, racing industry wide publication of the QPC and its successors in which industry news, developments and events, as well as amendments to the ARR or the Local Rules are notified. The latter feature gives it the character of an industry specific version of a government gazette (a character reinforced by the deemed notice provision in relation to the calendar in Local Rule 6). Inferentially, this is why the Board is obliged, under s 84 of the Racing Act, to publish the racing calendar.

26 Like advice about the QPC's new Centralised Prizemoney System appeared in an article by Mr Turner on behalf of the QPC in its "Queensland Racing Calendar" published in October 2000 and in a circular letter dated 23 June 2000, sent by the QPC to all trainers in Queensland. Notably, it was stated in the letter to trainers, "[t]he introduction of the centralised prizemoney system represents a substantial shift from traditional practices".

27 As to traditional practices, and as is highlighted in the article in the Queensland Racing Calendar of October 2000, historically, the prevailing position throughout the Australian racing industry prior to the introduction of the GST was that trainers paid nomination and acceptance fees, and riding fees, as part of race day pay-ups, to the relevant local racing club conducting a particular race meeting. That same article offers this description of the effect of the on that historic position:

> Under the new system they continue to pay these charges, albeit after the event through the weekly invoicing cycle, and in effect, their cash flows are actually improved. Importantly, they are provided with tax invoices that assist in meeting their GST obligations, and enable them to easily identify and pass on relevant costs to their owners.

28 Elsewhere in that article, and consistent with this position, it is stated:

> Charges of nomination and acceptance fees, **jockeys' riding fees**, and workcover insurance fees, **are processed through trainers** as "agents" for their owners. As such, trainers should not account for the GST associated with these charges in their Business Activity Statements. They should simply lift the transactions off their QPC tax invoices and charge their owners through whatever accounting system they have, inclusive of GST.
>
> [Emphasis added]

29 A feature of the adoption of the Centralised Prizemoney System by the QPC was that it was not preceded by discussions with individual jockeys or jockey representatives. The adoption of the system was a unilateral act by the QPC in discharging, as it saw it, its general administration function and its function as, for Queensland, the Principal Racing Authority under the Racing and Betting Act and the ARR, rather than the result of a series of agreements

with individual jockeys or even with a body representative of jockeys in Queensland. Though the QPC conducted seminars for jockeys and other racing industry participants about the Centralised Prizemoney System, the aim of these was to explain the changes which the QPC had decided to make on the implementation of the GST rather than to solicit agreement about these changes.

30 Another feature of the adoption of the Centralised Payment System was that the ramifications, if any, in relation to liability to the superannuation guarantee charge, of the adoption of the Centralised Prizemoney System did not feature either in the discussions of the working group or in those within the QPC in deciding to adopt that system. It is not just evident, both from Mr Turner's affidavit evidence and from the contemporaneous business records of the QPC in the form of circular letters to racing industry participants and descriptions offered to the racing industry of the new system in the Queensland Racing Calendar that there was any hint that the subject of any changed application or, for that matter, any application at all of the superannuation guarantee charge, was taken into account.

31 Having regard to Mr Stout's evidence, which in this regard I accept, and to the business records annexed to his affidavits, the essential features of the Centralised Prizemoney System as described by Mr Turner in the letters and Queensland Racing Calendar articles which he authored in 2000 remained in place throughout the whole of the Relevant Periods.

32 In terms of industry regulation and apart from the QPC's general administrative function under the Racing and Betting Act, the introduction of the Centralised Prizemoney System in Queensland was supported by an amendment by it of the Local Rules, which came into force in July 2000. The new Local Rule was Local Rule 3A, which provided, materially:

> (1) The Principal Club may establish a system or systems for the payment of all prizes, rebates or similar sums to persons entitled thereto.
>
> (2) As part of such system or systems, the Principal Club may deduct from sums payable under (1) all nomination or acceptance fees, forfeits, fines or other sums as might be payable under the Rules of Racing.
>
> **(3) Where the Principal Club establishes a system or systems in accordance with this Rule all persons and Clubs subject to the Rules of Racing shall comply with such conditions and requirements as specified by the Principal Club to support such system or systems.**
>
> [Emphasis added]

33 Also made and commenced at that time so as to underpin the Centralised Prizemoney System was another new Local Rule 76A, which provided:

> The Principal Club shall from time to time determine the fee payable to a jockey or an apprentice jockey in respect of:
>
> (a) Riding in a race;
>
> (b) Participating in official barrier trials.

34 It was no coincidence that the introduction of the Centralised Prizemoney System was buttressed by rules changes. It is clear to the point of demonstration on the evidence that, both before and after the introduction of the Centralised Prizemoney System and, in particular, throughout the Relevant Periods, the thoroughbred racing industry in Queensland was closely regulated not just by the Queensland Parliament via statute, but also via an interlocking network of rules namely, the ARR and the Local Rules. In this regulation, the influence of Racing Australia and of the Board and its predecessors was both pervasive and decisive. All economic relations within the thoroughbred racing industry in Queensland were, necessarily, conducted against the background of this regulation and representations made to the industry by the Principal Racing Authority of the day, be that the QPC or its successors including, latterly, the Board.

35 There was evidence in abundance to highlight just how detailed was the regulation of the thoroughbred racing industry in Queensland throughout the Relevant Periods. All jockeys were required to be licenced by the Board, or one of the predecessors, to ride in races or barrier trials in Queensland: see ARR 81. Stewards were empowered to grant permission for visiting riders licensed in another jurisdiction to ride in Queensland. Trainers were likewise required to be licensed by the Board or one of its predecessors. Owners needed to be registered through Racing Australia or its predecessors by completing a Horse Registration Form. The ARR and the Local Rules are replete with detailed prescription in relation to fees, prizemoney and conduct, amongst other subjects.

36 Each such registration was dependent upon the submission of an application. Of these, the standard form of application submitted to the Board or a predecessor by jockeys assumed particular importance in the case.

37 On the evidence, the practice in relation to the licensing of a jockey was as follows. A jockey applied to the Board (or a predecessor) for a licence by completing an application (**Jockey Licence Application**). If the Board accepted a Jockey Licence Application, the jockey was then licensed in Queensland to ride thoroughbred horses in races on which betting was conducted under the terms contained in the Jockey Licence Application. By submitting a

Jockey Licence Application, by clause 4 of the Jockey Licence Application, each jockey declared:

> I have read the Australian Rules of Racing and the RQL's Local Rules of Racing ... and it is my obligation as a jockey to update myself in relation to RQL's policies and any rule changes and to abide by those policies and rules of racing.
>
> [For "RQL", one might now substitute the "Board"]

38 This practice was in conformity with the requirements of ARR 2, quoted above, and of Local Rule 9, which provided:

> **Local Rule 9 Procedure for applying for a Licence**
>
> A person applying for a Licence or renewal of Licence shall:
>
> (a) do so in the form prescribed by the Principal Racing Authority;
>
> (b) comply with any conditions printed on the application form;
>
> (c) shall forward with the application such fee as the Principal Racing Authority shall prescribe.

39 The following was common ground between the parties in relation to the Relevant Periods. Jockeys in Queensland received fees for riding in horse races and barrier trials (**riding fees**). Those jockeys also received a share of the prize money payable when the horses they rode won or placed second or third in races (although such prize money is not the subject of any of the Assessments). Local Rules 52 and 71A(3) contemplate that riding fees will be paid to jockeys for riding in horse races separately from, and in addition to, prize money. The riding fees are prescribed by each Principal Racing Authority: ARR 90. The riding fees payable to jockeys varied over the Relevant Periods. The practice was that changes to riding fees were usually notified in the Queensland Racing Calendar.

40 As to prize money, the practice of the Board (and its predecessors) during the Relevant Periods was to deduct funds from the total of the prize money allocated for a particular event for the payment of percentage shares to both the trainer (10%) and the jockey (5%), with the owner receiving the balance percentage from funds otherwise payable to the owner (85%).

41 There is no ARR or Local Rule specifying who is liable to pay riding fees to jockeys. Throughout the Relevant Periods, the Jockey Licence Application provided "RQL will pay your riding fees etc via the Central Prizemoney distribution system" (for "RQL", one may substitute the Board or a predecessor).

42 Over the Relevant Period, horse races or, as the case may be, race meetings were categorised as follows:

- Feature or non-feature.
- TAB or non-TAB meeting.
- Metropolitan, provincial or country.

The riding fee payable to a jockey varied in amount, depending on the type of horse race or race meeting.

43 At no time during the Relevant Periods was it specified either in statute, the ARR or the Local Rules that it was any part of the functions of the Board (or a predecessor) to engage jockeys to ride either in barrier trials or races. Rather, that is, under the ARR, the role of the "manager" of the horse: ARR 57(2)(b). Unsurprisingly therefore, the business records of the Board (including those of its predecessors) do not, as a search which Mr Stout caused to be undertaken disclosed, contain any record of any contract or arrangement between the Board (or a predecessor) and a jockey for any such riding activity. They do, of course, contain Jockey's License Application Forms, the material part of which I have set out above. I address later in these reasons for judgement exactly what that application evidences in the context of any liability of the Board to pay the superannuation guarantee charge.

44 This particular absence of function and records was consistent with the evidence which Mr Stout gave as to custom and practice throughout the thoroughbred racing industry in Australia in relation to the engagement of licensed jockeys. I am satisfied that Mr Stout is, by virtue of his diverse and lengthy experience in the racing industry throughout Australia well qualified to give such evidence. In this regard, his evidence is a species of expert evidence to which s 79 of the *Evidence Act 1995* (Cth) is applicable. Insofar as some of his evidence might be thought to go to with whom contracts of engagement of jockeys are and were usually made, to the extent that this goes to any ultimate issue in the case, it is, by virtue of s 80 of that Act not rendered inadmissible for that reason. I am also satisfied that such evidence is relevant.

45 The position which emerges from Mr Stout's evidence as to industry custom and practice, both before and during the Relevant Periods, is this. The engagement of a jockey to provide riding services was made via a contract, nearly always made orally, between the horse owner (or owners), or their trainer on their behalf, and the jockey concerned.

46 Once a jockey was so engaged, an owner, via the trainer, provided the jockey with the "silks" (inferentially, the owner's racing colours), to be worn by that jockey in the race for which the jockey was engaged to ride. The usual practice was that the jockey would provide other riding gear, including race whip, helmet and goggles, as well as the saddle and the saddle cloth.

47 Most jockeys rode for a number of different owners and trainers. I understood this to mean that, for example, at a particular race meeting, a jockey might ride for different owners in different races. While this was the general position, there was a category of jockeys known as "stable jockeys". Stable jockeys were employed or engaged by a particular trainer's stable. In this regard, I understood the alternative reference to "engagement" to embrace jockeys who were not employees of the trainer but rather those the provision of whose services was governed by a retainer. In turn, depending upon the terms of that retainer, such jockeys may or may not have been free to accept riding engagements from other owners or trainers in any particular race meeting.

48 What emerges from this survey of the Board's functions, its business records and custom and practice is a necessary conclusion that, at no stage during the Relevant Periods, did the Board or its predecessors either employ or engage jockeys.

49 It was the trainer's role to declare a jockey as riding a particular horse in a particular race. There were restrictions on changing riding declarations thereafter. On occasion, two or more trainers (or owners directly) claimed to have engaged the same jockey for a single race. In these circumstances a Steward was responsible for determining which trainer or owner had engaged the jockey after considering how each trainer or owner claimed to have engaged the jockey for that particular race. These subjects, and many more, were not just left to custom and practice but taken up into the ARR or, as the case may be, the Local Rules. The following excerpts from these given a good indication as to the degree of regulation which formed the background against which owners, trainers and jockeys interacted in the racing industry:

> **Local Rule 36. Nomination - Declaration of acceptance - scratching**
>
> (1) A nomination, declaration of acceptance or scratching shall be made to RISA.
>
> **ARR.8.** To assist in the control of racing, Stewards shall be appointed according to the Rules of the respective Principal Racing Authorities, with the following powers:-
>
> ...
>
> (ll) To adjudicate on the claim by any rider that a nominator or trainer of a horse had refused to honour a riding engagement, and to make an order regarding

the engagement and/or any compensation considered appropriate.

ARR.48.

...

(b) Entries for all races shall be made in the name of the owner (or, if the horse is leased, the lessee) and shall be in writing signed by the owner (or, if the horse is leased, the lessee) or the trainer of the horse or the authorised agent of any of them...

ARR.57.

(1) The manager may be removed or replaced by a memorandum signed by the joint owners or lessees or syndicate members representing a majority interest in the horse.

(2) The manager of a horse shall, alone of the joint owners, lessees or syndicate members be entitled to:

(a) enter, nominate, accept or scratch such horse for any race;

(b) engage a jockey to ride such horse for any race;

(c) receive any prize money or trophy won by such horse; or

(d) act for and represent the joint owners, lessees or syndicate members in relation to the horse

in all respects for the purpose of these Rules.

Local Rule 52. Engagement to ride

(1) If a Rider claims to have been engaged to ride a horse in a race and the engagement is withdrawn by the connections or if the horse is scratched for any reason, on application by the Rider, if the Stewards find that the Rider was so engaged, they shall determine whether or not the Rider should be paid a fee and, if so, the amount.

(2) The Stewards may require that a Rider make himself available to ride in a race, in work or in Trials.

ARR.97. No retainer shall be recognised unless it be in writing signed by the parties and lodged at the office of the Principal Racing Authority.

ARR.98. Employers retaining the same jockey have precedence according to the priority of their retainers.

ARR.99. If a jockey be prevented from riding by disqualification or suspension any person who has retained him may cancel the retainer.

ARR.100. In the absence of special agreement, a jockey's retainer shall be terminable by three months notice in writing on either side, and not otherwise; but the Principal Racing Authority may at any time release an owner or jockey from a retainer for any cause appearing to them sufficient and on such terms as they think fit.

Local Rule 67. Declaration of Rider

(1) An owner or Trainer of a horse intended to be run in a race shall declare to the

RISA the name of the Rider not later than the time advertised in the approved program for the Race Meeting and/or advertised in the Racing Calendar.

(2) The Stewards may extend the time provided by this Rule.

(3) Provided that for an emergency runner, riders must be declared by 9:30am on the morning of the race.

ARR.135A. When by or on behalf of a trainer, any instruction is given to, or arrangement made with the rider of a horse engaged in a race that the horse be ridden in the race in a manner different from the manner in which the horse was ridden at its most recent start or starts, it shall be the responsibility of the trainer or his duly authorized agent to notify the Stewards of any such instruction or arrangement as early as practicable but not later than 30 minutes prior to the race. Upon receipt of that notification the Stewards may make any public release in respect thereof as they deem to be appropriate.

[Emphasis added]

The abbreviation "RISA" in Local Rules 36 and 67, excerpted above, is a reference to Racing Information Services Australia Pty Ltd, later Racing Australia Ltd, a privately owned operation conducting a national, consolidated, racing information services business to service the Australian horse racing industry and other users of horse racing information.

50 Regard to these rules reinforces the conclusion that neither the Board nor its predecessors employed or engaged jockeys during the Relevant Periods. Even so, were the jockeys, nonetheless, in the circumstances described above, their employees by virtue of the operation of s 12(8) of the SGAA?

51 In answering this question, it is desirable first to describe the scheme in the SGAA.

52 Superannuation guarantee charges arise in quarters where an employer has one or more individual superannuation guarantee shortfalls: s 17, SGAA. Individual superannuation guarantee shortfalls are calculated under s 19 of the SGAA. They are based on "total salary and wages paid by an employer to an employee for the quarter". Thus, for an individual superannuation guarantee shortfall to arise, there must be an "employer," an "employee" and "salary and wages" paid from the employer to the employee in the relevant quarter. Materially, s 11(1)(d) of the SGAA defines "Salary or wages" to include "payments to a person for work referred to in subsection 12(8)".

53 As to the elements of s 12(8) of the SGAA, it is common ground that horse racing is a sport. It would have been a considerable step, perhaps even a vexatious one, to have made that subject controversial. In the *Encyclopaedia Britannica* (Online Edition, Last Updated 14 February

2019) article on "Horse Racing", horse racing is described as the, "sport of running horses at speed, mainly Thoroughbreds with a rider astride or Standardbreds with the horse pulling a conveyance with a driver. ... Horse racing is one of the oldest of all sports, and its basic concept has undergone virtually no change over the centuries. It developed from a primitive contest of speed or stamina between two horses into a spectacle involving large fields of runners, sophisticated electronic monitoring equipment and immense sums of money". Indeed, the usual sense in which the expression "sport of kings" is used is as a reference to horse racing (Oxford Dictionary, Online Edition).

54 It was also common ground that the expression, "liable to make the payment" in s 12(8) referred to a legal obligation to make the payment. There is no reason, reading the word, "liable" in context and according to its natural meaning, to doubt the correctness of that shared position.

55 So has the Board demonstrated that neither it nor a predecessor was liable to make the payments namely, the riding fees, in respect of which the Commissioner has based his assessments of superannuation guarantee charge?

56 The source of any such liability cannot be found in statute, because neither the Racing and Betting Act nor the Racing Act visited on the Board or a predecessor any such liability. Local Rule 76A, set out above (since repealed) empowered the Board to fix the amounts of riding fees but did not itself make the Board liable to pay them.

57 Local Rule 3A, also set out above (since repealed), was facultative in that it empowered the Board to set up "systems for the payment of all prizes, rebates or similar sums to persons entitled thereto" and also a source of obligation for all those bound by the Local Rules to comply with obligations created by such a system. The "Centralised Prizemoney System" has been made pursuant to Local Rule 3A and those bound by the Local Rules are bound to comply with obligations created by it. So it does not follow that the Board's submission that the rules were not a source of a legal obligation to pay riding fees can be accepted uncritically. If the "Centralised Prizemoney System" imposed such an obligation on the Board, it would seem to me that all of the elements found in either or each of s 12(8)(a) of the SGAA would be satisfied.

58 The Board submitted that, properly understood, the "Centralised Prizemoney System" did not impose such a liability. It submitted that any legal liability in respect of the payment of riding fees vested in either a trainer or an owner. In particular, the Board submitted:

(a) There was never any contract between the Board or any of the predecessors and any jockey for jockeys to ride in races or barrier trials.

(b) Any such engagements during the Relevant Periods were made by owners and/or trainers without any reference to or any input from the Board or the predecessors.

(c) There was never any intention to create contractual relations between the Applicant or any of the predecessors and any jockey for jockeys. The Jockey Licence Application was a document completed by jockeys with required information to allow the Board to decide whether or not to grant a licence to ride. During the Relevant Periods, the Board and its predecessors were responsible under the Racing Act for licencing of persons involved in the racing industry, including jockeys, pursuant to a regulatory scheme comprising the Racing Act, regulations made thereunder and the ARR and Local Rules. The completion of the Jockey Licence Application was a legal requirement for any jockey wishing to ride in Queensland. There was no voluntary agreement to ride with the Board or any of its predecessors. Jockeys wishing to ride in Queensland had no choice but to apply for a licence to ride on the form prescribed by the Applicant and the predecessors. There was not, nor could there be, any negotiation as to any terms or conditions. False statements by jockeys were and are a criminal offence. Jockeys could be disciplined for a breach of licence conditions and a raft of other matters dealt with in the ARR and Local Rules. The holding of a licence did not entitle a jockey to ride in a race if the stewards directed a jockey not to ride in a race. Jockeys have to submit to any drug testing required before or after a race. On no proper understanding of the regulatory scheme, so the submission went, could it be characterised as giving rise to a contract with mutual obligations and liability on the Board or any of its predecessors to pay riding fees.

(d) No consideration flowed from any jockey to the Board or any of its predecessors with respect to the Jockey Licence Application.

(e) The Jockey Licence Application was signed by the relevant jockey and contained the jockey declaration but was not signed or executed by the Board or, as the case may be, any of its predecessors. (On the evidence, this proposition is factually correct.)

(f) To the extent that the Commissioner relies on the jockey's declaration attached to the Jockey Licence Application, that declaration does not provide for mutual obligations and only relevantly refers to payments to jockeys of prizemoney.

(g) The Jockey Licence Application contains no statement that the Board agrees, promises, is obliged to or is otherwise liable to make any payments to jockeys. Such language could be easily have been included and would be expected to be present if the parties had intended to create a binding liability on the Board and its predecessors to pay.

(h) It is not to the point that the Jockey Licence Application states that the Board "will" pay riding fees etc. via the "Centralised Prizemoney System". That statement creates no legal obligation to make any payment;

59 Whether or not a particular state of affairs between parties gives rise to contractual relations between them requires an objective assessment of that state of affairs, free of the application of prescriptive rules: *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 105 per Gaudron, McHugh, Hayne and Callinan JJ.

60 The Board submitted that an application by a jockey for a licence and the granting of any such licence by the Board did not give rise to any contractual relations between the Board (or, as the case may be, a predecessor) and that jockey: *South Australian River Fishery Association Inc and Warrick v South Australia* (2003) 85 SASR 373 per Doyle CJ at [33] and [73] – [74]; per Gray J at [175]; and per Besanko J at [220]; *NT Power Generation Pty Ltd v Power & Water Authority and Ors* (2001) 184 ALR 481 per Mansfield J at 570, [383] -[385]; (2002) 122 FCR 399 per Finklestein J at 452-453, [187], in dismissing the appeal from Mansfield J; the implied term on the granting of a licence argument was not pursued on the further appeal to the High Court - (2004) 219 CLR 90 at 107, [40] fn 59; *Lismore City Council v Stewart* (1989) 18 NSWLR 718 at 725G – 726F; *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* (2004) 140 FCR 445 at 560 – 562, [600] – [608]; and, on appeal, (2005) 148 FCR 68 at 115 – 118, [174] – [195].

61 Were this just a case of an application, via the Jockey Licence Application, for permission to undertake an activity which was otherwise rendered unlawful by statute and by Local Rules having the status of statutory instruments permissibly made thereunder, I should be inclined to accept the Board's submission. But although the existence of the ARR is recognised in the Local Rules and though the latter have the status of statutory instruments, the ARR do not. The

clue as to the nature of the relationships is to be found in ARR 2, quoted above. The circumstances of this case are not materially distinguishable, in my view, from *NSW Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691 (***NSW Thoroughbred Racing Board v Waterhouse***). In that case, at 698, [35], in respect of a similar regulatory regime entailing local rules given force under statute and the ARR, Hodgson JA (Handley and Santow JJA concurring in this regard) observed:

> 35 It is to be noted that the Board is not an instrument of government (see the Board Act s 4–s 6). The Rules of Racing are rules to which participants in racing become contractually bound; but they are also given statutory consequences, for example by s 14 of the Board Act.

Paraphrasing, by reference to the position in Queensland under the Racing Act, one might likewise note that the Board is not an instrument of government (s 9, Racing Act) and, though the Local Rules have the status of statutory instruments, participants in racing in Queensland become contractually bound to comply with the ARR and the Local Rules. That the Local Rules are also given statutory force in their application to participants would not detract from there being an underlying contract between participants: *McHugh v Australian Jockey Club*, at [1410] per Robertson J.

62 A conclusion that there existed an underlying contract between industry participants in this case is, in my view, completely congruent with conclusions reached in the House of Lords in *Clarke v The Earl of Dunraven and Mount Earl - The "Santanita"* [1897] AC 59 (***Clarke***). The background to that case was as follows. Two yachts, the *Santanita* and the *Valkyrie*, were entered by their respective owners for a club race, each owner undertaking with the club to be bound by the club sailing rules. By the rules the owner of any yacht disobeying any of the rules was to be liable for "all damages arising therefrom." The yacht *Santanita*, in breach of a sailing rule, through improper navigation without the actual fault or privity of the owner, ran into and sank the *Valkyrie*. It was concluded that there was a contract between the owners upon which the owner of the damaged yacht could sue the owner of the other, and that upon the true construction of the rules the words "all damages" excluded the operation of a statutory limitation of the amount of liability. The result in the House of Lords was unanimous with the following observation made, at 63, by Lord Herschell being the most apt for present purposes:

> I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.

Also notably for present purposes, the then Lord Chancellor, Lord Halsbury, in stating like views as to the existence of a contract, expressly, at 62, drew an analogy with horse racing:

> [B]ut remember that these are competing vessels, and where you are speaking of these first-class yachts competing in a yacht-race you might as well value a race-horse by its weight, so many pounds of flesh, as speak of the value of a yacht according to its tonnage

63 *Clarke* was referred to last year by His Honour Judge Eyre QC, (sitting as a Judge of the High Court) in the English case, *Mercato Sports (UK) Ltd v The Everton Football Club Co Ltd* [2018] EWHC 1567 (Ch) (***Mercato Sports v Everton Football Club***). The following observations made by his Honour, at [41] – [42], are consistent with *NSW Thoroughbred Racing Board v Waterhouse* and are applicable by analogy to the relationships abroad in the present case in relation to the Board, owners and trainers and jockeys:

> 41. ... Participation in a sport or in activities connected with that sport does not of itself mean that those participating have as between each other the rights and obligations provided for in the rules of that sport's governing body. Whether there is an implied contract between such participants to the effect that they have as against each other those rights and obligations is to be determined by a fact sensitive analysis undertaken by reference to the general principles of contractual formation. In particular the court has to consider whether a given participant is a party to a vertical contract making him subject to the rules of the sport's governing body and whether the circumstances as a whole are such as to give rise to consequent and corresponding horizontal contracts with other participants. That approach is correct both by reference to authority and as a matter of principle and is to be adopted here.
>
> 42. In many cases the court will readily conclude that there were both vertical contracts with the relevant governing body and horizontal contracts with other participants. Thus those engaging in a sporting event organised under the auspices of a particular governing body are likely to be held to have agreed with those organising the event to be bound by the rules of that body and to have entered horizontal contracts to the same effect with the other participants. However, such a conclusion will be less readily reached the further removed the activity in question is from the actual playing of the sport concerned.

64 When a jockey completed and signed the Jockey Licence Application, that jockey was agreeing to be bound by the ARR and the Local Rules in return for permission to ride in races. When a trainer completed a similar application, that trainer was agreeing likewise to be bound in return for being permitted to conduct particular training activities. When an owner registered a horse, that owner was also likewise agreeing to be bound in return for being able to race that horse at race meetings conducted by approved clubs. These applications upon their acceptance created relationships in contract of like character to those described in *Clarke* and, even more particularly, in *NSW Thoroughbred Racing Board v Waterhouse*. What was created, to adopt

the terminology employed in *Mercato Sports v Everton Football Club*, were both "vertical" and "horizontal" contracts.

65 Accepting this to be the background position, when a jockey was employed or engaged by an owner or trainer to ride a horse in a race, they entered into another, separate contract with that trainer or owner, and only that trainer or owner, to perform that service. Each also had, via a contract, separate (vertical) contractual rights and obligations with the Board (or a predecessor) and horizontal contractual rights with each other by virtue of having applied for a licence and being granted one. Insofar as those rights and obligations arose under the Local Rules, their source was also in a subordinate instrument.

66 On close analysis, the Centralised Prizemoney System did not alter these separate relationships. Neither, materially, did it create some different source in respect of the liability to pay a riding fee to a jockey.

67 Before the introduction of that system, it was the owner or trainer who, via a discrete contract, employed or engaged the jockey to ride in a race or barrier trial and who was liable, under that contract, to pay that riding fee. After the introduction of that system, that remained the case. All that occurred after the introduction of that system was that owners or trainers and jockeys agreed with each other and with the Board, under the separate contract formed when each applied for and was granted a licence and agreed to be bound by the ARR and the Local Rules, that the Board was to pay that riding fee to the jockey *on behalf of* that owner or trainer. That payment would be made "on behalf of" was, as I have emphasised in the descriptions of the system above, made explicit from the outset of the introduction of that system. Likewise, payments of prizemoney are made "on behalf of" clubs conducting particular races. The contracting party on whose behalf a payment was being made was, in all instances, fully and openly disclosed. On and from the introduction of the Centralised Prizemoney System, riding contracts were, necessarily, given that owners or trainers and jockeys had already each bound themselves contractually to abide by the ARR and the Local Rules, formed on the basis that payment in discharge of an owner's or trainer's riding fee liability to the jockey would be made on behalf of that owner or trainer by the Board (or a predecessor) under the Centralised Prizemoney System. If the Board (or a predecessor) had failed to make payment, the jockey's cause of action to recover the riding fee would be against the owner or trainer under the riding contract with the owner or trainer being entitled to join the Board so as to seek contribution or indemnity for a failure to abide by the terms of the separate contract that that owner or trainer

had with the Board whereby the Board had agreed to pay the riding fee on behalf of that owner or trainer. That the Local Rules were statutory instruments would provide a further basis for seeking that contribution or indemnity but not alter the source of the liability to pay the riding fee.

68 What follows from this is that, throughout the Relevant Periods, a jockey was a person who was paid to participate in a sport, namely thoroughbred racing, but the person legally liable to pay the riding fee, which was the payment for that participation, was always the owner or trainer who had employed or engaged that jockey to ride in that race. The Commissioner has misunderstood the nature of the Centralised Prizemoney System and the source of the legal liability to pay the riding fees. The source remained the contract between jockey and the owner or trainer but that liability was discharged by a payment made on behalf of that owner or trainer by the Board (or a predecessor) via the Centralised Prizemoney System.

69 It follows that s 12(8)(a) of the SGAA did not, throughout the Relevant Periods, apply so as to make the jockeys employees. The Board has therefore proved the assessments to be excessive.

70 I have reached this conclusion without any need to consider *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 214 FCR 82 (***On Call Interpreters***). But each side made submissions as to the application or even the correctness of that case so some reference should be made to those submissions and that case.

71 *On Call Interpreters* was a taxation appeal in which the applicant, a provider of interpreter and translation services, came unsuccessfully to appeal against an objection decision of the Commissioner which had affirmed assessments of a liability to pay a superannuation guarantee charge. The assessments related to amounts paid to a majority of interpreters whom the applicant did not recognise as its employees. The applicant contended that the interpreters were independent contractors on the grounds that they owned and operated their own businesses and had a capacity to manage their affairs so as to maximise their profits. The assessments were cast on the basis that, even if the interpreters were not employees, s 12(3) of the SGAA deemed them to be employees for the purposes of that Act. That subsection provides:

> (3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

72 In the result, Bromberg J held that s 12(3) applied to the interpreters so as to render them employees. In so doing, his Honour, at [306] made some observations about s 12 of the extended beyond s 12(3) in their application:

> Whilst s 12 of the Superannuation Guarantee Act makes it clear that the scheme for enhancing occupational superannuation was not intended to be restricted to common law employees, it is also clear that the extent of that expansion is to be limited by the evident purpose of the legislation. Parliament did not intend that a client of a sole practitioner solicitor provide for the retirement savings of the solicitor out of the exchange of labour for remuneration that arises out of the relationship of solicitor and client. However, Parliament did intend to cover employment-like relationships in which work is performed for remuneration or payment despite the fact that the relationship in question may not be recognised by the common law as a relationship between an employer and employee. **Each of the categories of persons dealt with in subs (2) and (4) to (10) of s 12 are persons who may not be common law employees but who earn remuneration in exchange for the provision of personal services in the context of an employment-like setting.** Those categories include: parliamentarians; directors of corporations; statutory office holders; and, public servants (including police officers and Defence Force personnel). In my view, Parliament's intent in relation to s 12(3) is similar. The subsection seeks to facilitate occupational superannuation being paid out of the exchange of work for remuneration when an independent contractor provides personal services in an employment-like setting which is not of a domestic or private nature (see s 12(11)). Whether an employment-like setting exists may be best answered by asking: Whether, in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee?
>
> [Emphasis added]

73 The words emphasised in the passage quoted from *On Call Interpreters* underpinned a further submission behalf of the Board that there was nothing on the evidence about a licence granted by the Board in response to the lodgement with it of a Jockey Licence Application which initiated an "employment-like setting". That may well be so but there is, with respect, quite some substance in the Commissioner's riposte that "employment-like setting" is a gloss on the text Parliament has employed in s 12 of the SGAA. At common law neither constables nor members of the military (qv, s 12(9)(b)) are employees of the Crown but they are paid by the Crown to perform their duties and subject to the over-arching control of the Crown. So it is not difficult to see how that category may have inspired the observations made by Bromberg J. It is much more difficult to discern any such features with members of a parliament or local government council (qv ss 12(4), 12(5), 12(6), 12(7) and s 12(10)). Thus, with respect, the discerned unifying characteristic in respect of the extended class in s 12 of an "employment-like setting" is not apparent to me. That each might, in the vernacular, be termed a "servant of the people" does not make a parliament or a local government chamber an "employment like setting". His Honour's observations were *obiter* and s 12(3) of the SGAA is not relied upon

by the Commissioner in this case. So it is unnecessary to examine s 12(3) and reach any concluded views about the correctness of the observations made by Bromberg J in order to resolve the present case.

74 Exactly what constitutes the metes and bounds of an "employment-like setting" may be elusive. It is pellucid that the mere submission and acceptance of a Jockey Licence Application does not render a person an employee of the Board. All that the person does is agree to be bound by the ARR and the Local Rules in return for which the privileges of being a licensed jockey are on licensing conferred. But the person does not thereby come to undertake any task at all for the Board. So I suppose it might be said that there is no "employment like setting" but my preference is just to look to the text of s 12(8) of the SGAA, free of any such gloss.

75 As something of a fall-back position, the Board put in issue whether, even if it were liable for superannuation guarantee charge, it was not responsible for the liabilities of its predecessors.

76 *Prima facie*, the liability to pay the superannuation guarantee charge falls on the entity which is liable to make the payments to those who are or are taken to be its employees. There is nothing in the SGAA which would serve to render the Board liable for any entity whose functions it has assumed.

77 The Board was established under the Racing Act by s 11 of the *Racing and Other Legislation Amendment Act 2012* (Qld) (**2012 Amending Act**), which came into force on 1 May 2013. The Board submitted, and the fact is, that 16 of the 21 assessments in question concern payments that were made before the Board was established on 1 May 2013 (Pre-Formation Assessments). Therefore, so the submission went, the Board could not have been the relevant employer (if any) under the SGAA for the Pre-Formation Assessments. So much may be accepted.

78 The Board's further submission was that no provision of the 2012 Amending Act or the Racing Act deals specifically with the SGAA or superannuation default assessments or charges. This, also, may be accepted.

79 The Board then referred to s 73 of the 2012 Amending Act inserted a new s 447, which included a provision (s 447(1)(a)) that anything that was an asset or liability of a former control body immediately before the commencement became an asset or liability of the Board. The Board also referred to s 187 of the Racing Act, which provides that "a right or obligation of the former control body under this Act immediately before the commencement becomes a right or

obligation of the [Board]". It submitted that neither of these provisions was a source of liability in relation to the Pre-Formation Assessments. That was because, so the submission went, s 36(3) of the SGAA provides that a default assessment is "payable on the day on which the assessment is made." The Assessments were issued on 25 March 2015. Therefore, the Board submitted, neither s 447(1)(a) or s 187, nor any other section of the Racing Act or the 2012 Amending Act operates to impose on the Board any obligations with respect to the Pre-Formation Assessments.

80 The Commissioner submitted that the Board's submission, "confuses the concept of a default assessment being payable with liability for to pay superannuation guarantee charge." The Commissioner submitted that the Board's predecessor bore a liability (within the meaning of that word in s 447 of the Racing Act) or an obligation (within the meaning of that word in s 453 of the Racing Act) to for superannuation guarantee charge immediately before the commencement of the relevant amending enactment. The Commissioner then submitted that the operation of the *Superannuation Guarantee Charge Act 1992* (Cth) and the SGAA was such that the charge was imposed on the Board's predecessor once it had the relevant shortfalls. The Commissioner submitted that this charge liability or obligation came into existence based on the circumstances and application of the relevant law to those circumstances with the assessments merely rendered these liabilities payable. His further submission was that the transitional provisions operated to transfer that liability or obligation from Racing Queensland Ltd to the Board on the commencement of s 447 (if a liability) or s 453 (if an obligation).

81 In support of his submission, the Commissioner referred to *Re Finney; Ex parte Official Trustee in Bankruptcy v Finney* (1997) 35 ATR 259 at 270 but this was a bankruptcy case and the reference there to additional tax was in the contest of a provision which, unlike those under present consideration, expressly extended to contingent liabilities. The Commissioner's submission is, in my view, really a resurrection of a view expressed by Gibbs J (as his Honour then was) in *Re Mendonca; Ex parte Commissioner of Taxation* (1969) 15 FLR 256 at 259-260 and repeated by his Honour in *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 (***Clyne***). That view is that a liability to tax or, in this case, the charge (or obligation) arises when the facts giving rise to that liability occur, even though the extent of the liability remains to be ascertained and payment would not become due until the future. That view did not command the support of any of the other judges in *Clyne*, with the following passage from Mason J's judgment, at 16-17, being the prevailing view:

> However the correct view in my opinion is that income tax is due when it is assessed and notice is served of that assessment and that the tax does not become payable before the date fixed by s. 204. Dixon C.J., McTiernan, Williams, Webb and Fullagar JJ. in *George v Federal Commissioner of Taxation* said that "tax is only due after it is 'assessed' (see, for example, s. 204)". I recognize that on other occasions members of this Court have said that "tax is a debt due and owing, although not payable, notwithstanding that no assessment has been made", in the words of Gibbs J. in *Re Mendonca; Ex parte Federal Commissioner of Taxation*. This approach can be traced back to the majority decision of this Court in *Commissioner of Stamps (W.A.) v West Australian Trustee, Executor and Agency Co. Ltd* (*Mortimer Kelly's Case*). I think that the decision is to be explained on the footing that it was held that a debt for income tax not assessed until after the deceased's death, was a "debt due by the deceased" for the purpose of Acts imposing death and probate duties. The decision was so explained by Taylor J. (dissenting) in *Deputy Federal Commissioner of Taxation v. Brown* and this explanation derives support from the judgments of Higgins and Starke JJ., if not from a judgment of the third member of the majority, Knox C.J., in *Mortimer Kelly's Case* [footnotes omitted]

82 *Clyne* and a plethora of later cases in which that prevailing view has been referred to were helpfully collected by Griffiths J in *Commissioner of Taxation v Nash* (2013) 211 FCR 520 (***Nash***), a case to which the Commissioner quite properly drew attention. *Nash* was a case concerning when liability to the general interest charge arises but, in the course of considering that subject, Griffiths J, after an analysis of the authorities collected, referred, at [60], in relation to income tax, to "the importance of the giving of a notice of assessment in creating a liability to pay income tax. Tax is not due or payable until such time as a notice of assessment is given". That, with respect, represents the position as I understand it, in relation to when a liability to income tax arises.

83 Assessment, be it deemed or default, is similarly an essential element in the creation of a liability to superannuation guarantee charge under the SGAA. As the Board correctly submitted, s 35 and s 36 have the combined effect that a superannuation guarantee charge is not payable until a first superannuation guarantee statement is lodged (which by s 35 "has effect" as an assessment) or an assessment is made.

84 However, the focus must first be on the text of the transitional provisions in the State legislation mentioned. It is true that they do not employ words of extension such as "vested or contingent" or "future" in relation either to "liability" or "obligation". Even so, and this is the flaw in what is otherwise an attractive submission made by the Board, the necessary extension, in relation to liability, is supplied by the meaning to be afforded to the word "liability" where it appears in State legislation (and in the absence of any contrary intention) by s 36 and Schedule 1 to the *Acts Interpretation Act 1954* (Qld). That provides that the ordinary meaning to afford the word "liability" in State legislation is "any liability or obligation (whether liquidated or unliquidated,

certain or contingent, or accrued or accruing)". It is highly unlikely that the State Parliament intended, in providing for a succession of responsibility for the regulation of racing in the Queensland, to do other than use "liability" in this extended sense. So used, it is apt, in my view, to capture a liability that is not made certain until assessment, deemed or otherwise under the SGAA. It is apt to capture as a contingent liability circumstances where a shortfall has arisen but no related superannuation guarantee charge has yet been assessed. Therein lies the breach in this fall-back position of the Board.

85 The Board also submitted that the assessments were invalid. There are a number of difficulties with that submission.

86 The first is s 41 of the SGAA, which is an analogue of s 175 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 36**) and which provides, "The validity of an assessment is not affected because any provision of this Act has not been complied with." Like s 175 of the ITAA 36, s 41 of the SGAA does not render an assessment immune from challenge on the basis that it is invalid. However, the means of challenging validity is not via an appeal such as the present under Pt IVC of the *Taxation Administration Act 1953* (Cth), but rather via a proceeding in the original jurisdiction of the High Court under s 75(v) of *The Constitution* or in this Court's materially equivalent jurisdiction under s 39B of the *Judiciary Act 1903* (Cth): *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 (***Futuris***).

87 The second, having regard to *Futuris*, is that, even if this were an appropriate proceeding, the grounds upon which review might be sought are circumscribed and, materially, there is not a scintilla of evidence that the Commissioner's assessments were the result of "conscious maladministration" on his part.

88 The third, contrary to the Board's submission in this regard, is that the word, "may", as used in s 36 of the SGAA, is, as a matter of construction, facultative. The Commissioner's reference to the following passage in the judgement of Windeyer J in *Finance Facilities v Commissioner of Taxation* (1971) 127 CLR 106, at 134 is exactly on point:

> This does not depend upon the abstract meaning of the word "may" but whether the particular context of the words and circumstances make it not only an empowering word but indicate the circumstances in which the power is to be exercised – so that in those events the 'may' becomes a "must".

Here, if the conditions precedent in s 36(1)(a) and s 36(1)(b) of the SGAA are present, the Commissioner is empowered to, and must, assess. That is the meaning, in context, of the word, "may" in s 36(1) of the SGAA.

89 Thus, though there is no merit in the Board's various alternative grounds of challenge to the assessments, its primary ground of challenge is made out. Its appeal must therefore be allowed, the objection decision set aside and, in lieu thereof, it must be ordered that its objection to the assessments be allowed in full. It will then be for the Commissioner to give effect to that order by administrative action.

I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan.

Associate:

Dated: 12 April 2019