IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C2 of 2011

B E T W E E N:

QUEANBEYAN CITY COUNCIL

Appellant

AND:

ACTEW CORPORATION LTD

First Respondent

10

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)

Second Respondent

20

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

(Water Abstraction Charge)

30

Date of document: 6 June 2011
Filed on behalf of: The Attorney-General for the State of Victoria

Prepared by:
James Ruddle
Acting Victorian Government Solicitor
25/121 Exhibition St
MELBOURNE 3000

DX 300077
Tel: No. (03) 8684 0444
Fax No. (03) 8684 0449
Direct tel.: (03) 8684 0223
Ref: Jonathan.Bayly@vgso.vic.gov.au

I. PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth), in support of the respondents.

III. APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

3. The applicable constitutional provisions, statutes and regulations are set out in Annexure A to the Appellant's submissions.

V. ARGUMENT

4. This proceeding and proceeding C3 of 2011 raise for determination the validity of two fiscal exactions:

   (1) the water abstraction charge (**WAC**) imposed by Ministerial determination pursuant to s 78 of the *Water Resources Act 1998* (ACT) (the **1998 WR Act**) and later by s 107 of the *Water Resources Act 2007* (ACT) (the **2007 WR Act**); and

   (2) the Utilities Network Facilities Tax (**UNFT**) imposed pursuant to the *Utilities (Network Facilities Tax) Act 2006* (ACT).

5. It is convenient to deal, as the parties have, with the validity of the WAC in the submissions filed in this proceeding and to deal with the validity of the UNFT in the submissions filed in proceeding C3 of 2011.

A. Summary of Intervener's Argument

6. In summary, the Attorney-General for Victoria contends that, as the Court below held by majority,[1] the WAC is not a tax, and hence not a duty of excise, for the following reasons:

(1) The WAC is a charge for the acquisition of valuable rights to use, for commercial purposes, a limited public natural resource and as such falls within an established exception to the traditional definition of "taxation", namely a fee for the acquisition of such rights.[2] It is akin to a royalty or a profit à prendre (as Keane CJ held below) (paragraphs 12 to 18 below).

(2) Where a charge of this kind is imposed (as distinct from a charge for the provision of services) there is no requirement that there be a "discernible relationship" between the charge and the value of the resource in question (paragraphs 19 to 27 below).

(3) Alternatively to (2), if there is a requirement that there be a discernable relationship between the charge and the value of the resource, that requirement is met where the State or Territory imposing the charge fixes the amount of the charge by reference to the *quantity* of the resource acquired, according to what it considers the appropriate price for the right to use the resource, unconstrained by a requirement that the price reflect only the cost of access to the resource or its objectively determined "value" (paragraphs 28 to 36 below).

(4) Contrary to the Appellant's submissions,[3] where a charge is a charge for the acquisition or use of a natural resource, the fact that the charge has a revenue raising purpose is irrelevant to its characterisation as a tax. Such a charge will be likely always to have a revenue raising purpose, just as the sale of any property or rights owned by a State or Territory would have a revenue-raising purpose. In that respect, a charge for the right to

---

1 Keane CJ and Stone J, Perram J dissenting.

2 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

3 Appellant's submissions on the WAC at [36]-[52].

acquire or use natural resources owned or controlled by a State or Territory is fundamentally different to a fee for services provided by a State or Territory (paragraphs 38 to 41 below).

(5) Contrary to the Appellant's submissions,[4] the fact that a purpose of a fee for the acquisition or use of a limited public natural resource is intended to reduce demand for that resource does not point to it being a duty of excise. It remains a fee for the right to acquire or use the resource and akin to a profit à prendre (paragraph 42 below).

B. The statutory regime

10 7. Water in the Australian Capital Territory is currently regulated by the 2007 WR Act. It was previously regulated by the 1998 WR Act. Under both regimes the right to the use, flow and control of water of the Territory[5] was vested in the Territory.[6]

8. Each regime also provided that:

(1) subject to certain exceptions not presently relevant, a person shall not take water without a licence;[7]

(2) a licence may be granted to a person to take water,[8] and such licence may be subject to conditions;[9]

(3) the Minister may determine fees for the Act.[10]

---

4 Ibid at [95].

5 The phrase "water of the Territory" was not defined in the 1998 WR Act but is defined in the Dictionary to the 2007 WR Act to mean surface eater or groundwater. Surface water is defined in s 8 to mean water on or flowing over land after having fallen as precipitation, having risen from underground or having been returned to the environment after treatment or use, or such water collected in a dam, reservoir or tank.

6 2007 WR Act, s 7; 1998 WR Act, s 13.

7 1998 WR Act, s 33(1); 2007 WR Act, s 28.

8 1998 WR Act, s 35(1); 2007 WR Act, s 30.

9 1998 WR Act, s 35(2); 2007 WR Act, s 31.

10 1998 WR Act, s 78(1); 2007 WR Act, s 107.

9. The First Respondent (**ACTEW**) holds a licence to take water under the 2007 WR Act and previously held a licence to take water under the 1998 WR Act.

10. From time to time the Minister has determined that a fee is payable for the extraction of water pursuant to a licence. As outlined in the judgment of Keane CJ,[11] the charges were as follows:

(1) 10c per kilolitre from 1999-2003;

(2) 20c per kilolitre from 2004-2005;

(3) 25c per kilolitre from 2005-2006;

(4) 55c per kilolitre from 2006-2008;

(5) 51c per kilolitre from 2008-present.

11. The 10c per kilolitre and 20c per kilolitre charges were based on reports prepared by the Independent Pricing and Regulatory Commission (**IPARC**) that outlined the factors considered by it in recommending a price per kilolitre, together with indicative figures representing particular cost factors. The later charges were not based on IPARC reports.

C. Nature of the WAC

12. It is indisputable that water is a valuable, scarce natural resource. Flowing water is by its nature unsuited to possession as private property — it is "common property not especially amenable to private ownership and best vested in a sovereign state",[12] and this has long been recognised by the common law and by statute. As French CJ, Gummow and Crennan JJ observed in *ICM Agriculture Pty Ltd v Commonwealth*:[13]

> The common law position in relation to flowing water, which adapted Roman law doctrine, was settled in *Embrey v Owen*. Baron Parke adopted the view of Chancellor Kent that flowing water is *publici juris* in the sense that no-one has "property in the water itself, but a simple usufruct while it passes along". This reflected Blackstone's classification of water as a "moveable, wandering thing"

---

11 *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 546-551 (AB).

12 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [55] (French CJ, Gummow and Crennan JJ).

13 (2009) 240 CLR 140 at [55]-[57].

> which was "common" property. As such it is "beyond individual appropriation and alienation". Riparian rights did not depend on ownership of the soil of a stream; they attached to land in either lateral or vertical contact with a stream.
>
> This can be contrasted with the common law position in relation to groundwater settled in England in *Chasemore v Richards*. ... Such water could be intercepted by a landowner.

13. All States and Territories have legislation reflecting this common law position and vesting in the State or Territory all rights to the use, flow and control of water in waterways and groundwater.[14] And, as outlined above, in the present case s 7 of the 2007 WR Act (like s 13 of the 1998 WR Act) provides that the right to the use, flow and control of all water of the Territory is vested in the Territory.

14. Unlike the regime in issue in *Attorney-General (NSW) v Homebush Flour Mills Ltd*,[15] the State and Territory legislation vesting rights to water in the States and Territories did not appropriate property from a person and then make provision for that person to re-purchase their property at a price higher than the price paid upon appropriation. More particularly, neither s 13 of the 1998 WR Act nor s 7 of the 2007 WR Act appropriated property from the Appellant or from ACTEW and then provided for the Appellant or ACTEW to repurchase that property. To the contrary, the Appellant and ACTEW had no property in or rights over Territory water prior to the enactment of the relevant statutory regimes; and it was the 1998 WR Act and the 2007 WR Act that conferred upon them the ability to obtain rights to use Territory water. The fact that "the ACT's control over its water resources itself is the creation of statute"[16] is irrelevant in light of the common law position in relation to water that preceded the imposition of any legislative regime.

States and Territories may alienate rights over public natural resources

15. It is axiomatic that a State or Territory that has ultimate rights over a natural resource may alienate those rights to other persons or entities — and that it may

---

14 See, e.g., *Irrigation Act 1886* (Vic) (and see currently s 7 of the *Water Act 1989* (Vic)); see generally *Water Rights Act 1896* (NSW); *Rights in Water and Water Conservation and Utilization Act 1910* (Q); *Rights in Water and Irrigation Act 1914* (WA); *Control of Waters Act 1919* (SA); Control of Waters Ordinance 1938 (NT); Lake Burley Griffin Ordinance 1965 (ACT).

15 (1937) 56 CLR 390.

16 Appellant's submissions on the WAC at [60].

choose to do so at a price. In this case, the WAC was and is the price to be paid for the right to use Territory water. As such it is relevantly indistinguishable from the licence fee payable for the right to take abalone considered and held not to be a tax in *Harper v Minister for Sea Fisheries*.[17]

16. In that case Brennan J held, in a judgment with which the whole Court expressed agreement:[18]

> When a natural resource is limited so that it is liable to damage, exhaustion or destruction by uncontrolled exploitation by the public, a statute which prohibits the public from exercising a common law right to exploit the resource and confers statutory rights on licensees to exploit the resource to a limited extent confers on those licensees a privilege analogous to a profit à prendre in or over the property of another. 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.

17. Mason CJ, Deane and Gaudron JJ were in general agreement with Brennan J, but added brief reasons of their own. After considering the relevant context — that the legislation created "an entitlement of a new kind created as part of a system for preserving a limited public natural resource"[19] — their Honours stated that the commercial licence fee imposed in relation to the taking of abalone was:[20]

> properly to be seen as 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, by their own choice, acquire or retain commercial licences. So seen, the fee is the quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder. It is not a tax. That being so, it is not a duty of excise.

---

17 (1989) 168 CLR 314. Notably, abalone and other fish were in an analogous position to water at common law, in that they were regarded as property of no-one and available for public fishing subject only to statute: ibid at 329 (Brennan J). The legislation in issue in *Harper* had qualified the public right to fish for abalone by providing that no person shall take abalone from Tasmania's waters without a licence; and providing that the Minister could sell licences for certain fixed sums. But, as here, there was no appropriation of any private property and provision for repurchase of that property.

18 Ibid at 335.

19 Ibid at 325.

20 Ibid.

18. The same reasoning applies in this case. The Appellant contends, however, that a qualification expressed by Dawson, Toohey and McHugh JJ in *Harper* — namely that any charge imposed for the acquisition of a right of this kind must bear a "discernable relationship" to the value of what is acquired[21] — ought now to be followed by this Court.

D. No requirement that there be a discernible relationship between the charge and the value of what is acquired

Authorities do not support the "discernable relationship" requirement for rights to use or acquire property

10 19. The notion that a fee for a service might in some cases be a tax, depending on the amount of the fee, emerged in cases such as *Harper v State of Victoria* (the *Egg Grading Case*)[22], *Swift Australian Co (Pty) Ltd v Boyd Parkinson*[23] and *General Practitioners Society v Commonwealth*.[24]

(1) In the *Egg Grading Case*, the Court placed reliance on the fact that the fee for grading and testing eggs was calculated by reference to the cost to the authority of providing the service, and held that the fee was not a tax.[25]

(2) In *Swift Australian*, Dixon CJ held that a fee for meat inspection was a tax rather than a fee for services because fees were payable for the
20 general purpose of defraying government administrative expenses.[26]

---

21 Ibid at 336-337. Notably, in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [297] McHugh J described the fee in issue in *Harper* as a "fee for services", suggesting that his Honour's understanding of the fee was that it was *not* a charge for the right to acquire or use a valuable natural resource so much as a fee for services, to which the "discernible relationship" requirement applied in accordance with existing authority.

22 (1966) 114 CLR 361.

23 (1962) 108 CLR 189.

24 (1980) 145 CLR 532.

25 (1966) 114 CLR 361 at 377 (McTiernan J), 378 (Taylor J), 379 (Menzies J), 382 (Owen J).

26 (1962) 108 CLR 189 at 200-201 (Dixon CJ, with whom Kitto J (at 209) and Windeyer J (at 224) agreed); see, to similar effect at 222 (Menzies J, with whom Taylor J (at 214) agreed).

(3) In *General Practitioners Society*, Gibbs J observed that a fee for services might be regarded as a tax if the fee was "so large that it could not reasonably be regarded as a fee".[27]

20. More recently, this Court has adopted the requirement that there be a "discernable relationship" between the fee in question and the services being acquired, with the relationship not being necessarily limited to the recoupment of the costs involved in the provision of the service in question. The phrase was first used in this context[28] in *Air Caledonie v The Commonwealth*,[29] a case concerning fees for services, not charges for the acquisition of property or other valuable rights. After considering Latham CJ's traditional definition of a tax the Court said:[30]

> There are three comments which should be made in relation to the above general statement of Latham CJ. 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. 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

---

27 (1980) 145 CLR 532 at 562 (Gibbs J - Barwick CJ, Stephen, Mason and Wilson JJ agreeing).

28 The phrase "discernible relationship" had earlier been used by some members of this Court in the context of whether a particular tax had the requisite connection with the quantity or value of goods subject to a fee so as to constitute an excise. So, for example, in *Gosford Meats Pty Ltd v State of New South Wales* (1985) 155 CLR 368 at Dawson J (dissenting) held that a fee for operating an abattoir, calculated by reference to the number of animals slaughtered in the previous year, was not a duty of excise because there was "no discernible relationship between the products of the abattoir and fee imposed for the privilege of running the abattoir". And in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 669, Deane J stated that "[i]t is unnecessary to consider whether, if it were critical that there exist a discernible relationship between the tax and the quantity or value of the relevant goods, it could properly be assumed that the amount of $10,000,000 per annum in respect of each pipeline was not selected as the result of some arbitrary whim but by reason of some relationship to either the anticipated quantity or value of goods which were to be transported through the pipeline".

29 (1988) 165 CLR 462.

30 (1988) 165 CLR 462 at 467.

> 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.

This passage links the need for a "discernible relationship" only to the fee for services exception; not to the other exceptions expressly mentioned.

21. Consistently with *Air Caledonie*, neither the judgment of Mason CJ, Deane and Gaudron JJ nor that of Brennan J in the later decision in *Harper* made reference to any requirement for a "discernible relationship" in relation to a charge for a right to use or acquire a natural resource. Given the terms of the statement in *Air Caledonie* and the prominence of this point in the judgment of Dawson, Toohey and McHugh JJ, it cannot be thought that Mason CJ, Brennan, Deane and Gaudron JJ simply overlooked or failed to mention the point; rather, it ought to be inferred that their Honours did not regard a discernible relationship to quantity or value as essential to prevent a charge for the right to acquire or use a limited public natural resource being characterised as a tax.[31]

22. Finally, all the judgments in *Airservices Australia v Canadian Airlines International Ltd*[32] use the language of fees for services when discussing the discernible relationship requirement. While this may in part be explained by the fact that the case concerned fees for services and not a fee for the right to acquire or use a valuable natural resource, it is notable that even in the general articulation of principle no member of the Court linked the discernible relationship requirement to such a right.

---

31 Contrary to the Appellant's submissions on the WAC at [58], the Court below did not err in declining to follow "clear and considered dicta" in *Harper*. While all Justices in *Harper* agreed with the judgment of Brennan J, the statements of Dawson, Toohey and McHugh JJ in relation the discernible relationship requirement were the expression of a minority view; and the Court below was not free to follow those statements in preference to the approach of the majority.

32 (1999) 202 CLR 133.

The Court should not apply the "discernable relationship" requirement to the acquisition of rights in respect of natural resources

23. In any event, the "discernible relationship" requirement is not appropriately applied to a charge for the right to acquire or use a natural resource so as to limit the amount that a State or Territory can charge for the right in question. The amount to be charged for such resources raises complex social, political and economic issues relating to conservation of scarce resources, including for future generations, the value of the resource in the market, the costs associated with access to the resource and the need to deter over-consumption. These are matters suitable for political judgment by the legislature — they are not matters that lend themselves readily to judicial determination.[33]

24. There is a principled basis for distinguishing a fee for services and a charge for a right to acquire or use a limited public natural resource. In the cases where an entity is required to obtain a service from a State or Territory in order to conduct its business the entity obtains a service that forms part of the regulation of the carrying on of that business, while also benefitting the entity.[34] In those circumstances, the imposition of a requirement that the fee charged for the service must bear a discernable relationship to the cost or value of the service[35] (and

---

33 *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 583 (Stone J) (AB).

34 For example, the service of egg grading and testing considered in *Harper v State of Victoria* (1966) 114 CLR 361; the services of air traffic control, rescue and fire services considered in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133; fees for dispute resolution services in relation to complaints against members of the Telecommunications Industry Ombudsman scheme, levied under s 128 of the *Telecommunications (Consumer Protection and Service Standards Act 1999* (Cth) and considered in *Australian Communications Authority v Viper Communications Pty Ltd* (2001) 110 FCR 380. Cf *Swift Australia Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 200, where a fee "for the purpose of defraying the expenses of inspection of meat for sale and of carrying [the legislation] into effect" was held to be a tax because it went beyond the cost of provision of the services in question: see paragraph 19 above.

35 In the context of fees for services, the supply of such services would generally be highly elastic, thus causing the market price to reflect closely the cost to a supplier of providing the service. The existence of a requirement that a person obtain a particular service, and that they obtain it from the government, artificially removes the elasticity. However, the cost of provision of the service, plus a reasonable rate of return, would reflect the likely market price were there no government monopoly. Thus this is generally the appropriate benchmark for determining a "discernible relationship" where a government monopoly exists in relation to services.

making allowance for a "reasonable rate of return"[36]) ensures that the provision of a compulsory, regulatory service is not utilised as a device for imposing what is in truth a tax to fund the general services of government to the wider community, rather than a charge for the services received by the person who pays that charge.

25. In contrast, when an entity pays a fee for the right to acquire or use a limited public natural resource, even where in a practical sense it has to obtain the resource from the State or Territory in order to conduct its business, it obtains a valuable right to acquire something that it may trade to others. In those circumstances, the State or Territory is simply selling its own rights over the commodity; the purchaser obtains a valuable thing; and there is no need in principle for there to be any discernible relationship between price and value in order to ensure that the price of the commodity is not utilised as a device for imposing what is in truth a tax. The fee is simply the price at which the owner of the rights in question is prepared to sell those rights; the purchaser then obtains the rights; and the price paid for those rights is not a tax.

26. Finally, the discernible relationship requirement ought to be rejected in this context because it would create the anomalies and difficulties identified by Perram J in the court below,[37] which stem from an attempt to apply the "discernible relationship" requirement in the context of monopoly rights over a limited public natural resource. Without the "discernible relationship" requirement, the anomalies identified by Perram J do not arise.

27. For the above reasons, the Court should not now adopt a requirement that there be a discernable relationship between the price charged for rights to acquire or use a limited public natural resource and the value or quantity of the resource so acquired in order for the charge to fall outside the notion of a tax. Contrary to the Appellant's submissions, this will not mean that natural resources constitute a "type of goods ... to which s 90 does not apply" and will not remove a large

---

36 See *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [141] (Gaudron J, Hayne J agreeing), [297], [318] (McHugh J), [450] (Gummow J).

37 At 588 [194]-[195].

portion of economic activity from the protective reach of that section.[38] Once a State or Territory has alienated its rights over natural resources, if the State or Territory then sought to impose a levy on, for example, the further use or sale of such resources, such a levy may well, depending on the circumstances, constitute a duty of excise.

E. If there is a "discernible relationship" requirement, it permits setting of price by reference to the quantity of the resource acquired

28. In the alternative, if there is a requirement that there be a discernable relationship between the charge imposed and the right conferred in relation to a natural resource, it is satisfied if the charge is set by reference to the *quantity* of the resource obtained by the purchaser, rather than by reference to its value. This is consistent with the judgment of the Court in *Stanton v Federal Commissioner of Taxation*;[39] and it also emerges from a closer consideration of the judgments in *Harper*.

Stanton v Federal Commissioner of Taxation

29. In *Stanton* the Court considered whether moneys paid under a contract for the taking of timber were received "as or by way of royalty" so as to be included in a taxpayer's assessable income pursuant to s 26(f) of the *Income Tax and Social Services Contribution Assessment Act 1936* (Cth). The contract was described by the Court as follows:[40]

> [I]n substance the agreement amounts to a sale of standing timber, with a limitation as to quantity, at a lump sum price based in the end upon the amount of timber found to be standing upon the land whether the timber was cut or removed or not. It will be seen too that the price was payable in quarterly instalments which became due independently of the amount of timber removed, so that the full price remained payable without regard to the extent to which the purchaser might exercise his right to cut and remove the timber.

30. The Court held that the payments under the contract were not royalties because they were unrelated to the quantity or value of the timber removed; rather, the

---

38 Appellant's submissions on the WAC at [61].

39 (1955) 92 CLR 630.

40 Ibid at 639.

lump sum fee was payable regardless of whether or not the purchaser exercised his right to take timber. Their Honours considered the development of the concept of a royalty, and then described a royalty in relation to the taking of things from land in the following terms:[41]

> What matters here is the parallel though distinct development of the meaning of the word which seems to arise from payments made to the Crown in respect of metals and the like won or taken from the soil. Similar payments to the owners of mines are regarded as royalties and by an extension not difficult to follow payments made in respect of the taking under the agreement or licence of the owner of land of anything which may be considered part of or naturally attached to the soil such as coal, stone, sand, shells, oil and standing timber came to be spoken of as royalties. Warren and piscary and such rights are not heard of amongst us but conceivably there may be things made the subject of royalty which belong to ownership of land that cannot be considered actually to be part of the soil. In the case of monopolies and the like the essential idea seems to be payment for each thing produced or sold or each performance or exhibition in pursuance of the licence. In the same way in the case of things taken from the land the essential notion seems to be that the payment is made in respect of the taking of something which otherwise might be considered to belong to the owner of the land in virtue of his ownership. In other words it is inherent in the conception expressed by the word that the payments should be made in respect of the particular exercise of the right to take the substance and therefore should be calculated either in respect of the **quantity or value** taken or the occasions upon which the right is exercised.

31. Thus when considering whether a particular payment is a royalty paid as the price for taking a thing from land, the payment must be made in relation to the exercise of the right in question; and this requires a relationship between the payment and either the *quantity* or the *value* of what is taken. It is not necessary to show a relationship between the price set for a given quantity and also some independent, objective value of the thing taken.

Harper v Minister for Sea Fisheries

32. Likewise, in *Harper* the Court accepted that a fee calculated by reference to the *quantity* of the thing taken was, for that reason, not a duty of excise.

---

41 Ibid at 641-642 (emphasis added).

33. The fees in issue in *Harper* were as follows:[42]

(1) up until 1 December 1987, $360 per tonne of abalone the licence holder was authorised to take while the licence was in force;

(2) from 1 December 1987 to 13 December 1988, an amount calculated as 5% of the gross value of the abalone taken in State fishing waters in the preceding year, as declared by the Director, levied on a per tonne basis; and

(3) from 13 December 1988, a flat fee depending on the quantity of abalone authorised to be taken pursuant to the licence:

(a) $28,000 where the quantity did not exceed 15 tonnes; or

(b) $40,000 where the quantity exceeded 15 tonnes.

34. There was no evidence before the Court as to how the sum of $360 per tonne or the flat fees of $28,000 and $40,000 were arrived at, or whether those fees or the "gross value" declared by the Director represented any assessment of the market value of the abalone. There was no evidence as to whether there had been any independent valuation of the resource and the costs associated with the taking of the resource, as had occurred in relation to the earlier calculation of the fees in the present case.[43]

35. Rather, Dawson, Toohey and Gaudron JJ, while stating that the presence of "a relationship between the amount paid and the value of the privilege conferred" was "most important", accepted that each method of calculating the fee exhibited the requisite relationship.[44] It is thus apparent that their Honours considered that a fee for the taking of a limited public natural resource set by reference to the *quantity* of the resource obtained or permitted to be obtained had a sufficient

---

42 (1989) 168 CLR 314 at 326-328 (Brennan J).

43 See discussion in *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 545-548 (Keane CJ) (AB).

44 Ibid at 336 (Dawson, Toohey and McHugh JJ).

relationship to the value of the good in question so as to render it "the price paid for the right to appropriate a public natural resource".[45]

36. As a consequence, even applying the approach of Dawson, Toohey and Gaudron JJ in *Harper*, a State or Territory imposing a charge for the acquisition of a natural resource is entitled to set that charge by reference to the quantity of the resource acquired or permitted to be acquired, according to what it considers the value of the right so to acquire the resource. The States and Territories are unconstrained by a requirement that the price reflect only the cost of access to the resource or only the market value of the resource (if that can be determined), or by any requirement that they have obtained independent advice as to relevant costs or "value". Further, in setting what is in effect the price of the resource in question the State or Territory is entitled to take into account the intrinsic value of the resource, the need to conserve the resource and the entitlement of the State or Territory to raise revenue by sale of rights over limited natural resources.

37. That test is plainly satisfied in the present case, because the WAC is charged explicitly by reference to the quantity of water taken.

F. Intention to raise revenue by selling rights to use or access valuable natural resources irrelevant

38. When a State or Territory is the owner of rights over natural resources, such as minerals, water or fish, it is entitled to alienate its rights over those resources, and to do so for a price. The State or Territory is entitled to set the price at which it alienates its rights over natural resources so as to raise revenue for the consolidated revenue fund of the State or Territory in question. It is inherent in the sale of rights or property held by a State or Territory that revenue will be raised.

39. This is what State and Territory royalties in relation to the extraction of minerals have traditionally done. There is no suggestion in the authorities that such royalties are not permitted to raise revenue, or are only permitted to yield a

---

[45] Ibid at 337 (Dawson, Toohey and McHugh JJ).

"reasonable rate of return" on the cost of providing access to the minerals, or on the market value of the minerals.

40. While "the expense of administering legislation is not a valid justification, of itself, for imposing a compulsory charge" for the provision of a government service,[46] for reasons set out above that proposition has no relevance to a case where the charge is levied in return for rights to acquire or use a public natural resource.

41. Thus the fact that a charge for rights to acquire or use a natural resource has as its purpose or effect the raising of revenue for the general services of government is irrelevant to the question whether it is a tax and hence a duty of excise.

G. Intention to alter demand through adjustments to price of valuable natural resource irrelevant

42. Contrary to the Appellant's submissions, the fact that price signals may be used to reduce demand for a limited natural resource, the rights to which are vested in a State or Territory, is not a matter that "points to the exaction being an excise duty".[47] Where a State or Territory owns the rights over a natural resource and wishes to discourage use of that resource on public policy grounds it is entitled to use price signals to do so; the fact that a State or Territory cannot impose a *tax on goods* so as to reduce demand (such as a tax on tobacco in order to reduce tobacco consumption) does not mean that a charge in return for the acquisition of rights and which has the effect of reducing demand for a relevant good is a tax on that good. The effect on demand of the price charged for such rights, especially in circumstances where the good in question is a limited natural resource, says nothing about the character of the charge as a tax or otherwise.

---

46 Appellant's submissions on the WAC at [38], citing *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189 and *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

47 Appellant's submissions on the WAC at [95] (emphasis omitted).

Dated: 6 June 2011

STEPHEN McLEISH
Solicitor-General for Victoria
Telephone: (03) 9225-6484
Facsimile: (03) 9670-0273

KRISTEN WALKER
Melbourne Chambers
Telephone: (03) 9640 3281
Facsimile: (03) 9640 3108

James Ruddle
Acting Victorian Government Solicitor per: