IN THE HIGH COURT OF AUSTRALIA

CANBERRA
~~SYDNEY~~ REGISTRY

No. C2 and 3 of 2011

BETWEEN:

QUEANBEYAN CITY COUNCIL

Appellant

and

HIGH COURT OF AUSTRALIA
FILED
- 6 JUN 2011
THE REGISTRY SYDNEY

ACTEW CORPORATION LTD

First Respondent

and

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)

Second Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I

1. These submissions may be published on the internet.

Parts II - III

2. The Attorney General intervenes under s 78A of the Judiciary Act 1903 (Cth).

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Part IV

3. The applicable constitutional and statutory provisions are sufficiently annexed to the Appellant's submissions.

Part V

4. These submissions are organised as follows:

(a) background.

(b) the WAC.

(c) the UNFT.

(d) S 90.

10 **Background**

5. A Water Abstraction Charge ("the WAC") and a Utilities (Network Facilities) Tax ("the UNFT") were imposed by, or by force of, laws made by the Australian Capital Territory.

6. The Territory's legislative powers were and are subject to s 90 of the Constitution: Capital Duplicators Pty Ltd v Australian Capital Territory (1993) 178 CLR 561.

7. Section 90 relevantly provides:

> On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

20 8. In Ha v New South Wales (1997) 189 CLR 465 at 499 the majority stated:

> ... duties of excise are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin. Duties of excise are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods.

9. An excise must also be a tax, but the converse does not follow. Further, as discussed below, there are customary indicia and, indeed, contra-indications for when an exaction is a tax, or an excise or both, but that is all they are, namely indications

which inform the ultimate task of characterisation.

10. The primary judge found that:

(a) the WAC was not a tax and thus not an excise, essentially because there was a discernible relationship with the value of what was acquired by ACTEW and because the Territory was entitled to realise the underlying value of a commodity, namely water, which it controlled, even though it was also the custodian of it as a limited natural public resource: primary judgment [120], [124]-[126];

(b) the UNFT was both a tax and a duty of excise given that the Act authorizing that tax was a step in the production, sale and distribution of goods having regard to its terms and its substantive effect and, because it operated as an indirect tax on consumers: primary judgment [141], [162]-[164].

11. The Respondents appealed and the Appellant cross-appealed. The Full Court (Keane CJ, Stone and Perram JJ) allowed the former and dismissed the latter. The Court:

(a) unanimously held that the UNFT was not a duty of excise as there was a disconnect between the amount of the tax and both the value and the quantity of water passing through the pipeline: the tax was based on the length of the pipeline, but it was the diameter of the pipe that would determine the value and quantity of the water. It followed that there was an insufficiently close connection with the activity of transporting water for the tax to be treated as an impost on a step in the production or distribution of water: appeal judgment [136]-[138], [152], [160], [180];

(b) by majority (Keane CJ and Stone J, Perram J dissenting) held that the WAC was not a tax and therefore not a duty of excise: appeal judgment [94], [177]. Although the majority agreed that it could *not* be said that there was no discernible relationship between the WAC and the value of the water supplied by the Territory to ACTEW (appeal judgment [87]-[89], [174]-[175]) the reasoning of the majority otherwise diverged in that:

(a) Keane CJ, applying Harper v Minister for Sea Fisheries (1989) 168 CLR 314 held that the WAC was a quid pro quo in a voluntary transaction to

acquire a right to an asset derived from public resources, and was sufficiently like a profit à prendre or a royalty to deny its characterization as a tax: appeal judgment [81]

(b) Stone J, applying Air Caledonie International v Commonwealth (1988) 165 CLR 462, characterized the WAC as a fee for a privilege (being a right to do something, namely take water, which was otherwise forbidden): appeal judgment [168], [176].

12. In substance, the Attorney General for NSW submits that the conclusions of the Court below were right for the reasons given both in the judgment of Keane CJ and the submissions of the Second Respondent in this Court.

13. "The first step in the making of [an] assessment of the validity of any given law is one of statutory construction": Gypsy Jokers Motorcycle Club Inc v Commissioner Of Police (2008) 234 CLR 532 at [11].

14. Further, as was said by Brennan CJ, McHugh, Gummow and Kirby JJ in Ha v New South Wales at 498:

> When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitational restriction is not circumvented by mere drafting devices. In recent cases, this Court has insisted on an examination of the practical operation (or substance) of a law impugned for contravention of a constitutional limitation or restriction on power.

15. Accordingly, matters of construction are now addressed.

The WAC

16. The land comprising the Territory, which was surrendered by the State of NSW to the Commonwealth, is vested in the Commonwealth as a Commonwealth Territory: Constitution s 122, cp s 125; Seat of Government (Acceptance) Act 1909 (Cth).

17. Since the granting of local self-government in 1988, the Territory Executive has responsibility for the management of "Territory land" in the Territory, and the Territory legislature has had power to make laws with respect to that land: Australian Capital Territory (Self-Government) Act 1988 (Cth) ss 22, 36, 37,

Schedule 4; Australian Capital Territory (Planning And Land Management) Act 1988, ss 27, 28, 29. (There was and is identical responsibility and power in relation to "water resources": Australian Capital Territory (Self-Government) Act 1988 (Cth) Schedule 4.)

18. By s 7 of the Water Resources Act 2007 (ACT) the "right to the use, flow and control of all water of the Territory is vested in the Territory"; relevantly that Act's predecessor was in similar terms: Water Resources Act 1998 (ACT) s 13. Each Act continued a long historical pedigree. Thus, in ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 at [54], French CJ, Gummow and Crennan JJ said:

> .... The *Water Rights Act 1896* (NSW) (the 1896 Act) provided: "The right to the use and flow and to the control of the water in all rivers and lakes ... shall ... vest in the Crown." Section 6 of the 1912 Act retained this language. Similar language was adopted in water legislation in other parts of Australia. Of significance for this case is that the vesting of rights to the "use" and "control" of water constituted an exercise of sovereignty in the sense that the rights so vested were based on the political power of the state. Accordingly, the reasoning of the Full Court of the Supreme Court of New South Wales in *Hanson v The Grassy Gully Gold Mining Co*, that the 1896 Act vested in the Crown the common law rights of riparian owners, is to be preferred ...The assertion of control over water was assumed to include the power to issue licences. (citations omitted)

19. The agreement between the Commonwealth and NSW which is a Schedule to the Seat of Government (Acceptance) Act 1909 (Cth), specifically dealt with those rights, for example providing :

> The right of the State or of the residents therein to the use and control of the waters of the Queanbeyan and Molonglo Rivers and their tributaries which lie to the east of the Goulburn to Cooma Railway shall be subject and secondary to the use and requirements of the Commonwealth (which are hereby declared to be paramount) for all the purposes of the Territory...

20. There was a statutory power to set the WAC, by determination. Thus, as Keane CJ said below:

> [14] The 1998 Water Act provided:
>
> - *by s 33(1)* that "a person shall not take water without a licence",
> - *by s 35* for the granting of a licence to take water which might be subject to conditions,

- *by s 78(1)* that "The Minister may, in writing, determine fees for this Act",
- *by s 78(3)* that "A reference in this section to a *fee* includes a reference to a fee that is a tax".

[15] On 1 August 2007, the 1998 Water Act was replaced by the 2007 Water Act. It made, by ss 28, 30 and 31, and s 107, provision to the same effect as the provisions of the 1998 Water Act to which I have referred.

21. It was permissible but not compulsory for the relevant Minister in determining the fee, to have regard to reports from the ACT Independent Pricing and Regulatory Commission, later called the Independent Competition and Regulatory Commission. In the circumstances explained by Keane CJ at appeal judgment [31]:

> ...the ACT government policy was to try to fix the WAC by reference to the cost of providing water to consumers. That policy was to change in the 2006-07 financial year. It was this change in policy which led to the QCC's challenge to the validity of the WAC.

22. The Appellant attacked the increase of 30c per kilolitre (c/kl) from 1 July 2006 which took the WAC to 55c/kl and then 51c/kl (it being accepted that this last charge was revenue neutral and unobjectionable: appeal judgment [38]). That charge was imposed upon the Respondent, ACTEW, as the holder of the relevant water licence, and was passed on to the Appellant: appeal judgment [9], [13].

23. It was in these circumstances that Keane CJ stated that:

> [81] I consider that the WAC is best regarded as a payment exacted as the quid pro quo in a voluntary transaction to acquire a right to an asset from public resources. It is sufficiently akin to a profit à prendre or a royalty that it can not properly be described as a tax.

24. It is noted that in R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327 at 344 Mason J, with whom Brennan J agreed, adopted the following definition of a profit à prendre:

> ... a profit à prendre confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some of its natural produce, or the animals ferae naturae existing upon it... (*Alfred F. Beckett Ltd. v.Lyons* (1967) 1 Ch 449, at p 482, per Winn L.J.)

The UNFT

25. Section 8 of the Utilities (Network Facilities Tax) Act 2006 (ACT) states:

> The owner of a network facility on land in the ACT is liable to pay tax in relation to the facility at the rate worked out as follows: determined rate x route length.

26. Notably, a "network facility", which is part of the infrastructure of a utility network, can relate to utilities including water, gas, electricity and sewerage. It does not include a facility for which in whole or part there already exists a right attached to the land, such as a lease or licence, to use the facility on the land. (In this respect, there is a significant difference compared to the legislation in Hematite Petroleum Pty Ltd v Victoria (1983) 151 CLR 599 where the pipeline licensees already had a permit to operate the pipelines and the fee attached to the licence not the anterior permit.)

27. These matters led Keane CJ to find that:

> [136] The UNFT is distinguishable from the licence fee under consideration in Hematite in ways that show that the UNFT is not an impost on a step in the production or distribution of water. In this regard:
>
> - *first*, the UNFT is payable by the owner of the network, not by the operator of the network;
> - *secondly*, the UNFT is imposed by reference to the conferral of the right to use and occupy land on which its facility is situated: this is not a case like *Hematite* where, as Mason J observed, the taxpayer was otherwise entitled to use the facility in question;
> - *thirdly*, the quantum of the tax is referable to the length of land occupied;
> - *fourthly*, the quantum of the UNFT is not explicable "only on the footing that it is imposed in virtue of the quantity and value" of the water supplied by ACTEW to consumers;
> - *fifthly*, payment of the fee is not a condition upon the transportation of water; and
> - *sixthly*, the UNFT does not select the water network for discrimination so as to warrant the conclusion that the tax is upon the water carried in the network.
>
> [137] ... The quantum of the UNFT is fixed without any evident regard to the quantity or value of the water which may or may not pass through the network. In this case, there is not only no arithmetical relationship between the UNFT and the quantity or value of water which passes through the network, there is no relationship *at all* between the UNFT and the quantity or value of water which passes through the network.

> [151] ... the quantum of the UNFT has no natural relationship with the amount or value of water which may be distributed through the facility. The amount or volume of water so transported depends not upon the length of the pipeline of the facility but upon its diameter.

28. Stone and Perram JJ agreed, the latter adding that :

> [180] ... in *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 the High Court held that a charge levied on road hauliers which was calculated by reference to the potential load which could be carried by a truck and the number of miles travelled was not a duty of excise. Such an arrangement appears indistinguishable from the UNFT at the level of principle — both are taxes on the extent of transportation infrastructure. So long as the tax is levied by reference to the extent of transportation infrastructure it will not, generally speaking, be an excise. It will become an excise when it is imposed not by reference to the infrastructure's extent but instead by reference to that which is transported. It is the difference between a tax on the transporter and a tax on the transported; between carrier and carried.

Section 90

General Matters

29. In Airservices Australia v Canadian Airlines International Limited (2001) 202 CLR 133 Gummow J conveniently summarised many of the basal legal principles which arise on these appeals, saying:

> [436] To determine the character of a law imposing a monetary burden, Latham CJ in *Matthews v Chicory Marketing Board (Vict)* stated that the following positive and negative attributes, if they all be present, will suffice to stamp an exaction of money with the character of a tax: "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... *not a payment for services rendered*"...
>
> [437] In *Air Caledonie International v The Commonwealth*, the Court commented upon Latham CJ's statement in three respects:
>
> > "The first is that it should not be seen as providing an exhaustive definition of a tax ... The second is that, in *Logan Downs Pty Ltd v Queensland,* Gibbs J made explicit what was implicit in the reference by Latham CJ to 'a payment for services rendered', namely, that the services be 'rendered to' – or (we would add) at the direction or request of – 'the person required' to make the payment. The third is that the negative attribute – 'not a payment for services rendered' – should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present."

Turning to the third proposition, the Court then considered the character of a

law which, whilst nonetheless satisfying the positive attributes mentioned by Latham CJ, did not constitute a tax:

> "Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes. On the other hand, a compulsory and enforceable exaction of money by a public authority for public purposes will not necessarily be precluded from being properly seen as a tax merely because it is described as a 'fee for services'. *If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.*"

The WAC and s 90

30. The conclusion of Keane CJ in relation to the WAC is correct.

31. First, the fact that a law operates to raise, or directly authorise the raising of, revenue is a necessary but of itself insufficient indication that it amounts to a tax: Harper v Victoria (1966) 114 CLR 361 at 377; Airservices Australia at [91].

32. Second, the statutory imposition of a charge by a State or Territory for acquisition by another person of property the State or Territory owns – for example, timber, sand, or coal – or a public resource it controls, such as water, stands outside the prohibition contained in s 90 of the Constitution. Such charges are, or are sufficiently analogous to, royalties or profits à prendre.

33. Keane CJ correctly stated that "[n]o decision of the High Court supports the proposition that a charge by a public authority for the acquisition of a public resource in the control of the public authority is a tax.": appeal judgment [58].

34. Just as Perram J reserved for an occasion on which it might squarely arise the question "whether an impost on water, air or light can ever be a tax on goods": appeal judgment [199], so, the Attorney General for NSW, would wish to reserve the right to argue that question in another case.

35. Third, equally, a *voluntary* payment of money in order to acquire rights in the nature of property is not to be characterised as a tax.

36. As already noted, the Court said in Air Caledonie International at 467:

> If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax.

37. Here, ACTEW was not legally obliged by the relevant statutory provisions to purchase any water, although it was perhaps politically obliged to do so: appeal judgment [65]: that does not amount to being given no choice.

38. Further, the concept of a compulsory exaction in this area of the law sits uneasily with the fact that ACTEW was effectively owned and controlled by the Territory: cp Second Respondent's submissions paragraphs 50-52.

39. Fourth, no case decides that "a state or territory government imposes an excise by charging a price for the voluntary supply of a resource in its stewardship.": appeal judgment [73].

40. Fifth, in contrast, there is a compelling analogy with the facts in Harper v Minister for Sea Fisheries, suggesting that the WAC was analogous to a royalty or profit à prendre: appeal judgment [73]. As Brennan J made clear in that case, formal title to the resource as property was not required. His Honour stated at 335:

> A limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property whether or not the Crown has the radical or freehold title to the resource. A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no resource to which a right of access is obtained by payment of the fee.

41. Sixth, as Stone J noted:

> [173] In *Harper*, neither the joint judgment of Mason CJ, Deane and Gaudron JJ nor the judgment of Brennan J, makes any reference to the need for a nexus between the fee and the value of what is obtained in return.

42. To the extent it then remains an issue, it has not been established by the Appellant that there is an absence of *any* discernable relationship between the WAC and the value of the water. In this regard, the Attorney General for NSW adopts the

submissions of the Second Respondent at paragraphs 29-47.

The UNFT and s 90

43. Plainly the description of the UNFT as a "tax" tends to suggest that it is. Bearing that in mind, the first question (although the Full Court did not need to deal with it) is whether the UNFT is a charge for the privilege of use and occupation of property rather than a tax. The second is whether, if it is a tax, it is nevertheless not an excise.

44. As the Respondents convincingly demonstrate in their submissions, the UNFT is indeed a charge for the right to use and occupy, or continue to use and occupy, "Territory land" (but not "National land") in the Territory, so that the components of a utility network – in this case water, but no doubt the principles are equally applicable to sewerage and electricity networks – can be installed, operated, replaced and maintained.

45. The UNFT is thus "a charge for the acquisition or use of property [or], a fee for a privilege ...[being] examples of special types of exaction of property which are unlikely to be properly characterised as a tax...": per the Court in Air Caledonie International at 467. Accordingly, despite its description, the better view is that the UNFT is not a tax.

46. As to the second question, the issue is whether the Appellants have established that the UNFT is imposed on a step in the production or distribution of goods – which are assumed for the purposes of this case to include water – for s 90 purposes, rather than a tax on ownership, use or occupation of land, which has never been held to contravene s 90.

47. Inevitably, comparisons must be made with the somewhat extreme facts in Hematite. The points of distinction identified by Keane CJ and quoted from above are persuasive.

48. Further, in Hematite, this Court found that in substance there was an exaction upon the hydrocarbons being transported. Under the UNFT it is not the volume or value of the water in the network which is being made the subject of the exaction, it is the mode of transport measured by its extent: the statute calculates it as "determined rate

x route length".

49. Exactions based on ownership of an asset which transports goods is a long way – and too far for s 90 purposes – from exactions based on the production or manufacture of those goods. The UNFT was therefore correctly distinguished from:

(a) the chicory levy based on the number of half acres a producer planted in Matthews v Chicory Marketing Board (Vic) (1938) 60 CLR 263); and

(b) a tax on the ownership of livestock used for what they produced by way of offspring or such things as milk, meat or wool in Logan Downs Pty Ltd v Queensland (1977) 137 CLR 59;

10 as in each of those cases the tax had a natural relation to the quantity or value of the commodity produced. Here that relationship is absent.

50. The Appeals should be dismissed.

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