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 LIMITED
First Respondent

AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent

APPELLANT'S REPLY

(Re Water Abstraction Charge)

Filed on behalf of the Appellant on 7 June 2011 by:
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1. The submissions are in a form suitable for publication on the internet.

REVENUE-RAISING PURPOSE

2. The ACT correctly accepts at [45] that this question is intimately tied to the "discernible relationship to value" issue. It cites extrinsic materials at [33]-[39] in answer to QCC's argument that the ACT made no attempt to link the new 30c "water fee" to the value of what was being acquired. QCC agrees that the materials are relevant. Contrary to ACTEW's views at [54] (contrast [35] at fn 42), no issue of parliamentary privilege arises in using such materials in ascertaining the character of a measure,[1] and such use is entirely orthodox. However, the ACT's examination only confirms that the two purposes given for the water fee were to raise revenue and to manage demand.

THE DISCERNIBLE RELATIONSHIP REQUIREMENT

3. The ACT puts the heart of its case at [49]: s 90 imposes no constitutional limit on the amount that a Territory [or State] can charge for water (or presumably any natural resource) that it owns or controls, and it can charge a monopoly price. That proposition removes a significant portion of economic activity from the reach of the s 90 guarantee.

4. At [15], ACTEW says that the discernible relationship requirement applies only to fees for services, not to fees for goods, because with services one must identify whether the fee "is *for* a particular service provided to the particular individual, or is instead for the conglomeration of 'services' provided by the government to the public at large". The same issue arises for goods. If a government charges considerably above the value of a good (in monopoly circumstances), the government cannot be charging for the particular good as opposed to raising revenue for its general purposes.

5. At [21], ACTEW follows Mason CJ, Deane and Gaudron JJ in *Harper* (1989) 168 CLR 314 at 325 in accepting that a State/Territory is not entitled to charge a fee which is "a mere device for tax collecting". But ACTEW does not explain how to distinguish such a device, nor why one should do so given the Respondents' position here. The way to do so – consistent with authority and with principle – is to look to whether there is a discernible relationship to the value of that which is charged for.

6. At [23], ACTEW says that QCC's submissions rest upon "a novel and internally contradictory conception of the place of s 90". At [61]-[62] of its primary submissions, QCC invoked authoritative and consistent statements of this Court. Section 90 fosters national unity by facilitating free and equal trade in goods and giving the Commonwealth real control over the taxation of commodities, ensuring that the Commonwealth is not impeded by fiscal measures of the States if it adopts a policy of stimulating or deflating demand for goods.

7. The Respondents say that s 90 does not apply to "royalties": ACT, [47]-[48] and [54]; ACTEW, [28]. There is no such carve-out from s 90. ACTEW errs to suggest that Brennan J accepted the contrary in *Harper*: at 333.8, his Honour was referring to the arguments put (see 333.3 and 334.4). The question must be whether a measure can be characterised as an excise. The ACT suggests at [54] that, otherwise, one would expect numerous challenges to royalties on "natural resources such as minerals, timbers and hydrocarbons". For each of those resources, State and Territory governments hold no

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[1] Cf also *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 493; *Sportodds Systems Pty Ltd v NSW* (2003) 133 FCR 63 at [40]-[41].

monopoly position. If a State imposed a royalty on miners with no discernible relationship to the value of the minerals, miners would look elsewhere for their supply. This issue only arises where the person subjected to the exaction "is given no choice about whether or not he acquires": see *Air Caledonie*, 467. (This also answers ACTEW, at [19], on States selling in competition with private competitors.) Similarly, Keane CJ erred at [90] in posing an analogy with government rail transport services. Section 90 only applies with respect to goods, not services.

8. At [32], ACTEW asserts that, in *Harper*, the licence fees bore no obvious relationship to value. There were three versions of the licence fee in issue: the 1987 fee ($360 for each tonne authorised under the licence); the 1988 fee (5% of the gross value of the quantity of abalone authorised under the licence); and the 1989 stepped fee of $28,200 for up to 15 tonnes and $40,000 for more than 15 tonnes: see 168 CLR 314 at 326.9-329.2. The 1989 market price paid to abalone fishers was approximately $17/kg (see at 317.8) – $17,000/tonne. In those circumstances – and where discernible relationship was not argued – it can be seen why Dawson, Toohey and McHugh JJ found it possible to discern a relationship between the amount paid and the value of the privilege: 168 CLR 314 at 336.7. At [65], the ACT invokes Keane CJ's statement at [72] that "the most exiguous relationship will do to exclude the conclusion that there is 'no discernible relationship'". Although the test does not require fine or precise analysis, it has real content. Contrary to Keane CJ's analysis, *Harper* does not suggest otherwise.

9. At [61], the ACT submits in effect that the significance of *Airservices* is limited to the statute construed. However, s 67 of the relevant Act provided that the charges "shall not be such as to amount to taxation": the constitutional cases on taxation were discussed in that context. ACTEW's claim, at [30], that absence of a discernible relationship "may be of very little moment" is not supported by the cited paragraphs from *Airservices*.

MONOPOLY PRICING

10. Both Respondents invoke Keane CJ at [76], saying that any practical compulsion recognises "that the WAC is not so high that consumers would make a rational economic choice to acquire their potable water from other suppliers": ACT, [75]; ACTEW, [39]-[41]. First, the WAC is imposed on untreated water taken by ACTEW, not potable water received by consumers. Secondly, the effect of his Honour's analysis was that a State or Territory could charge whatever it wished, and could get away, in the market – thus, in a monopoly situation, it could charge monopoly prices: see Keane CJ at [86]-[89] and [92]. However, as QCC put in its primary submissions at [65]-[69], to accept that proposition is to denude the "discernible relationship" notion of meaning.

11. At [48]-[49], ACTEW argues that there was no legal or practical compulsion on ACTEW to acquire the untreated water. Buchanan J rightly rejected that argument as unrealistic: see [110] and [117]. ACTEW, as the relevant licensor, was obliged by ss 83-84 of the *Utilities Act* to supply water to consumers who requested it. The only sufficient source of water to supply consumers was the ACT's developed water supply. ACTEW called evidence that it had been considering buying some water from the Snowy-Hydro scheme as one drought-mitigation strategy.[2] But this was not suggested as an alternative supply. As Buchanan J said, at [110], that "there was simply no

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[2] Second Supplementary Affidavit of Ross Munro Knee, 5 February 2009: AB 927-938; Annexure C – Email from David Harris of SnowyHydro Ltd to Leigh Crocker of ACTEW, 6 March 2007: AB 938.

practical alternative supply of water available to ACTEW",[3] and "[a]ny speculation about alternative sources of supply was about remote, costly, future possibilities, not present realities".

12. If ACTEW argues that practical compulsion is insufficient, this should be rejected. It is inconsistent with authority on the point,[4] inconsistent with the analysis in *Air Caledonie* at 467 on being "given no choice about whether or not he acquires", and inconsistent with this Court's emphasis on looking to the substantial and practical effect of measures in the process of characterisation.

NO DISCERNIBLE RELATIONSHIP TO VALUE

13. The Respondents submit that "value" in this context includes "in an appropriate case such as this, political, environmental and social considerations, not just economic ones": ACT, [76]; ACTEW, [35], [42] and [56]. It is commonplace for taxes to be imposed for purposes beyond raising revenue. It is contrary to basic authority to suggest that such non-taxing purposes might lead to a measure not being characterised as a tax: cf QCC's primary submissions, [94]. If the Respondents' position was accepted, a State or Territory could impose levies on alcohol or tobacco because of a desire to manage or reduce demand in light of the dangers of those goods, or levies on petrol if justified by a desire to conserve a limited natural resource or reduce emissions.

14. Section 90 is an economic guarantee. The notion of a discernible relationship to the value of what is acquired must relate to the objective value of the good in question. To extend the value to political or related considerations would enable governments to read themselves into power and out of the reach of s 90. The ACT complains at [95] that QCC's position would deny it one means of managing water demand. But there is nothing surprising about the fact that the Constitution may deny a State one (fiscal) means of achieving a potentially legitimate end.[5]

15. Both Respondents refer to an acceptance by counsel for QCC below that the increase in the WAC was a genuine assessment by the ACT to reflect more fully the true economic value of the water: ACT, [40] and [89]; ACTEW, [35]. And so it was – where the economic value included the monopoly profits it could, and did, extract. That economic value reaches beyond what is permitted.

16. The ACT makes the formal point at [91] that QCC should not be permitted to refer to evidence given by the experts because QCC has not specifically raised this in its appeal notices. But it was specifically raised in the notices of appeal to the Full Court, the majority of the Full Court did not consider the point, and it is sufficiently encompassed here within appeal ground 5.[6]

17. The ACT suggests at [83] that neither Professor Grafton nor the ICRC referred to the downstream evidence as a suitable proxy. That is incorrect: see QCC primary

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3 See also Mr Fogarty's evidence on the costs of alternative supplies of potable water: AB 202-204; AB 54-55 (cross-examination).

4 *Attorney-General (NSW) v Homebush Flour Mills* (1937) 56 CLR 390; *Airservices* (1999) 202 CLR 133 at [132] (Gaudron J), [289]-[290] (McHugh J), and authority there cited.

5 Note *Commonwealth Oil Refineries Case* (1926) 38 CLR 408 at 423 (Isaacs J); *Homebush Flour* (1937) 56 CLR 390 at 414 (Dixon J).

6 Paragraph 3A, Federal Court of Australia, Further Amended Notice of Cross-Appeal, 21 May 2010: AB 2751; High Court Notices of Appeal, 21 April 2011: AB 2862.

submissions, [79]. Both invoked this evidence in support of the "opportunity cost" of the water being abstracted in the ACT. The ACT then says, at [84], that neither Grafton nor the ICRC expressed the view "that the irrigation water market in the Murrumbidgee is 'analogous' to the market for urban potable water in the ACT". This is quite true, but the ACT misunderstands the relationship, which relates to market value for *untreated* water. The same may be said of Keane CJ at [92], invoked by the ACT at [85].

18. At [34], ACTEW accepts that market value may be relevant. At [44], it seeks to distinguish the Murrumbidgee evidence because it says it would only be interested in acquiring permanent high security entitlements, not temporary trades. This misses the point: evidence of "temporary trades" is evidence of the selling price of actual untreated water (as opposed to general, future entitlements) in the nearest downstream market. It is that price which is informative of the worth of the untreated water taken by ACTEW from the ACT. Secondly, ACTEW says there is evidence of the price in the actual market. That is a circular way of saying that the ACT can charge whatever it likes. Thirdly, it suggests that the downstream evidence indicates high volatility. ACTEW neglects to mention that the high levels reached were in response to the worst drought on record, and were still well below the level of the WAC from 1 July 2006.

OTHER POINTS RAISED BY THE RESPONDENTS

19. **Internal financial arrangement: ACTEW, [50]-[52].** ACTEW argues that the ACT could charge consumers whatever it wished, and that ACTEW should be equally free. The supposed "common ground" as to the premise reflected QCC's acknowledgement that, on the current state of the law, s 90 may not extend to levies directly on the consumer.[7] The majority in *Ha* (1997) 189 CLR 465 at 499-500 expressly stated that "it is unnecessary to consider whether a tax on the consumption of goods would be classified as a duty of excise". If the ACT had imposed the charge on consumption, QCC could have agitated that issue. As it is, QCC did not need do so.

20. ACTEW is a "Territory-owned corporation" and, although subject to the direction of the ACT (because the Government controls all voting shares and has a power of direction), it is nevertheless a company limited by shares and legally distinct from the ACT: see the *Territory-owned Corporations Act 1990* (ACT), s 6(1), Schedule 1. The WAC has been imposed on ACTEW, and is designed to be passed on to consumers. The ACT chose not to impose the WAC directly on each consumer of water.[8] ACTEW effectively asks the Court to ignore its distinct legal personality. No doubt the Court must be concerned here with substance and not form, but the creation of separate legal personality is no mere matter of form, and reflects an ACT policy choice with ramifications in a wide range of legal areas (for example, taxation, employment, use of government services). There is no warrant for ignoring this basic legal distinction here.

21. **Whether an excise even if a tax: ACTEW, [55]-[56].** The ACT concedes at [3] that, if the WAC is a tax, then it is an excise. ACTEW does not; its argument is without merit: cf Buchanan J (2009) 178 FCR 510 at [126]. The fee is imposed by reference to the quantity of untreated water taken, where that water is used in producing potable water. ACTEW's arguments here are a variant of its position that political/environmental

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7 Trial transcript 98/4-5.

8 Just as Tasmania was found, in *Dickenson's Arcade Ltd v State of Tasmania* (1974) 130 CLR 177, to have chosen (as a matter of substance) not to impose the tobacco consumption tax directly on each consumer of tobacco but to impose that tax on retailers.

considerations may be taken into account in "value", addressed in paragraph 13 above.

22. **Reading down: ACT, [98]-[99].** The ACT submits that, if invalidity is established, the relevant executive instruments should be read down as though they referred to a level of 25c/kl. The instruments in question do not state that the WAC is "25c plus 30c per kl". They state the WAC is, for the relevant dates, 55c/kl (or later 51c/kl).[9] Although QCC does not object to the 25c/kl level, it is not for the Court or the parties to choose a number that would satisfy the "discernible relationship" requirement and insert that instead of the number actually specified. That is a legislative action.

23. **QCC's recovery of the WAC from ACTEW: ACTEW, [57]-[60].** This issue arises for the WAC passed on to QCC in the 12-month period from 1 July 2006 to 30 June 2007, after which date QCC declined to pay the portion attributable to the WAC (although it has since paid the relevant amounts pursuant to the trial Judge's orders). In response, first, QCC seeks to rely on s 21A of the *Limitation Act 1985*, which applies to "[a]n action for recovery of a revenue amount" – "an amount of money paid voluntarily or under compulsion as ... a tax, licence fee or duty imposed, or purportedly imposed, under an Act". However, "[a]s between ACTEW and QCC the WAC was not paid as a tax. It was a contractual payment": Buchanan J at [170]. Section 21A protects governments from claims with respect to invalid taxes. If it had been intended to protect taxpayers from claims by others, it would have been expressed differently.

24. ACTEW disputes that a basis for an action for money had and received is made out. Yet there was a total failure of consideration: Buchanan J at [166]-[168]. The water invoices issued on behalf of ACTEW itemised the amounts payable for the WAC (and UNFT), as a distinct part of the consideration.[10] The money was claimed by ACTEW and paid by QCC under the practical compulsion of a monopoly involving a basic human necessity. The ties of natural justice and equity require restitution in such a case.[11] As ACTEW itself submits, it is an entity of the ACT. That corporate structure cannot be ignored, but it is relevant to the claim that ACTEW should be required to disgorge the money taken. Whether or not QCC passed the WAC on to ratepayers is not to the point, just as it was not to the point in *Roxborough*. Furthermore, QCC is not a profit-making enterprise, but a local council which uses funds raised for the benefit of ratepayers.

25. ACTEW claims a "change of position" defence. To establish the defence it is necessary to establish that the "the defendant has acted to his or her detriment on the faith of the receipt".[12] Here there was no such reliance. ACTEW kept paying the WAC to the ACT even after QCC ceased making payments to ACTEW, suggesting that it would have paid the money on to the ACT even if QCC's refusal to pay had started earlier. Further, ACTEW agreed from July 2008 that "any payments made under this agreement on account of the WAC shall be repaid by ACTEW to QCC" if the WAC is held invalid.[13]

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9 Water Resources (Fees Determination) 2006 (No 1): AB 1485; Water Resources (Fees Determination) 2007 (No 1): AB 1627; Water Resources (Fees Determination) 2008 (No 1): AB 2151.

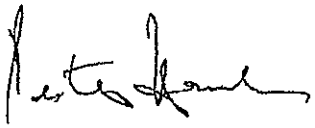
10 Cf *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [13], [21], [24], [109]. Examples of the invoices are found at AB 1144, 1146, 1442, 1614, 1641 and 2158.

11 Note *Roxborough* (2001) 208 CLR 516 at [93]-[95].

12 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385.5; see eg *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964.

13 Clause 3.7 of the Pricing Agreement between ACTEW and QCC, 7 July 2008: AB 411-412.

7 June 2011



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