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
Second Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

ON THE UTILITIES NETWORK FACILITIES TAX

Filed for the Second Respondent by:

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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. Both appeal C2 of 2011 and C3 of 2011 raise the same issues for determination in relation to the Utilities Network Facilities Tax (the **UNFT**):

   2.1. whether the UNFT is a tax; and

   2.2. if the UNFT is a tax, whether it is a duty of excise.

3. In relation to the first issue, the second respondent (the **Territory**) submits the UNFT is not a tax, rather it is properly characterised as a fee for the occupation or use of Territory land.

4. In relation to the second issue, the Territory submits that even if the UNFT could be characterised as a tax, it is not, either in form or in its substantial effect, a tax "upon goods" and is therefore not a duty of excise.

5. These submissions should be taken as submissions in relation to the UNFT in both appeal C2 of 2011 and C3 of 2011.

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

6. The respondent is satisfied that the appellant has given Notice in compliance with s 78B of the *Judiciary Act 1903* (Cth).

PART IV MATERIAL FACTS

7. The factual matters set out in paragraphs 6-12 of the appellant's (**QCC**'s) submissions on C3 of 2011 are not in contention. The submissions made in paragraphs 13-16 are dealt with in Part V below.

PART V RELEVANT PROVISIONS

8. The Territory accepts QCC's statement of the applicable constitutional provisions, statutes, regulations and ministerial determinations.

PART VI ARGUMENT

Legislative scheme

9. Section 8(1) of the *Utilities (Network Facilities Tax) Act* 2006 (ACT) (the **UNFT Act**) imposes a charge described as a "network facility tax" on the "owner" of a "network facility" where that facility is located on land in the Territory. "Owner" is defined in the Dictionary to the Act as "for a network

facility, the legal owner, whether or not the legal owner also has rights to operate the facility".

10. Section 6(1) defines a "network facility" to mean "any part of the infrastructure of a "utility network". However, s 6(2) excludes from that definition any facility fixed to land which is subject to a lease or a licence granted by the Territory or any other right prescribed by regulation in relation to the use of the land for the utility network.

11. Section 7 of the UNFT Act provides that a utility network is (a) an electricity transmission network, an electricity network, a gas transmission network, a gas distribution network, a sewerage network or a water network under the *Utilities Act 2000* (ACT)[1]; (b) a telecommunications network under the *Telecommunications Act 1997* (Cth), or (c) any other network prescribed by regulation. No other networks are presently prescribed by regulation.

12. Section 8(1) provides that the amount of the tax payable in relation to the "network facility" is the "determined rate" x "route length".

13. The *determined rate* means the rate determined under section 139 of the *Taxation Administration Act 1999* (ACT) **(the TAA)**. The *route length* of a network facility on land means the length of the horizontal projection of the facility on the land (see Dictionary). The determined rate for the period of six months until 13 March 2008 was $355 per kilometre. From 13 March 2008, the determined rate for the period of 12 months is $676 per kilometre.

14. While the UNFT is a charge imposed on *owners* of a network facility, the right to *operate* a network facility is governed separately by the *Utilities Act 2000* (ACT).

The UNFT is not a tax

15. It is submitted that the UNFT is properly characterised as a fee for the privilege of locating a network facility on Territory Land that is not the subject of a relevant private right or interest held by the utility (see s 6(2) UNFT Act). Consequently, the Territory submits that the UNFT is not properly characterised as a tax. The Full Court did not need to decide this issue as it concluded that the UNFT was not a duty of excise.[2]

16. QCC first points to the form of the UNFT in support of its contention that the UNFT is a tax.[3]

17. Whether a charge is a "tax" or a "fee" for the purposes of a s 90 exercise is a matter of substance.[4]

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1 A "water network" is defined under the *Utilities Act 2000* as infrastructure used in relation to the collection and treatment of water for distribution by a person to premises of another person, or for the distribution of water by a person for supply to premises of another person: s 12.

2 Judgment at [124]-[125], [152] per Keane CJ (AB 115), at [160] per Stone J (AB 127), at [180] per Perram J (AB 134); see Notice of Contention filed 4 May 2011 at para 2.

3 QCC UNFT submissions at [21].

4 See *Air Caledonie International v Commonwealth* (1988) CLR 462 at 467; *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 433 per Mason CJ and

18. The UNFT is described by the legislature as a "tax" (apparently to reflect the fact that it is administered under the TAA, however that does not conclude the question of its appropriate characterisation.

19. When the UNFT was originally announced by the Territory in the 2006-07 budget, it was described as a fee payable for a "utility land use permit".[5] The name of the charge was subsequently changed to the Utilities Network Facility Tax. In the introduction speech for the UNFT Act, the Minister explained that, after consulting with utility companies, the government had decided to use its existing taxation infrastructure to collect the new charge on network facilities and to apply the charge as a tax on ownership to allow the charge to be applied more simply (with less administrative burden than through a more complex permit system).[6]

20. It is submitted that the fact that the UNFT, along with a number of other charges, is administered under the TAA is a factor that should be regarded as neutral (or, alternatively, given very little weight) in determining whether the UNFT is properly characterised as a tax for the purposes of s 90 of the Constitution.[7] The purpose of the TAA is to make general provision in relation to the administration and enforcement of "tax laws" (s 6), where certain laws, including the UNFT Act, are defined as "tax laws" for the purposes of that Act (s 4) and, in turn, *"tax"* is defined in the Dictionary as a tax, duty or levy under a "tax law". Nomenclature for the purpose of administration and collection of a fee should not determine the substantive question under s 90 of the Constitution.

21. Secondly, QCC's submission that, because the UNFT applies to those network facilities that are affixed to private leasehold land, it cannot be properly characterised as a fee for a privilege is misconceived.[8] It fails to appreciate the unique system of land tenure that exists in the ACT.

22. Land in the ACT is either National Land or Territory Land within the meaning of the *Australian Capital Territory (Planning and Land Management Act) 1988* (Cth). National Land is land that is intended to be, or is used by or on behalf of the Commonwealth and has been declared to be National Land: s 27. Land that is not National Land is Territory Land: s 28. In relation to Territory Land:

    22.1. The Executive of the Territory, on behalf of the Commonwealth, has responsibility for the management of Territory Land, which includes care, control and maintenance of the land: s 29 *Australian Capital Territory (Planning and Land Management Act) 1988* (Cth).

    22.2. All privately-occupied land in the ACT is leasehold land occupied pursuant to a lease granted by the Executive of the Territory on behalf of the Commonwealth: *Planning and Development Act 2007 (ACT)*, Chapter 9.

Deane J; *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 332 per Brennan J; *Ha v NSW* (1997) 1989 CLR 465 at 498 per Brennan CJ, McHugh, Gummow and Kirby JJ; *Matthews v Chicory Marketing Board* (1938) 60 CLR 285 per Starke J.

5 Judgment of Buchanan J at [131] (AB 39).

6 Judgment of Buchanan J at [131] (AB 39).

7 See Keane CJ Judgment at [124] (AB 115).

8 QCC UNFT submissions at [24]ff.

23. Consequently, the Territory is empowered to grant facility network owners the right to occupy Territory Land on which the facility is situated.[9] The fact that it may raise revenue in doing so does not detract from the character of the charge.[10] Thus, QCC's submission that the UNFT is in substance a fee for the exercise of legislative power is misconceived[11] (but in this respect, if the UNFT could be said to be a charge for the exercise of legislative power, then the same can be said for the fee held to be valid in *Harper*[12]).

24. Thirdly, in support of its contention that the UNFT cannot be properly characterised as a fee for a privilege, QCC contends that the UNFT applies to National Land.[13] There is no basis for construing the UNFT Act as applying to land over which the Territory Parliament does not have legislative authority.

24.1. Both general principle and s 120 of the *Legislation Act 2001* (ACT) require that the meaning of the term "land" in the UNFT Act be read down so as not to exceed legislative power.

24.2. In view of the unusual and highly particularistic system of landholding in the ACT, it is reasonable to assume that where the Territory Parliament intends to refer to National Land, over which it has no legislative control, it will expressly say so: see, for example, ss 107, 233 of *Utility Act* and definition of "public land" in the Dictionary to that Act.

24.3. It is apparent from the terms and structure of the UNFT Act that the Act is not intended to apply to National Land. It is submitted that the phrase "a network facility on land in the ACT" in s 8(1) refers to a network facility on land in the ACT that is capable of being the subject of a lease or a licence granted by the Territory in favour of the utility but in respect of which no such lease or licence has been granted. That necessarily excludes National Land.

24.4. In any event, the validity of the UNFT Act should be judged against the circumstances of its claimed operation: here there is no doubt that the UNFT is applied to a facility owned by ACTEW located on Territory, as opposed to National Land.

25. Finally, QCC's submission that ACTEW's right to operate its water network facility is not granted by the UNFT Act but by the Utilities Act (with the suggested consequence that the UNFT cannot be regarded as a fee for a privilege) is flawed and should be rejected.[14]

26. The right to operate a network facility is governed separately by the Utilities Act. The UNFT is a charge on the legal *owner* of a network facility, not its *operator*. As the definition of "owner" in the UNFT Act makes clear, the legal owner of a network facility will not necessarily be the holder of a licence to operate that facility.

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9 See generally Keane CJ Judgment at [136], second factor (AB 118).
10 *Cf.* QCC UNFT submissions at [32]-[36].
11 QCC UNFT submissions at [27]-[28].
12 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (see in particular Mason CJ, Deane and Gaudron JJ at 325 and Brennan J at 334).
13 QCC UNFT submissions at [13], [24]-[28].
14 QCC UNFT submissions at [29]-[30].

27. The Utilities Act requires the operator of a network facility to hold a licence, for which an annual licence fee is payable. Section 45 of that Act makes clear that the annual licence fee payable under the Act is a reasonable contribution towards the costs incurred, or expected to be incurred, by the ICRC in the exercise of functions in relation to utility services.[15] That fee is payable regardless of whether the network facility in respect of which the licence is held is located wholly on Territory Land or wholly on land leased by the utility. The extent to which the network facility is located on land leased by the utility is irrelevant in determining the amount of the licence fee under s 45. That fee is not a fee for the privilege of locating a network facility on Territory Land.

28. For these reasons, it is submitted that the UNFT is properly characterised as a fee for a privilege of locating a network facility on Territory Land that is not the subject of a relevant private right or interest held by the utility (see s 6(2) UNFT Act). It is therefore not a tax.

The UNFT is not a duty of excise

General principles

29. Even if the UNFT can properly be characterised as a tax, the UNFT is not a duty of excise.

30. An excise is a tax levied on a step in the production, manufacture, sale or distribution of goods.[16] To be an excise a tax must be levied "upon goods". It is necessary that the tax "be of such a nature as to affect them [the goods] as the subjects of manufacture or production or as articles of commerce".[17] It is not sufficient that the tax bears a close relation to the production or manufacture, the sale or the distribution of goods.

31. The gravamen of QCC's challenge to the UNFT is that a tax on the occupation of land is an excise because the land is used in the manufacture or distribution of goods. However, there is no decision of this Court in which it has been held that a tax on the occupation of land is an excise simply because the land happens to be used in the course of an operation which will ultimately result in the manufacture or distribution of goods.

32. The object of the exclusive power given to the Commonwealth Parliament by s 90 of the Constitution is to give the Parliament real control of the taxation of commodities. As Keane CJ observed in the Full Court, s 90 of the Constitution is not concerned to give the Commonwealth exclusive power to impose taxes on the ownership or use of land.[18]

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15 *Cf.* QCC UNFT submissions at [30].

16 *Ha v NSW* (1997) 189 CLR 465 at 499; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 1]* (1992) 177 CLR 248 at 279 per Brennan, Deane and Toohey JJ; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 657 per Brennan J, 665 per Deane J.

17 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 304 per Dixon J.

18 Keane CJ Judgment at [126] (AB 115); *Parton v Milk Board (Victoria)* (1949) 80 CLR 229 at 260; *Ha v State of New South Wales* (1997) 189 CLR 465 at 495.

33. In determining whether a tax is properly characterised as an excise, it is necessary to have regard to a range of relevant factors, none of which is determinative.[19]

Hematite

34. The sorts of factors that are relevant to the characterisation of a tax as an excise were discussed by the High Court in *Hematite*.[20]

35. In *Hematite*, this Court held that state legislation imposing a fixed licence fee of $10 million in respect of three pipelines that were used for the purpose of carrying (respectively) crude oil, liquefied petroleum gas and natural gas from Longford in Gippsland, where they were separated into those components, to their places of distribution, contravened s 90 and was invalid. The three pipelines that were the subject of the charge had been singled out for special treatment – the tax was imposed by express reference to the licence numbers of the three pipelines (in circumstances where the relevant licence dictated what might pass through each of the pipelines). All other pipelines were subject to a charge of only $40 per km.

36. After noting that "the court has from time to time insisted that there must be a strict relationship between the tax and the goods in order to constitute a tax on goods, Mason J stated at 632:

> "To justify the conclusion that the tax is upon or in respect of the goods it is enough that the tax is such that it enters into the cost of the goods and is therefore reflected in the prices at which the goods are subsequently sold. It is not necessary that there should be an arithmetical relationship between the tax and the quantity or value of the goods produced or sold, still less that such a relationship should exist in a specific period during which the tax is imposed. This is because there are many cases where an examination of the relevant circumstances will disclose that a tax is a duty of excise notwithstanding that it is not expressed to be in relation to the quantity or value of the goods."

37. Mason J then identified the significant features of the fee, which led his Honour to conclude that it was, in its substantial effect, a tax in respect of hydrocarbons, as follows (at 634):

> "(1) that it is levied only upon a trunk pipeline, that is the Gas and Fuel Corporation pipeline, the gas liquids pipeline and the crude oil pipeline, through which flow the entirety of the hydrocarbons recovered from the Bass Strait fields;
>
> (2) that it is a fee payable for permission to operate a pipeline for which the plaintiffs otherwise hold a permit to own and use;
>
> (3) that the fee is a special fee which is extraordinarily large in amount, having no relationship at all to the amount of the fees

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19 *Anderson's Pty Ltd v State of Victoria* (1964) 111 CLR 353 at 365 per Barwick CJ; *Hematite* at 629, 633 per Mason J, 666 per Deane J; *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1993) 178 CLR 561 at 583 per Mason CJ, Brennan, Deane and McHugh JJ.

20 *Hematite Petroleum Proprietary Limited v The State of Victoria* (1982) 151 CLR 599.

payable for other pipeline operation licences — the fee payable for a trunk pipeline is $10,000,000 whereas the fee payable for any other pipeline is $40 per kilometre; and

(4) that the fee is payable before an essential step in the production of refined spirit can take place — the transportation of the hydrocarbons from Longford to Long Island Point where the refinery is situated."

38. Mason J concluded (at 634–5):

"The co-existence of these features indicates that the pipeline operation fee payable by the plaintiffs is not a mere fee for the privilege of carrying on an activity; it is a tax imposed on a step in the production of refined petroleum products which is so large that it will inevitably increase the price of the products in the course of distribution to the consumer. The fee is not an exaction imposed in respect of the plaintiffs' business generally; it is an exaction of such magnitude imposed in respect of a step in production in such circumstances that it is explicable only on the footing that it is imposed in virtue of the quantity and value of the hydrocarbons produced from the Bass Strait fields. To levy a tax on the operation of the pipelines is a convenient means of taxing what they convey for they are the only practicable method of conveying the hydrocarbons to the next processing point." (emphasis supplied)

39. Brennan J's reasoning at 658-9 was to similar effect to that of Mason J:

"Where a tax which takes the form of a licence fee is exacted not in respect of a business generally but in respect of a particular act done in the business, it is a tax upon the doing of that act; where that act is a step in the production, manufacture or distribution of goods, a tax upon that step is burden upon production, manufacture or distribution. And that is so whether or not the tax is calculated upon the quantity or value of the goods produced, manufactured or distributed.

...

The impugned taxes that are imposed by s 35 are selective and discriminatory. Section 35 selects the gas liquids, crude oil and Gas and Fuel Corporation pipelines as against all other pipelines in Victoria and imposes a tax upon the licensees of each of those pipelines in respect of the operation of each of those pipelines. Apart from s 35 the respective licensees would be authorized to operate those pipelines without payment of the tax; by virtue of s 35 the respective licensees may operate their pipelines only if they have first paid the tax or an instalment of the tax to cover the period of proposed operation." (emphasis supplied)

40. As Keane CJ observed, it is apparent from the reasoning of the majority that the basis of the decision in *Hematite* was that the *particular features* of the legislation meant that the pipeline licence fee, which was formally in respect of

the pipelines carrying the hydrocarbons, was in substance an exaction imposed upon the transport of the hydrocarbons carried in those particular pipelines.[21]

41. There are no equivalent factors here that would justify the conclusion that the UNFT is in substance an exaction imposed upon the water passing through ACTEW's water network.

42. *No relationship between value or quantity of goods and amount of charge.* For the reasons set out at paragraphs [70]-[76] below, there is no relationship at all between the amount of the UNFT and the quantity of the goods that are distributed.

43. *Magnitude of the fee.* Unlike the charge in *Hematite*, the UNFT is not "enormously large in amount".[22] It is not "of such magnitude ... that it is explicable only on the footing that" it is imposed by virtue of the quantity and value of the water distributed through the network.[23] Rather, it is explicable as a charge for the use or occupation of Territory Land by a network owner.

44. *Non-discriminatory fee.* The UNFT is also imposed on a range of "utility networks" in the ACT for electricity, gas, sewerage and telecommunications.[24] In each case, the UNFT is imposed by reference to *ownership* of a facility on land and the length of the network on the land.[25]

45. Thus, in contrast to the tax considered in *Hematite*, the UNFT imposed in respect of a water network is the same as the amount of the fees payable for all other networks located on ACT land.[26]

46. QCC asserts that it is irrelevant that the UNFT applies to a wide range of utilities and networks other than the water network owned by ACTEW. In doing so QCC wrongly ignores the following:

46.1. the UNFT Act does not single out ACTEW's water network for special treatment;

46.2. the UNFT is not levied only upon a particular pipeline or part of a network of a particular owner;[27]

46.3. the UNFT Act does not select and discriminate against particular network facilities as against all other such facilities in the ACT;[28]

46.4. the UNFT imposed in respect of a water network bears a relationship to – indeed, it is calculated in the same manner as – the fees payable for all other networks located on Territory Land;[29]

46.5. even though the value of goods that are conveyed through the various different types of network may vastly differ, if those networks occupy the

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21 Keane CJ Judgment at [135] (AB 118).
22 *Cf* Mason J in *Hematite* at 634.
23 *Cf.* Mason J in *Hematite* at 634-5.
24 See ss 6-7 UNFT Act; see Keane CJ Judgment at [100] (AB 108).
25 Keane CJ Judgment at [97], [108], [118], [121] (AB 108).
26 *Cf. Hematite* at 634 per Mason J.
27 *Cf. Hematite* at 667.4, 667- 668 per Deane J.
28 *Cf. Hematite* at 659; per Brennan J; at 667.4, 667- 668 per Deane J.
29 *Cf. Hematite* at 634 per Mason J.

same length on Territory Land, the owner pays the same amount of UNFT;

46.6. the methodology for calculating the UNFT is not correlated to the amount or type of goods conveyed through the network.

47. QCC appears to misapprehend that the Territory relies on the fact that the UNFT is imposed on other network facilities to argue that the UNFT may not be an excise in all the circumstances to which it is intended to apply (and therefore it cannot be an excise in relation to its imposition on the owner of a water network).[30] The Territory does not rely on the imposition of the UNFT on other network facilities for this purpose.

48. Rather, as the Full Court correctly concluded, the relevance of the imposition of the UNFT on other network facilities in the ACT is to underscore the fact that – by contrast to the charge in *Hematite* – the UNFT does not select the water network for discrimination so as to warrant the conclusion that the charge is upon the water carried in the network.[31]

49. As Keane CJ observed, in *Hematite* the principal feature of the legislative scheme which lead to the licence fee being seen as falling on the step of transporting the hydrocarbons in the course of their production was the vast disparity between the fee for the pipeline carrying the hydrocarbons and the fees charged in respect of other pipelines.[32]

50. By contrast, in the present case, there is no such indicator that the water in the network is, as a matter of substance, the target of the UNFT.[33]

51. *The quantum of the tax is referable to the length of land occupied.* The charge imposed in *Hematite* was a flat fee of $10,000,000 for each of the three pipelines it applied to. Here the quantum of the UNFT is referable to the length of land occupied by any utility network.

52. *Charge on ownership not the operation of utility network.* Unlike the charge in *Hematite*, the UNFT is a charge on the ownership of a facility, not a charge on its operation.[34] The UNFT is payable by the owner regardless of how much water, if any, is transported by the operator.[35]

53. A non-owner operating the network – for example, the entity which produces goods and then distributes the goods through the network – would not be subject to the UNFT. Rather, the UNFT would be payable by the legal owner, even though:

53.1. the operator owns the goods that are being distributed through the facility;

53.2. the legal owner never takes a step in the distribution of goods at all.

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30 QCC UNFT Submissions at [81.6]-[81.7].

31 Keane CJ Judgment at [136], sixth factor (AB 119); *cf. Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 634 per Mason J; per Brennan J at 659; Deane J at 667.4, 667- 668.

32 Keane CJ Judgment at [138] (AB 119).

33 Keane CJ Judgment at [138] (AB 119).

34 Cf *Hematite* Mason J at 634, Brennan J at 659, Deane J at 668.

35 Keane CJ Judgment at [128] per Keane CJ (AB 115).

54. Consequently, the fact that the use of the water network might be an essential step in the production and distribution of water by the entity operating the network facility is immaterial – the operator is not liable to pay the UNFT. Likewise, because only the owner is liable to pay the UNFT and not the operator involved in production, it is a mischaracterisation to suggest that the UNFT is imposed at a "stage of production".

55. *Time for payment.* In *Hematite* it was held to be significant in the characterisation of the charge as an excise that the fee was payable before an essential step in the production of the good could take place.[36] By contrast, the UNFT is payable in arrears after the lodgment of an annual return 60 days after the end of that year (see s 12 UNFT Act). Thus, in no sense is the payment of the UNFT a condition upon the transportation of water.[37]

56. As Keane CJ observed, the pipeline licence fee in *Hematite* was held to be an excise because it was a tax on the hydrocarbons being transported through the pipeline, not because it was a tax on the pipeline itself.[38]

57. While this timing question may of itself receive only modest weight in the overall characterisation question, it is yet another factor pointing in the same direction.

58. For the reasons set out above, it cannot be said that the levying of the UNFT on the ownership of the network is merely a convenient means of taxing what they convey.[39]

QCC's contentions

59. QCC contends that three key matters point to the conclusion that the UNFT is a duty of excise.[40] Each is dealt with in turn.

1. Not a tax on an essential step in the production and distribution of water

60. QCC contends that the UNFT is imposed on a network which is said to be an essential step in the production and distribution of water.[41] In so contending, QCC asserts – even though there was no evidence to this effect in the case – that use of the water network is a practical necessity for the production and distribution of water in the ACT.[42] These contentions ignore the fact that the UNFT is not imposed on *use* of the water network.

61. As Keane CJ correctly concluded, a tax which falls indiscriminately on ownership of a facility on land used for production is not directly connected with the production of goods so as to be described as an excise.[43]

62. The recognition that the UNFT is payable by the owner not the operator does not involve the elevation of substance over form, as QCC appears to contend.[44]

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36 *Hematite* at 634 per Mason J; at 667; 668, 669 per Deane J.
37 Keane CJ Judgment at [136], fifth factor (AB 119).
38 Keane CJ Judgment at [148] (AB 122).
39 *Cf.* QCC UNFT submissions at [50].
40 QCC UNFT submissions at [37].
41 QCC UNFT submissions at [45].
42 QCC UNFT submissions at [48]-[49].
43 Keane CJ Judgment at [128] (AB 115).

As the definition of "owner" in the Dictionary to the UNFT Act makes clear, the legal owner of a network facility will not necessarily be the holder of a licence to operate that facility. Further, the Utilities Act allows for there to be more than one licensed water distributor at any one time.[45]

63. The absence of a connection between the UNFT and the operation of the water network pursuant to the licence granted under the Utilities Act reinforces the conclusion that the UNFT is both in substance and form an imposition on ownership of the facility, not on the activity of transporting water.[46]

64. Here, the owner of the network happened to also be the operator. However, where a non-owner operates the network, the UNFT is not payable by that operator (and the legal owner who does pay never takes a step in the production or distribution of goods at all).

65. QCC relies heavily on the decisions in *Matthews v The Chicory Marketing Board (Victoria)* and *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 to argue that the UNFT is relevantly a tax upon production. As Keane CJ observed, the reasoning in each of these cases demonstrates that mere ownership of a productive asset is not sufficiently close to the activity of production or manufacture of goods to be regarded as an excise.[47]

66. QCC's reliance on the result in *Matthews*, where a tax imposed on every half acre of land planted with the crop chicory was held to be an excise, is inapposite.[48] The levy was imposed on and was to be paid by the producers of chicory. As Keane CJ observed, there is no support in the reasoning in *Matthews* for the view that the circumstance that a tax is upon the ownership of a productive asset suffices to establish a sufficiently close connection with the activity of production or distribution of goods.[49]

67. Likewise, QCC's reliance on the result in *Logan Downs*, where a tax imposed on owners of stock was held to be an excise, is inapposite.[50] In *Logan Downs*, owners of livestock were required to pay a fee in respect of the number of stock held, which were themselves considered to be "articles of commerce".[51] A network facility is not a commodity, or an "article of commerce", in the sense in which that expression was used in *Logan Downs*.[52] There is no trade in network facilities.

68. As Keane CJ correctly observed, in the decisions of this Court which explain what is meant by saying that an excise is a tax imposed "upon goods" or upon "the production or manufacture, the sale or consumption of goods," it has never been held that a tax upon the ownership of a facility which may be operated to

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44 QCC UNFT submissions at [53]-[57].

45 See Part 3 of Utilities Act and definition of "water distributor" in the Dictionary contained in Schedule 1

46 Keane CJ Judgment at [128] (AB 115).

47 Keane CJ Judgment at [145] (AB 121).

48 QCC UNFT submissions at [64].

49 Keane CJ Judgment at [148] (AB 122).

50 QCC UNFT submissions at [54].

51 *Logan Downs* (1977) 137 CLR 59 at 78 Mason J (Barwick CJ agreeing), at 70-71 per Stephen J; see Keane CJ Judgment at [149] (AB 122).

52 See Keane CJ Judgment at [151] (AB 124).

produce or transport goods has a sufficient relationship with production of goods to be regarded as an excise.[53]

69. In this respect, in *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 the High Court held that a charge levied on road transportation companies calculated by reference to the load capacity which could be carried by a truck or the number of miles travelled was not a duty of excise. As Perram J emphasised, such an arrangement appears indistinguishable from the UNFT at the level of principle – both are taxes on the extent of transportation infrastructure.[54]

10 2. *UNFT does not bear a natural relation to the quantity and value of the commodity being distributed*

70. QCC next contends that the UNFT bears a natural relation to the quantity and value of the commodity being distributed.[55]

71. The quantum of the UNFT bears no such natural relationship.

72. The Territory accepts that decisions of this Court establish that there is no need for an arithmetical relationship.[56] However, there must be a sufficiently close relationship between the tax and the production of the goods to show that the tax affects the goods as the subject of production.[57]

73. Here, as the Full Court correctly observed, not only is there no arithmetical
20 relationship between the UNFT and the quantity or value of water which passes through the network, there is no relationship *at all*.[58]

74. Where, as here, there is no relationship at all between the value or quantity of goods and the amount of the charge, there must be sufficient other factors to indicate that, notwithstanding the form of the charge, the *substantial effect* of the charge is to impose a levy on the goods themselves.[59] Those factors are not present here. QCC's submissions wrongly ignore the following:

74.1. The quantum of the UNFT is calculated solely by reference to the length of the facility located on Territory Land.

74.2. The methodology for calculating the UNFT is unrelated to the amount of
30 water actually produced or distributed by means of the facility.

74.3. The amount or volume of water so transported depends not upon the length of the facility but upon its diameter.[60]

74.4. Contrary to QCC's submissions at [63]-[64], the UNFT Act does not disclose an express relationship with the potable water conveyed by the network. Rather, the UNFT applies regardless of the volume of goods

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53 Keane CJ Judgment at [139] (AB 119).
54 Perram J Judgment at [180] (AB 134).

55 QCC UNFT submissions at [58]ff.
56 QCC UNFT submissions at [60].
57 *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 per Dixon J at 304.
58 Full Judgment at [137] (AB 119).
59 See *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 632 per Mason J, 666 per Deane J; *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 per Dixon J at 304.
60 Keane CJ at [151] (AB 124).

passing through the network (and regardless of whether goods ever flow through the network).[61]

74.5. Even though the value of goods that are conveyed through the different types of utilities networks subjected to the UNFT may vastly differ, if those networks occupy the same length on Territory Land, the owner pays the same amount of UNFT.

74.6. While water may move through the network in response to consumer demand,[62] contrary to QCC's submission, the evidence demonstrated that the volume of water flowing through the network was *not* relatively stable over time (although, of course, the UNFT payable remained constant).[63] For example, it is not disputed that the volume of water flowing through the network reduced by 20-40% in response to the imposition of water restrictions by the Territory.[64]

75. QCC relies on the result in *Matthews*, asserting that the value of crops actually harvested from the acreage planted (where the levy was imposed on the acreage planted, being a fixed amount) would have varied according to seasonal variations and this variation did not prevent characterisation as an excise.[65] However, as Dixon J observed in *Matthews*, by adopting area planted as the criterion of the amount of the levy upon each producer, the Marketing Board had placed an impost upon an essential step in production, namely, planting, computed quantitatively. Dixon J continued: "There is no distinction of substance and scarcely any even of form between levying a tax upon the area planted and levying a tax upon the act of planting the area."[66] As Rich J observed, if you tax according to planting you affect or influence the operation upon which the extent of attempted production depends.[67]

76. By contrast here, the UNFT applies regardless of the whether the entity which happens to be the operator ever attempts to distribute any water through the network.

3. The UNFT was passed on to customers by ACTEW

77. Finally, QCC points to the circumstance that the UNFT was passed on to customers by ACTEW.[68]

78. QCC conceded, properly, below, that a payroll tax is not a duty of excise and nor are the other taxes which States may legitimately impose which may be passed on in a manner which ultimately affects the final cost of goods to a consumer.[69]

79. However, QCC takes out of context a passage of Mason J in *Hematite* at 632 to suggest that a significant factor in characterising a charge as a duty of excise is

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61 Keane CJ at [137] (AB 119).
62 QCC UNFT submissions at [64.3].
63 *Cf.* QCC UNFT submissions at [64.4].
64 QCC UNFT submissions at [64.4].
65 QCC UNFT submissions [64.4].
66 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 per Dixon J at 303.
67 *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 per Rich J at 281.
68 QCC UNFT submissions at [69]ff.
69 Keane CJ Judgment at [141] (AB 120); QCC UNFT submissions at [79].

whether it is likely to be passed on to consumers.[70] As Keane CJ noted below, Mason J explained at some length what he meant in saying that the tax "enters into the cost of the goods". It is apparent from that explanation that he was not speaking of any impost apt to increase the cost of goods.[71]

80. In *Ha v NSW*, Brennan CJ, McHugh, Gummow and Kirby JJ, expressly acknowledged that taxes may enter in some way into the cost of goods to consumers without attracting the operation of s 90 of the Constitution.[72] Rather, what must be present is a *"close relation"* to the production or manufacture of goods, which does not exist here.[73]

10 81. Finally, the fact that ACTEW separately identifies the UNFT in accounts provided to QCC is not a matter that should be given any weight in determining whether the UNFT is a tax on the production, manufacture, sale or distribution of water.[74] First, because the UNFT is imposed on the length of the network (and not the water transported) ACTEW must convert the per-kilometre rate of the UNFT into a per-litre rate when it chooses to pass the charge on to consumers. Secondly, and in any event, the actions of ACTEW cannot affect the constitutional validity of the charge.

Conclusion

82. The Territory submits that for the reasons stated above, the UNFT is not
20 properly characterised in its substantial effect as a tax in respect of goods levied on a step in their distribution.

PART VII ORDERS

83. The Territory submits that the appeals should be dismissed with costs.

Dated: 31 May 2011

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70 QCC UNFT submissions at [70].

71 Keane CJ Judgment at [141] (AB 120).

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

73 See *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 per Dixon J at 304; Keane CJ Judgment at [143] (AB 121)

74 QCC UNFT submissions at [75]

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