IN THE HIGH COURT OF AUSTRALIA
CANBERRA OFFICE OF THE REGISTRY

No. C2 of 2011

BETWEEN:

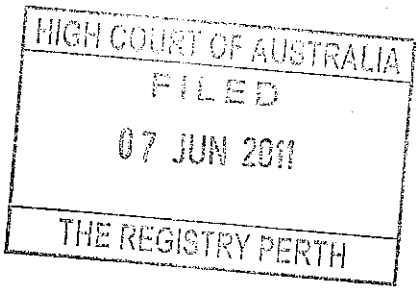
QUEANBEYAN CITY COUNCIL
Appellant

and

ACTEW CORPORATION LTD
First Respondent

and

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent



WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

(RE WATER ABSTRACTION CHARGE)

Date of Document 3 June 2011

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Western Australia intervenes pursuant to s 78B(1) *Judiciary Act* 1903 (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE LEGISLATION

4. The legislation applicable to the determination of this matter is set out in the submissions of the Appellant and the Respondents.

PART V: CONTENTIONS

5. Western Australia adopts the submissions of the Respondents in relation to the legal principles applicable to whether the water abstraction charge ("WAC") is a tax. It does not make any submissions in relation to whether the WAC is an excise if, contrary to the submissions of the Respondents, the WAC is a tax.

6. Western Australia makes the following supplementary submissions:

   (a) a fee apparently exacted in return for the grant of rights over a public resource, which is analogous to a *profit a prendre* or royalty, is unlikely to be properly characterised as a tax;[1]

   (b) in characterising whether a charge is a fee for a service rendered or a tax, it is generally appropriate to consider whether there is a discernible relationship between the amount charged and the cost (or in some cases value) of the service provided;[2]

   (c) in contrast, in characterising whether an exaction is a *quid pro quo* for a right conferred in relation to a natural resource, or a tax, it is unnecessary, and generally of limited or no utility, to consider whether

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1 See [7] to [14] below.
2 See [15] to [25] below.

there is a discernible relationship between the amount charged and the value of the privilege provided;[3] and

(d) if, contrary to the above, it is necessary or relevant in that context to consider whether there is a discernible relationship between a fee charged and the value of the right conferred, "value" should be construed broadly to include the value to the community of the resource. Even if monopoly rents are obtained, it does not mean a price charged ceases to be recognisable as the price of what is being supplied and is an exaction having no discernible relationship to the acquisition.[4]

10 **Tax**

7. A duty of excise is an inland tax on a step in the production, manufacture, sale or distribution of goods.[5] If the water abstraction charge is not a tax, it cannot be an excise.

8. Although not an exhaustive definition, the presence of three features will be relevant to the characterisation of an exaction of money as a tax:[6]

> "a compulsory exaction of money by a public authority for public purposes, enforceable by law, and . . . not a payment for services rendered."

9. Payments for services rendered are one category of various special types of exaction which are unlikely to be properly characterised as taxes. Other
20 categories include charges for the use or acquisition of property or fees for privileges.

10. As the court observed in *Air Caledonie International v The Commonwealth*:[7]

> ". . . the negative attribute 'not a payment for services rendered' – should be seen as intended to be but an example of various types of exaction which may not be taxes even though all the positive attributes mentioned by Latham 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

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3 See [26] to [31] below.
4 See [32] to [43] below.
5 *Ha v NSW* (1997) 189 CLR 465 at 490 per Brennan CJ, McHugh, Gummow and Kirby JJ.
6 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467 citing *Matthews v Chicory Marketing Board (Vict.)* (1938) 60 CLR 263 at 276 per Latham CJ.
7 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

properly characterized as a tax notwithstanding that they exhibit those positive attributes."

11. A further category of charge which has been recognised as not comprising a tax is a fee exacted in return for the grant of rights over a public resource, which is analogous to a *profit a prendre* or royalty.

12. As Brennan J observed in *Harper v Minister for Sea Fisheries* ("*Harper's* case"):[8]

> "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 a 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 a 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.
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> . . .
>
> As the amounts payable to obtain an abalone fishing licence are of the same character as a charge for the acquisition of property, they do not bear the character of taxes. They are not duties of excise."

13. Mason CJ, Deane and Gaudron JJ agreed with the reasons of Brennan J and observed, to similar effect, that:[9]

> "What was formerly in the public domain is converted into the exclusive but controlled preserve of those who hold licences. The right of commercial exploitation of a public resource for personal profit has become a privilege confined to those who hold commercial licences. This privilege can be compared to a *profit a prendre*. 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

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8 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 335-336 per Brennan J.

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

> 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.
>
> In that context, the commercial licence fee is 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."

14. It matters not whether a charge such as the WAC is characterised as a charge for the acquisition or use of property, a fee exacted in return for the grant of rights over a public resource, which is analogous to a *profit a prendre* or royalty, or the *quid pro quo* for the right to take water. In each circumstance it is equally unlikely to be properly characterised as a tax.

15. In *Harper's* case, whilst Dawson, Toohey and McHugh JJ agreed with Brennan J, they qualified their position and placed reliance on the fact that it was "possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence".[10]

16. For the reasons that follow, such a consideration is relevant to characterising a fee as a fee for services or a tax. It is not however necessary, and generally of no or limited utility, to consider whether there is a discernible relationship in characterising whether a fee such as the WAC is a tax.

Discernible relationship

Fees for services rendered

17. In characterising whether a charge is a payment for a service rendered, in general there must be:[11]

> ". . . particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment."

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

11 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 469-470 referred to by Gaudron J in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [133]. See also *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 588 per Dawson J; *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 at 408 per Starke J.

18. If however the charge is "devoted to building up consolidated revenue"[12] or to generate revenue to finance public purposes rather than to render such services[13] it may give it the character of taxation. As Windeyer J observed in *Fairfax v Federal Commissioner of Taxation*:[14]

> ". . . taxes are ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government."

19. Whilst a tax may arise in circumstances of practical, rather than legal, compulsion to acquire a service, it cannot alter the character of the charge if it is otherwise a fee for service.[15]

20. In the process of characterisation, the presence or absence of a relationship between a charge and the cost or expenditure incurred in providing a particular service are relevant because they are evidence of whether "the payment is *for* the service".[16] It has traditionally been recognised as a significant indicator of whether a charge is a tax.[17] Therefore, for example, in *Harper v Victoria*[18], a charge payable to a Board in relation to the grading and testing of eggs was held not to be a tax. The amount of a charge was determined by reference to the cost to the Board, or the cost, as estimated by the Board, of rendering those services.[19]

21. More recently it has also been recognised that, at least in a commercial context, the existence of a discernible relationship between the value of a particular service

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12 *Harper v Victoria* (1966) 114 CLR 361 at 377 per McTiernan J; *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [89] per Gleeson CJ and Kirby J.

13 See, for example, *Matthews v Chicory Marketing Board (Vict.)* (1938) 60 CLR 263 at 281 per Rich J in which the charge imposed was to be applied to meet marketing expenses and other purposes to be undertaken in the public interest.

14 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 19 per Windeyer J.

15 *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 561-562 per Gibbs J (Barwick CJ, Stephen, Mason, Murphy and Wilson JJ agreeing), referred to by Gaudron J in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [133].

16 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [298] per McHugh J.

17 See *Harper v Victoria* (1966) 114 CLR 361 at 377 per McTiernan J; *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 204 per McTiernan J. Compare *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 568 per Mason CJ, Deane, Toohey and Gaudron JJ.

18 *Harper v Victoria* (1966) 114 CLR 361.

19 *Harper v Victoria* (1966) 114 CLR 361 at 382 per Owen J.

provided may also be relevant to whether a charge is properly characterised as a payment for a service rendered rather than a tax.[20]

22. The rationale behind the use of the existence of a discernible relationship as an indicia of a fee for service is based in part on the recognition that:[21]

> ". . . where there is no discernible relationship, it is easier to infer that there is a revenue-raising purpose behind an exaction."

23. Whilst the absence of a discernible relationship between a payment and the cost or value of particular identified services is relevant to whether a charge is properly characterised as a payment for a service rendered rather than a tax, it is not a necessary feature.

24. As the Court observed in *Air Caledonie International v The Commonwealth*:[22]

> "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."

25. In certain circumstances, such as where charges are not imposed to raise revenue but are imposed on a user pays basis for the provision of services and facilities across an entire range of users, the charges may not be taxes. This may be so even if there is no discernible relationship between the cost of the particular service provided and the charges, and the charges exceed "the value to particular users of particular services or the cost of providing particular services to particular users".[23]

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20 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 470; *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [297]-[298] per McHugh J.

21 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [310] per McHugh J.

22 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467. See also *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189; *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [91]-[93] per Gleeson CJ and Kirby J, at [135]-[140] per Gaudron J (Hayne J agreeing at [516]).

23 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [91]-[93] per Gleeson and Kirby JJ (see also [141]-[142] per Gaudron J (Hayne J agreeing at [516]) and [449]-[450] per Gummow J).

Rights over a natural resource analogous to a profit a prendre or royalty

26. In contrast to fees for services rendered, in characterising whether an exaction such as the WAC is a *quid pro quo* for a right conferred in relation to a natural resource, or a tax, the better view is that it is unnecessary, and generally of limited or no utility, to consider whether there is any discernible relationship between the amount charged and the value of the privilege provided.

27. In *Harper's* case[24], whilst Dawson, Toohey and McHugh JJ attached significance to the ability to discern a relationship between the amount paid and the value of the privilege conferred by the licence,[25] Mason CJ, Brennan, Deane and Gaudron JJ implicitly did not. Rather, they concluded that the exaction was not a tax without any apparent need to also consider whether the charge exhibited a discernible relationship with value.[26]

28. Whilst the observations of Dawson, Toohey and McHugh JJ have subsequently been referred to by other members of the Court in *Airservices Australia,*[27] it was in the materially different context of whether fees for services were properly to be characterised as taxes.

29. Whereas in the context of fees for services such a test may assist to characterise whether a fee is for a particular service or for a revenue-raising purpose and a tax,[28] such a distinction is likely to be of no or limited assistance in the context of a charge for rights over a public resource.

30. Whilst legislative purpose generally has limited relevance to the characterisation process,[29] an objective of raising revenue for expenditure on general public purposes is one of the positive characteristics of a tax.[30] It is not however a determinative consideration.[31] That is so particularly in the case of a charge for

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24 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.
25 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 336-337.
26 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325-336.
27 *Airservices Australia* at [136] per Gaudron J (Hayne J agreeing at [516]), at [293]-[298] per McHugh J, Gummow J at [446]-[447].
28 See *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [311] per McHugh J.
29 *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 570. See also *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [374] per Gummow J.
30 *Harper v Victoria* (1966) 114 CLR 361 at 377 per McTiernan J.
31 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [91] per Gleeson CJ and Kirby J.

rights over a public resource. Of its nature, a charge of that type represents "the price exacted by the public, through its laws, for the appropriation of a limited public natural resource".[32] That the charge may objectively be determined to have a revenue raising purpose does not alter its essential character as a price paid for that valuable right and convert it into a tax. In those circumstances consideration of a discernible relationship test to ascertain if there is a revenue raising purpose is unlikely to advance the characterisation process.

31. That is not to deny that a circumstance might arise in which a charge, although in form a charge for a service or the appropriation of a natural resource, is in reality a tax.[33] The Court is required to give consideration to the substance and effect of the law, as well as its terms.[34]

Operation of no discernible relationship test if applicable

32. If, contrary to the above, it is necessary or relevant to characterisation to consider whether there is a discernible relationship between a fee charged and the value of a right conferred over a natural resource, the following considerations arise.

33. The type of relationship between the fee and value of the right that will be sufficient to be recognised as a discernible relationship does not admit of precise description and will depend on the circumstances of the case.[35]

34. The inexactitude of the degree of connection that will be sufficient is illustrated by *Harper*'s case[36]. Whilst the members of the Court who considered the question were satisfied that there was a discernible relationship, it is not immediately apparent what that discernible relationship was. Whilst for the first two years being considered the fee was proportionate to the number of abalone that the licence holder was authorised to take, for the third year, it was based on a tiered system of flat fees – $28 200 where the quantity of abalone permitted to be

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

33 See, for example, *Attorney-General for NSW v Homebush Flour Mills* (1937) 56 CLR 390.

34 *Ha v NSW* (1997) 189 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ.

35 See, for example, the observations of Gaudron J in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [135]-[140] (Hayne J agreeing at [516]).

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

taken did not exceed 15 tonnes and $40 000 where the licence permitted the taking of a greater amount.[37]

35. If the charge is relatively small in comparison to, or does not exceed, the value of the right, it is indicative that there is a discernible relationship or, in any event, that the charge is not a tax.[38]

36. In certain circumstances the size alone of an impost may require the characterisation of the impost as a tax because it could not reasonably be regarded as a fee.[39]

37. In the context of characterising whether a fee is for a service provided or a tax, it was suggested by McHugh J in *Airservices*[40] that in the context of a natural monopoly, where no supply side competition exists, the relevant measure of value may be "the cost of providing, or the expenses incurred in providing, the service", possibly allowing for a reasonable rate of return on assets of a "cost of a capital nature".[41] Justice Gummow also considered the question of the means by which value was to be assessed in a situation where there was no market value for the exchange of the subject matter, settling on a similar costs based measure.[42] He distinguished *Harper*'s case[43] noting that in that case the Court was able to consider market prices and it was not necessary to consider non-market values or "the relationship between the amount paid and the costs of administering the licensing system".

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37 See *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 327-329 for an explanation of the relevant formulae and fees charged. Gummow J observed in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [447] that in *Harper's* case the statutory formula for the amount of each abalone licence turned on the gross value of abalone and the value of the privilege conferred was referable to the market value of the abalone meat and the abalone shell. The formula differed however in each of the three years under consideration.

38 This is consistent with the Court's general approach to characterisation in the fee for services cases. See, for example, *Harper v Victoria* (1966) 114 CLR 361. See also *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 , *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

39 See *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562 per Gibbs J (Barwick CJ, Stephen, Mason, Murphy and Wilson JJ concurring) and *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 647 per Wilson J, referred to by Gaudron J in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [135].

40 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [447] per Gummow J.

41 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [299], [316]-[318] per McHugh J.

42 *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 at [443]-[450] per Gummow J.

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

38. Whilst a costs-based approach to value may well be apposite in the context of ascertaining whether a pricing structure can be characterised as a fee for a service or employed for a revenue-raising purpose and therefore a tax, for the reasons previously given, that does not advance the situation in the present context.

39. In principle, there is no reason why s.90 of *The Constitution* precludes a government from charging such price as it considers to be appropriate, and is able to obtain, as the price for the sale of property that it owns. So too, in principle, there is no reason why s.90 precludes a government from charging such price as it considers to be appropriate, and is able to obtain, as the *quid pro quo* it may charge for the appropriation of a natural resource. Even if a charge for the appropriation of a natural resource reflects a monopolistic element it does not alter the character of the charge from being the *quid pro quo* for the valuable right obtained into a tax. As Keane CJ correctly observed:[44]

> "The exercise of a monopoly power to charge what the market will bear does not mean that the price charged ceases to be recognisable as the price of what is being supplied, rather than an exaction having no discernible relationship to the acquisition."

40. In considering whether a discernible relationship exists, "value" should be construed broadly. It should include the value to the community of a finite natural resource and recognise that assessment of that value may involve normative judgments rather than strictly empirical assessments. That broader considerations of value may be relevant was apparently accepted by Dawson, Toohey and McHugh JJ in *Harper's* case. After concluding that it was possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, they stated that:[45]

> "In discerning that relationship it is significant that abalone constitute a finite, renewal resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence."

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44 *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541 at [87] per Keane CJ.

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

41. There is a limited role for the judiciary in enquiring into such matters. As Hayne, Kiefel and Bell JJ observed in *ICM Agriculture v the Commonwealth*, albeit in a different constitutional context:[46]

> "The determinative issue in this case is constitutional. That issue neither requires nor permits consideration of any of the large and difficult policy questions that may lie behind the legislative and executive acts which give rise to the proceeding."

42. As in the case of fees for services, the existence or absence of a discernible relationship is not necessarily determinative of characterisation.[47]

10 **Water Charge like the WAC**

43. A water charge like the WAC is not properly characterised as a tax. Rather, it is properly characterised as either a charge for the acquisition or use of property, a fee exacted in return for the grant of rights over a public resource, which is analogous to a *profit a prendre* or royalty, or the *quid pro quo* for the right to take water. As with the price obtained for the sale of property, a government is entitled to place a value on that right and to reflect it in the charge imposed in exchange for that right. That the charge may be greater than that which could be achieved in a more competitive market does not alter the character of the right. Even if it is necessary or relevant to identify a discernible relationship between
20 the charge and the value of the right, one is readily apparent given the evident demand for, and value to the community of, such a scarce resource.

DATED: 3 June 2011

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46 *ICM Agriculture v The Commonwealth* (2009) 240 CLR 140 at [90] per Hayne, Kiefel and Bell JJ.

47 *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467. See also *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189; *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133.