IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No: C2 of 2011
C3 of 2011

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN

10 **QUEANBEYAN CITY COUNCIL**

Appellant

- and -

ACTEW CORPORATION LTD

First Respondent

- and -

20

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)

Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

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HIGH COURT OF AUSTRALIA
FILED
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THE REGISTRY ADELAIDE

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Part I - Certification:

1. This written submission is in a form suitable for publication on the Internet.

Part II - Basis of intervention:

2. The Attorney-General for the State of South Australia ("South Australia") intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Respondents.

Part IV - Applicable Constitutional provisions, statutes and regulations:

3. South Australia has nothing to add to the references provided by the parties.

Part V - Argument:

4. In summary, South Australia submits:

4.1 the Full Court and the primary judge were, with respect, correct in their characterisation of the water abstraction charge: it is a 'charge for the acquisition of a right akin to property'[1] and the 'price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who'[2] obtain a licence to take water. It is not a tax.

4.2 On the assumption that the utilities network facilities tax is a tax, it is not an excise. It is a tax on ownership, imposed by reference to the conferral of a right to occupy land, calculated according to the length of land occupied.

i. Section 90

5. Section 90 reserves to the Commonwealth exclusively the power to impose duties of customs and of excise.[3]

5.1 It was a central objective of federation to eliminate inter-colonial border duties and discriminatory burdens and preferences in inter-colonial trade,[4] to create and maintain a free trade area or economic union throughout the Commonwealth,[5] and to achieve uniformity in

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1 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 335 (Brennan J).
2 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 (Mason CJ, Deane and Gaudron JJ).
3 As the judge at first instance noted, the exclusivity of the power applies equally to the Territories; *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)* (1992) 177 CLR 248.
4 *Cole v Whitfield* (1988) 15 CLR 360 at 391-4 (The Court).
5 *Cole v Whitfield* (1988) 15 CLR 360 at 391-4 (The Court).

duties of customs and excise and in the conferral of bounties (subject to s91)[6] thereby guaranteeing to the people of the Commonwealth equality in respect of the burden of such duties and the benefit of such bounties[7] and protection against undesirable competition between States through the imposition of varying rates of taxation on goods.[8]

5.2 Economic unity was one of the principal goals of the movement towards federation[9] and was an integral part of the union of the people of the former colonies in "one indissoluble Federal Commonwealth".[10] It was not intended that federation would create "an association of States, each with its own separate economy".[11]

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5.3 The importance of the above resulted in a detailed constitutional scheme. In particular:

(a) Section 92 requires that interstate trade and commerce be immune from discriminatory burdens of a protectionist nature[12] ensuring that "the domestic market of each State be opened equally to goods from interstate and goods of local production or manufacture...".[13]
(b) Sections 99 and 102 complement s92 by prohibiting preferences.[14]
(c) Exclusive control over customs, excise and bounties is vested in the national government by:
    (i) the vesting in the Commonwealth Parliament of exclusive powers to impose external tariffs, to impose duties of excise and (subject to s91) to grant bounties on the
20 production and export of goods (see ss 86, 88, 90 and 91);
    (ii) the transfer of the departments of customs and excise in each State to the Commonwealth on federation by s69, exclusive legislative power with respect to these departments being vested in the federal parliament by s52(ii);[15] and
    (iii) the vesting in the Commonwealth executive of the collection and control of duties of customs and excise and the control of the payment of bounties at federation (s86).[16]
(d) The Commonwealth's legislative powers are required to be exercised uniformly (see ss 51(ii), 51(iii), 88 and 99).

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6 *Philip Morris v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 426 (Mason CJ and Deane J); *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

7 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 661-2 (Deane J).

8 *Official Report of the National Australasian Convention Debates* (Sydney, 1891), 347 (Mr Munro); M Coper, *The High Court and Section 90 of the Constitution*, (1976) 7 Fed LR 1 at 21.

9 *Cole v Whitfield* (1988) 15 CLR 360 at 385-392 (The Court).

10 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 660 (Deane J).

11 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ); *Philip Morris v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 426 (Mason CJ and Deane J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631 (Mason CJ), 660-2 (Deane J).

12 *Cole v Whitfield* (1988) 15 CLR 360 at 391 (The Court).

13 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

14 *Cole v Whitfield* (1988) 15 CLR 360 at 392 (The Court).

15 *Capital Duplicators v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 262 (Mason CJ, Dawson and McHugh JJ).

16 *Capital Duplicators v Australian Capital Territory (No 1)* (1992) 177 CLR 248 at 262 (Mason CJ, Dawson and McHugh JJ).

5.4 Hence in *Betfair* it was observed that this scheme, largely contained in Ch IV, implemented a broader scheme of political economy.

> [12] Moreover, there have been significant developments in the last 20 years in the Australian legal and economic *milieu* in which s 92 operates. The first of these concerns an interpretation given to Ch IV of the Constitution by this Court in 1997. In *Ha v New South Wales* the Court recognised both the character of State "licence fees" as duties of excise to which s 90 of the Constitution applied and, at a more general level, the place occupied by both s 90 and s 92 in Ch IV of the Constitution. The creation and fostering of national markets would further the plan of the Constitution for the creation of a new federal nation and would be expressive of national unity.
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> [13] In that vein, *Ha* decided that the exclusivity of federal power to impose duties of excise is not limited to the more modest purpose of protection of the integrity of the tariff policy of the Commonwealth. ...
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> ...
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> [23] The inclusion of Ch IV in the Constitution illustrates the point made by Palgrave in his *Dictionary of Political Economy* which was published in London in 1896:
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> "*All known precedents lead us to associate the idea of commercial federation with that of political federation.* In the existing federal systems with which we are familiar, such as those of the United States, Germany, Switzerland, Austria-Hungary, and Canada, freedom of internal trade has been the result, even where it has not been the fundamental condition, of political unity. *In the system which has been proposed for the Australasian colonies one of the chief objects aimed at is the same freedom of internal trade. Free commercial intercourse, indeed, seems one of the most distinctive marks of national unity.* It appeals directly to the masses, and gives at once a sense of mutual interest and mutual benefit." (emphasis added) (footnotes omitted)[17]

5.5 The scheme accepts that the States will raise revenue independent of the Commonwealth, but recognises that differential taxes on goods and differential bonuses on production and export may distort local markets within the Commonwealth and thereby undermine the objective of creating a free trade area.[18] Hence it is to the elimination of such distortions that s90, together with ss 51(ii) and (iii), 86, 88 and 92, is directed in vesting legislative authority to impose taxes on goods and to grant bounties exclusively in federal Parliament to exercise in the national interest, and in requiring that Parliament exercise those powers uniformly.

6. Duties of excise are inland taxes directly related to goods, imposed on a step in their production, manufacture, sale or distribution before they reach the hands of consumers and irrespective of whether the goods are of foreign or domestic origin.[19] The inquiry as to whether or not a particular

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17 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [12]-[12], [23] (Gleeson CJ, Gummow, Kirby, Hayne Crennan and Kiefel JJ).

18 *Capital Duplicators v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585-7 (Mason CJ, Brennan, Deane and McHugh JJ)

19 *Ha v New South Wales* (1997) 189 CLR 465 at 499 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Bolton v Madsen* (1963) 110 CLR 26 at 271 (The Court); *Andersons Pty Ltd v Victoria* (1964) 111 CLR 353 at 373 (Kitto J); *Western Australia v Chamberlain Industries Pty Ltd; Victoria v IAC (Wholesale) Pty Ltd* (1970) 121 CLR 1 at 13 (Barwick CJ), 43-44 (Walsh J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615 (Gibbs CJ), 628 (Mason J), 644 (Wilson J), 655 (Brennan J), 665-6 (Deane J); *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 377-8 (Gibbs CJ), 383-4 (Mason and Deane JJ), 400-4 (Wilson J), 414-416 (Dawson J); *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 429-431 (Mason CJ and Deane J), 443-445

impost is an excise duty within the meaning of s90 is, therefore, a question of characterisation. As such the task is one of identifying whether or not the impugned impost bears sufficient relation to the constitutional conception of an excise tax.[20]

7. Whether or not a particular impost bears sufficient relation to the constitutional conception of an excise tax involves answering two questions; first, is the impost a tax. Second, is it a tax on goods, imposed on a step in their production, manufacture, sale or distribution. In order that each of these questions be answered an examination of the practical operation of the law pursuant to which the impost is levied must be undertaken to ensure that 'the limitation or restriction is not circumvented by mere drafting devices'.[21]

8. As to what is a tax, in *Air Caledonie International and Others v The Commonwealth* this Court said:

> In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, the Privy Council identified three features which sufficed to impart to the levies involved in that case the character of a "tax". Those features were that the levies: were compulsory; were for public purposes; and were enforceable by law. In *Matthews v. Chicory Marketing Board (Vict.)*, Latham C.J. adopted those three features as the basis of what has subsequently been recognized in this Court as an acceptable general statement of positive and negative attributes which, 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" (see, e.g., *Browns Transport Pty. Ltd. v. Kropp*). More recently this Court has drawn attention to other criteria, namely, that a tax is not by way of penalty and that it is not arbitrary (see *MacCormick v. Federal Commissioner of Taxation*; *Deputy Federal Commissioner of Taxation v. Truhold Benefit Pty. Ltd.*).
>
> There are three comments which should be made in relation to the above general statement of Latham C.J. The first is that it should not be seen as providing an exhaustive definition of a tax. Thus, there is no reason in principle why a tax should not take a form other than the exaction of money or why the compulsory exaction of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public. The second is that, in *Logan Downs Pty. Ltd. v. Queensland*, Gibbs J. made explicit what was implicit in the reference by Latham C.J. 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 C.J. are all present. 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

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(Brennan J) and 488-9 (McHugh J); *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 584-591 (Mason CJ, Brennan, Deane and McHugh JJ).

20 In this regard South Australia does not disagree with the Appellant's WAC submissions at [36]-[41].

21 *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

> 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.[22] (footnotes omitted)

9. The Appellant places significance on the revenue raising capacity of the WAC and the UNFT, although it does not say that this factor is decisive.[23] As Gleeson CJ and Kirby J observed in *Airservices Australia v Canadian Airlines*:

> [91] Not all taxation has as its primary purpose the raising of revenue; and some forms of taxation are notoriously inefficient means to that end. An objective of raising revenue is not, therefore, a universal determinant. Even so, the presence or absence of such an objective will often be significant.[24]

10 Further, revenue may be raised by methods other than taxation (e.g. fines imposed for breaches of regulatory offences, payment for services, the conferral of a privilege, or for other rights).[25]

10. Consistent with the protection afforded by s90 extending to the practical effect of a State impost, in determining whether or not an impost is a tax it is relevant to assess the relationship between the value of the benefit provided and the amount of the fee. Clearly wherever the fee exceeds the value of the benefit (whether it be goods or services) the inference that the impost is a tax strengthens. As McHugh J said in *Airservices Australia v Canadian Airlines* the 'presence of a discernible relationship negatives the inference that the charge was imposed for a revenue raising
20 purpose'.[26] But of relevance to this case is the further observation made by McHugh J:

> [312] ... But, as the evidence in this case discloses, where a natural monopoly exists, whether in the public or private sector, there are difficulties associated with levying a price which exhibits a discernible relationship to the value of the service provided to a particular user on a particular occasion. Where services are provided by a public authority with a natural monopoly and where the statutory context and the surrounding circumstances otherwise fail to indicate a revenue-making purpose for a charge, the lack of a discernible relationship between the value of a particular service received on a particular occasion and the amount of the charge for that service does not necessarily indicate that the charge has the character of a tax.[27]

11. If an impost is a tax it will be held to be an excise duty if it is upon, or in respect of, or in relation
30 to,[28] goods[29] in that it is imposed on a step in their production, manufacture, sale or distribution before they reach the hands of consumers and irrespective of whether the goods are of foreign or domestic origin. When this relationship exists is 'a vexed question'.[30]

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22 *Air Caledonie International and Others v The Commonwealth* (1988) 165 CLR 462 at 466-7 (The Court)

23 Appellant's WAC Submissions at [52] ; UNFT Submissions at [38].

24 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [91] (Gleeson CJ and Kirby J).

25 In this regard South Australia adopts the submissions of the First Respondent; WAC Submissions [53]-[54]; UNFT Submissions [32].

26 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [311] (McHugh J).

27 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133.

28 *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129 (The Court); *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467 (Dawson, Toohey and Gaudron JJ).

29 And commodities; *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454 (Mason CJ, Brennan and McHugh JJ).

30 *Mutual Pools & Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 467 (Dawson, Toohey and Gaudron JJ).

12. It is not enough that an impost enters the price of a good.[31] There are many taxes that have this consequence that are not excises, such as land tax and payroll tax. As Dixon J noted in *Matthews v Chicory Marketing Board (Vic)*, it may be difficult to say where a licence fee or duty ceases to be a tax imposed upon the person expected to bear the burden and becomes an element incorporated in the price of every article such that it is a tax upon goods.[32] That the price is passed on may be an indicator, but no more.[33]

> It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity.[34]

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13. The calculation of a tax by reference to the quantity or value of a good or commodity produced, manufactured, distributed or sold may in a given case be indicative of the character of the tax as being an excise.[35] It is not, however, an 'exhaustive nor an universal criterion'.[36] In this regard a natural relationship is sufficient.[37]

> The natural or practical relations between manufacture or production and activities or conditions chosen as the tests or standards of liability to taxation depend, not upon logical definitions, but upon the actual course of industrial organisation and technique and of the productive arts.[38]

14. Clearly the search is for factors indicative of a sufficient connexion between the tax and the
20 production, manufacture, distribution or sale of goods or commodities such that its nature and general tendency permit it to be properly characterised as a tax upon, or in relation to, or in respect of the production, manufacture, distribution or sale of goods or commodities.[39]

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31 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617 (Gibbs CJ).

32 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 301 (Dixon J).

33 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ).

34 *City of Halifax v Fairbanks' Estate* [1928] AC 117 at 126 (Lord Cave) as quoted with approval in *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 301 (Dixon J) and in *Philip Morris Ltd v Commissioner for Business Franchises* (1989) 167 CLR 399 at 436 (Mason CJ and Deane J).

35 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 303 (Dixon J); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 77 (Mason CJ).

36 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 657 (Brennan J).

37 An arithmetic relationship is not required; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 630 (Mason J), 668 (Deane J).

38 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 303 (Dixon J); see also 304 (Dixon J).

39 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane and McHugh JJ); *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 (Barwick CJ). In this regard South Australia adopts the submissions of the First Respondent; UNFT Submissions at [35]-[38].

ii. The Water Abstraction Charge in the context of the national framework for the efficient and sustainable reform of the Australian Water Industry

15. In February 1994 the Council of Australian Governments (COAG) agreed to the implementation of a strategic framework for the 'efficient and sustainable reform of the Australian water industry'.[40] That framework included the adoption of consumption based pricing and full cost recovery. The intention was that true cost would then be factored into decisions made by consumers where previously those decisions were distorted by supply at less than cost resulting in demand being inflated and efficiency discouraged. With respect to urban water services COAG agreed, inter alia:-

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i. to the adoption by no later than 1998 of charging arrangements for water services comprising an access or connection component together with an additional component or components to reflect usage where this is cost-effective, and

ii. that supplying organisations, where they are publicly owned, aim to earn a real rate of return on the written-down replacement cost of their assets, commensurate with the equity arrangements of their public ownership.[41]

16. In September 1998 the Minister provided the ACT Independent Pricing and Regulatory Commission

20 with an industry referral that amongst other things sought advice ...

> ... on the approach to establishing an appropriate water abstraction charge that reflects sound economic and environmental principles as well as providing advice on structure and level of charges that would apply if that approach were applied.[42]

In reporting the Commission noted:

> Such a charge [a water abstraction charge] is consistent with COAG requirements and the ARMCANZ guidelines. These require that utilities charge the full economic cost including cost of externalities. 'Externalities' in principles 5 and 7 of the guidelines means environmental and natural resource
30 management costs attributable to and incurred by the water business. Ernst and Young states that water businesses should include externalities in determining full economic cost only when there is an existing charge or levy, such as a resource management charge or an environmental levy.
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> The statement of regulatory intent states that:
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> > [The] charge will be identified as a component of the fee for ACTEW's licence to take water proposed in the Water Resources Bill and will flow through into water use accounts. In this way, and on the basis of current consumption levels, the incentive for efficient use of water could be increased without an overall increase in charges.
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> 40 In an ideal situation, water charges would include all costs, including the environmental costs, of resource use. As these (external) costs are not charged for, consumption of the relevant resource is higher than it would otherwise be. Failure to include these costs means that consumption and investment decisions are

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40 Council of Australian Governments, Hobart, 25 February 1994, Communique; Attachment A: Water Resource Policy.

41 Council of Australian Governments, Hobart, 25 February 1994, Communique; Attachment A: Water Resource Policy, §3(b).

42 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [25] (Buchanan J). See also, Independent Pricing and Regulatory Commission, *ACTEW's Electricity, Water & Sewerage Charges for 1999/2000 to 2003/2004*, May 1999.

made without considering the full economic costs of using resources. If environmental costs were included, customers' decisions could be made with an appreciation of the economic and environmental considerations of their consumption of water.[43] (footnotes omitted)

17. Since June 2001 ACTEW, a statutory corporation owned by the ACT and created under the *Territory-Owned Corporations Act 1990* (ACT), has held licences to take water pursuant to either the *Water Resources Act 2007* (ACT) or its predecessor, the *Water Resources Act 1998* (ACT), for purposes including urban water supply.[44] The licences have been subject to conditions which, since 1 January 2000, included the payment of a water abstraction charge[45] levied 'to reflect the full cost of water supply and to encourage Canberrans to conserve one of our most precious resources'.[46]

18. The ACTEW has and continues to supply the Appellant with potable water pursuant to agreement.[47] The terms of those agreements have included the passing on of the cost of the water abstraction charge by the ACTEW to the Appellant.[48]

19. Consistent with the advice of the Independent Pricing and Regulatory Commission the water abstraction charge was set at 10c/kl and imposed as of 1 January 2000.[49]

20. In August 2003 COAG agreed to develop a National Water Initiative to build on achievements of the 1994 COAG strategic framework. Amongst other things the intention was to increase the productivity and efficiency of water usage. A key objective of the NWI was the establishment of best practice water pricing involving the principles of user pays and full cost recovery and including, where appropriate, the cost of delivery, planning and environmental impact.[50]

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43 Independent Pricing and Regulatory Commission, *ACTEW's Electricity, Water & Sewerage Charges for 1999/2000 to 2003/2004*, May 1999 at 59. See also, *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [25]-[26] (Buchanan J).

44 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [12] (Buchanan J). To take water without a licence amounts to an offence; s33(1) *Water Resources Act 1998* (ACT); s28 *Water Resources Act 2007* (ACT). A licence to take water may be granted by the Minister; s35 *Water Resources Act 1998* (ACT); s30 *Water Resources Act 2007* (ACT).

45 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [7] (Buchanan J). The power to charge a fee is to be found in s78 *Water Resources Act, 1998* (ACT); s107 *Water Resources Act, 2007* (ACT).

46 ACT Budget Speech, 4 May 1999, MsCarnell MLA as quoted in *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [30] (Buchanan J).

47 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [13] (Buchanan J).

48 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [15] (Buchanan J). This was required by a price direction issued by the Independent Pricing and Regulatory Commission on 28 February 2000; *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [31] (Buchanan J). See also, *Independent Competition and Regulatory Commission Act 1997* (ACT), Part 4.

49 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [7], [27]-[31] (Buchanan J).

50 Council of Australian Governments, 29 August 1994, Communique.

21. The water abstraction charge was increased to 20c/kl as of 1 January 2004 and 25c/kl in 2005/2006.[51] These increases were levied after the Independent Competition and Regulatory Commission reviewed the methodology involved in calculating the charge.[52] The Commission identified three possible costs not covered by the regulatory arrangements applying to ACTEW - catchment management costs (water supply costs), environmental costs associated with consumptive water use and the scarcity value of water (flow costs).[53] It was observed that the inclusion of these costs in the calculation of the water abstraction charge was consistent with COAG's agreement of August 2004.[54] Passing on the full cost of water supply sent a signal to consumers as to the true cost which would then encourage efficient usage and investment in water saving.[55] It was recommended that from 1 January 2004 the Water Abstraction Charge could be 20c/kl.[56] The Commission also made observations as to the role of pricing in controlling demand.[57]

22. The water abstraction charge was subsequently increased to 25c/kl from 1 July 2005.[58]

23. In June 2004 COAG took the opportunity to complement and extend the 1994 strategic framework for the efficient and sustainable reform of the Australian water industry through the Inter-governmental Agreement on a National Water Initiative (the NWI). Amongst other things it was agreed to implement water pricing and institutional arrangements which promote economically efficient and sustainable use of water resources, water infrastructure assets and government resources devoted to the management of water.[59] As to pricing it was further agreed that, in accordance with National Competition Policy, the States and Territories would bring into effect pricing policies for water storage and delivery in rural and urban systems that facilitate efficient water use and trade in water entitlements, including through the use of consumption based pricing and full cost recovery for water services to ensure business viability and avoid monopoly rents,

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51 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [33] (Buchanan J).

52 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [34] (Buchanan J).

53 Independent Competition and Regulatory Commission, Final Report, Water Abstraction Charge, (October 2003) at [2.1].

54 Independent Competition and Regulatory Commission, Final Report, Water Abstraction Charge, (October 2003) at [2.1]. See also, the ACT 2003-4 Budget Papers as quoted by Buchanan J, *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR at [33].

55 Independent Competition and Regulatory Commission, Final Report, Water Abstraction Charge, (October 2003) at [1.1].

56 Independent Competition and Regulatory Commission, Final Report, Water Abstraction Charge, (October 2003) [3.1.3]; Ch 7 Recommendations; *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [37] (Buchanan J).

57 Independent Competition and Regulatory Commission, Final Report, Water Abstraction Charge, (October 2003) Ch 4.

58 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [39]-[40] (Buchanan J).

59 Intergovernmental Agreement on a National Water Initiative, 25 June 2004; §64.

including recovery of environmental externalities, where feasible and practical.[60] Specifically this required the States and Territories to move towards 'upper bound pricing' by 2008.[61]

24. From 1 July 2006 the water abstraction charge was increased to 55c/kl. The increase was intended to provide the Government with a return on a valuable resource[62] in addition to assisting with managing demand.[63] The Chief Minister described the increase in terms of a charge reflecting the true economic value of water, reflecting scarcity and contributing to a sustainable approach to consumption.[64] In July 2008 the Independent Competition and Regulatory Commission made similar observations.[65]

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iii. The Water Abstraction Charge is not a tax

25. A consideration of the national framework for the reform of the Australian Water Industry makes clear that market forces were considered an important means by which the twin objectives of improving efficiency and sustainability were to be achieved.[66] Consequently, if water was not a commodity it has now become one. In its natural state it is *publici juris*,[67] but once taken it becomes property. As such Buchanan J was correct, with respect, in accepting that potable water was a good or commodity to which s90 could apply.[68]

20 26. That framework should also be understood against the background of the approach which commenced pre-federation to control the use of water.[69] As French CJ, Gummow and Crennan JJ observed in *ICM Agriculture v The Commonwealth*:

> [50] Water is a finite and fluctuating natural resource. Both within Australia and internationally, the need for sustainable and efficient management of water resources has attracted a good deal of attention. Questions of the ownership and the need for the conservation of water resources were serious legal

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60 Intergovernmental Agreement on a National Water Initiative, 25 June 2004; §65.

61 Intergovernmental Agreement on a National Water Initiative, 25 June 2004; §66(i). Upper bound pricing is defined in the NWI as 'the level at which, to avoid monopoly rents, a water business should not recover more than the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes, provision for the cost of asset consumption and cost of capital, the latter being calculated using a weighted average cost of capital'.

62 Consistent with the NWI a return on capital would reflect the opportunity cost of the usage; National Water Commission 2009, *Australia Water Reform 2009: Second Biennial Assessment of Progress in Implementation of the NWI*, NWC Canberra, at Ch 8, [8.3.1.1].

63 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [41]-[44] (Buchanan J).

64 *Queanbeyan City Council v ACTEW* [2009] FCA 943; (2009) 178 FCR 510 at [44] (Buchanan J).

65 Independent Competition and Regulatory Commission, *Water and Wastewater Price Review: Final Report and Price Determination* (April 2008) at 54-5.

66 National Water Commission, *Australian Water Reform 2009: Second biennial assessment of progress in implementation of the National Water Initiative*, NWC, Canberra, at 169-170, 249.

67 *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [55] (French CJ, Gummow and Crennan JJ), [109] (Hayne, Kiefel and Bell JJ).

68 *Queanbeyan City Council v ACTEW Corporation Ltd* [2009] FCA 943; (2009) 178 FCR 510 at [162] (Buchanan J).

69 As discussed in *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140.

> issues in Australia even prior to Federation. The first statutes significantly regulating water resources were passed by New South Wales and Victoria during the 1880s and 1890s. Since that time, the regulation of water has developed as understanding of the resource has progressed, and the need for irrigation has intensified.[70] (footnotes omitted)

27. The national framework and the history of water regulation in Australia form part of the context in which the *Water Resources Act 1998* (ACT) and the *Water Resources Act 2007* (ACT) and action taken under those Acts by the ACT Executive is to be considered.[71]

28. As stated the rights to the use, flow and control of all water in the ACT are, relevantly, vested in the ACT.[72] Any common law usufructuary right is abrogated.[73] It is replaced by a system whereby water may be taken by those possessing a licence to do so.[74] This is the common means in Australia by which governments are able to manage a scarce natural resource.[75] Thus, like the control exercised by Tasmania over the abalone fishery in that State, here the right to take water is similarly not a public right, but a statutory right.[76] The basis for the imposition of the water abstraction charge is then virtually on all fours with that of the licence fee for taking abalone.

> Its basis lies in environmental and conservational considerations which require that exploitation, particularly commercial exploitation, of limited public natural resources be carefully monitored and legislatively curtailed if their existence is to be preserved. Under that licensing system, the general public is deprived of the right of unfettered exploitation of the Tasmanian abalone fisheries.[77]

29. It follows that the water abstraction charge is then a 'charge for the acquisition of a right akin to property'[78] and the 'price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who'[79] obtain a licence to take water.

> In truth, however, it is an entitlement of a new kind created as part of a system for preserving a limited public natural resource in a society which is coming to recognize that, in so far as such resources are concerned, to fail to protect may destroy and to preserve the right of everyone to take what he or she will may eventually deprive that right of all content.[80]

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70 *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [50] (French CJ, Gummow and Crennan JJ). See also at [90] (Hayne, Kiefel and Bell JJ).

71 In this regard see the First Respondent's additional facts; First Respondent's WAC submissions [5]-[8].

72 *Water Resources Act 1998* (ACT), s13; *Water Resources Act 2007* (ACT), s7.

73 *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [54], [72] (French CJ, Gummow and Crennan JJ), [116] (Hayne, Kiefel and Bell JJ).

74 *Water Resources Act 1998* (ACT), ss33 and 35; *Water Resources Act 2007* (ACT), ss28 and 29.

75 *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [52]-[57] (French CJ, Gummow and Crennan JJ).

76 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 334-5 (Brennan J).

77 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 (Mason CJ, Deane and Gaudron JJ).

78 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 335 (Brennan J).

79 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 (Mason CJ, Deane and Gaudron JJ).

80 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325 (Mason CJ, Deane and Gaudron JJ).

30. Further, to the extent that this new right is analogous to a *profit a prendre* it is also analogous to a royalty. The water abstraction charge is then consideration paid for permission to exercise a beneficial privilege.[81]

31. Accordingly, South Australia submits that, with respect, Keane CJ was correct in his characterisation at [81]-[82].[82]

32. The Appellant focuses upon the 2006 increase in the fee and in essence contends that it is of such size that it must contain a component in addition to that which can properly be characterised as the quid pro quo for the statutory right to take water. In particular the Appellant contends that:

    i. the increase on 1 July 2006 from 25c/kl to 55c/kl was for the principal purpose of revenue raising. To the extent that the measure was also imposed as a means of controlling demand it was still revenue raising;[83]
    ii. a State or Territory cannot levy a charge for the provision of a resource that impacts upon the sales of a commodity beyond the value of that resource.[84] A State or Territory that enjoys a monopoly in the supply of a resource cannot charge monopoly rents.[85]
    iii. a State or Territory cannot levy a charge for the provision of a resource intended to control demand for that resource as to do so undermines the Commonwealth Parliament's exclusive control over customs, excise and bounties contrary to the conception of economic unity implicit in Ch IV;[86]
    iv. the 30c/kl increase on 1 July 2006 bears no discernible relationship to either the value or cost of the water abstracted. As such it cannot be characterised as a fee for the benefit provided. Thus inferentially that component of the 51c/kl charge over and above 25c is for revenue raising purposes;[87]
    v. an increase in price for the purposes of demand management does not mean that the impost is not a tax. Further, such purpose is suggestive of an excise as it has an impact upon the supply and price of goods contrary to Ch IV of the Constitution.[88]

33. The Appellant relies upon the comment of Dawson, Toohey and McHugh JJ in *Harper v Minister for Sea Fisheries* to the effect that the character of the charge in that case was in part due to the fact that it was possible to discern a relationship between the amount paid and the value of the privilege conferred.[89] None of the other four justices in that case held that such requirement was necessary.

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81 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 497 (Mason CJ, Brennan, Deane and Gaudron JJ), 517-8 (Dawson and Toohey JJ) and 530-1 (McHugh J); *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630; *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235.

82 *Australian Capital Territory v Queanbeyan City Council* [2010] FCAFC 124; (2010) 188 FCR 541. In this regard South Australia also adopts the submissions of the First Respondent WAC submissions at [24]-[28].

83 Appellant's WAC submissions at [42]-[52].

84 Appellant's WAC submissions at [59]-[61].

85 Appellant's WAC submissions at [65]-[74].

86 Appellant's WAC submissions at [62].

87 Appellant's WAC submissions at [75]-[91], [97]-[105].

88 Appellant's WAC submissions at [92]-[96].

89 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 336 (Dawson, Toohey and McHugh JJ).

34. South Australia does not deny the utility of a test that focuses on a rational connection between that paid and a benefit received in determining whether or not the sum paid has the character of a tax. The existence of such a connection is not indispensable to a conclusion that a particular impost is not a tax.[90] The question that arises is whether or not such approach is applicable to a right of the sort conferred here. This is not a case analogous to *Air Caledonie* or *Northern Suburbs General Cemetery Reserve Trust* where the ratio turned on whether the traveller received the service asserted in exchange for the fee paid.[91] Here there is undoubtedly a passing of property. Section 90 poses no impediment to the price set by the effective owner of property upon the sale of that property.

35. Further, this is not a case where it can be said that cost is the appropriate metric (assuming what to include as a cost and the basis to cost it can be agreed).[92] Such approach may be appropriate where a regulator is determining whether or not charges levied by a utility provider are compliant with statutory criteria. A rational connection between benefit and payment may still be evident despite the amount paid exceeding cost. That a rational connection is not confined to an assessment of cost is clear from *Air Caledonie* and *Harper* where the metric was expressed in terms of the value of what is acquired.[93]

36. Generally the approach of requiring a rational connection assumes the existence of an efficient market.[94] That is not this case. Market value then is not a suitable metric. The Appellant refers to the closest relevant market as the market for untreated river water allocations and to the evidence of Professor Grafton.[95] It is said that that evidence demonstrates a market value/opportunity cost in the next downstream market of 1.9c/kl to 26.8c/kl during the period commencing with the imposition of the water abstraction fee. With respect, no conclusion can be drawn from this evidence at all. The next downstream market does not include urban purchasers in relation to whom demand for water is inelastic. That is, this is a market price determined without the participation of the ACT users of water. Demand for water by urban users is less elastic than water intensive agricultural users. Thus the strength of the ACT users willingness to pay is not in play in the observed

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90 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [142] (Gaurdon J), [312] (McHugh J) and [457] (Gummow J).

91 See the treatment of these case by Gummow J in *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [437]-[441].

92 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [430] (Gummow J).

93 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

94 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [444] (Gummow J).

95 Appellant's WAC Submissions at [78]-[84].

downstream market price. Also the value of the water extraction right acquired by ACTEW reflects that it is perfectly located in respect of ACTEW infrastructure (e.g. dams and pipes). The value to ACTEW is derivative of the value to ACTEW customers. If ACTEW customers had to acquire their own water extraction points they would presumably pay a lot more for a water resource that can be transported using ACTEW's network than if they had to arrange for the separate carting of water and premises for storage, or otherwise coordinate their actions to achieve economies of scale in supply and distribution.

37. The ACT stands in the position of a monopolist vested with responsibility for the stewardship of a public resource.[96] Five points may be made here; first, it cannot be said that the element of compulsion is indicative of the charge being a tax.[97] Second, and perhaps obviously, value as determined in an efficient market cannot be the applicable metric. Third, sight must not be lost of the nature of the monopoly – at its core it concerns the stewardship of a scarce natural resource by the elected representatives of the people for the benefit of the people.[98] Fourth, the exercise of monopoly power to charge a price for that supplied which the market will bear does not mean that that price does not reflect the value of the good or service supplied.[99] Fifth, the position in which the ACT finds itself is distinguishable to that of the monopoly situation considered in *Attorney-General for New South Wales v Homebush Flour Mills*.[100]

38. The Appellant asserts that the ACT charges monopoly rents. That is to ignore the explanation provided for the increase by the Chief Minister - to realise a return on a valuable resource in addition to assisting with managing demand.[101] As to the former, in *Airservices* Gleeson CJ and Kirby J and McHugh J considered that the inclusion in the fees of a margin reflecting a reasonable rate of return did not have the consequence that the fee became a tax.[102] With respect to the latter, price is used to control the demand side of the market to ensure sustainability of the resource. That is an expression of value - the ACT Executive has determined that water is undervalued with the consequence that the commodity does not move to where it is most valued, waste occurs, and

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96 In theory the ACTEW did not have to take water from the ACT. Nothing in the *Territory-Owned Corporations Act 1990* (ACT) would prevent it buying entitlement and allocation from the Murray Darling Basin.

97 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [290] (McHugh J).

98 See s3 *Water Resources Act 1998* (ACT); s6 *Water Resources Act 2007* (ACT).

99 *Australian Capital Territory v Queanbeyan City Council* [2010] FCFCA 124; (2010) 188 FCR 541 at [87] (Keane CJ). See also *Queanbeyan City Council v ACTEW Corporation Ltd* [2009] FCA 943; (2009) 178 FCR 510 at [120] (Buchanan J).

100 *Attorney-General for New South Wales v Homebush Flour Mills* (1937) 56 CLR 390.

101 See also the Second Respondent's WAC Submissions at [34]-[39]; Note, the power to charge a fee includes a fee "in relation to any matter under or related to [the Water Acts]"; *Legislation Act 2000* (ACT), s56(2).

102 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [72] (Gleeson CJ and Kirby J), [317]-[318] (McHugh J).

there is no incentive for users to improve efficiency.[103] By adjusting the water abstraction charge the ACT effects a revaluation with the consequence that low value users will, in the short run, reduce consumption and in the long run all users will, because of the price signal, make capital investments to more efficiently use the resource. Value is not determined by the market, it is determined by the ACT Executive.[104] There is then the necessary relationship. It cannot be contended that there is no discernible relationship.[105]

39. The action taken by the ACT is in keeping with the NWI and the role of government within the national framework for the reform of the water industry. That role demands that value be determined having regard to social, environmental, economic, and political factors. It is essentially, as Keane CJ stated, a political and policy issue rather than a legal one.[106]

40. It is not to the point that an alternative means of reducing demand was available to the ACT Government (water restrictions). In any event such restrictions are inequitable and do not have the effect that water moves to where it is most valued. They do not foster improvements in efficiency. Further the more inelastic the demand the greater the cost to the community of restricting demand. Thus, the benefits of using price are greater than that to be gained by imposing restrictions.

41. It could be said that the adjustment – 30c/kl – is so great that it evidences a revenue raising purpose. Such an increase is warranted on the basis of the inelastic nature of demand for water in an urban setting. Further, the observations of McHugh J in *Airservices Australia* are apposite:

> ...Where services are provided by a public authority with a natural monopoly and where the statutory context and the surrounding circumstances otherwise fail to indicate a revenue-making purpose for a charge, the lack of a discernible relationship between the value of a particular service received on a particular occasion and the amount of the charge for that service does not necessarily indicate that the charge has the character of a tax.[107]

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103 On the demand side price is used to ration the use of the existing scare resource. To maximise benefit to the people price needs to reflect the efficient cost of providing a good or service. When price is below cost, consumption is subsidised, thereby encouraging excess consumption, placing pressure on capacity and bringing forward the need expand capacity. On the supply side price is used to induce production and signal the need for investment in capacity. See also the National Water Commission, *Review of Pricing Reform in the Australian Water Sector 2011* at [3.2] as to the demand and efficiency objectives of pricing reform of water.

104 South Australia adopts the First Respondent's WAC Submissions at [35]-[37] and the Second Respondent's WAC Submissions at [76]-[77].

105 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467 (The Court); South Australia also adopts the Second Respondent's WAC Submissions at [63]-[73].

106 *Australian Capital Territory v Queanbeyan City Council* [2010] FCFCA 124; (2010) 188 FCR 541 at [91] (Keane CJ). See also *Queanbeyan City Council v ACTEW Corporation Ltd* [2009] FCA 943; (2009) 178 FCR 510 at [119] (Buchanan J).

107 *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133 at [312] (McHugh J).

42. The Appellant contends, in effect, that power to levy an impost of this kind would enable the ACT to undermine the Commonwealth Parliament's exclusive control over customs, excise and bounties contrary to the conception of economic unity implicit in Ch IV. This, with respect, is to overstate the position. The breadth of the operative effect of s90 is not such that it can achieve total control for the Commonwealth over goods and commodities.

> On any possible view of its effect, s. 90 itself confers on the Parliament only a very limited power to control the economy. There are many taxes which have a tendency to enter into the price of commodities but which are not excises, and which are accordingly within the power of the States to impose. Payroll tax is an obvious example. There are many other legislative measures which a State can take either to discourage or to encourage production and manufacture. On the one hand it can fix quotas on production or manufacture, or indeed forbid production or manufacture altogether; on the other hand it can, for example, favour producers and manufacturers by reducing their taxes and the charges made to them for power and freight, and by building ports and railways for their use and providing them with other assistance. Thus s. 90 does not go very far towards giving the Commonwealth exclusive control of or influence over the production or manufacture of goods.[108]

Harper is an example of this.

43. Further, the intention of the Water Abstraction Charge is to contribute positively to the economy by reducing waste and fostering development and improved efficiency.

iv. The Utilities Network Facilities Tax is not an excise

44. On the assumption that the UNFT is a tax, South Australia contends it is not an excise. South Australia adopts the submissions of the First and Second Respondents[109] and submits, in particular:

44.1 the UNFT is levied upon owners of a network facility. The rate is not calculated by reference to the quantity or value of the goods or commodity conveyed by the network. Nor is it calculated by reference to the provision of an input as a necessary step in the production or distribution of potable water. By analogy, the UNFT is closer in kind to a tax on the land of a chicory grower than a tax on the area of land planted with chicory;[110]

44.2 accepting that the network pipelines do form an essential step in the production and distribution of water, there nevertheless remains a very real disconnect between the discrimen of the UNFT and that conveyed, arithmetic, natural or otherwise. The connection proffered appears to be: the longer the network, the more potable water produced and distributed, the greater the UNFT. It is not a relationship that accounts for demand or the lack thereof. It is a tenuous connection. Unlike *Matthews v Chicory Marketing Board* where a chicory grower paid the levy in relation to the area planted (a relatively direct connection between input and product), here the ACTEW pays the levy not because of any increase in production or distribution of potable water, but because its network makes use of Territory land (a far less direct connection between input production and distribution). Perram J's analogy with the levy considered in *Hughes and Vale Pty Ltd v New South Wales* is, with respect, apt.[111]

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108 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 617 (Gibbs CJ).

109 First Respondent UNFT submissions [40]-[75]; Second Respondent UNFT submissions [29]-[82].

110 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 303 (Dixon J).

111 *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 75 (Dixon CJ), 87 (Williams J).

44.3 The tenuous nature of the proffered relationship is all the more evident when one considers that the UNFT applies to different types of network conveying different types of commodity (and services) and yet all pay the same rate.

44.4 *Hematite* is distinguishable for the reasons identified by Keane CJ:[112]

i. First, the UNFT is payable by the owner, not the operator of the network. A tax on ownership of a network has little connection to the production and distribution of commodities carried via the network, unless the owner and operator are the same person.[113] It is true that "use" of pipelines is an essential step in the production and distribution of water, but use and ownership are different questions. In *Hematite*, Brennan J regarded the imposition of the tax on the operation of the pipelines as "determinative".[114]

ii. Secondly, the UNFT is imposed by reference to the conferral of the right to use and occupy land. The taxpayer is not otherwise entitled to the use the facility in question. In *Hematite*, the taxpayer was entitled by a separate permit to use the pipeline.

iii. Thirdly, the quantum of the tax is referable to the length of land occupied. It is unaffected by the amount of water flowing through the network. Although no arithmetical relationship is required,[115] the absence of any relationship between the quantum of the UNFT and the quantity of the good travelling through the network indicates a lack of proximity between the UNFT and the production and distribution of water.

iv. Fourthly, unlike the fee in *Hematite*, the UNFT is not of such magnitude that it is explicable "only on the footing that it is imposed in virtue of the quantity and value"[116] of the water conveyed via the network. The Appellant correctly submits that so much is not required.[117] However, it was a factor that was regarded as significant in *Hematite*.

v. Fifthly, payment of the fee is not a condition upon the transportation of water.

vi. Sixthly, the UNFT does not select the water network for discrimination (nor does it select a particular pipeline or part of the network for discrimination) so as to warrant the conclusion that the tax is upon the water carried in the network. The UNFT also applies to electricity, gas, sewerage and telecommunications networks.[118] Water is not the target of the impost.[119] It is true that a levy could be an excise in part and not in another,[120] but the absence of discrimination is a factor which suggests that no part of the UNFT is an excise.

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112 *Australian Capital Territory v Queanbeyan City Council* [2010] FCAFC 124; (2010) 188 FCR 541 at [136] (Keane CJ).
113 See First Respondent's UNFT Submissions [47].
114 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 659 (Brennan J).
115 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 304 (Dixon J); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 630 (Mason J), 668 (Deane J).
116 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 634 (Mason J).
117 Appellant's UNFT Submissions [81.4].
118 *Utilities (Network Facilities Tax) Act 2006* (ACT), s7.
119 *Australian Capital Territory v Queanbeyan City Council* [2010] FCAFC 124; (2010) 188 FCR 541 at [137] (Keane CJ).
120 Appellant's UNFT Submissions [81.6].

The Appellant submits the fourth and sixth features present in *Hematite* are not required to establish an excise. However, that submission is not to the point, since it was the unique "coexistence of ... features"[121] present in the *Hematite* case that led to the conclusion that it was a duty of excise.

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121 *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 634 (Mason J).