IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C2 of 2011

ON APPEAL FROM THE FULL COURT, FEDERAL COURT OF AUSTRALIA

BETWEEN:

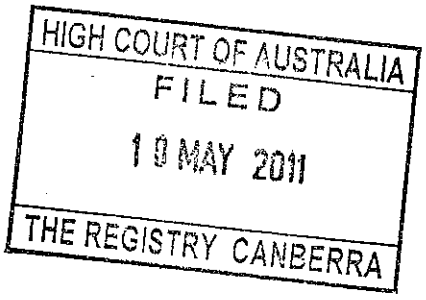
QUEANBEYAN CITY COUNCIL
Appellant

ACTEW CORPORATION LTD
First Respondent

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent

APPELLANT'S SUBMISSIONS

(Re Water Abstraction Charge)



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PART I: PUBLICATION OF SUBMISSIONS

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

PART II: STATEMENT OF ISSUES

2. These proceedings concern the validity of two ACT levies:

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

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

3. Two appeals are before this Court, C2/2011 and C3/2011. Each of the ACT and ACTEW appealed from the primary judge's judgment that the UNFT was invalid; and the Appellant (**QCC**) cross-appealed in the ACT's appeal against the primary judge's rejection of its challenge to the validity of the WAC. In the Full Court, Keane CJ and Stone J dismissed the cross-appeal on the WAC (Perram J dissenting), and all members of the Court allowed the appeals with respect to the UNFT.

4. It is convenient to deal with the challenge to the WAC in this appeal, and the challenge to the UNFT in the C3/2011appeal. The following issues arise in relation to the WAC:

   4.1. Can a governmental levy for access to a natural resource avoid characterisation as a tax if it has no discernible relationship to the value of what is acquired or obtained?

   4.2. If such a "discernible relationship" requirement does apply, will it necessarily be satisfied if the government charges any rate that the market will bear, including monopoly rents?

   4.3. Did the evidence establish here that there is no discernible relationship between the WAC (as imposed from 1 July 2006) and the value of what was acquired or obtained?

PART III: SECTION 78B NOTICES

5. QCC has served notices in compliance with s 78B of the *Judiciary Act 1903*.

PART IV: JUDGMENTS BELOW

6. Buchanan J's judgment is reported as *Queanbeyan City Council v ACTEW Corp Ltd* (2009) 178 FCR 510. The Full Federal Court's judgment is reported as *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541.

PART V: MATERIAL FACTS

7. QCC adopts the account by the primary judge (Buchanan J) of the legal and factual context as set out at [3]-[52] of his Honour's judgment. The following points are noted.

8. The Second Respondent (the **ACT**) introduced the WAC, at 10c/kl, from 1 January 2000. The WAC was established by Ministerial determinations pursuant to the 1998 WR Act and subsequently the 2007 WR Act, as explained in the trial judgment at [18]-[24]. Buchanan J noted at [24] that, if QCC was correct in its s 90 challenge, the

Minister was not authorised to set the fee at the relevant level (in other words the determinations would be ultra vires the authorising statutes).

9. The fee was levied on untreated water taken from the ACT catchments. The main payer of the levy was the First Respondent (**ACTEW**), a government-owned utility that delivers potable water in the ACT. The levy was imposed by reference to the amount of water delivered (which for ACTEW was less than the amount abstracted due to losses in the distribution network).

10. ACTEW also supplies QCC with potable water, under contract,[1] for delivery by QCC to urban users within Queanbeyan.

11. The WAC was increased by the ACT as follows:

    11.1. to 20c/kl with effect from 1 January 2004;[2]

    11.2. to 25c/kl with effect from 16 August 2005;[3] and

    11.3. to 55c/kl with effect from 1 July 2006.[4]

12. From 1 July 2008, the WAC was reduced to 51c/kl, reflecting a change in the calculation method, with the WAC imposed on the amount of water abstracted rather than delivered.[5] The change was designed to be "revenue neutral".[6]

13. At first instance, QCC challenged the validity of each increase beyond the initial 10c/kl. QCC's appeal (to the Full Federal Court and to this Court) was and is confined to the increase of 30c/kl (the so-called new "Water Fee") imposed from 1 July 2006, which took the WAC to 55c/kl and then 51c/kl.

14. In September 1998, the ACT asked its Independent Pricing and Regulatory Commission (the **IPARC**) to advise on establishing a WAC "that reflects sound economic and environmental principles": Buchanan J at [25]. In May 1999, IPARC recommended a level of 10c/kl, noting that ideally water charges "would include all costs, including the environmental costs, of resource use": Buchanan J at [26].

15. In May 2003, after announcing a proposal to increase to WAC to 20c/kl, then to 25c/kl, the ACT Treasurer asked IPARC's successor, the Independent Competition and Regulatory Commission (the **ICRC**) for further advice: see Keane CJ at [24]; ICRC Report at 33.

16. The ICRC reported in October 2003, stating that it had received legal advice as to the validity of such a fee and that it was proceeding on the basis that the quantum of the

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1 Pricing Agreements between ACTEW Corporation Ltd and Queanbeyan City Council for the Supply of Bulk Water for the years 1999/00, 2000/01, 2001/02, 2002/03 2003/04, 2004/05, 2005/06, 2006/07, 2007/08 and 2008 to 2013.

2 *Water Resources (Fees) Revocation and Determination 2003 (No 2)*, in effect from 1 January 2004 to 1 July 2004; and *Water Resources (Fees) Determination 2004*, in effect from 1 July 2004 to 23 April 2005; *Water Resources (Fees) Determination 2005 (No 1)*, in effect from 23 April 2005 to 16 August 2005.

3 *Water Resources (Fees) Determination 2005 (No 2)*, in effect from 16 August 2005 to 30 June 2006.

4 *Water Resources (Fees) Determination 2006 (No 1)*, in effect from 1 July 2006 to 30 June 2007; *Water Resources (Fees) Determination 2007 (No 1)*, in effect from 1 August 2007 to 30 June 2008 (s 4(1) of the *Water Resources (Validation of Fees) Act* 2008 (ACT) extended DI 2006-0138 to 31 July 2007).

5 *Water Resources (Fees) Determination 2008 (No 1)*, in effect from 1 July 2008 to 20 June 2009; *Water Resources (Fees) Determination 2009 (No 1)*, in effect from 1 July 2009.

6 *Water Resources (Fees) Determination 2008 (No 1)*, Explanatory Statement. See also the primary judgment, at [7]. The change is explained in the ACT Government submission to the ICRC inquiry into water and wastewater pricing, 2008-09 to 2012-13, 30 November 2007, p 1867.

charge should "reflect discernible and measurable costs to government (and therefore the community)", that these costs "can include social and environmental as well as economic costs", and that "the charge should not be levied for revenue raising purposes".[7] The ICRC calculated that an amount of 17.7c/kl was supportable, with approximately a further 2c/kl supportable by reference to bushfire remediation.[8]

17. ACT Government policy had been to set the WAC by reference to the cost of provided water to consumers, but this policy changed from the 2006/7 financial year: Keane CJ, [31]. The ACT Budget papers for that year, announced in May 2006, stated that:

> From 1 July 2006 the Government will introduce a water fee to be incorporated into the Water Abstraction Charge (WAC), which will increase the WAC by 30 cents per kilolitre. As well as providing the Government with a return on a valuable resource, this initiative will assist in managing demand for water.

18. The ACT led expert evidence from Prof Grafton on the value of the ACT's untreated water. QCC filed responsive evidence from Dr Beare. Prof Grafton's evidence established that the market value of untreated water in the nearest downstream market (in the literal sense – ie the Murrumbidgee River in the irrigation area) was substantially less than the level of the WAC at all material times, as follows:

Period	**Price**	**WAC**
01.01.04 – 31.12.04	4.1c/kl	20c/kl
01.01.05 – 30.06.06	1.9c/kl	25c/kl [including period when the new 30c/kl water fee was actually announced]
01.07.06 – 30.06.08	16.8c/kl	55c/kl
01.07.08 – date of report (01.09.08)	26.8c/kl	51c/kl [different method of calculation]
1.9.08 to December 08	About 16.8c/kl	51c/kl

19. The ACT's expert indicated that the rise in the figures in 2006-2008 reflect the major drought ("the Big Dry"), when 2006 and 2007 "was the lowest ever recorded two-year inflow period in the River Murray".[9] Prof Grafton also argued that other components could be included in the valuation of the water, each of which was disputed by QCC. The trial judge (Buchanan J) found that all of this evidence was irrelevant: at [88].

20. With regard to demand management, the documentary evidence established that water restrictions had proved highly effective in regulating water demand within the ACT during the drought, reducing demand by 20-40%.[10] Prof Grafton said that elasticity of demand for water is low (-0.10):[11] for price to have any significant effect on demand, a very large impost is necessary. Conversely, the current 51c/kl WAC – taking account that price consumers pay much more than 51c/kl – reduces demand by 1.3%.[12]

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7 Report at 16, reflected also at 3.

8 Report at 14.

9 First Grafton Report, 1.9.2008, at [31].

10 Noted by Beare, 3.12.2008, at [43] and [116(a)].

11 First Grafton Report, 1.9.2008, at [45].

12 Beare, 3.12.2008, at [116(a)]; see also at [43].

21. QCC's position in its challenge was (and is) that:

    21.1. the WAC, at least from 1 July 2006, imposed an excise;

    21.2. as the decisions were ultra vires, no WAC has been imposed on ACTEW since 1 July 2006 (the previous determination setting the level of the WAC did not operate after 30 June 2006: *Water Resources (Fees Determination) 2006 (No 1)*, cl 3 and the heading to Column 4);

    21.3. ACTEW is only entitled, under its agreements with QCC, to recover from QCC charges validly incurred by ACTEW; and

    21.4. as the WAC was passed through to QCC by ACTEW as a distinct and clearly identifiable charge, there has been a total failure of consideration founding an action for money had and received of the kind discussed in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

22. The ACT and ACTEW disputed that the WAC, at any level, imposed a tax. The WAC was said to represent a fee for the acquisition of, or access to, property and a limited natural resource (the "fee for a good" argument). They argued that the "discernible relationship to value" issue did not arise for such a fee and the ACT was entitled to charge what the market could bear, including monopoly pricing. The ACT also argued there was a discernible relationship to value, and relied on of Prof Grafton's evidence.

23. Buchanan J made the following material findings (not overturned by the Full Court):

    23.1. ACTEW was required as a matter of practice and commercial reality to take water under the control of the ACT in quantities determined by the consumption of those to whom ACTEW supplied water, in circumstances where consumers have no real choice but to use water: at [110] and [117];

    23.2. no explanation or calculation of the kind earlier carried out by the IPARC or by the ICRC was provided by the ACT government to justify the 5c/kl increase to the WAC effective from 1 July 2005 or the further 30c/kl water fee incorporated into the WAC from 1 July 2006: at [46];

    23.3. it was hard to see the WAC from 1 July 2006 as having any relationship to the value of water to ACTEW: at [116];

    23.4. the principal and plain purpose of the 30 c/kl increase in the WAC was to raise additional revenue: at [46] and [108];

    23.5. a further element in the ACT's decision to increase the WAC from 1 July 2006 was an objective of assisting in managing demand for water: at [121];

    23.6. the WAC was intended to be, and was, passed on to domestic consumers: at [116];

    23.7. as from 1 July 2006, the WAC had the positive characteristics of a tax: at [111];

    23.8. if the WAC, or any part of it, was a tax it would be a duty of excise because it would be a tax on a step in production and distribution of potable water intended to be, and actually, passed on to customers and consumers: at [126].

24. However, Buchanan J held that the WAC was not a tax, and thus QCC's case was not made out. Although his Honour took the view that "an exaction under colour of a charge for the use or acquisition of property may ... be vulnerable to characterisation as a tax if, or to the extent that, it has no discernible relationship with the value of what is acquired": at [83]; he went on to hold that:

24.1. the ACT was entitled to tap the "unrealised value" of the water it controlled by using its "monopoly power" to increase prices, and this use of power "raises political and policy questions rather than legal ones": at [118]-[120] and [125];

24.2. the claimed ACT objective of raising water prices to manage demand is a legitimate objective and there was "nothing on the face of the explanation given to suggest that it ought not be accepted as genuine": at [121]-[124].

25. A majority of the Full Court upheld the finding that the WAC was not a tax:

25.1. Keane CJ held, contrary to Buchanan J's view, that there was no occasion to consider the "discernible relationship" issue with respect to a charge for gaining access to a public resource: at [81]; and agreed with Buchanan J that an exercise of monopoly power to exact monopoly profits did not establish an absence of discernible relationship to the value of what is acquired: at [87]-[89] and [92].

25.2. Stone J appeared to agree with the approach of Buchanan J: at [174]-[176].

25.3. Perram J dissented, holding that the discernible relationship requirement did apply: at [190]-[191]; and that this could not be answered simply by reference to what the market would bear in a monopoly situation: at [194]-[196]. His Honour would have remitted the matter to Buchanan J to make determinations on the expert evidence: at [197]-[198].

PART VI: APPELLANT'S ARGUMENT

26. QCC's submissions will address the issues in the following order:

A. Legal principles relating to s 90.

B. The significance of a revenue-raising purpose.

C. The discernible relationship requirement.

D. Monopoly pricing.

E. The absence of any discernible relationship here.

A. LEGAL PRINCIPLES RELATING TO SECTION 90

27. Section 90 of the Constitution applies to Territory laws[13] and relevantly provides:

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

28. An excise duty is "an inland tax on a step in production, manufacture, sale or distribution of goods".[14] An excise must thus be a tax.

29. In *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 466-467, the High Court noted the three features regarded as sufficient to give a levy the character of a "tax": namely that the levy was compulsory; was for public purposes; and was enforceable by law. Buchanan J found that the positive attributes of a tax were made out: see at [111]. The main issue was whether the WAC could be characterised as a fee for a good or privilege and thus not a tax.

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13 *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248.

14 *Ha v State of New South Wales* (1997) 189 CLR 465 at 490 (Brennan CJ, McHugh, Gummow and Kirby JJ); see also *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 587 (Mason CJ, Brennan, Deane and McHugh JJ);

30. Characteristically, duties of excise are likely to be borne by consumer of the relevant goods, even if applied at the point of production or in the course of distribution.[15]

31. The object of the exclusive power given by s 90 is "to give the Commonwealth a real control over the taxation of commodities".[16]

32. Section 90 is one of a series of provisions, the purpose of which "was to ensure that differential taxes on goods and differential bonuses on the production and export of goods should not divert trade or distort competition", and to ensure the Commonwealth Parliament has "effective control over economic policy affecting the supply and price of goods throughout the Commonwealth".[17] In *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [12], Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ said:

> In *Ha v New South Wales* ... the Court recognised ... 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.

33. The Commonwealth's exclusive power to impose customs and excise duties means that it "can protect and stimulate home production by fixing appropriate levels of customs and excise duties", or "it can lower the level of domestic prices by lowering customs and excise duties".[18]

34. The object of securing real Commonwealth control over the taxation of commodities "provides strong support for a broad view of what is an excise, one which embraces all taxes upon or in respect of a step in the production, manufacture, sale or distribution of goods, for any such tax places a burden on production".[19] Thus:

> A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production.[20]
>
> A tax on distribution, like a tax on production or manufacture, has a natural tendency to be passed on to purchasers down the line of distribution and thus to increase the price of, and to depress the demand for, the goods on which the tax is imposed.[21]

35. Here, Buchanan J correctly accepted that potable water is a good/commodity to which s 90 can apply: at [162]. The WAC has been passed on in full to consumers, as was intended: at [116].

B. THE SIGNIFICANCE OF A REVENUE-RAISING PURPOSE

36. The question whether an impost is a tax – as opposed to merely being a fee for service or such like – is one of constitutional characterisation: see, for example, *Airservices*

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15 *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129 (Dixon CJ, McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ); *Hematite Petroleum Pty Ltd v State of Victoria* (1983) 151 CLR 599 at 632 (Mason J); *Phillip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 435, 436 (Mason CJ and Deane J); *Capital Duplicators [No 1]* (1992) 177 CLR 248 at 278 (Brennan, Deane and Toohey JJ).

16 *Parton v Milk Board (Vict)* (1949 80 CLR 229 at 260 (Dixon J); *Ha* (1997) 189 CLR 465 at 495 (Brennan CJ, McHugh, Gummow and Kirby JJ).

17 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585-586 (Mason CJ, Brennan, Deane & McHugh JJ).

18 *Hematite* (1983) 151 CLR 599 at 631 (Mason J).

19 *Hematite* (1983) 151 CLR 599 at 632 (Mason J).

20 *Parton* (1949) 80 CLR 229 at 260 (Dixon J).

21 *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ). See also *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 13 (Barwick CJ).

Australia v Canadian Airlines International Ltd (1999) 202 CLR 133 at [88]. Further, because s 90 involves a constitutional guarantee, it is important to consider the substantial and practical operation of the legislation.[22]

37. For taxation, there is an additional, purposive consideration. The Court has said that a governmental purpose of providing "a source of additional revenue" will advance the conclusion that the charge in question is a tax.[23] For example, in *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [89] and [91], Gleeson CJ and Kirby J said:

> [89] What is it that would give a charge the character of one which was such as to amount to taxation? The most likely possibility would be that the charge was "devoted to building up consolidated revenue" ...
>
> [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.

38. Of course, any levy reflects an intention to raise revenue; but, when one is seeking to distinguish a tax from a fee for service or such like, the question is whether the intention of the lawmaker goes beyond merely seeking to recoup costs or value and extends to raising additional funds for general revenue. Put another way, the issue is whether there is a net intention to raise revenue. Thus, in *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 19, Windeyer J said: "Taxes are ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government." The expense of administering legislation is not a valid justification, of itself, for imposing a compulsory charge.[24]

39. If a purpose of revenue-raising is an *indicium* of a tax, there is plainly a need to go behind the form of legislation to look at substance and purpose. Government levies – of any kind – may be taxes even if they are described as fees of another kind: *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 332 (Brennan J).

40. Because the constitutional process of characterisation is approached as a matter of substance, no narrow view can be taken of the materials that are relevant. A government may wish not to disclose that it has, for example, a revenue-raising purpose. Such a purpose may have to be inferred from the surrounding circumstances.[25] Those circumstances no doubt include all the usual extrinsic materials that may assist in ascertaining the meaning of a measure,[26] including second reading speeches.[27]

41. It is the purpose of the law-maker that is relevant to characterisation where purpose is material. Where the measure in question is an Act of a legislature, it is the legislature's intention that is relevant. In this case, the law-maker that introduced and increased the

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22 *Ha* (1997) 189 CLR 465 at 498.

23 *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580 (Barwick CJ, with whose reasons McTiernan, Menzies, Windeyer and Owen JJ agreed); *Harper v Victoria* (1966) 114 CLR 361 at 377 (McTiernan J).

24 *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189 at 200-201 (Dixon CJ); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 78-79 (Mason J).

25 Note *Airservices Australia* (1999) 202 CLR 133 at [312]-[313] (McHugh J).

26 Note *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

27 Note *Sportodds Systems Pty Ltd v New South Wales* (2003) 133 FCR 63 at [39]-[41] (FFC).

WAC was the ACT Executive. It is the ACT Executive's purposes that are to be ascertained as part of the constitutional characterisation exercise as applied to the WAC.

The revenue-raising purpose here

42. Buchanan J found that the 30 c/kl increase in the WAC from 1 July 2006 resulted from a political decision to raise additional revenue: [46] and [108]; see paragraph 23.4 above.

43. The ACT had commissioned first IPARC in 1998, then the ICRC in October 2003, to provide advice on the level of and methodology for the WAC. IPARC found a 10c/kl levy could be justified in 1999, and in 2003 the ICRC found just under 20c/kl was supportable. However, when the decision was taken to increase the WAC from 25c/kl to 55c/kl on 1 July 2006 in the context of the ACT's 2006-07 budget, no attempt was made to explain or justify how that substantial increase had been calculated, nor was there any reference to the ICRC: noted by Buchanan J at [44]. The budget papers referred to the 30c/kl increase as a new "water fee": Buchanan J at [42].

44. There is no evidence that the additional Water Fee of 30c was added to the WAC from 1 July 2006 because of any assessment of the value of the water or the cost of providing access to the water. Rather, the 120% increase in the WAC from 25c/kl to 55c/kl (175% above the level found to be supportable three years earlier by the ICRC), with an express revenue-raising intent, signals a tax.

45. The revenue from the WAC is not hypothecated to any particular service or services, but is paid into the ACT's consolidated revenue. A Department of Treasury email of 21 November 2006, after noting that "the WAC is not a hypothecated revenue stream", stated: "WAC revenue therefore accrues to consolidated revenue to be spent on a range of Government services such as education, health, transport, housing and welfare support".[28] That a levy is "devoted to building up consolidated revenue" is an indicator that it is a tax.[29]

46. Further, in June 2006, a Budget fact sheet on revenue (prepared for the 2006-07 Budget) stated:[30]

> What's in the [2006-07] Budget on revenue?
>
> The ACT Government will:
>
> Incorporate a Water Fee of 30 cents per kilolitre into the Water Abstraction Charge.

47. The ACT Treasurer informed the Legislative Assembly, when introducing the 2006-07 Budget, that the WAC would be increased by 30c/kl to 55c/kl:[31]

> As a revenue measure and also a device for moderating demand, a Water Fee of 30 cents per kilolitre will be incorporated into the Water Abstraction Charge.

48. The 2006-07 Budget Paper No 3 (Revenue and Forward Estimates) stated:[32]

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28 Email from Jason McNamara (ACT Department of Treasury) to Mr Andrew Gordon dated Friday, 17 November 2006 9:45am. See also answer to question on notice, prepared in Department of Treasury: Department of Treasury email of 23 November 2006 from Ellen Russell to Jason McNamara later set out in Answer to Question on Notice No. 1387 from the Chief Minister to Mr Richard Mulcahy MLA dated 4 December 2006.

29 *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580 (Barwick CJ, with whose reasons McTiernan, Menzies, Windeyer and Owen JJ agreed); *Harper v Victoria* (1966) 114 CLR 361 at 377 (McTiernan J); *Airservices Australia* (1999) 202 CLR 133 at [89] (Gleeson CJ and Kirby J).

30 ACT, Budget 2006-2007, Fact Sheet #F2: Revenue, June 2006.

31 ACT, Budget 2006-2007, Budget Speech, page 24 (emphasis added).

> From 1 July 2006 the Government will introduce a water fee to be incorporated into the Water Abstraction Charge (WAC), which will increase the WAC by 30 cents per kilolitre. As well as providing the Government with a return on a valuable resource, this initiative will assist in managing demand for water.
>
> The initiative will increase revenue from the Water Abstraction Charge by $14 million in 2006-07, increasing to $14.3 million in 2009-10 ...
>
> Revenue from the Water Abstraction Charge in 2005-06 is estimated at $13.109 million and is forecast to increase to $27.163 million. This increase mainly reflects the introduction of the water fee.

49. A Department of Treasury minute prepared before the 2006-07 Budget referred to Treasury "calculations ... that if $15 million were to be raised through an increase in the WAC the charge would increase from the current 25 cents per kilolitre to around 60 cents per kilolitre". The minute points to achievement of a particular level of revenue as a factor driving the calculation of the increase.[33]

50. The alteration to the method of calculation from 1 July 2008 has not changed the explanations or justifications for the 30c increase.[34]

51. The ACT offered two main explanations or justifications for the substantial increase in the WAC: raising revenue and moderating demand. Buchanan J was correct to conclude that the revenue-raising purpose was the principal objective of the ACT. In any case, any demand management purpose also points towards the 55/51c/kl level of the WAC being a tax: see Part F of these submissions below.

52. The finding that the ACT's principal purpose for adding the 30c/kl Water Fee to the WAC was revenue-raising is significant in considering whether the WAC as imposed at the 55/51c/kl level should be characterised as a tax. This factor is intimately tied to the "discernible relationship to value" issue which was at the centre of the dispute between the parties below (see Parts C and E of these submissions below).

C. THE DISCERNIBLE RELATIONSHIP REQUIREMENT

53. As noted above, Buchanan J and Perram J held that a fee for acquisition of property, or the privilege of accessing a natural resource, can be a tax if there is no discernible relationship to the value of what was acquired. Keane CJ disagreed. The position of Stone J on this issue is unclear.

54. The need to establish such a relationship to distinguish between fees for services and taxes has been implicit in the law for some time: see, for example, *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189, discussed below. The need was made explicit in *Air Caledonie* (1988) 165 CLR 462, at 466-467, where the Court said that in characterising a measure as a tax, the negative notion of "not a payment for services rendered" was "but an example of various special types of exaction which may not be taxes". The Court offered "a charge for the acquisition or use of property" as another example. The Court then said:

> 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

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32 ACT, 2006-07 Budget Paper No 3, Revenue and Forward Estimates, page 42.

33 See also Budget Speech, page 25; Budget brief June 2006.

34 The change is explained in ACT Government submission to the ICRC inquiry into water and wastewater pricing, 2008-09 to 2012-13, dated 30 November 2007.

> 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.

55. The relevance of the "discernible relationship" requirement to characterising charges for access to natural resources was expressly identified in the plurality judgment of Dawson, Toohey and McHugh JJ in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 336, where their Honours described it as the "[m]ost important" consideration in concluding that the fee at issue was not an excise.

56. As Buchanan J explained at [77] and [82], the other judgments in *Harper* are not inconsistent with this requirement, especially when it is understood that, for the measure in that case, a discernible relationship to value was made manifest on the face of the legislative measure, and no argument was put suggesting that the requirement was not made out. (Note also McHugh J in *Airservices Australia* (1999) 202 CLR 133 at [297].) It is notable that Mason CJ, Deane and Gaudron JJ stated that the fee at issue in *Harper* "is not a mere device for tax collecting": at 325; indicating that such a fee might still be capable of characterisation as a tax.

57. Furthermore, four members of this Court in *Airservices Australia* referred approvingly to the judgment of Dawson, Toohey and McHugh JJ: see at [136] (Gaudron J, with Hayne J agreeing at [516]), [445]-[447] (Gummow J), and [293] and [297] (McHugh J). Gaudron J said "that a charge bears a close relationship with the cost or value of a service or the grant of a valuable right has been seen as indicating that it is not a tax".

58. In declining to follow the clear and considered dicta in *Harper*, not inconsistent with any High Court decision or dicta, and subsequently approved by four justices, Keane CJ exceeded the proper role of an intermediate court of appeal; cf Perram J at [191]. The Chief Justice was, in any event, in error.

59. There is no reason in principle to distinguish fees for goods or resources from fees for services. The question for the Court in each case is whether an impost can be characterised as a fee for a service or a good, and not as a tax. If the fee bears no discernible relationship to the value of the benefit that is acquired, then it cannot properly be characterised as a fee for the benefit[35] – rather, it is both a fee for the benefit and an additional tax. Where "there is no discernible relationship, it is easier to infer that there is a revenue-raising purpose behind an exaction".[36]

60. If the ACT had charged an amount related to the value of the water, then imposed an additional levy on sales/transfers of water called the "Water Goods Tax" on top, there would be little doubt that the latter was a tax. Describing the levy instead as a "Water Fee" and including it in the nominal sale price makes no difference in constitutional terms. *Attorney-General for NSW v Homebush Flour Mills Pty Ltd* (1937) 56 CLR 390 illustrates that s 90 cannot be circumvented by such drafting devices.[37] Keane CJ distinguished that case in part (at [87]) because here "the power to exact the monopoly profit is not an artificial construct of the legislative regime under which the charge was exacted". But the ACT's control over its water resources itself is the creation of statute,

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35 Note *Airservices Australia* (1999) 202 CLR 133 at [298] (McHugh J).

36 *Airservices Australia* (1999) 202 CLR 133 at [310] (McHugh J).

37 Cf also, in another context, *Guy v Baltimore*,100 US 434 at 443 (1879) relating to wharfage charges, as referred to in *Betfair* (2008) 234 CLR 418 at [42].

even if such dominion has long been asserted: see s 13 or the 1998 WR Act, and s 7 of the 2007 WR Act.

61. Keane CJ's distinction would mean that there is a type of goods – natural resources controlled by States/Territories – to which s 90 does not apply, removing a large portion of national economic activity from the protective reach of the constitutional prohibition.

62. That point links to the purposes of s 90. If a State or Territory governmental levy, imposed on sale/transfer of a resource, goes beyond charging for the value of the resource, that will impact on sales of the commodity. The ACT's secondary explanation of the measure was "demand management". That demand-dampening effect:

10 62.1. undermines the Commonwealth's real control over the taxation of commodities – were the Commonwealth to impose a national tax on such sales or transfers, it would recoup less from within the relevant State/Territory than it would otherwise expect because of the effect of the double taxation;

62.2. impedes the creation and fostering of national markets, to which s 90 (with s 92) was directed; and

62.3. undermines the Commonwealth's ability to protect and stimulate national home production by fixing appropriate levels of custom and excise duties.

63. That a charge for a natural resource is "akin to a profit a prendre or a royalty" does not establish that it cannot, in whole or part, also be characterised as a tax: contra Keane CJ
20 at [81]. That logic would equally suggest that, if a fee can be said to be akin to a fee for service then it is not a tax; yet this Court has rejected that view, reflecting its concern for form over substance.

D. MONOPOLY PRICING

64. QCC did not succeed before Buchanan J because, in his Honour's view, the ACT was entitled to tap into the "unrealised value" of the water it controlled by using its "monopoly power" to increase prices, and that use of power "raises political and policy questions rather than legal ones": at [118]-[120] and [125]. In other words, if the ACT could achieve the relevant price in the market into which it sold, then that was sufficient to establish a discernible relationship to value. His Honour accepted the ACT's
30 argument that it was entitled to charge whatever it chose – and whatever the market would bear – in the exploitation of its resource. Keane CJ accepted that point at [86]-[92]. Stone J seemingly agreed with the trial judge (Buchanan J) at [174]-[176].

65. To accept that a State/Territory is entitled to charge monopoly rents for a commodity, and that its ability to do so in the marketplace is simply the achievement of "unrealised value", is in truth to reject the application of the "discernible relationship to value" requirement in this area. The contradiction is shown by considering the key passage from *Air Caledonie* (1988) 165 CLR 462 at 466-467:

> If the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with
40 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.

66. The issue only arises in the context of a practical monopoly – it arises when the acquirer "is given no choice about whether or not he acquires the services". In that light, to accept that, if the government is merely charging monopoly rents, that is sufficient of itself to satisfy the "discernible relationship" requirement, is to miss the very point of the question. So much was noted by Perram J at [195]:

> But the *Air Caledonie* test begins with the assumption of a monopoly in goods or services and then poses the question of whether the impost in question exceeds their value. If the learned trial judge be right then the *Air Caledonie* test can never be failed for there will always be a discernible relationship between the exaction and the value of the service – they will be the same. On this view, the rule has consumed any possibility of being failed.

67. There would have been no sense in Dawson, Toohey and McHugh JJ stating in *Harper* that the "[m]ost important" consideration in that case was "the fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence, namely, the right to acquire abalone", if the State could charge monopoly rents. Tasmania was exercising the same monopoly power as the ACT exercised here, although not with respect to a necessity of life.

68. Further, the ACT's monopolistic control over water within the Territory arises by virtue of its own statute. If monopoly power is the answer to a s 90 complaint, then the ACT has lifted itself and its legislation into validity.

69. That the issue arises in monopolistic contexts is not surprising.

    69.1. Assume a government charges for providing a service or good (such as an internet connection to the home by a public authority) but there is no legal or practical compulsion involved in acquisition of the good or service (for example, because there are substitutable alternatives readily available). It would be likely that the amount charged would bear a relationship to the value of what is acquired, and the true character of the measure would simply be a charge for the service or good. That would flow from the operation of competitive market forces.

    69.2. However, if the consumer is legally or practically compelled to pay the charge in question, and no relationship can be discerned between the charge and the value of the good, the levy imposed cannot be characterised as a charge for the service or good but is rather a compulsory exaction.

    69.3. Only if the government has monopoly power can it charge a fee that exceeds the value of what is acquired and achieve the purpose of raising revenue, as opposed to seeking reasonable recompense for the provision of the service or good.

70. The notion of a relationship to <u>value</u> implies something more objective than what the government can get away with charging. How, then, does one assess value in such a monopoly context? In *Airservices Australia* (1999) 203 CLR 133 at [287]-[299], McHugh J explained that there had been an apparent shift from requiring a relationship to <u>costs</u> to requiring a relationship to <u>value</u>, but then stated at [299]:

> In the situation of a natural monopolist, no supply side competition exists. There is nothing to generate a market value. The relevant measure of value would seem to be the cost of providing, or the expenses incurred in providing, the service. For present purposes, I will assume that these costs or expenses could include a reasonable rate of return on assets as a "cost of capital", and return to this issue later.

71. Similarly, Gummow J said at [444] (citations omitted):

> What to an economist is "value" does not necessarily find its synonym in "market value" or "exchange value" as understood in the case law respecting resumptions which has been built up around *Spencer v Commonwealth*. "Market value" is determined by an inquiry into what a willing purchaser will pay and a not unwilling vendor will receive for the subject matter being valued. The premise of the inquiry is that an efficient market

> exists or, at least, that an efficient market can be reasonably hypothesised from an existing inefficient market. Where there is no market for exchange of the subject matter, it is necessary to consider other means of fixing value.

72. His Honour, similarly to McHugh J, suggested at [450] that it was appropriate to refer to costs necessarily or reasonably incurred, allowing for a reasonable rate of return.

73. The decision in *Swift Australian (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189 (see in particular Dixon CJ at 200-201), is an example of a fee for a service held invalid because the amount of the fee exceeded the value of the service provided – the issue seemingly being assessed by reference to costs. The State regulations imposed a fee payable by abattoirs and butchers' shops "for the purpose of defraying the expenses of inspection of meat for sale and of carrying this Act into effect". The fact that the fee was imposed in part to defray general administration costs under the Act led to the fee being held invalid. Implicit in that decision was a finding of an absence of a discernible relationship between the costs of the service provided and the amount of the fee. Similar points may be made about *Harper v Victoria* (1966) 114 CLR 361 at 378; and *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 581; as discussed by McHugh J in *Airservices Australia* (1999) 203 CLR 133 at [294]-[295].

74. How objective value is to be assessed will no doubt depend on all the circumstances. In the absence of any other suitable metric, reasonable costs, plus a reasonable rate of return (at least where capital has been expended), will be an appropriate guide. However, in some instances there will be other evidence available, including evidence of price in analogous or related markets. Here, there was such evidence. And, either on a costs approach or on a market approach, there was ample evidence that there was no discernible relationship between the level of the WAC after 1 July 2006 and the value of the goods/benefit acquired.

E. NO DISCERNIBLE RELATIONSHIP TO VALUE HERE

75. It may be accepted that "the line between a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it may often be difficult to draw".[38] No doubt that is why this Court has spoken of there being "no discernible relationship with the value of what is acquired", and the test is not to be applied in some close or precise manner. Although difficulties in differentiation may arise in some cases, there are no such difficulties here, whether one focuses on market value or cost.

76. QCC's case on this issue did not depend on its expert evidence. On the contrary, it relied on the history of the calculation of the WAC (illustrating the absence of any relationship between the new "water fee" and cost), and objective evidence – presented by the ACT's own expert – of the market value of untreated water in the Murrumbidgee River system. QCC only relied (relevantly) on its expert's evidence, first, for some relatively simple mathematical calculations about the "demand management" effect of the WAC (based on the demand elasticity figure given by the ACT's expert) and, secondly, to answer some other points raised by the ACT's expert.

77. Buchanan J rejected all of the expert evidence as irrelevant: at [90]-[93]; because the "debate involved disagreement amongst economists" and "moved further and further away from an examination of whether it could be said, if necessary, that the WAC, at particular levels, had no discernible relationship with the value of water": at [90]. There

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

is force in this criticism with respect to much of Prof Grafton's evidence (and, thus, of Dr Beare's response to those parts). But his Honour's wholesale rejection failed to understand the limited, objective, simple points that QCC had sought to make in relation to cost, market value, and demand management.

Market value

78. As part of his analysis, the ACT's expert, Prof Grafton, sought to calculate the "opportunity cost" to the ACT of providing water to ACTEW.[39] He did so by ascertaining the prices for temporary trades – that is, purchases of rights to abstract water in a particular season (as opposed to the permanent right to access such water) – in untreated river water in the nearest downstream market, being the market regulated by the *Murrumbidgee Regulated River Water Sharing Plan 2003* (NSW). The market price downstream represented the value that the market has placed on water in recent times. One can see that, as either an opportunity cost for the ACT in terms of lost revenue from alternative sales, or an opportunity cost to those downstream who are denied the opportunity to purchase the water, they are two sides of the same coin.

79. In cross-examination, Professor Grafton accepted that the relevant figures "under the heading OC [opportunity cost] in table 6 could meaningfully be described as the market price for water in the next downstream market from the ACT".[40] Similarly, he accepted that, in a meaningful sense, those figures "might be said to represent the market price that the ACT could get for this water if it sold it downstream".[41]

80. As noted in paragraph 18 above, the figures indicated that, from 1 May 2005 to 30 June 2006 (the period which includes the time (May 2006) when the decision to introduce the "water fee" was announced), the trading value was 1.9c/kl. This rose to 16.8c/kl in the period 1 July 2006 to 30 June 2008, then 26.8c/kl in the period 1 July 2008 to the date of the report on 1 September 2008. In cross-examination, Prof Grafton accepted that pricing information for December 2008 showed a fall in price for this market to something of the order of 16.8c/kl.[42] As noted in paragraph 19 above, he indicated that the figures from 2006 onwards reflected the "Big Dry", in which the inflows to the River Murray system were the lowest on record in the period 2006-2008, causing both a substantial fall in supply of water combined with an increase in demand.[43]

81. Thus, the ACT's evidence established that the market price for its untreated water in the closest relevant market was, as at the time the decision was taken to introduce the Water Fee, some **1.9c/kl**. The new level of 55c/kl was more than 25 times higher than market value. In the period after the introduction of the Water Fee – reflecting the extreme drought conditions – the price jumped to 16.8c/kl, then to 26.8c/kl and then fell. Thus, even at the peak of the worst drought on record, the WAC was double the market price.

82. Lest it be suggested that the ACT anticipated the spike in water trading prices and calculated the WAC on that basis, in cross-examination, Professor Grafton accepted that it is difficult to predict market trading prices, adding:[44]

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39 First Report, 1.9.2008, paragraphs 35-36, then manifest as the figures in the "OC" column at table 6, paragraph 52.

40 Ts 191/22-24.

41 Ts 199/36-39.

42 Ts 195-197, especially at Ts 197/15-20.

43 First Report, 1.9.2008, paragraphs 31-3.

44 Ts 197/32-36.

> I certainly didn't predict it. Most people didn't, no. Most people were very surprised. They'd never seen prices like that before. They're exceptionally high prices ... I was quite taken aback at how high those prices were.

83. In its 2003 report the ICRC had similarly calculated a scarcity value/opportunity cost, using the same methodology, and came up with a figure of 4.4c/kl.[45]

84. This evidence of market value in the nearest downstream market – relied on by both the ICRC and the ACT's expert as a suitable proxy – dispels any claim that the WAC has a discernible relationship to the value of the water acquired by ACTEW

Cost analysis

85. As noted in paragraph 14, above, in 1999 IPARC advised the ACT on the appropriate approach to establishing a WAC, including as to levels; noted that ideally water charges "would include all costs, including the environmental costs, of resource use": Buchanan J at [25]-[26]; and recommended a level of 10c/kl.[46]

86. In 2003, having already announced an increase in the WAC to 20c/kl, stepping later to 25c/kl, the ACT directed the ICRC to provide advice on the appropriate methodology for determining, and level of, the WAC.[47] The amount that the ICRC found to be justifiable was 17.7c/kl, perhaps plus another 2c/kl because of costs of the Canberra bushfires, leading to a total amount of about 20c/kl: Buchanan J at [37]. As noted in paragraph 16 above, the ICRC said that it had received legal advice, and that it was proceeding on the basis that the quantum of the charge should "reflect discernible and measurable costs to government (and therefore the community)", that these costs "can include social and environmental as well as economic costs", and that "the charge should not be levied for revenue raising purposes".[48]

87. As Buchanan J noted at [46], when the Water Fee component of an additional 30c/kl was introduced in the 2006-07 Budget, there was no explanation or calculation of the kind earlier carried out by the IPARC and the ICRC to justify the increase since those bodies had carried out their calculations. As noted in paragraphs 47-48 above, the principal reason for the increase was to raise revenue for the Territory, with reference also made to "demand management".

88. Nothing on the face of the relevant executive determinations reveals any connection between the 55/51c/kl levels and the value of what is being acquired – in contrast to the measures considered in the *Harper* case. There was no hypothecation of the revenue raised from the WAC – it was not, for example, directed to catchment management.

89. QCC does not suggest that it is necessary for governments to produce such calculations each time such a fee is introduced or increased. However, the ACT had twice had such calculations carried out – in a careful and independent manner: see paragraphs 14, 16, 43 above; and the new water fee bore no relationship to those calculations. Less than 3 years had passed since the ICRC's report when the 30c/kl water fee was announced in May 2006, yet this fee meant the WAC was now 175% higher than the ICRC had found to be justifiable.

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45 ICRC, Final 2003 Report, page 14.

46 Trial judge at [26]-[29]; ICRC, *ACTEW's Electricity, Water & Sewerage Charges For 1999/2000 To 2003/2004, Price Direction*, May 1999, pp 60-62.

47 Reference issued by the ACT Treasurer, 14 May 2003.

48 Report at 16; reflected also at 3.

90. There is room to be sceptical about whether all of the "costs" included by the ICRC can properly be characterised as such for constitutional purposes. This issue was dealt with further below in responding to Prof Grafton's evidence. But, even if they were all included, it is still apparent that there is no discernible relationship between the costs to the ACT of the untreated water and the level of the WAC from 1 July 2006. The primary justification of the new water fee was plain and simple – to raise revenue. That, as put in paragraphs 37-38 above, indicates it was a tax.

91. It is also noteworthy that the determinations imposing the increased WAC of 55c/kl singled out water taken by ACTEW for urban water supply.[49] Water taken for other purposes, if not supplied through the urban supply network or taken from certain defined areas, remained subject to a WAC at the rate of 25c/kl. That fact undermines the claim that there is a discernible relationship between the WAC as increased by the Water Fee and the costs of the water acquired by ACTEW; and confirms that the principal purpose of the Water Fee was to raise revenue.

    91.1. In *Hematite* (1983) 151 CLR 599, at 635, Mason J said that one relevant factor in characterising the measure as a tax on goods was the very large differential between the levy on the pipeline in question and the levy imposed on other pipelines; see also Deane J at 667-668. Although the differential here is not of the same order, the disparity is still substantial.

    91.2. Moreover, the criterion for the operation of the higher WAC is that the water is "for the purposes of urban water supply" – in other words, that the water is taken for production as potable water and subsequent distribution to consumers, as opposed to direct consumption by the licensee. The higher rate is thus directed at the very type of activity protected by s 90. The differential indicates an attempt to recover revenue on the production and distribution of water to the extent possible, with the burden to be passed on to ACTEW's many customers.

Demand management

92. Demand management was the second explanation or justification advanced by the ACT at the time for the introduction of the Water Fee. Buchanan J said, of this explanation, that conservation of water was "a great public objective of longstanding importance in Australia", that he did not think "the justification for a charge to this end is examinable on policy grounds", and it "would be necessary to be satisfied that the charge was, in truth, a device to collect a tax, whether or not some collateral justification for it was, at the same time, advanced": at [122]. These statements manifest error.

93. **First**, the issue does not involve examining the WAC on "policy grounds", and does not require finding that the explanation was a sham: it is one of characterising the law.

94. **Secondly**, no doubt it is a legitimate and important public policy objective to manage demand for an essential resource such as water, in particular during times of low rainfall. But that public policy justification does not establish that the measure is not a tax. Taxes commonly are imposed, not only to raise revenue, but also to achieve other public objectives. The fact that an exaction seeks to achieve some other purpose – even if revenue-raising were merely a secondary purpose – does not prevent the measure

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[49] *Water Resources (Fees) Determination 2006 (No 1)*; *Water Resources (Fees) Determination 2007 (No 1)*.

being characterised as a tax.[50] As Dawson, Toohey and McHugh JJ said in *Harper v Minister for Sea Fisheries*, "what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural public resource".[51]

95. **Thirdly**, the suggested public purpose of restricting demand strongly suggests that the exaction is an excise duty. An excise duty is a tax that burdens production by entering into the price of the goods to the ultimate consumer, thereby diminishing demand for the goods.[52] Section 90 is one of a series of provisions, the purpose of which "was to ensure that differential taxes on goods and differential bonuses on the production and export of goods should not divert trade or distort competition", and to ensure that the Commonwealth Parliament has "effective control over economic policy affecting the supply and price of goods throughout the Commonwealth".[53] Thus, the claimed secondary policy justification is one which points to the exaction being an excise duty. Although the end (demand management) may be legitimate, the means adopted by the ACT (the imposition of a fiscal exaction) is not constitutionally available to the ACT: "The same ends may be attainable by different means. Some means may be within power, others may be outside it".[54]

96. **Fourthly**, insofar as the ACT Government genuinely wishes to restrict demand, it has an effective tool to do so – water restrictions. Indeed, a comparison of the efficacy of the two available tools casts substantial doubt on the weight that can be given to the ACT's claimed secondary justification in any case.

    96.1. As noted in paragraph 20 above, the water restrictions imposed by the ACT had reduced demand by 20-40%, but a WAC at a level of 55c/kl would only reduce demand by 1.3% (relying on the -0.10 elasticity demand figure of Prof Grafton, and taking account of the overall price charged to consumers by ACTEW).

    96.2. The availability of an effective alternative indicates that, in substance, the WAC cannot be characterised as having been imposed for the purpose of managing demand.[55]

The justifications offered by Prof Grafton

97. Buchanan J was correct to reject the bulk of Prof Grafton's evidence, which was directed to trying to justify the level of WAC that might, theoretically, have been justifiable in terms of value. His analysis set out 4 components, the first 3 of which purportedly update the approach taken by the ICRC in its October 2003 report, and the 4th of which (his "scarcity price") reflected his own economic theory, which has been adopted by no government in Australia, including the ACT.

98. The first of his four components was "water supply costs", that is, the purported costs to the ACT of collecting, storing and making available untreated water. On a cost-based

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50 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 569, and generally at 568-572 (Mason CJ, Deane, Toohey and Gaudron JJ); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 6-7 (Kitto J), 18 (Menzies J).

51 *Harper* (1989) 168 CLR 314 at 337. Similarly, the environmental object claimed in *Castlemaine Tooheys Ltd v State of South Australia* (1990) 169 CLR 436 did not avoid breach of s 92.

52 *Hematite* (1983) 151 CLR 599 at 632 (Mason J); see also Deane J at 665-666; *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 586 (Mason CJ, Brennan, Deane and McHugh JJ).

53 *Capital Duplicators [No 2]* at 585-586 (Mason CJ, Brennan, Deane and McHugh JJ).

54 *Homebush Flour* (1937) 56 CLR 390 at 414 (Dixon J).

55 Cf *Castlemaine Tooheys* (1990) 169 CLR 436 at 472; *Betfair* (2008) 234 CLR 418 at [134] and [145] (Heydon J).

justification of value, only this first component would properly be included. Yet there was no proper attempt to prove these figures beyond the ICRC's calculations.

99. In its October 2003 report, the ICRC had calculated water supply costs at 8.2c/kl based on "Government water supply expenditures" of $5.3 million.[56] Yet Prof Grafton came up with figures of between 28.4c/kl to 38.9c/kl for the period from 1 January 2004 through to 1 September 2008.[57] Those figures were based on some calculations relying on instructions provided to him that the "water supply expenditures" for the year 2005/6 were $15.536m,[58] which he then indexed forwards and backwards. No proof was offered of those figures, save for tender of a letter from the ACT Government to the ICRC in a different context. Prof Grafton did not seek to review this evidence – he simply relied on what was provided to him to produce some mathematical calculations, as he was at pains to make this clear in his cross-examination.[59] The figures he produced are entirely unreliable:

    99.1. The figures, which are the mere assertion (in a different context) of an ACT Government Department, represent a 235% increase over a two-year period for the figures supplied to the ICRC. They are self-evidently dubious – eg, the largest claimed expenditure is by the ACT Planning and Land Authority ($8.317 million), which is over half the amount claimed. Why the ACT Governmental entity responsible for planning applications and the like should have any expenditure relating to the water catchment was entirely unexplained.

    99.2. Remarkably, the letter of instruction to Prof Grafton recognised the dubious nature of the figures, stating "the figures in Table 4 are only an approximation, they did not reflect all water policy expenditure of the Government at the time. The costs supplied also lacked normal quality and rigour".

    99.3. As that quotation reveals,[60] and as is apparent from the letter of 27 March 2006 provided in support, the 2005-06 figure provided included policy expenditure. Those generic policy costs cannot be attributed to the costs of supplying untreated water to ACTEW: compare *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 200 (Dixon CJ).

100. The second component used by Prof Grafton (and the ICRC) was the "opportunity cost" of the ACT removing water from the Murrumbidgee system, calculated by reference to the downstream market price (as described in paragraphs 78-79 above). The ICRC had included a "scarcity value", or opportunity cost, of 4.4c/kl.[61] Yet it is double-counting simply to add a downstream market price to the (purported) costs of producing the goods, and say that that represents a proper attempt at valuation. The ACT's ability to sell the water downstream assumes that it has caught the water in its catchments and incurred costs in doing so. The costs of doing so cannot be excluded from the calculation of the potential sale price that might be obtained from downstream sales.

101. The same may be said of the third component, "environmental costs", which was calculated by reference to what would have been the capital cost of buying a permanent

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56 ICRC, Final 2003 Report, pages 11-12.

57 Report of 1.9.2008, paragraphs 33-34; and table 6 at paragraph 52 under heading "WSC".

58 See paragraph 40-41 of his letter of instruction, found in his report of 1.9.2008.

59 Ts 181/7-17; Ts 183/22-23; Ts 187/41-42; Ts 188/18-24; Ts 188/32-41.

60 See also paragraph 39 of the letter of instruction.

61 ICRC, Final 2003 Report, page 14.

allocation of the amount of net water taken by the ACT in the downstream Murrumbidgee market. Further, none of the money raised by the WAC was used to pay for any downstream environmental externalities. It was simply ACT revenue. There are many other difficulties with this component.

102. The largest component in Prof Grafton's analysis, by far, was his "scarcity price" – something quite distinct from anything in the ICRC's analysis. This ranged from 73.1c/kl to 288.2c/kl. He described "scarcity price" as "the extra or marginal price over and above what ACTEW water consumers actually paid with the existing water restrictions to optimally postpone the water supply augmentation decision announced 23 October 2007 by the Chief Minister".[62] The decision announced by the Chief Minister was to go ahead with supply augmentation, the costs of which were said to be capital costs of $247.5 million for enlarging the Cotter Dam and other measures to increase the amount of water collected by the ACT.

103. A scarcity price is a price meant to manage demand from time to time, deterring consumers in such a way as to seek to avoid large capital expenditure. Such an approach has been adopted by no government in Australia. It is entirely irrelevant here.

104. First, as Prof Grafton accepted in cross-examination, his calculation is "a counter factual and it's ... retrospective";[63] "It is a counterfactual because it never took place".[64] To apply a scarcity price in Prof Grafton's sense requires knowledge of (a) the cost of the capital works sought to be avoided, and (b) the trigger point where the water supply has got so low that the works have to be undertaken regardless.[65] Yet he simply took the capital works figure from what was announced;[66] and he took the trigger point from the dam levels on the date of the ACT's announcement that significant new capital works would be undertaken.[67] This hypothetical, academic theory is entirely irrelevant to what occurred and may be disregarded. As Prof Grafton said, "Clearly, your Honour, no scarcity price was charged".[68]

105. Secondly, even if relevant, on Professor Grafton's own theory this would end when the decision was made to undertake the capital works that had been sought to be avoided. His report took the scarcity price up to 30 June 2008, after which it was zero. He accepted in cross-examination that, on his own analysis, it was "a reasonable contention to make" that it in fact should have been zero from 23 October 2007, when the relevant decision was made.[69] Thus this component, even if it had not been hypothetical, ceased to have any relevance after October 2007 or (at the latest) July 2008.

PART VII: RELEVANT PROVISIONS

106. Annexure A sets out the applicable constitutional provisions, statutes, regulations and ministerial determinations.

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62 1st report, 19.2008, paragraph 25.

63 Ts 256/17.

64 Ts 257/23-29; see also Grafton 2nd report, 22.12.2008, paragraph 37.

65 Ts 255/35-46.

66 1st report, 1.9.2008, paragraphs 25-26.

67 Ts 255/45 – 256/5).

68 Ts 256/21.

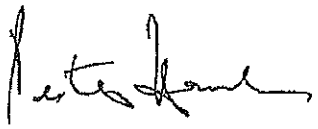
69 Ts 255/10-20.

PART VIII: ORDERS SOUGHT

107. If the WAC is an excise, there is no reason not to grant declaratory relief. Further, with respect to the claim for money had and received for WAC paid in the period 1 July 2006 to 30 June 2007 (after which QCC withheld relevant payments), the amounts referable to the WAC were always clearly and separately identified on invoices from ACTEW to QCC. The analysis of the primary judge as to relief and the effect of s 21A of the *Limitation Act 1985* (ACT) is correct: see at [165]-[169].

108. QCC seeks that the appeals be upheld, with costs. The precise form of the orders sought are set out in the Notices of Appeal.

10 May 2011



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ANNEXURE A TO APPELLANT'S SUBMISSIONS (WAC)

Table of Contents

Commonwealth of Australia Constitution Act

(Chapter IV—Finance and Trade)

90 Exclusive power over customs, excise, and bounties

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

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Currency – s 90 is still in force, in that form, at the date of making the attached submissions.

Australian Capital Territory (Planning and Land Management) Act 1988 **(Cth)**

Part V—Land management

27 National Land

(1) The Minister may, by notice published in the *Commonwealth Gazette* declare specified areas of land in the Territory to be National Land.

(2) The Minister shall not declare an area to be National Land unless the land is, or is intended to be, used by or on behalf of the Commonwealth.

(3) If an Act vests the management (however described) of specified land in the Territory in a person or body, the land is National Land for the purposes of this Act.

(4) Subsection (3) does not apply to the vesting of an estate in land.

28 Territory Land

At any time when any land in the Territory is not National Land, that land is Territory Land for the purposes of this Act.

29 Administration of Territory Land

(1) The Executive, on behalf of the Commonwealth:

(a) has responsibility for the management of Territory Land; and

(b) subject to section 9 of the *Seat of Government (Administration) Act 1910*, may grant, dispose of, acquire, hold and administer estates in Territory Land.

(2) The Executive shall perform its functions under subsection (1) subject to enactment and in accordance with the principles:

(a) that new estates in Territory Land shall be granted only in accordance with procedures that are notified to the public; and

(b) that appropriate classes of decisions relating to the administration of estates in Territory Land shall be subject to just and timely review without unnecessary formality.

(3) The term of an estate in Territory Land granted on or after Self-Government Day shall not exceed 99 years or such longer period as is prescribed, but the estate may be renewed.

(4) The Authority may intervene in any proceedings for review of a decision relating to the administration of an estate in Territory Land.

Currency – ss 27-29 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) are still in force, in that form, at the date of making the attached submissions

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***Water Resources Act 1998* (ACT) (repealed)**

13 Territory rights to water

Subject to this Act, the right to the use, flow and control of all water of the Territory (other than ground water under land the subject of a lease of Territory land granted before the commencement of this section) is vested in the Territory and, subject to any other Act, those rights are exercisable by the Minister in the name of and on behalf of the Territory.

Note This section commenced on 11 December 1998.

Currency – the *Water Resources Act 1998* (ACT) was repealed from 1 August 2007, replaced by the *Water Resources Act 2007* (ACT).

***Water Resources Act 1998* (ACT) (repealed)**

33 Unlicensed taking of water

(1) Subject to this section, a person shall not take water without a licence.

Maximum penalty: 50 penalty units.

(2) The lessee or occupier of land on or immediately adjacent to which there is a waterway may, without a licence, take water from the waterway or surface water from the land for—

(a) the use of the lessee or occupier or the lessee's or occupier's family or employees, for domestic purposes; or

(b) drinking water for stock; or

(c) irrigating a garden, not exceeding 2 hectares, being a garden cultivated for domestic use and not for the sale, barter or exchange of goods produced in the garden.

(3) A person may, without a licence, take water for camping purposes or for watering travelling stock from a waterway.

(4) Subsection (3) does not authorise a person to enter or remain on land to which the person does not otherwise have lawful access or to do anything on that land that the person does not have lawful authority to do.

(5) Subsection (1) does not apply to the exercise or purported exercise by a relevant person of a function under the *Emergencies Act 2004* for the purpose of protecting life or property, or controlling, extinguishing or preventing the spread of a fire.

(6) In proceedings for an offence against subsection (1), a certificate purporting to be signed by the authority stating that, on a specified date, there was on the land to which the proceedings relate, a channel or other means (including mechanical means by which water is capable of being taken) is evidence of the matters so stated.

(7) It is a defence to a prosecution under subsection (1) if it is proved that the water was taken in case of an emergency for the protection of life and property.

(8) In this section:

relevant person means—

(a) the chief officer (fire brigade); or

(b) any other member of the fire brigade; or

(c) the chief officer (rural fire service); or

(d) any other member of the rural fire service; or

(e) a police officer; or

(f) any other person under the control of the chief officer (fire brigade) or the chief officer (rural fire service).

stock means stock of a number not exceeding the number depastured ordinarily on the land having regard to seasonal fluctuations in the carrying capacity of the land and not held in close concentration for a purpose other than grazing.

Currency – the *Water Resources Act 1998* (ACT) was repealed from 1 August 2007, replaced by the *Water Resources Act 2007* (ACT).

Water Resources Act 1998 **(ACT) (repealed)**

35 Licence to take water

(1) Subject to this section, the authority may, on application, grant to a person a licence to take water from a specified waterway or location.

Note 1 A fee may be determined under s 78 (Determination of fees) for this section.

Note 2 If a form is approved under s 78A (Approved forms) for an application or licence to take water, the form must be used.

(2) A licence to take water may be granted subject to such conditions as are specified in the licence.

(3) For subsection (2), the authority may fix a different rate for different days of the year.

(4) Without limiting subsection (2), the conditions to which a licence to take water may be subject may include a condition—

(a) to keep and maintain records; or

(b) to install, operate and maintain equipment, including a water meter; or

(c) to provide information in relation to compliance with the licence or the conditions (if any) to which it is subject; or

(d) to conduct specified monitoring and testing consequent on the taking of the water; or

(e) to mark, in a specified manner, places from which water is taken under the licence; or(f) specifying the rate at which, or the maximum amount of, water that may be taken, or both.

(5) A person shall not, without reasonable excuse, contravene a condition of a licence to take water.

Maximum penalty: 50 penalty units.

(6) A licence to take water remains in force for such period as is specified in the licence unless it is sooner surrendered or cancelled.

(7) In deciding whether or not to grant a licence to take water, the authority shall take into account—

(a) the applicant's environmental record both in the Territory and elsewhere so far as it relates to water; and

(b) whether to grant the licence—

(i) would have an adverse effect on the environment; or

(ii) would adversely affect environmental flows of a particular waterway or aquifer or the rights of other water users; and

(c) whether the applicant has been convicted of an offence against this Act or a corresponding law of a State or another Territory; and

(d) in the case of an application for a licence to take ground water—

(i) whether the quantity of water available can meet the demand or there is a risk that the available water will not be sufficient to meet future demand; and

(ii) whether the taking of the water will or is likely to affect the quality of the water in the place to which the application relates.

(8) The authority shall not grant a licence to take water—

(a) subject to subsection (9), if a water allocation or interstate water allocation on which to base the taking of water from the place to which the application relates does not exist; or

(b) unless satisfied that the applicant has lawful authority to obtain access to the place from which the water is to be taken under the licence or to divert the water from that place to where it is to be used, or both, as the case requires; or

(c) in respect of a development before an application to conduct the development has been approved under the Land Act, part 6.

(9) Subsection (8) (a) applies to—

(a) ground water under land the subject of a lease of Territory land granted after the commencement of section 13; and

(b) ground water under unleased Territory land; and

(c) surface water.

Note Section 13 commenced on 11 December 1998.

(10) In this section:

development—see the Land Act, part 6.

Land Act means the *Land (Planning and Environment) Act 1991*.

Currency – the *Water Resources Act 1998* (ACT) was repealed from 1 August 2007, replaced by the *Water Resources Act 2007* (ACT).

***Water Resources Act 1998* (ACT) (repealed)**

78 Determination of fees

(1) The Minister may, in writing, determine fees for this Act.

Note The *Legislation Act 2001* contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

(2) A determination is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

(3) A reference in this section to a ***fee*** includes a reference to a fee that is a tax.

Currency – the *Water Resources Act 1998* (ACT) was repealed from 1 August 2007, replaced by the *Water Resources Act 2007* (ACT).

***Water Resources Act 2007* (ACT)**

7 Territory rights to water

Subject to this Act, the right to the use, flow and control of all water of the Territory is vested in the Territory and is exercisable by the Minister on behalf of the Territory.

8 Surface water

For this Act, ***surface water*** means—

(a) water on or flowing over land (including in a waterway) after having—

(i) fallen as rain or hail or precipitated in any other way; or

(ii) risen to the surface naturally from underground; or

(iii) been returned to the environment following treatment or use; and

(b) water mentioned in paragraph (a) that has been collected in a dam, reservoir or rainwater tank.

9 Ground water

(1) For this Act, ***ground water*** means water occurring or obtained from below the surface of the ground or beneath a waterway.

(2) ***Ground water*** includes water occurring in or obtained or flowing from a bore.

(3) However, ***ground water*** does not include water occurring in or obtained or flowing from any other system for the distribution, reticulation, transportation, storage or treatment of water or waste.

Currency – ss 7–9 of the *Water Resources Act 2007* (ACT) were in force at all relevant times except section 7A, which was inserted by the *Water Resources Amendment Act 2010* A2010-31, s 4 and commenced on 1 March 2011.

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11 Taking water

(1) For this Act, ***take*** water includes—

(a) in relation to surface water—

(i) withdraw, pump, extract or use surface water; and

(ii) divert surface water for the purpose of using it; and

(iii) do anything else that results in a reduction of flow of surface water in a waterway; and

(b) in relation to ground water—allow ground water to flow or be pumped from a bore.

(2) However, a person does not ***take*** water if the person uses water taken by someone else under a licence to take water.

Example—s (2)

using water provided by a water utility

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

Currency – s 11 of the *Water Resources Act 2007* (ACT) is still in force, in that form, at the date of making the attached submissions.

Part 5 Licences

Division 5.1 Licences to take water

28 Licence to take water—requirement

(1) A person commits an offence if the person—

(a) takes surface water or ground water from a place; and

(b) does not have a licence to take the water from the place.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(2) A person who is the owner or occupier of land commits an offence if the person—

(a) takes ground water from a bore on the land; and

(b) does not have a licence to take the ground water.

Maximum penalty: 50 penalty units.

(3) An offence against subsection (2) is a strict liability offence.

(4) A person commits an offence if the person—

(a) in the conduct of a business carrying or extracting water, takes surface water from a place; and

(b) does not have a licence to take the surface water.

Maximum penalty: 50 penalty units.

(5) An offence against subsection (4) is a strict liability offence.

(6) This section does not apply to—

(a) the taking of water from a waterway—

(i) for camping or similar purposes; or

(ii) for watering travelling stock; or

Examples—par (a) (i)

1 bushwalking

2 picnicking

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(b) the taking of rainwater from a rainwater tank that has been installed in accordance with the approval (if any) required under the *Planning and Development Act 2007*, chapter 7 (Development approvals); or

(c) the owner or occupier of land on or immediately adjacent to which there is a waterway who takes water from the waterway, or surface water from the land, for stock or domestic use; or

(d) the exercise or purported exercise by a relevant person of a function under the *Emergencies Act 2004* for the purpose of protecting life or property, or controlling, extinguishing or preventing the spread of a fire; or

(e) the taking of water by a person who is exempt under a regulation from the requirement to have a licence.

(7) In this section:

relevant person means—

(a) the chief officer (fire brigade); or

(b) any other member of the fire brigade; or

(c) the chief officer (rural fire service); or

(d) any other member of the rural fire service; or

(e) a police officer; or

(f) any other person under the control of the chief officer (fire brigade) or the chief officer (rural fire service).

Currency – s 28 of the *Water Resources Act 2007* (ACT) was amended by the following provisions:

Planning and Development (Consequential Amendments) Act 2007

[1.209] **Section 28(6)(b)**

substitute

(b) the taking of rainwater from a rainwater tank that—

(i) has been installed in accordance with a development approval under the *Planning and Development Act 2007*, chapter 7 (Development approvals); or

(ii) is an exempt development within the meaning of that Act.

Water Resources Amendment Act 2010

6 **Licence to take water—requirement Section 28 (1) to (5)**

relocate as section 77A (1) to (5)

7 **New section 28 (1)**

insert

(1) A person must not take water from a place if the person does not have a licence to take the water from the place.

8 **Section 28 (6)**

omit

This section does not apply to—

substitute

However, a licence is not required for—

---

29 **Licence to take water—application**

(1) A person may apply to the authority for a licence to take water from a stated place.

Note 1 If a form is approved under s 108 for this provision, the form must be used.

Note 2 A fee may be determined under s 107 for this provision.

(2) The authority may, by written notice given to the applicant, require the applicant to give the authority additional information or documents the authority reasonably needs to decide the application.

(3) If the applicant does not comply with a requirement under subsection (2), the authority may refuse to consider the application further.

30 Licence to take water—decision on application

(1) On application by a person for a licence to take water, the authority must—

(a) issue the licence; or

(b) refuse to issue the licence.

(2) The authority must not issue the licence unless satisfied that—

(a) the applicant—

(i) holds a water access entitlement, a corresponding water access entitlement or a surviving allocation on which to base the taking of water under the licence; or

(ii) is exempt from this requirement under a regulation; and

(b) the water to be taken under the licence is to be taken from—

(i) the water management area stated in the water access entitlement or subcatchment stated in the surviving allocation; or

(ii) another water management area from which the water may be taken under section 32 (Licence to take water—where water may be taken) or under a regulation; and

(c) the amount of water to be taken under the licence is not more than a reasonable amount for the intended use having regard to any determination in force under section 18; and

(d) the water is not intended to be used on urban residential property; and

(e) the intended use of the water is otherwise consistent with the Territory plan; and

(f) the applicant has lawful authority—

(i) to obtain access to the place from which the water is to be taken under the licence; and

(ii) if the water is to be diverted from that place to where it is to be used—to divert the water; and

(g) if the application relates to a development for which an approval is required under the *Planning and Development Act 2007*, chapter 7 (Development approvals)—the development has been approved under that chapter.

(3) Also the authority must not issue the licence unless satisfied it is appropriate to do so having regard to—

(a) the applicant's environmental record; and

(b) whether issuing the licence would or may—

(i) adversely affect the environmental flows for a particular waterway or aquifer that are required under the environmental flow guidelines; or

(ii) adversely affect the environment in any other way; or

(iii) adversely affect the interests of other water users; and

(c) anything else the authority considers relevant.

(4) Subsection (2) (d) does not apply—

(a) to a water utility; or

(b) if the entitlement on which the licence is to be based—

(i) was granted under section 111 (Surviving allocations—surrender generally) or section 202 (Water access entitlement for certain existing licence holders) (whether or not it has been later transferred); and

(ii) allows the water to be used on stated urban residential property.

(5) A regulation made for subsection (2) (a) may authorise the authority to exempt a person from the requirement mentioned in that subsection in the circumstances prescribed by regulation.

31 Licence to take water—conditions

(1) A licence to take water is subject to any condition—

(a) prescribed by regulation; or

(b) imposed on the licence by the authority.

Examples of conditions to which licence may be subject

1 that records must be kept

2 that a water meter must be installed, operated and maintained

3 that information about compliance with licence conditions must be given to the authority

4 that monitoring and testing must be done after water is taken

5 that places from which water is taken must be marked in a stated way

6 that water may only be taken at a stated rate (which may be different for different days of the year)

7 that not more than a stated maximum amount of water may be taken

8 that water must not be taken from a waterway at a time when there is no or little flow in the waterway

9 that the authority must be allowed to conduct regular routine inspections

Note 1 The licence is also subject to any condition that applies to a water access entitlement on which the licence is based (see s 23 (2)).

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(2) A condition imposed by the authority must not be inconsistent with any condition prescribed by regulation that applies to the licence.

Currency – ss 29–31 of the *Water Resources Act 2007* (ACT) are still in force, in that form, at the date of making the attached submissions.

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107 Determination of fees

(1) The Minister may determine fees for this Act.

Note The Legislation Act contains provisions about the making of determinations and regulations relating to fees (see pt 6.3).

(2) A determination is a disallowable instrument.

Note A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Currency – s 107 of the *Water Resources Act 2007* (ACT) is still in force, in that form, at the date of making the attached submissions.

Australian Capital Territory

Water Resources (Fees) Revocation and Determination 2003 (No 2)*

Disallowable Instrument DI 2003 — 334

made under the

***Water Resources Act 1998*, Section 78 - Determination of Fees**

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1. Pursuant to section 78 of the *Water Resources Act 1998* (the Act) I **REVOKE** the Determination No DI 2003 – 164 notified on the ACT Government Legislation Register.

2. Under section 78 of the *Water Resources Act 1998* (the Act), I **DETERMINE** that the fees payable for the purpose of those sections specified in Column 1 and described in Column 2 shall be those fees specified in Column 4. These fees are to be paid as described in Column 5.

3. Explanatory notes (including the previous year's fee) are included in the Schedule. Explanatory notes are included at the end of the Schedule, where applicable. Headings and explanatory notes in the Schedule do not form part of the determination.

4. The fees determined in this schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.

5. This Instrument commences on 1 January 2004.

Jon Stanhope
Minister for Environment

18 December 2003

*Name amended under Legislation Act 2001 s 60

THIS IS PAGE 2 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 July 2003 to 31 Dec 2003*	Fee Payable $ 1 Jan 2004 to 30 Jun 2004	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 2000 megalitres and up to 5000 megalitres per year.	*429.65*	429.65	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 5000 megalitres and up to 10000 megalitres per year.	*1073.70*	1073.70	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 10000 megalitres and up to 25000 megalitres per year	*2148.50*	2148.50	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 25000 megalitres per year	*5370.75*	5370.75	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre	*0.10*	0.20	Payments to be made for water charged to users in each three month period ending on the last day of February, May, August and November each year and within 28 days of the end of the three month periods.

Minister's Initials_____

THIS IS PAGE 3 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 July 2003 to 31 Dec 2003*	Fee Payable $ 1 Jan 2004 to 30 Jun 2004	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
Section 35	Licence to take water abstraction fee for all water taken from surface water or ground water except for that supplied through the urban water supply network or surface water taken for use in the areas described in Schedule 2 - per kilolitre	*0.10*	0.20	On a date set by the Environment Protection Authority. In all cases, where fees relating to part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
Section 39	Three year driller licence application fee where the applicant does not hold an equivalent licence in a state in Australia.	*329.85*	329.85	On application
Section 39	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*21.00*	21.00	On application
Section 44	Bore Construction Permit	*107.15*	107.15	On application
Section 47	Recharge licence Application Fee	*214.30*	214.30	On application for a licence
Section 47	Recharge licence yearly fee	*107.15*	107.15	For the first year of a licence the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority.

Minister's Initials_____

Australian Capital Territory

Water Resources (Fees) Determination 2004*

Disallowable Instrument DI 2004 — 114

made under the

***Water Resources Act 1998*, Section 78 - Determination of Fees**

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1. Name of instrument

This instrument is the Water Resources (Fees) Determination 2004.

2. Revocation

I revoke the Disallowable Instrument Number **DI 2003–334** notified on the ACT Government Legislation Register.

3. Determination of fees

The fees for services provided are specified in the Schedule hereunder in Column 2 and prices for 2004-2005 are specified in Column 4 opposite, in relation to that service. Where applicable, GST inclusive fees are marked with a double asterisk (**).

4. Explanatory Notes

Explanatory notes (including the previous period's fee) are at Column 4 and are included in the Schedule. Explanatory notes are included at the end of the Schedule, where applicable. Headings and explanatory notes in the Schedule do not form part of the determination. (For example: where new fees for 2004-05 are denoted by an "N/A" in 2003-04, if included in the schedule, would not form part of the determination).

5. Payment of Fee

The fees determined in this schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.

6. Commencement

This instrument commences on 1 July 2004.

Jon Stanhope
Minister for the Environment
15 June 2004

*Name amended under Legislation Act, s 60

THIS IS PAGE 2 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Item Number	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2004 to 30 June 2004*	Fee Payable $ 1 July 2004 to 30 Jun 2005	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
7.	Licence to take water administration fee for each licence year relating to a licensed volume of more than 2000 megalitres and up to 5000 megalitres per year.	*429.65*	438.20	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
8.	Licence to take water administration fee for each licence year relating to a licensed volume of more than 5000 megalitres and up to 10000 megalitres per year.	*1073.70*	1095.15	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
9.	Licence to take water administration fee for each licence year relating to a licensed volume of more than 10000 megalitres and up to 25000 megalitres per year	*2148.50*	2191.45	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
10.	Licence to take water administration fee for each licence year relating to a licensed volume of more than 25000 megalitres per year	*5370.75*	5478.15	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
11.	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre	*0.20*	0.20	Payments to be made for water charged to users in each three month period ending on the last day of February, May, August and November each year and within 28 days of the end of the three month periods.

Minister's Initials_____

THIS IS PAGE 3 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Item Number	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2004 to 30 June 2004*	Fee Payable $ 1 July 2004 to 30 Jun 2005	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
12.	Licence to take water abstraction fee for all water taken from surface water or ground water except for that supplied through the urban water supply network or surface water taken for use in the areas described in Schedule 2 - per kilolitre	*0.20*	0.20	On a date set by the Environment Protection Authority. In all cases, where fees relating to part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
13.	Three year driller licence application fee where the applicant does not hold an equivalent licence in a state in Australia.	*329.85*	336.45	On application
14.	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*21.00*	21.40	On application
15.	Bore Construction Permit	*107.15*	109.30	On application
16.	Recharge licence Application Fee	*214.30*	218.55	On application for a licence
17.	Recharge licence yearly fee	*107.15*	109.30	For the first year of a licence the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority.

Australian Capital Territory

Water Resources (Fees) Determination 2005 (No 1)

Disallowable Instrument DI2005—58

made under the

***Water Resources Act 1998*, Section 78 - Determination of Fees**

1. Name of instrument

This instrument is the Water Resources (Fees) Determination 2005 (No 1).

2. Revocation

I revoke the Disallowable Instrument Number **DI 2004–114** notified on the ACT Government Legislation Register.

3. Determination of fees

The fees for services provided are specified in the Schedule hereunder in Column 2 and prices for 2004-2005 are specified in Column 4 opposite, in relation to that service. These fees are to be paid as described in Column 5. Where applicable, GST inclusive fees are marked with a double asterisk (**).

4. Explanatory Notes

Explanatory notes (including the previous period's fee) are at Column 4 and are included in the Schedule. Explanatory notes are included at the end of the Schedule, where applicable. Headings and explanatory notes in the Schedule do not form part of the determination. (For example: where new fees for 2004-05 are denoted by an "N/A" in 2003-04, if included in the schedule, would not form part of the determination).

5. Payment of Fee

The fees determined in this schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.

6. Commencement

This instrument commences on the day after notification.

Jon Stanhope
Minister for the Environment
24 February 2005

THIS IS PAGE 3 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2004 to 30 June 2004*	Fee Payable $ 1 July 2004 to 30 Jun 2005	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 5000 megalitres and up to 10000 megalitres per year.	*1073.70*	1095.15	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 10000 megalitres and up to 25000 megalitres per year	*2148.50*	2191.45	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water administration fee for each licence year relating to a licensed volume of more than 25000 megalitres per year	*5370.75*	5478.15	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre	*0.20*	0.20	Payments to be made for water charged to users in each three month period ending on the last day of February, May, August and November each year and within 28 days of the end of the three month periods.
Section 35	Licence to take water abstraction fee for all water taken from surface water or ground water except for that supplied through the urban water	*0.20*	0.20	On a date set by the Environment Protection Authority. In all cases, where fees relating to part of a month are due, each day's use will be

Minister's Initials_____

THIS IS PAGE 4 OF SCHEDULE 1 TO THE DETERMINATION MADE BY THE MINISTER UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2004 to 30 June 2004*	Fee Payable $ 1 July 2004 to 30 Jun 2005	Payment Requirements
(1)	(2)	*(3)*	(4)	(5)
	supply network or surface water taken for use in the areas described in Schedule 2 - per kilolitre			taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
Section 39	Three year driller licence application fee where the applicant does not hold an equivalent licence in a state in Australia.	*329.85*	336.45	On application
Section 39	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*21.00*	21.40	On application
Section 44	Bore Construction Permit	*107.15*	109.30	On application
Section 47	Recharge licence Application Fee	*214.30*	218.55	On application for a licence
Section 47	Recharge licence yearly fee	*107.15*	109.30	For the first year of a licence the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority.

Minister's Initials_____

Australian Capital Territory

Water Resources (Fees) Determination 2005 (No 2)

Disallowable Instrument DI2005—184

made under the

***Water Resources Act 1998*, Section 78 - Determination of Fees**

1 Name of instrument

This instrument is the *Water Resources (Fees) Determination 2005 (No 2).*

2 Commencement

This instrument commences the day after notification.

3 Determination of fees

The services provided are specified in Schedule 1 hereunder in Column 2 and prices for 2005-2006 are specified in Column 4 opposite, in relation to that service. These fees are to be paid as described in Column 5. Where applicable, GST inclusive fees are marked with a double asterisk (**). Schedule 2 hereunder describes the lands to which the fees set out in schedule 1 apply. Schedule 2 is part of the determination.

4 Explanatory Notes

Explanatory notes (including the previous period's fee) are at Column 3 in Schedule 1 and at the end of the Schedules. Explanatory notes and their headings in Schedule1 do not form part of the determination. Additional explanatory notes comprising Schedule 2 form part of the determination.

5 Payment of Fee

The fees determined in this schedule are payable to the ACT Government by he person(s) requesting the goods or services, as listed.

6 Revocation

This instrument revokes Disallowable Instrument Number DI 2005–58.

Jon Stanhope MLA
Minister for the Environment

10 August 2005

THIS IS PAGE 4 OF SCHEDULE 1 TO THE DETERMINATION MADE UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2004 to 30 June 2005*	Fee Payable $ 1 July 2005 to 30 Jun 2006	Payment Requirements
(1)	(2)	(3)	(4)	(5)
Section 35	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre	*0.20*	0.25	Payments to be made for water charged to users in each three month period ending on the last day of February, May, August and November each year and within 28 days of the end of the three month periods.
Section 35	Licence to take water abstraction fee for all water taken from surface water or ground water except for that supplied through the urban water supply network or surface water taken for use in the areas described in Schedule 2 - per kilolitre	*0.20*	0.25	On a date set by the Environment Protection Authority. In all cases, where fees relating to part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
Section 39	Three year driller licence application fee where the applicant does not hold an equivalent licence in a state in Australia.	*336.45*	344.85	On application
Section 39	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*21.40*	21.90	On application
Section 44	Bore Construction Permit	*109.30*	112.00	On application
Section 47	Recharge licence Application Fee	*218.55*	224.00	On application for a licence

Australian Capital Territory

Water Resources (Fees) Determination 2006 (No 1)

Disallowable Instrument DI2006—138

made under the

***Water Resources Act 1998*, Section 78 - Determination of Fees**

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1 Name of instrument

This instrument is the *Water Resources (Fees) Determination 2006 (No 1).*

2 Commencement

This instrument commences on 1 July 2006.

3 Determination of fees

The services provided are specified in Schedule 1 hereunder in Column 2 and prices for 2006-2007 are specified in Column 4 opposite, in relation to that service. These fees are to be paid as described in Column 5. Where applicable, GST inclusive fees are marked with a double asterisk (**). Schedule 2 hereunder describes the lands to which the fees set out in Schedule 1 apply. Schedule 2 is part of the determination.

4 Explanatory Notes

Explanatory notes (including the previous period's fee) are at Column 3 in Schedule 1 and at the end of the Schedules. Explanatory notes and their headings in Schedule 1 do not form part of the determination. Additional explanatory notes comprising Schedule 2 form part of the determination.

5 Payment of Fee

The fees determined in this Schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.

6 Revocation

This instrument revokes Disallowable Instrument Number DI 2005–184.

Jon Stanhope MLA
Chief Minister
27 June 2006

THIS IS PAGE 3 OF SCHEDULE 1 TO THE DETERMINATION MADE UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2005 to 30 June 2006*	Fee Payable $ 1 July 2006 to 30 Jun 2007	Payment Requirements
(1)	(2)	(3)	(4)	(5)
	a data collection and sharing agreement with the Environment Protection Authority.			
Section 35	Licence to take water – administration fee for each licence year relating to a licensed volume of up to 1000 megalitres per year, where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*No fee*	Nil	
Section 35	Licence to take water – administration fee for each licence year relating to a licensed volume of more than 1000 megalitres per year.	*5615.10*	5823.00	For the first year of a licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 35	Licence to take water – abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre.	*0.25*	0.55	Payments to be made for water charged to users in each three month period ending on the last day of February, May, August and November each year and within 28 days of the end of the three month periods.
Section 35	Licence to take water – abstraction fee for all water taken from surface water or ground water except for that supplied through the urban water supply network or surface water taken for	*0.25*	0.25	On a date set by the Environment Protection Authority. In all cases, where fees relating to part of a month are due, each day's use will be taken to be equivalent to average daily use for that

THIS IS PAGE 4 OF SCHEDULE 1 TO THE DETERMINATION MADE UNDER THE WATER RESOURCES ACT 1998.

Section	Type of licence or permit	*Explanatory Notes Fee Payable $ 1 Jan 2005 to 30 June 2006*	Fee Payable $ 1 July 2006 to 30 Jun 2007	Payment Requirements
(1)	(2)	(3)	(4)	(5)
	use in the areas described in Schedule 2 - per kilolitre.			month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
Section 39	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*21.90*	116.00	On application
Section 44	Bore Construction Permit	*112.00*	116.00	On application
Section 47	Recharge licence Application Fee	*224.00*	116.00	On application for a licence
Section 47	Recharge licence yearly fee	*112.00*	300.00	For the first year of a licence the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority.
Section 69	Water control structures – permit to construct etc	*112.00*	116.00	On application

ML denotes megalitre
"Licence year" means the first whole year of a licence or subsequent whole years.

Australian Capital Territory

Water Resources (Fees) Determination 2007 (No 1)

Disallowable Instrument DI2007— 192

made under the

***Water Resources Act 2007*, Section 107 - Determination of Fees**

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1. **Name of instrument**
   This instrument is the *Water Resources (Fees) Determination 2007 (No 1).*
2. **Commencement**
   This instrument commences upon commencement of the *Water Resources Act 2007*
3. **Determination of fees**
   The services provided are specified in Schedule 1 hereunder in Column 2 and prices for 2007-2008 are specified in Column 4 opposite, in relation to that service. These fees are to be paid as described in Column 5. Schedule 2 hereunder describes the lands to which the relevant fees set out in Schedule 1 apply. Schedule 2 is part of the determination.
4. **Explanatory Notes**
   Explanatory notes (including the previous fees which were determined under the repealed *Water Resources Act 1998*) are at Column 3 in Schedule 1 and at the end of the Schedules. Explanatory notes and their headings in Schedule 1 do not form part of the determination. Additional explanatory notes comprising Schedule 2 form part of the determination.
5. **Payment of Fee**
   The fees determined in this Schedule are payable to the ACT Government by the person(s) requesting the goods or services, as listed.

Jon Stanhope MLA
Minister for the Environment and Climate Change
31 July 2007

THIS IS PAGE 3 OF SCHEDULE 1 TO THE DETERMINATION MADE UNDER THE WATER RESOURCES ACT 2007.

Column 1 Section	Column 2 Type of licence	Column 3 *Explanatory Notes* *Fee Payable $ 1 July 2006 to 31 July 2007*	Column 4 Fee Payable $ 1 August 2007 to 30 Jun 2008	Column 5 Payment Requirements
Section 30	Licence to take water administration fee for each licence year relating to a licensed volume of more than 1000 megalitres per year	*Not applicable*	6055.00	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
Section 30	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water charged to users – per kilolitre	*Not applicable*	0.55	Payments to be made for water charged to users in each three month period ending the last day of February, May, August and November each year and within 28 days of the end of the three month period.
Section 30	Licence to take water – abstraction fee for all water from surface water or groundwater except for that supplied through the urban water supply network or surface water taken from areas described in Schedule 2 – per kilolitre	*Not applicable*	0.25	On a date set by the Environment Protection Authority. In all cases, where fees relating to a part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
Section 34	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*Not applicable*	120.60	On application.
Section 38	Application fee for a bore work licence	*Not applicable*	120.60	On application
Section 48	Application for a Recharge licence	*Not applicable*	120.60	On application
Section 49	Recharge licence - yearly	*Not*	312.00	For the first year of the

1 Name of Act

This Act is the *Water Resources (Validation of Fees) Act 2008*.

3 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

4 Water Resources (Fees) Determination—effect

(1) Despite the repeal of the *Water Resources (Fees) Determination 2006 (No 1)* (DI2006-138), the determination has effect, and is taken always to have had effect, for all purposes as if it had continued in force until the end of 31 July 2007.

(2) This section is a law to which the Legislation Act, section 88 (Repeal does not end effect of transitional laws etc) applies.

Note If a law validates something that is or may otherwise be invalid, the validating effect of the law does not end merely because of the repeal of the law (see Legislation Act, s 88 (1)).

5 Expiry of Act

This Act expires on the day after its notification day.

Australian Capital Territory

Water Resources (Fees) Determination 2008 (No 1)

Disallowable Instrument DI 2008 - 153

made under the

***Water Resources Act 2007*, section 107 – Determination of fees**

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1. Name of instrument

This instrument is the Water Resources (Fees) Determination 2008 (No 1).

2. Commencement

This instrument commences on 1 July 2008.

3. Revocation of previous instrument

Disallowable instrument DI2007 - 192 (Water Resources (Fees) Determination 2007 (No 1)) is revoked.

4. Determination of fees

The fee payable in respect of each matter listed in an item in column 2 of schedule 1 is the amount listed for that matter in column 4 and in the manner listed for that matter in column 5.

5. Payment of Fee

The fees determined in this instrument are payable to the ACT Government by the person requesting the goods or services, as listed.

6. Definitions

In this instrument:

defined area – see schedule 2.

licence year means the first whole year of a licence or subsequent whole years.

repealed Act means the *Water Resources Act 1998*.

WAE means water access entitlement.

Jon Stanhope MLA
Minister for the Environment, Water and Climate Change

26 June 2008

column 1 Section of Act	column 2 Type of licence	*column 3* *Fee Payable* *1 August 2007 to 30 June 2008*	column 4 Fee Payable from 1 July 2008	column 5 Payment Requirements
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, except where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*$312.00*	**$325.25**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*Nil*	**Nil**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water administration fee for each licence year relating to a licensed volume of more than 1000 megalitres per year	*$6055.00*	**$6312.30**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water abstracted – per kilolitre	*$0.55*	**$0.51**	Payments to be made for water charged to users in each three month period ending the last day of February, May, August and November each year and within 28 days of the end of the three month period.
s.30	Licence to take water – abstraction fee for all water from surface water or groundwater except for that supplied through the urban water supply network or surface water taken from a defined area – per kilolitre	*$0.25*	**$0.25**	On a date set by the Environment Protection Authority. In all cases, where fees relating to a part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.

Australian Capital Territory

Water Resources (Fees) Determination 2009 (No 1)

Disallowable Instrument DI2009-109

made under the

***Water Resources Act 2007*, section 107 – Determination of fees**

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1. Name of instrument

This instrument is the Water Resources (Fees) Determination 2009 (No 1).

2. Commencement

This instrument commences on 1 July 2009.

3. Revocation of previous instrument

Disallowable instrument DI2008-153 (Water Resources (Fees) Determination 2008 (No 1)) is revoked.

4. Determination of fees

The fee payable in respect of each matter listed in an item in column 2 of schedule 1 is the amount listed for that matter in column 4 and in the manner listed for that matter in column 5.

5. Payment of Fee

The fees determined in this instrument are payable to the ACT Government by the person requesting the goods or services, as listed.

6. Definitions

In this instrument:

licence year means the first whole year of a licence or subsequent whole years.

repealed Act means the *Water Resources Act 1998*.

WAE means water access entitlement.

Simon Corbell MLA
Minister for the Environment, Climate Change and Water
22 June 2009

column 1 Section of Act	column 2 Type of licence	*column 3* *Previous fee payable in 2008-09 (where applicable)*	column 4 Fee Payable from 1 July 2009	column 5 Payment Requirements
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, except where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*$325.25*	**$336.60**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*Nil*	**Nil**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water administration fee for each licence year relating to a licensed volume of more than 1,000 megalitres per year.	*$6,312.30*	**$6,533.20**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water abstracted – per kilolitre.	*$0.51*	**$0.51**	Payments to be made for water charged to users in each three month period ending the last day of February, May, August and November each year and within 28 days of the end of the three month period.

column 1 Section of Act	column 2 Type of licence	*column 3* *Previous fee payable in 2008-09 (where applicable)*	column 4 Fee Payable from 1 July 2009	column 5 Payment Requirements
s.30	Licence to take water – abstraction fee for all water from surface water or groundwater except for that supplied through the urban water supply network – per kilolitre.	*$0.25*	**$0.25**	On a date set by the Environment Protection Authority. In all cases, where fees relating to a part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
s.34	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*$125.70*	**$130.05**	On application.
s.38	Application fee for a bore work licence.	*$125.70*	**$130.05**	On application
s.48	Application for a Recharge licence.	*$125.70*	**$130.05**	On application
s.49	Recharge licence - yearly administration fee.	*$325.25*	**$336.60**	For the first year of the licence, the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.41	Application fee for a Waterway work licence.	*$125.70*	**$130.05**	On application

Australian Capital Territory

Water Resources (Fees) Determination 2010 (No 1)

Disallowable Instrument DI2010-144

made under the

***Water Resources Act 2007*, section 107 – Determination of fees**

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1. Name of instrument

This instrument is the Water Resources (Fees) Determination 2010 (No 1).

2. Commencement

This instrument commences on 1 July 2010.

3. Revocation of previous instrument

Disallowable instrument DI2009-109 (Water Resources (Fees) Determination 2009 (No 1)) is revoked.

4. Determination of fees

The fee payable in respect of each matter listed in an item in column 2 of schedule 1 is the amount listed for that matter in column 4 and in the manner listed for that matter in column 5.

5. Payment of Fee

The fees determined in this instrument are payable to the ACT Government by the person requesting the goods or services, as listed.

6. Definitions

In this instrument:

licence year means the first whole year of a licence or subsequent whole years.

repealed Act means the *Water Resources Act 1998*.

WAE means water access entitlement.

Simon Corbell MLA
Minister for the Environment, Climate Change and Water
29 June 2010

column 1 Section of Act	column 2 Type of licence	*column 3* *Previous fee payable in 2009-10 (where applicable)*	column 4 Fee Payable from 1 July 2010	column 5 Payment Requirements
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, except where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*$336.60*	**$348.35**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water – administration fee for each licence year relating to a licenced volume of up to 1000 megalitres per year, where a licensee has entered into a data collection and sharing agreement with the Environment Protection Authority.	*Nil*	**Nil**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water administration fee for each licence year relating to a licensed volume of more than 1,000 megalitres per year.	*$6,533.20*	**$6,761.85**	For the first year of the licence, the fee shall be paid in full on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.30	Licence to take water abstraction fee for water taken for the purposes of urban water supply and calculated on the basis of the water abstracted – per kilolitre.	*$0.51*	**$0.51**	Payments to be made for water charged to users in each three month period ending the last day of February, May, August and November each year and within 28 days of the end of the three month period.

column 1 Section of Act	column 2 Type of licence	*column 3* *Previous fee payable in 2009-10 (where applicable)*	column 4 Fee Payable from 1 July 2010	column 5 Payment Requirements
s.30	Licence to take water – abstraction fee for all water from surface water or groundwater except for that supplied through the urban water supply network – per kilolitre.	*$0.25*	**$0.25**	On a date set by the Environment Protection Authority. In all cases, where fees relating to a part of a month are due, each day's use will be taken to be equivalent to average daily use for that month and, where monthly meter readings are not available, the Environment Protection Authority shall estimate water use after consultation with the licensee.
s.34	Three year driller licence application fee where the applicant does hold an equivalent licence in a state in Australia.	*$130.05*	**$134.60**	On application.
s.38	Application fee for a bore work licence.	*$130.05*	**$134.60**	On application
s.48	Application for a Recharge licence.	*$130.05*	**$134.60**	On application
s.49	Recharge licence - yearly administration fee.	*$336.60*	**$348.35**	For the first year of the licence, the fee shall be paid on application for a licence and thereafter, on a date set by the Environment Protection Authority
s.41	Application fee for a Waterway work licence.	*$130.05*	**$134.60**	On application
s.26	Application fee for the disposal of a transferrable water access entitlement either permanently or for a period of time.	*N/A*	**$134.60**	On application
s.26	Application fee for the acquisition of a transferrable water access entitlement either permanently or for a period of time.	*N/A*	**$134.60**	On application