

**IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY**

No C3 of 2011

BETWEEN:

QUEANBEYAN CITY COUNCIL

Appellant

AND:

ACTEW CORPORATION LTD

First Respondent

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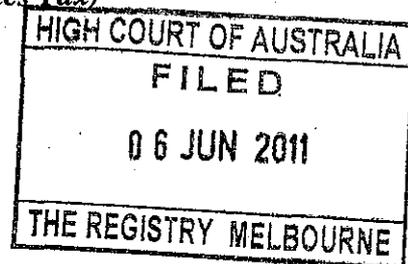
**THE AUSTRALIAN CAPITAL TERRITORY
(DEPARTMENT OF TREASURY)**

Second Respondent

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**SUBMISSIONS ON BEHALF OF THE
ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)**
(Utilities Network Facilities Tax)

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Filed on behalf of:

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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 C2 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) (the **UNFT Act**).

5. It is convenient to deal, as the parties have, with the validity of the UNFT in the submissions filed in this proceeding and to deal with the validity of the WAC in the submissions filed in proceeding C2 of 2011.

A. Summary of Intervener's Argument

6. In summary, the Attorney-General for Victoria contends that, as the Court below unanimously held, the UNFT is not a tax on goods, and hence not a duty of excise, because:

- (1) it is levied not on goods but on network facilities and is akin to a charge for the use of land rather than a tax on the production or manufacture of goods (paragraphs 19 to 23 below);
- (2) it is not explicable only by reference to the proposition that in substance it is related to the value or quantity of things passing through the network (paragraphs 24 to 30 below); and
- (3) the fact that the UNFT may ultimately enter into the price of things that pass through the network facilities subject to the UNFT does not render it a tax on those things (paragraphs 31 to 32 below).

10 B. The statutory regime

The UNFT Act

7. Section 8 of the UNFT Act provides as follows:

Network Facility Tax

- (1) The owner of a network facility on land in the ACT is liable to pay tax in relation to the facility at the rate worked out as follows:
determined rate \times route length
- (2) In this section:
determined rate means the rate determined under the *Taxation Administration Act 1999*, section 139.

- 20 8. Pursuant to the UNFT Act's Dictionary:

- (1) a network facility is "on" land if it is "over, under or on the land"; and
- (2) "route length" means the length of the horizontal projection of the facility on the land.

9. Section 6(1) of the UNFT Act provides that a "network facility" means any part of the infrastructure of a utility network. However, s 6(2) provides that:

a network facility does not include any facility or part of a facility that is affixed to land for which any of the following is in force in relation to the use of the land for the utility network:

- (a) a lease;
- (b) a licence granted by the Territory;

(c) any right prescribed by regulation.

10. Section 7 of the UNFT Act provides that a “utility network” is any of the following under the *Utilities Act 2000* (ACT):

- (1) an electricity transmission network or an electricity network;
- (2) a gas transmission network or a gas distribution network;
- (3) a sewerage network; or
- (4) a water network.

In addition, a telecommunications network under the *Telecommunications Act 1997* (Cth) is also a utility network.

10 11. The effect of s 6(2) is that not all parts of the infrastructure of a utility network on land in the Territory will be subject to the UNFT. In particular, where the owner of the utility network has a right to use particular land for the utility network pursuant to a lease granted by the owner of land (which may or may not be the Territory), a licence granted by the Territory or a right prescribed by regulation, then the part of the network that is affixed to that land will not be a “network facility” subject to the UNFT.

12. Pursuant to the determinations made pursuant to s 139 of the *Taxation Administration Act 1999*, the determined rate of the UNFT was as follows:

- (1) \$355 per kilometre from 1 January 2007 to 14 March 2008;¹
20. (2) \$676 per kilometre from 14 March 2008 to 14 August 2008;²
- (3) \$697 per kilometre from 15 August 2008 to 22 March 2010;³
- (4) \$722 per kilometre from 22 March 2010 to ** 2011;⁴ and

¹ Taxation Administration (Amounts Payable – Utilities (Network Facilities Tax)) Determination 2006 (No 1).

² Taxation Administration (Amounts Payable – Utilities (Network Facilities Tax)) Determination 2008 (No 1).

³ Taxation Administration (Amounts Payable – Utilities (Network Facilities Tax)) Determination 2008 (No 2).

⁴ Taxation Administration (Amounts Payable – Utilities (Network Facilities Tax)) Determination 2010 (No 1).

- (5) \$749 per kilometre from ** 2011 to present.⁵

The Utilities Act

13. Part 7 of the *Utilities Act* confers rights on public utilities that are enforceable against owners, lessees and occupiers of land in the Territory. These rights include the right to maintain network facilities, including a power to enter onto land and undertake work,⁶ and the right to require an owner, lessee or occupier of land to take action to stop interference with the network facility.⁷ However, in relation to national land these rights and powers are exercisable only by agreement with the Commonwealth.⁸

10 **C. Nature of the UNFT**

14. The UNFT is therefore a charge imposed on the owner of the infrastructure of a utility network (including pipes and cables) that:

- (1) is used for the transmission of gas or electricity, or for a gas, electricity, sewerage, water or telecommunications network; and
- (2) is on land in the Territory (except networks that are affixed to land in relation to which there is in force, in relation to the use of the land for the network, a lease, a licence granted by the Territory or a prescribed right).

15. The Attorney-General for Victoria makes no submissions on whether the UNFT is a tax, because regardless of whether it is a tax or a charge for the occupation or use of land, it is not in form or substance a tax on goods; hence it is not a duty of excise.⁹

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⁵ Taxation Administration (Amounts Payable – Utilities (Network Facilities Tax)) Determination 2011 (No 1).

⁶ *Utilities Act*, ss 106, 116.

⁷ *Ibid*, s 125.

⁸ *Ibid*, s 107.

⁹ The Full Court took the same approach to the question whether the UNFT is a tax, finding it unnecessary to decide: *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 572 (Keane CJ, with whom Stone and Perram JJ agreed on this issue) (AB).

16. The UNFT is not imposed directly on goods. In form it is imposed on or by reference to infrastructure on (or in or over) land.
17. It may be accepted that the water network is an essential aspect of the production and distribution of potable water; but to so conclude does not mean that a tax on ownership of a water network is in substance a tax on the water that passes through that network, any more than a tax on ownership of land is a tax on the goods produced by use of the land.¹⁰
18. The circumstances in *Hematite Petroleum Pty Ltd v Victoria*¹¹ that led the Court to reach the conclusion that the pipeline fee there in issue was in substance a tax on the hydrocarbons flowing through the pipeline were exceptional and are not present in this case. As Keane CJ observed in the Court below¹² (Stone and Perram JJ agreeing), the UNFT is quite unlike the pipeline fee considered in *Hematite*, for several reasons as set out below.

UNFT payable by owner of network

19. First, the UNFT is payable by the owner of the network in so far as it is on relevant land, not by the operator of the network. In that sense the UNFT is akin to a charge for the use of land, rather than a tax on goods.
20. In this regard, the UNFT is distinguishable from the imposts considered in *Logan Downs Pty Ltd v Queensland*.¹³ There, the impost was levied on ownership of stock. The Court held (by a statutory majority) that, in so far as the impost was imposed on ownership of cattle and sheep it was a tax on the goods ultimately produced by those animals (be it meat, dairy products, wool or further sheep and cattle)¹⁴ — the objects the ownership of which was taxed were themselves “articles of commerce” or productive units producing articles of commerce. In

¹⁰ Cf a tax on land by reference to the particular crop with which the land is planted, as in *Matthews v Chicory Marketing Board* (1938) 60 CLR 263.

¹¹ (1983) 151 CLR 599 (*Hematite*).

¹² *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 575 (AB).

¹³ (1977) 137 CLR 59.

¹⁴ (1977) 137 CLR 59 at 70 (Stephen J), 78 (Mason J, with whom Barwick CJ agreed).

contrast, the Court held that in so far as the impost attached to stock horses, which were used in the course of production but were not themselves articles of commerce, it was not a tax on goods and was not a duty of excise.¹⁵ Similarly, the UNFT is imposed on ownership of a thing that is used in the production and distribution of goods (as were the horses in *Logan Downs*) but which is not itself an article of commerce¹⁶ or a “productive unit”.

UNFT imposed by reference to conferral of right to use and occupy land

21. Second, the UNFT is imposed by reference to the conferral of the right to use and occupy the land on which the network is situated. This is apparent from the fact that network facilities on land in relation to which the public utility already has rights pursuant to a lease, a licence granted by the Territory or a prescribed right, are excluded from the definition of “network facility”. In turn, such facilities are not taken into account in calculating “route length” for the purpose of s 8 of the UNFT Act. The UNFT therefore only applies in relation to land where rights in relation to a network facility situated on, over or under that land are conferred by statute (namely Part 7 of the *Utilities Act*) rather than by a lease, Territory licence or prescribed right. Again, this is akin to a charge for the use of land, rather than a tax on goods.

22. Keane CJ explained the effect of s 6(2) of the UNFT Act as follows:¹⁷

20 the UNFT is calculated by reference to that part of a network facility that is affixed to land which is not the subject of relevant private rights or interests held by the utility or the owner of the network. That is, the UNFT is calculated by reference to those parts of the network for which there does not exist a lease, a licence granted by the Territory or any right prescribed by regulation in relation to the use of the land for the utility network.

¹⁵ (1977) 137 CLR 59 at 70 (Stephen J), 78 (Mason J, with whom Barwick CJ agreed). Notably, Gibbs J and Jacobs J, in the statutory minority, took the view that “mere ownership cannot properly be described as the taking of any step in the production or distribution of goods”, even if they are ultimately intended to be sold: at 65 (Gibbs J), 82-83 (Jacobs J). Thus five judges agreed that a tax on ownership of goods used for the purpose of production but not themselves articles of commerce or directly productive of articles of commerce (i.e. horses, in this case) was not a duty of excise.

¹⁶ See *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 579 (AB).

¹⁷ *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 568 (AB).

It is therefore incorrect to suggest, as the Appellant does,¹⁸ that the “route length” of the First Respondent’s water network necessarily includes the entire length of its pre-treatment pipes, bulk water supply mains and reticulation pipes.¹⁹

23. The Territory has thus conferred on public utilities valuable rights to use and occupy land in the Territory. The UNFT is properly seen as a charge by reference to the extent of those rights, rather than a charge in respect of any goods produced or manufactured using those rights.

Quantum of UNFT is referable to length of network, not volume or value of goods passing through the network

- 10 24. Third, the quantum of the UNFT is in form referable to the length of the land occupied — not to the volume or value of things passing through the network. Contrary to the Appellant’s submissions,²⁰ the length of the network does not have a “natural relationship” to the quantity of the things passing through it — and certainly no relationship to their value. The length of the network simply reflects how far away the various customers who purchase water are, not how much water those customers purchase. The *diameter* of a pipeline-based network might have some relationship to the quantity (and hence value) of the things passing through it²¹ — but that is not the basis on which the UNFT is imposed.
- 20 25. This can readily be seen in the case of networks through which no “goods” are, on any view, conveyed (in particular, a sewerage network and probably also a telecommunications network), but the same is true of networks through which a quantifiable thing such as gas, electricity or water, is transmitted or transported. The value or quantity of that which is transmitted or transported has no relationship at all to the length of the overall network. A very large amount may be sent over a short distance, or a very small amount over a long distance.

¹⁸ Appellant’s submissions on the UNFT at [13]-[14]; cf at [24].

¹⁹ In addition to the exception in s 6(2) of the UNFT Act, the Attorney-General for Victoria adopts the construction of the UNFT Act adopted by the Second Respondent in its submissions on the UNFT at [24], namely that the UNFT Act does not apply to those network facilities or parts thereof situated on national land.

²⁰ Appellant’s submissions on the UNFT at [37.2], [58]-[68].

26. Moreover, the rate of the UNFT in each of the years in question is the same irrespective of the nature of the network. Whether the network carries water, gas, electricity, telecommunications signals or sewage, the same rate per kilometre applies.
27. In *Matthews v Chicory Marketing Board*, upon which the Appellant relies, it was the “close relation”,²² as a matter of fact, between a levy on land planted with chicory and the volume of chicory ultimately produced that rendered the levy in substance a tax on chicory. Dixon J observed that:²³

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By adopting area planted as the criterion of the amount of the levy ... the board has taxed the production of the commodity as effectually as if it had selected, for instance, the weight of the chicory gathered in its raw state, the quantity treated or the gross returns. There is no distinction of substance and scarcely any even of form between levying a tax upon the area planted and levying a tax upon the act of planting the area. The levy is directed to the normal case of a man reaping even as he sows.

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28. A close connection of this kind is absent in this case. Taxation by reference to the length of network facilities, as explained above, has no “close” or “natural” connection with the quantity or value of the various things that may pass through them. It is entirely neutral as to quantity or value. Rather, it has a close connection with the amount or extent of land occupied by the network facility.

Quantum of UNFT not indicative of a tax on goods passing through network

29. Fourth, the quantum of the UNFT is not indicative of the UNFT being a tax on the things which pass through the networks. As Keane CJ noted, and again unlike the circumstances in *Hematite*, the UNFT does not select the water network for discrimination as against other networks so as to warrant the conclusion that the UNFT is in substance a tax on the water carried in the water network.²⁴

²¹ As Keane CJ observed: *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 579 (AB).

²² (1938) 60 CLR 263 at 304 (Dixon J).

²³ (1938) 60 CLR 263 at 303.

²⁴ *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 575 (AB). And see *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 286 (Starke J).

30. Under the UNFT Act, the UNFT applies, on a “route length” basis, to networks that are used for various essential services. Some of those services (notably sewerage) do not involve the transport of goods at all. Others, such as telecommunications, involve transmission of some kind but what is carried cannot readily be described as “goods”. The case is to be contrasted with *Hematite*, where it was critical to the characterisation of the fees as excises that they imposed a very high charge specifically on pipelines used in the production and manufacture of hydrocarbons.²⁵

Relevance of fact that the UNFT ultimately enters the price of water

- 10 31. Further, as the court below held,²⁶ and as members of this Court have observed,²⁷ it is not the case that any charge that ultimately enters the price of goods is a duty of excise. There are many taxes and charges that States and Territories do or might legitimately impose that enter the price of goods and which are not taxes on goods and hence not duties of excise, including:
- (1) payroll tax;
 - (2) land tax;
 - (3) taxes and charges on vehicles, including vehicles used in the production or transportation of goods; and
 - (4) stamp duties.
- 20 32. The fact that, when imposed on manufacturers, these taxes and charges are likely to enter into the price of goods produced does not render such taxes and charges duties of excise. So, for example, in *Matthews v Chicory Marketing Board* it was not the fact that the levy was likely to enter into the ultimate price of the chicory produced, but rather the close connection between the levy and the quantity or volume of goods produced, that was determinative.

²⁵ (1983) 151 CLR 699 at 634-635 (Mason J), 639-640 (Murphy J), 658-659 (Brennan J); 669 (Deane J).

²⁶ *ACT v Queanbeyan City Council* (2010) 188 FCR 541 at 576 (AB).

²⁷ *Ha v New South Wales* (1997) 189 CLR 465 at 497 (Brennan CJ, McHugh, Gummow and Kirby JJ).

Conclusion

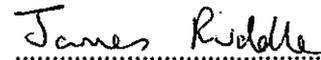
33. Thus, whether it is a tax or not, the UNFT is not a tax on goods and hence not a duty of excise.

Dated: 6 June 2011



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