IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY **NO C2 OF 2011**

NO C3 OF 2011

QUEANBEYAN CITY COUNCIL

Appellant

ACTEW CORPORATION LIMITED

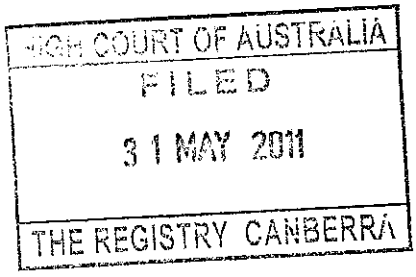
First Respondent

THE AUSTRALIAN CAPITAL TERRITORY

10 Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

ON THE WATER ABSTRACTION CHARGE



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PART I SUITABILITY FOR PUBLICATION

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

PART II ISSUES

2. Appeal C2 of 2011 and C3 of 2011 raise the same issues for determination in relation to the Water Abstraction Charge (the **WAC**). These submissions should be taken as submissions in relation to the WAC in both appeal C2 of 2011 and C3 of 2011.

3. The primary issue between the Appellant (QCC) and the Second Respondent (the Territory) in relation to the WAC is whether the WAC (to the extent it exceeded 25c/kl) is a tax. The Territory accepts that if the WAC (to the extent it exceeded 25c/kl) is properly characterised as a tax, it is an excise.

4. The sub-issues for determination are:

   4.1. whether the WAC is a charge or fee for the use or acquisition of property and therefore not a tax;

   4.2. whether the WAC is a charge or fee for the acquisition of the right to appropriate the Territory's water and is of the same character as either a royalty or the price of a profit a prendre to acquire the Territory's water and therefore not a tax;

   4.3. whether the WAC is the quid pro quo which is paid in return for the rights the First Respondent (**ACTEW**) obtains under its licences to take water, being rights to appropriate or take and make use of a limited public natural resource, and therefore not a tax;

   4.4. whether the WAC is not a tax because ACTEW was not under any legal or practical compulsion to acquire water only from the Territory;

   4.5. whether it was a requirement of QCC's case to establish the absence of any discernible relationship between the charge and the value of the property;

   4.6. if there is such a requirement, whether QCC established that there was an absence of <u>any</u> discernible relationship between the amount of the WAC (to the extent it exceeded 25c), as imposed from 1 July 2006, and the value of the water acquired or obtained by ACTEW;

   4.7. if the Court finds that the WAC (to the extent it exceeds 25c/kl) is a tax and therefore an excise, whether the relevant ministerial determinations can be read down to preserve the validity of the WAC to the extent that it does not exceed 25c (or otherwise impose a tax).

PART III NOTICE UNDER S 78B OF THE *JUDICIARY ACT*

5. Notice has been given in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

6. The Territory accepts 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, adopted by QCC at [7]. The Territory also adopts the legal and factual context as set out by Keane CJ at [11] –[38].

7. At [18] – [19] QCC refers to expert evidence that was not admitted by the primary judge: at [88]. Insofar as those paragraphs purport to summarise the effect of the expert evidence, the Territory does not accept that they are an accurate summary.

10 8. Insofar as QCC's account of the "Material Facts" contains submissions, those submissions are dealt with in Part VI below.

PART V APPLICABLE LEGISLATION

9. QCC's statement of applicable constitutional provisions, statutes, regulations and ministerial determinations should also refer to the *Legislation Act* 2001 (ACT) ss 46, 126, 132.

PART VI RESPONSE TO ARGUMENT OF APPELLANT

10. The Territory submits that, as Keane CJ (at [83]), Stone J (at [176]-[177]) and the primary judge (at [126]) held, the WAC is not properly characterised as a tax (Perram J, in dissent, made no finding as to the proper characterisation of
20 the WAC (at [198])). This is because:

10.1. the WAC is a charge for the acquisition of property which the ACT Government effectively owns or controls (see Keane CJ at [82], Perram J at [184], primary judge at [125]); or, alternatively

10.2. the WAC is the quid pro quo paid in return for the rights which the First Respondent obtained under its licence to take water, being rights to appropriate a limited public natural resource (see Stone J at [168], [176], Perram J at [184], primary judge at [125]; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 325.

Legislative framework

30 11. Determining whether legislation imposes an excise contrary to s 90 of the Constitution is fundamentally an exercise in statutory interpretation.

12. That is not to say that the practical operation of the statute need not be considered. As Brennan CJ, McHugh, Gummow and Kirby JJ said in *Ha v State of New South Wales* (1997) 189 CLR at 498:

> *"When a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms in order to ensure that the limitation or restriction is not circumvented by mere drafting devices."*

13. However, as QCC conceded at first instance (transcript, 70.22) the process of characterisation is an objective one.

14. Section 37 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) provides that the ACT Executive is responsible for governing the ACT with respect to the matters in Schedule 4, which include "water resources".

15. The management of the water resources of the Territory is currently governed by the *Water Resources Act 2007* (the 2007 Act), which replaced the *Water Resources Act 1998* (the 1998 Act). [1]

16. Significantly, section 7 of the 2007 Act (and section 13 of the 1998 Act) vests in the Territory the right to the use, flow and control of all water of the Territory, subject to the Act. Accordingly, all water of the Territory is effectively owned or controlled by the Territory.[2]

17. The objects of the 2007 Act (and 1998 Act) are:

    17.1. to ensure that management and use of the water resources of the Territory sustain the physical economic and social wellbeing of the people of the ACT while protecting the ecosystems that depend on those resources; and

    17.2. to protect aquatic ecosystems and aquifers from damage and, where practicable, to reverse damage that has already happened; and

    17.3. to ensure that the water resources are able to meet the reasonably foreseeable needs of future generations.[3]

18. The 2007 Act regulates the use of water in the Territory. A person may apply to the Minister for a "water access entitlement", which entitles the holder to a percentage of the water available for taking in a particular water management area (ss 19 and 20). The 2007 Act also establishes a licensing scheme, whereby a person must apply for a licence in order to take water from a stated place: s 29. It is an offence to take water without a licence: s 28 of the 2007 Act. A licence will not be granted unless, inter alia:

    18.1. the applicant holds a relevant water access entitlement: s 30(2)(a) of the 2007 Act;

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[1] The Water Resources Act 1998 was repealed by the Water Resources Act 2007, which commenced on 1 August 2007. QCC challenges the validity of the following determinations made under s 78 of the Water Resources Act 1998 and s 107 of the Water Resources Act 2007: the Water Resources (Fees) Determination 2006 (No. 1), which determined a WAC of 55c/kl a kilolitre1 for the period 1 July 2006 to 30 June 2007 (and revoked the Water Resources (Fees) Determination 2005 (No. 2)); the Water Resources (Fees) Determination 2007 (No 1), which determined a WAC of 55c/kl a kilolitre 1 from 1 August 2007 to 30 June 2008; and the Water Resources (Fees) Determination 2008 (No 1), which determined a WAC of 51c/kl a kilolitre calculated on the basis of water abstracted, applicable from 1 July 2008 (and revoked the Water Resources (Fees) Determination 2007 (No 1)).

[2] "Water resources of the Territory" includes Googong Dam (which is leased by the ACT from the Commonwealth): s 7A Water Resources Act 2007.

[3] Section 6 2007 Act; s 3 1998 Act.

18.2. the amount of water to be taken under licences is not more than "a reasonable amount": s 30(2)(c) of the 2007 Act;

18.3. the authority is satisfied that it is appropriate to issue the licence having regard to whether to issue the licence would or may adversely affect the environmental flows for a particular waterway or aquifer, adversely affect the environment in any other way or adversely affect the interests of other water users: s30(3) of the 2007 Act.

19. Prior to 1 August 2007, the 1998 Act regulated the use of water in the Territory in a similar manner.[4]

10 20. Section 107 of the 2007 Act (and s78 of the 1998 Act) confers a power on the Minister to determine fees for the Act. Such determinations are disallowable instruments: s 107(2) of the 2007 Act, s78(2) of the 1998 Act.

21. By a series of determinations made pursuant to s 78 of the 1998 Act and s107 of the 2007 Act the Minister has imposed a "water abstraction charge" on all licence holders for water taken pursuant to a licence.

22. QCC's challenge to the validity of the WAC is confined to the validity of the 30 cent 'water fee' added to the WAC by a ministerial determination made on 1 July 2006.[5] QCC does not dispute that, prior to the addition of the 'water fee', the WAC at a level of 25c/kl was not a tax. [6]

20 **The characterisation exercise**

23. There is no single determinate of what constitutes a "tax".

24. In *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276 Latham CJ defined a "tax" as "...a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ...not a payment for services rendered."

25. But Latham CJ's definition is neither complete nor exhaustive: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467. In *Air Caledonie* this Court held that "the negative attribute — 'not a payment for services rendered' — should be seen as intended to be but an example of various
30 special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present" (at 467). A "charge for the

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[4]The 1998 Act did not contain the concept of a "water access entitlement". Rather, Part 6 of the 1998 Act provided that the EPA could grant a "water allocation", which provided for the amount water that a person was entitled to take under the allocation. However, like the scheme of the 2007 Act, under the 1998 Act, for a person to be entitled to take water, they were required to hold both a "water allocation" and a "licence to take water".

[5] On 1 July 2006, the WAC increased from 25c/kl to 55c/kl. The increase was achieved by adding a water fee of 30c/kl to the WAC. The water fee only applied to any licence to take water for urban supply, which was limited to ACTEW. Consequently, the WAC remained at 25c/kl for all licensees apart from those licensees taking water for urban water supply.

[6] At first instance, QCC contended that the WAC was invalid at all levels other than 10c/kl. On appeal to the Full Federal Court and in this Court, QCC does not challenge the trial judge's finding that the WAC was not a tax when set at a level of 20c/kl or 25c/kl.

acquisition or use of property" is another example of a "special type of exaction of money which is unlikely to be properly characterised as a tax notwithstanding that [it] exhibit[s] those positive attributes" referred to by Latham CJ (at 467).

26. However, the Court added in Air *Caledonie* at 467:

> *"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 pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernable 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."*

27. The nature of a "tax" was further considered in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314, where a prescribed fee payable to the Tasmanian Government to obtain a commercial abalone fishing licence was held to be of the same character as a charge for the acquisition of property and therefore not a tax for the purpose of s 90 of the Constitution. The State did not own, or at least did not own all of, the abalone taken pursuant to a licence. It was therefore difficult to characterise the charge as simply a fee for the acquisition of property. However, the Court was nevertheless prepared to treat the charge as another example of a "special type of exaction" that is not properly characterised as a tax on the basis that it was a fee for the privilege of exploiting a scarce natural resource. Mason CJ, Deane and Gaudron JJ stated at 325:

> *"...the commercial licence fee is properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences. So seen, the fee is the quid pro quo of the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder. It is not a tax. That being so, it is not a duty of excise."*

28. The reasoning of Brennan J at 335-336 was to similar effect.

29. Dawson, Toohey and McHugh JJ, while agreeing with Brennan J, emphasised at 336 that the proper conclusion that the charge was not a tax flowed from all the circumstances of the case, the "most important" of which 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...in specified quantities".

30. Drawing on the language of *Air Caledonie*, they went on to say at 336-337:

> *"...the conclusion reached by Brennan J by no means carries with it the consequence that no exaction of money can constitute a tax if it is demanded for the purpose of conserving a public natural resource. If such an exaction otherwise exhibits the characteristics of a tax it will properly be seen as such. In particular, if 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": Air Caledonie International v The Commonwealth (1988) 165 CLR 462, at 467.*

31. There is no strict dichotomy between a "tax" and a "fee". It is a question of characterisation, having regard to all of the relevant circumstances. No one factor is determinative.

32. QCC relies on three principal factors in asserting that the WAC (to the extent it exceeds 25c/kl) is properly characterised as a tax, each of which is addressed below:

    32.1. the revenue raising purpose of the water fee;

    32.2. the alleged absence of any discernible relationship between the amount of the WAC (to the extent it exceeds 25c/kl) and the value of the water; and

    32.3. the demand management purpose of the water fee.

Revenue raising purpose not determinative

33. QCC's submission (at [43]) that no attempt was made by the Territory to explain or justify the introduction of the 30 cent water fee is not correct.

34. Water taken for urban water supply accounts for around 95% of water taken from the Territory each year. That is, around 65 gigalitres of water taken from the Territory is taken for the purpose of urban water supply, compared with a combined amount of around 3 gigalitres only taken by all other parties licensed to take water for other purposes.[7]

35. The 30 cent water fee was introduced in pursuance of the "Think Water, Act Water" strategy ("the Strategy"), which is the ACT's long term water strategy for water management until 2050.[8] The Strategy specifically focuses on reducing per capita consumption of mains water (that is, water used for urban water supply), setting a target of a reduction in per capital consumption of mains water by 12 per cent by 2013 and 25 per cent by 2023.[9]

36. In relation to current levels of usage of urban water supply, the Strategy concludes:

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7 Letter from Jon Stanhope, Chief Minister of the Territory and Treasurer, to Andrew Gordon dated 7 December 2006.

8 The Strategy, Volume 1 p 9

9 The Strategy, Volume 1 p 20

"At this current level of use, combined with population forecasts and climate-change issues, the ACT's water supply will come under increasing pressure. The issues around water supply have been worsened by the severity of the recent drought and the January 2003 bushfires in the water catchments. ...

If no action is taken now, based on the current population projections and per capita consumption, existing water supply infrastructure is expected to meet demand until we reach a population of about 405,000 people, anticipated around 2017. However, this expectation does not take uncertainties, such as reduced rainfall, reduced catchment yields as a result of bushfires, unexpected populations growth, or any future decision to extend cross-border water supply, into account."[10]

37. As the 2006-2007 Budget paper explained:

"Water Fee

The increase in the Water Abstraction Charge (WAC) to incorporate a water fee is to better reflect the value of water to the Territory. Water is a valuable resource, and prices need to encourage a more efficient use of this scarce resource. This initiative continues the Government's commitment to the Think Water, Act Water Strategy, which has a focus on reducing per capita consumption of mains water in the short term".[11]

38. Similarly, in the 2006-2007 Budget Speech the Minister stated:

"Mr Speaker, the Government has set itself the target of reducing per capita potable water use by 12 per cent by 2013 and by 25 per cent by 2025. As a revenue measure and also as a device for moderating demand, a Water Fee of 30 cents per kilolitre will be incorporated into the Water Abstraction Charge.

As well as providing the Government with a return on a valuable resource, this initiative will help us to manage the demand for water. It will raise revenue of around $14 million a year."[12]

39. Similarly, in the Explanatory Statement accompanying the 1 July 2006 determination to increase the WAC to 55c/kl by the addition of the 30c water fee the Chief Minister said:

"The fee under section 35 for licence holders licensed to take water for the purposes of urban water supply will be changed to reflect the Government's introduction of a water fee to be incorporated in to the Water Abstraction Charge (WAC), which will be increased from 25

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10 The Strategy, Volume 1 p 22

11 (ACT) Budget paper – (2006-2007) No 3 – Revenue and Forward Estimates

12 ACT Budget Paper No. 1 - 2006-2007 Budget Speech

cents per kilolitre to 55 cents per kilolitre. Currently ACTEW is the only such licensee.

This increase in the WAC represents the decision of Government to charge a price for water that more fully reflects its true economic value. This value presents an appropriate price for a scare resource and is likely to achieve a more economically sustainable approach to water consumption within the Territory."

40. Before the Full Federal Court, Senior Counsel for the QCC accepted that the statement that the increase in the WAC was to "more fully reflect [the] true economic value" of the water provided for urban water supply by the ACT was a genuine assessment by the ACT government: see Keane CJ at [34]; Transcript 24/5/10 at p 9.5-10.

41. The fact that the 30 cent water fee was introduced, in part, as a revenue raising measure to provide the Government with a return on a valuable resource does not require the conclusion that the water fee is properly characterised as a tax: Keane CJ at [52]-[53].

42. An objective of revenue raising is not a universal determinant of a tax: *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at 178 per Gleeson CJ and Kirby J.

43. In *Airservices* at [374] Gummow J said that "the character of the provisions of the Act in question is to be determined by their operation, not by whether they were made with an objective which might be the raising of revenue." The mere fact that a "fee for service" may have an economic effect equivalent to that of a tax is not determinative or even relevant: *Airservices* at [89] per Gleeson CJ and Kirby J. Similarly, a charge is not characterised as a tax merely because it includes a reasonable profit margin: *Airservices* at [72] per Gleeson CJ and Kirby J and [317]-[318] per McHugh J. Further, the fact that a payment is deposited into consolidated revenue does not prevent it from being a "fee for services" or a fee for the acquisition of goods: e.g. *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 562.

44. Any levy reflects an intention to raise revenue: Buchanan J at [109]. The presence or absence of a revenue raising purpose *may* be a significant factor in determining whether a charge is properly characterised as a tax but its significance depends on all of the circumstances. In the present circumstances, it is difficult to see how an objective of revenue raising can be a significant factor in determining whether a charge is properly characterised as a tax when a Government is selling a valuable and scarce natural resource that it effectively owns or controls. The 'revenue' is properly characterised as the consideration paid for the acquisition of the good.

45. As QCC accepts (at [52]) the significance of a revenue raising purpose is "intimately tied" to the "discernible relationship to value" issue. The Territory submits that "issue" has no application to the WAC.

No requirement to show discernible relationship with value

46. Where a Government imposes a charge for the acquisition of property that it effectively owns or controls, it is not necessary to establish that there is a discernible relationship between the amount of the charge and the value of the property acquired in order to avoid the charge being characterised as a tax.

47. As Sir Maurice Byers QC submitted in *Harper v. Minister for Sea Fisheries* (1989) 168 CLR 314 at 321:

> *"A levy related to the extraction of a resource in which the Crown has an interest in the nature of ownership is a royalty and not an excise."*

48. That submission is directly applicable here. The WAC is a royalty or is in the nature of the royalty. It is therefore not a tax and cannot be an excise: *Harper; Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 640-641.

49. Consequently, there is no constitutional limit imposed by s 90 on the amount that can be charged by the Territory for the acquisition of water that it owns and controls. The Territory can charge "a monopoly price" for its water resources with the intent of raising revenue and/or managing demand or restricting supply without infringing s 90.

50. Section 90 is not intended to operate as a surrogate constraint on commercial conduct of the kind found in Part 4 of the *Competition and Consumer Act 2010*.

51. That does not mean that the fee required to be paid to the Territory for the acquisition of its water is uncontrolled. It simply means that there are more appropriate controls than s 90 of the Constitution, principally the ballot box (noting that the impact on ultimate consumers of the cost of potable water in the ACT and Queanbeyan will be the same).

52. As far as the Territory is aware, it has never previously been suggested that a Government imposes a duty of excise by charging a price for the acquisition of goods that it effectively owns or controls. The rationale for s 90 has no application in such circumstances. The sale by the Government for "a monopoly price" of a scarce natural resource that it owns or controls is different from a Government imposing a charge on goods owned or controlled by somebody else in which it otherwise has no proprietary interest.

53. The Territory submits that this is because it has never been doubted that a charge for the acquisition of goods owned or controlled by the Government is not a tax and the task of properly characterising such a charge is relatively straightforward.

54. If the law were otherwise, one might expect to find numerous cases challenging the validity of royalties payable to the Crown in respect of natural resources such as minerals, timbers and hydrocarbons on the basis that such charges, although described as 'royalties', are in fact "excises" contrary to s 90 of the Constitution because there is no discernible relationship between the 'royalty' and the value of what is acquired. To the Territory's knowledge, there are no such cases: cf Keane CJ at [73].

55. Prior to *Harper* (which is discussed in detail below), the application of the 'no discernible relationship with value' test was confined to those cases where a charge is described as a "fee for services".[13] The purpose of the test is to establish that a particular identified service has in fact been provided to the person required to pay the charge. Those cases should not be applied inflexibly to the characterisation of a fee for the acquisition of a scarce natural resource effectively owned or controlled by the Government. There is a distinction between goods and services, having regard to the tangible nature of the former.

56. In *Air Caledonie*, the High Court observed at 469:

> *"In one sense, all taxes exacted by a national government and paid into national revenue can be described as "fees for services". They are the fees which the resident or visitor is required to pay as the quid pro quo for the totality of benefits and services which he receives from governmental sources. It is, however, clear that the phrase "fees for services' in s 53 of the Constitutional cannot be read in that general impersonal sense. Read in context, the reference to "fees for services" in s 53 should ...be read as referring to a fee or charge exacted for particular identified services provided or rendered individually to, or at the required or direction of, the particular person required to make the payment."*

57. The requirement that some particular identified service must be provided to a person required to pay a charge described as a 'fee for services' in order to prevent the charge being characterised as a tax, means that the proper characterisation of a 'fee for services' involves considerations that do not arise when a charge is imposed as the quid pro quo for the acquisition of a tangible good effectively owned or controlled by the Government.

58. In particular, where a charge is described as a 'fee for services', it may be necessary to show that there is some relationship between the amount charged and the services provided to the person required to pay the charge. It has been held in a number of cases that a particular charge or exaction described as a 'fee for services' could not be so regarded because no service was provided to the person required to make the payment or because there was a colourable attempt to represent that the exaction was in consideration for 'services': *Parton v Milk Board (Vict)* (1949) 80 CLR 229; *Swift Australian Co (Pty) Ltd v Boyd-Parkinson* (1962) 108 CLR 189; *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

59. The passage in *Air Caledonie* relied on by QCC (at [54) does not support its submission that it is necessary to establish a "discernible relationship with value" to avoid the WAC being characterised as a tax. The Court's observations in that case are expressly confined to "fees for service".

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[13] The term "fees for services" derives from s 53 of the Constitution, which relevantly provides that a "... proposed law shall not be taken to ... impose taxation, by reason only of its containing provisions for the imposition ... of fees for services under the proposed law".

60. In *Harper*, this Court held that a prescribed fee payable to the Tasmanian Government to obtain a commercial abalone fishing licence was of the same character as a charge for the acquisition of property and therefore did not constitute a tax for the purpose of s 90 of the Constitution. Four members of this court held, without qualification, that the exaction was not a tax because it was a charge for the acquisition of a right akin to property (Justice Brennan at 335-6) or the quid pro quo for the property which was lawfully able to be taken under a statutory right or privilege (Mason CJ, Deane and Gaudron JJ (at 325)). Once their Honours had determined that the fee for the acquisition of a commercial abalone licence was of the same character as a charge for the acquisition of property, the conclusion immediately followed that "it is not a tax". Their Honours did not think it necessary to examine or even refer to the quantum of the charge at all. Justices Dawson, Toohey and McHugh agreed with Brennan J but added a "comment" at 336-337 heavily relied on by QCC that, in such a case, it is necessary to establish a discernible relationship with value. Whatever the status of that "comment" it is not part of the ratio of the other four Justices who, at least on this issue, form the majority.

61. The other authority relied on by QCC (at [56], [57]), *Airservices*, was a case concerning the proper characterisation of charge said to be a fee for service. The relevant charge was levied under s 67 of the *Civil Aviation Act 1988* (Cth), which section required the charge to be "reasonably related to the expenses incurred or to be incurred by the Authority in relation to the matters to which the charge relates". The Court's analysis in that case is to be understood in the particular statutory context in which it arose (see Keane CJ at [69]).

62. There is no binding authority of this Court, or long established and considered dicta, to the effect that the "no discernible relationship with value" test articulated in *Air Caledonie* applies to a charge for the acquisition or use of property (see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150-151 [134] per the Court; Perram J at [191]). Keane CJ was correct and did not exceed the proper role of an intermediate appellate court to find that there was no such requirement (see QCC's submissions at [58]).

In any event, there is not an absence of any discernible relationship between the amount of the WAC and the value of water

63. In any event, even if a test of "absence of any discernible relationship with value" does apply (which is denied), Keane CJ (at [89], Stone J ([175]) and the primary judge (at [120], [124]) were correct to find that there is not an "absence of any discernible relationship with value" between the amount of the WAC and the value of water as a scarce resource (Perram J, in dissent, making no finding on this issue: see [198]).

64. The critical question posited by the passage in *Air Caledonie* at 467 is whether there is an absence of any relationship between the charge and the value of the commodity or service in question: see Stone J at [174]; Buchanan J at [88]. There is no requirement for the ACT to positively establish that there is a discernible relationship between the quantum of the WAC and the value of what is acquired by the person required to pay the charge. All that is required

is for the Court to be satisfied that there is not an absence of any discernible relationship with the value of the water acquired as the quid pro quo for payment of the WAC.

65. The formulation "absence of any discernible relationship with value" imposes a very low threshold (see Keane CJ at [72], Stone J at [174], primary judge at [88]). As *Harper* demonstrates, "the most exiguous relationship will do to exclude the conclusion that there is 'no discernible relationship'" (Keane CJ at [72]).

66. The fee is not required to represent "good value" for the return under the licence. Nor is the relationship between the amount of the fee and the value of the good required to be "fair", "equitable" or "reasonable" (cf the statutory requirement that a charge be "reasonably related" to the service provided considered in *Airservices*).

67. Further, for a relationship to be 'indiscernible', it must be impossible for the Court to see or perceive any kind of relationship at all. It is an impressionistic test, not a precise one. It is not necessary for the Court to embark on the kind of close analysis that may be required if the Court had to positively identify both that a relationship with value exists and that it is a "reasonable" one. Significantly, in *Airservices*, McHugh J described the positive requirement in s 67 of the Civil Aviation Act that the amount or rate of a charge "be reasonably related to the expenses incurred ... in relation to the matters to which the charge relates" as "a rather low threshold" (at p 220, [245]). The 'no discernible relationship' threshold is lower still than that particular statutory mandate. What must be perceived is that no relationship of any kind exists at all. If any connection or association can be seen between the charge and the value of what is acquired by the person required to pay the charge, the test is not made out.

68. The cases illustrate that whether there is "no discernible relationship with value" is a broad brush test that is to be approached impressionistically.

69. In *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 581, *Swift Australian Co (Pty) Ltd v Boyd Parkinson* (1962) 108 CLR 189 at 201, *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 and *Air Caledonie*, it was held to be apparent simply by looking at the terms of the legislation that there was no relationship between the amount charged and the service said to have been provided to the person required to pay the charge.

70. In *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532, the charge in question was assessed as being "nominal", without any particular reference to evidence. The Court simply compared the amount charged with the nature of the service said to have been provided and formed an impression as to the size of the charge and the possible value of such a service.

71. In *Airservices*, this Court considered detailed expert evidence in relation to "Ramsay pricing" but that case is of little assistance on the issue here. The expert evidence in that case was directed to the express statutory requirement in s 67 of the Civil Aviation Act that the amount or rate of a charge "be

reasonably related to the expenses incurred or to be incurred in relation to the matters to which the charge relates …". That is a different statutory context.

72. Perhaps the most telling analysis is in *Harper* itself. Justices Dawson, Toohey, and McHugh were the only Justices who referred to the issue. The sum total of their Honours' analysis of the existence of a discernible relationship with the value of what was acquired, which their Honours regarded as the "most important" factor, is as follows (at 336):

> *"Most important is 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 for commercial purposes in specified quantities. In discerning that relationship it is significant that abalone constitute a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence".*

73. There is not an absence of any discernible relationship in the sense described above between the amount of the WAC and the value of water extracted by ACTEW.

74. First, Keane CJ was correct to hold that the exercise of monopoly power to charge what the market will bear does not mean that the price charged ceases to be recognisable as the price of what is being supplied, rather than an exaction having no discernible relationship to the acquisition (at [87]; see also primary judge at [120]).

75. Secondly, as Keane CJ found (at [65], [75]), ACTEW is not under any legal obligation to take water from the ACT. On exercising a choice to do so, it becomes obligated to pay the WAC. To say that ACTEW is practically compelled to obtain water from the ACT because it would be uneconomic to obtain water from any other source merely highlights the fact that the WAC is not set at a level so high that it bears no discernible relationship to value (Keane CJ at [76]).

76. Thirdly, the value in question is not simply "economic value" (see primary judge at [120]). 'Value' is a broad concept. It is not limited to a narrow arithmetical or accounting-based notion of monetary worth. It imports a range of necessarily imprecise considerations including, in an appropriate case such as this, political, environmental and social considerations, not just economic ones.

77. The notion of "value" in respect of a finite natural resource such as water:

    77.1. ought not merely take into account the value from the perspective of the acquirer of the scarce natural resource (who is likely to be focused on short-term considerations); but rather

    77.2. must be analysed from the perspective of the polity vested with stewardship or control of the scarce natural resource. That value is necessarily not limited to short-term considerations, but will normally

encompass longer-term public considerations arising from its role as custodian of a resource which is finite and depletable, including by degradation.

78. The following observations by Hayne, Kiefel and Bell JJ in *ICM Agriculture v Commonwealth (2009) 240 CLR 140* at [90], while general in terms and expressed in the context of s 51(xxxi), have a resonance in approaching the present s 90 question:

> *"In Australia, water and rights to use water are of critical importance, not just to those who are immediately interested in particular water rights, but to society as a whole. Governments have wrestled with the problems presented by Australia's limited water resources since well before federation. The determinative issue in this case is constitutional. That issue neither requires nor permits consideration of any of the large and difficult policy questions that may lie behind the legislative and executive acts which give rise to this proceeding".*

79. The question whether the ACT, in the public interest, should attribute a scarcity value to water, and if so at what level, is a question of government policy which is far removed from the legitimate concerns of a Court: Keane CJ at [91], Stone J at [175], primary judge at [92].

80. The effect of QCC's submissions is that "value" is limited to economic value, assessed in a restrictive fashion. QCC identifies two reasons why it says this Court should find that there is no discernible relationship between the quantum of the WAC (to the extent it exceeds 25c/kl) and the value of water acquired. It submits that the "value" of water in 2006 should be assessed as being limited to either:

80.1. equivalent to the "market price downstream", that is, the price that the Territory could have obtained for its water if it had sold the water to irrigators in the nearest downstream market (being the market regulated by the Murrumbidgee Regulated River Water Sharing Plan 2003 (NSW)) rather than to ACTEW; or

80.2. equivalent to the amount of the WAC determined by the ICRC in 2003, that is 25 cents per kilolitre.

81. Both submissions should be rejected for the following reasons.

(a) Market value of water

82. Insofar as QCC seeks to rely upon the "market value" of the Territory's water if sold downstream in the Murrumbidgee market, that submission is based entirely on material not admitted into evidence (see further [90]-[92] below).

83. Further, contrary to the assertion by QCC at [84], neither the ICRC or the ACT's expert, Professor Grafton, relied upon evidence of market value in the nearest downstream market "as a suitable proxy" for the value of water in the ACT.

84. Professor Grafton and the ICRC both used the price paid by irrigators for untreated river water in the nearest downstream market (being the market regulated by the Murrumbidgee Regulated River Water Sharing Plan 2003 (NSW)) to calculate the external costs of water consumption imposed on downstream users, that is, the "opportunity cost" to water users downstream. Both Professor Grafton and the ICRC considered that this "opportunity cost" was one factor only, amongst others, to be taken into account in calculating the value of water. Neither Professor 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 or "related" to it in any way other than geographically, as the nearest downstream market (cf QCC's submissions at [74]).

85. The downstream Murrumbidgee market does not provide a "proxy" for the market value of water in the ACT. As Keane CJ correctly observed, it is common ground that there is no current competitor with the ACT for the supply of potable water in the market which it dominates as a monopolist (at [92]).

86. In any event, QCC's reliance on what is claimed to be evidence of the market value of the water in an analogous market is misconceived because, inter alia, it fails to bring to account the breadth of issues which properly inform the "value" of water. That "value" falls to be determined by a wider range of considerations than mere "market value". To concentrate simply on the market price or price is to ignore the particular features of Government control of the use of water in Australia, as recently reaffirmed (in the s 51(xxxi) context) in *ICM Agriculture* at [50]-[57] per French CJ, Gummow and Crennan JJ and [90] per Hayne, Kiefel and Bell JJ.

(b) The 2003 ICRC report

87. Insofar as QCC seeks to rely upon the determination of the ICRC in 2003 that the WAC should be charged at a rate of 25 cents per kilolitre, it is important to note that the ICRC has no mandatory statutory role in relation to the WAC. Its involvement is at the behest of the Territory. The Territory is not confined to acting only on the advice of the ICRC as that body itself recognises (primary judge at [119]) and a "discernible relationship" does not require that the amount be set by an independent body (Stone J at [175]).

88. In assessing whether the amount of the WAC bears no discernible relationship to the 'value' of urban water supply, the ACT Government should be permitted by the Constitution appropriate latitude in determining an appropriate price for a scarce resource, taking into account a range of policy considerations beyond mere cost and expense, including those considerations expressly or impliedly mandated by the 1998 and 2007 Acts. For example, the 'value' of the urban water supply includes considerations like the importance of ensuring that there is sufficient water to meet the reasonably foreseeable needs of future generations (s 3 of the Act) and the application of the precautionary principle. It would also include considerations of the kind set out in the Think Water, Act Water Strategy, which states that:

> *"How water resources are managed into the future is dependent upon a range of issues such as population growth, the legacy of the 2003 bushfires in the Cotter catchment, climate change and how the 'urban water cycle' is managed."* [14]

89. The weighing of considerations of this kind is fundamentally a matter which the Constitution has left to government. Before the Full Federal Court Senior Counsel for the QCC accepted that the political judgment made by the ACT that the increase in the WAC was to more fully reflect the true value of the water was a judgment genuinely made by those proposing the exaction (Transcript 24/5/10 p 9.5-10). It is submitted that there would have to be a compelling reason for a Court to conclude that the Government has 'overvalued' such considerations and to substitute the Court's or the ICRC's own view as to their value.

Irrelevancy of the expert evidence

90. At [18]-[20], [78]-[84], [97]-[105], QCC makes detailed submissions in relation to expert evidence. That evidence was not admitted in the proceedings (see primary judge at [93]). QCC unsuccessfully appeal that ruling (Keane CJ at [92], Stone J at [177]).

91. The Court should not entertain QCC's submissions in relation to the expert material. First, QCC has not sought to challenge that ruling in its notice of appeal. Secondly, even if the Court were to find that the expert evidence is relevant to the constitutional characterisation of the WAC, the Territory submits that the evidence should be remitted to the primary judge for consideration.

92. However, for abundant caution (and to indicate the matters which would need to be considered by the primary judge), the Territory has addressed QCC's submissions in relation to the expert evidence in a separate annexure.

Demand management

93. At paragraph [96] of its submissions, QCC seeks to suggest that there is reason to doubt whether a genuine or significant purpose of the 30 cent water fee was to assist in the management of demand for water, despite this having been a stated justification for the water fee. The thrust of QCC's argument is that the imposition of a water fee is less effective than water restrictions in restricting demand (or so it says) and it is therefore unlikely that the Territory's claimed purpose of reducing demand for water through the introduction of the water fee is genuine.

94. That submission should be rejected. It depends on expert opinion that was not admitted into evidence in the proceedings (see above). QCC made a similar submission at first instance. It is for this reason that the primary judge expressed the view that he did not think that the justification for the water fee

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[14] The Strategy, Volume 1 p 3

was examinable on policy grounds and concluded: "There is nothing on the face of the explanation given to suggest that it ought not be accepted as genuine. There is nothing improbable about the proposition that price increases might serve the purpose of encouraging a moderation in demand" (at [123]). This Court should similarly decline QCC's invitation to examine the Territory's stated policy justification for the WAC.

95. QCC's ultimate contention at [95] is that the only constitutionally-effective tool the ACT has at its disposal to deal with water demand issues is water restrictions. The contention appears to be that the ACT, as the owner or controller of a scarce resource, is prevented by s 90 of the Constitution from incorporating demand-management principles when setting prices. Thus, QCC's position is that s 90 dictates which measure a State or Territory government may choose in seeking to influence demand for a finite natural resource it effectively owns or controls.

96. Insofar as a purpose of the WAC is to assist in the management of demand for water, the charge falls within the views expressed by Mason CJ, Deane and Gummow JJ in *Harper*, that is, it "is properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public resource...It is not a tax" (at 325): see also primary judge at [121]-[124]. The WAC is the quid pro quo paid in return for the rights which ACTEW obtained under its licence to take water, being rights to appropriate a limited public natural resource.

97. Finally, QCC submits that the suggested purpose of restricting demand not only does not preclude the exaction from being a tax but strongly suggests that the exaction is an excise duty (QCC's submissions at [95]). This submission does not advance the sole issue in dispute between QCC and the Territory, namely whether the WAC (to the extent it exceeds 25c/kl) is a tax. The Territory accepts that if the WAC, or any part of it, is found to be a tax, it would follow that it is an excise.

If the "water fee" is an excise, the WAC is not wholly invalid

98. QCC's appeal is confined to challenging the validity of the 30 c/kl "water fee" added to the WAC from 1 July 2006: [13]. However, at [21.2] QCC asserts that, should this Court find that the WAC imposed an excise from 1 July 2006, no WAC has been imposed on ACTEW since that date.

99. The Territory submits that if the Court finds that the WAC, to the extent it exceeds 25c/kl, is properly characterised as an excise, the Court is required by s 43 of the *Legislation Act* 2001 (ACT) to read down the relevant determination(s) in such a way as to be within power, that is, as if the invalid amount had not been added to the charge.[15]

[15] See also ss 126, 132 Legislation Act 2001 (ACT); *Sportodds Systems Pty Ltd v State of New South Wales* (2003) 133 FCR 63 at [16]-[21]; *Harrington v Lowe* (1996) 190 CLR 311 at328; *Victoria v Commonwealth* (1995-1996) 187 *CLR 416* at 502

PART VII ARGUMENT ON NOTICE OF CONTENTION

100. Most of the issues raised by the Territory's notice of contention are dealt with in Part VI above.[16]

101. The Territory makes the following additional submission in support of grounds 1.3 and 1.4 of its notice of contention.

The WAC is a fee for a privilege and not a tax

102. The WAC may be characterized as the quid pro quo which is paid in return for the rights ACTEW obtains under its licences to take water, being rights to appropriate or take and make use of a limited public natural resource.

10 103. It is therefore on all fours with the charge found not to be a tax in *Harper*: see Mason CJ, Deane and Gaudron JJ at 325.

ACTEW was not under any legal or practical compulsion to acquire water only from the Territory

104. In *Air Caledonie* at 467 the Court said:

> *"If the person required to pay the exaction is given* ***no choice*** *about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly to be seen as a tax"* (emphasis
20 added).

105. It is submitted that the WAC is not a tax because ACTEW was not under any legal or practical compulsion to acquire water only from the ACT. ACTEW exercised a choice to obtain water from the Territory.

106. As Keane CJ correctly observed at [76] to say that there is a "practical compulsion" upon ACTEW to acquire ACT water because of the economic reality that the decision to acquire water from resources outside the ACT would not be economic is to recognise that the WAC is not so high that ultimate consumers would make a rational economic choice to acquire their potable water from other suppliers (or at least put pressure on ACTEW to do
30 so).

ANNEXURE A SUBMISSIONS ON EXPERT EVIDENCE

a) Professor Grafton's evidence

107. Professor Grafton's evidence was to the effect that, having regard to the objective 'value' of water, the WAC ought to have been set at levels higher than as determined by the Minister because the WAC does not presently

[16] In relation to grounds 1.1 and 1.2, see [10.1], [46]-[53], [59]; in relation to ground 1.3, see [10.2], [59].

include a component for the "scarcity price" of water (that is, a price that encourages efficient use of water so as to reduce the demand for water and postpone the need for significant capital investment that would otherwise be required to increase water supply.[17]) Thus, even if scarcity pricing was not built into the WAC, it ought to have been or could rationally have been included.[18] QCC's expert, Dr Beare, accepted under cross-examination that:

107.1. "a number of people have put th[e] position forward" that scarcity pricing is an alternative means of demand management;[19]

107.2. there is a broadly held view that water restrictions are economically inefficient because, in short, some people who have very high values for water cannot adjust as effectively as people who have low values;[20]

107.3. partly in recognition of the economically-inefficient operation of water restrictions, greater attention is now being given in Australia to scarcity pricing as an alternative means of demand management;[21]

107.4. the greater attention that has been given to scarcity pricing as a means of demand management is reflected extensively in academic writing and in the reports of government agencies, namely in:

107.4.1. the academic writings of Professor Grafton;[22]

107.4.2. an article by Sibley in 2006 and a report by Frontier Economics in 2008;[23]

107.4.3. a report by the Productivity Commission;[24]

107.4.4. a report by the Australian Bureau of Agriculture and Resource Economics (of which Dr Beare was formerly the chief economist);[25] and

107.4.5. a 2008 publication of the National Waters Commission.[26]

108. The water fee was introduced, in part, to better reflect the value of water and to control demand. Professor Grafton objectively assesses the value of water at the relevant time by reference to various factors, including a scarcity price. There is no reason why Professor Grafton's analysis should be discounted simply because it was not available when the water fee was introduced (see

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17 See Grafton Affidavit, 2 September 2008 at [52]ff; Table 6 at para [52].
18 See generally, Grafton Affidavit, 2 September 2008, [25]-[29].
19 XXN Beare T 148.32
20 XXN Beare T 146.45-147.03
21 XXN Beare T 148.32
22 XXN Beare T 149.01-149.15
23 XXN Beare T 150.34
24 XXN Beare T 149.01-149.15
25 XXN Beare T 149.01-149.15
26 XXN Beare T 149.46

paragraph [104] of QCC's Submissions). If the issue of the absence of a discernible relationship with value arises at all, it must be an objective test.

109. In concluding that the WAC ought to have been set at levels higher than as determined by the Minister, Professor Grafton also included a component for "water supply costs".[27] Those costs – namely, $15.536 million for the 2005-2006 year – were based on information provided by the Chief Minister to the ICRC on 27 March 2006.[28] As the letter of instructions to Professor Grafton made plain, the $15.536 million figure did "not reflect *all* water policy expenditure of the Government at the time".[29] The letter went on to confirm that "the ACT Government's water related expenditure for this period was likely to be *at least* $15.536 million"(emphasis added).[30] It follows that Professor Grafton's calculations for "water supply costs" at para [52] of his affidavit were based on conservative figures.[31]

b) Dr Beare's evidence

110. It is inappropriate for QCC to seize upon particular parts of Dr Beare's evidence and ignore its context as a whole. He was arguing for a WAC as low as 1.5c/kl, which QCC does not now seek to support, but only because he had ignored the relevance of any policy, social and environmental considerations that a government owner or controller of a natural resource such as water would ordinarily take into account in setting a price.[32]

Dated: 31 May 2011

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27 Grafton Affidavit #1 at [33]-[34]; [52]
28 Grafton Affidavit #1 at [33]; Attachment A
29 Letter of Instructions para [41] (annexure A to Grafton Affidavit #1)
30 Letter of Instructions para [41] (annexure A to Grafton Affidavit #1)
31 see XXN Grafton T 189.35 ff
32 see XXN Beare T 141.20-3-, 172.08.