



HIGH COURT OF AUSTRALIA

5 October 2011

QUEANBEYAN CITY COUNCIL v ACTEW CORPORATION LTD & ANOR
C2/2011

QUEANBEYAN CITY COUNCIL v ACTEW CORPORATION LTD & ANOR
C3/2011

[2011] HCA 40

Today the High Court dismissed an appeal by the Queanbeyan City Council ("Queanbeyan") against a decision of the Full Court of the Federal Court of Australia, which held that water licence fees and a utilities network tax imposed by the Australian Capital Territory ("the Territory") upon ACTEW Corporation Ltd ("ACTEW"), and passed on to Queanbeyan, were not contrary to s 90 of the Constitution. Under s 90 of the Constitution, the power of the Commonwealth Parliament to impose duties of excise is exclusive.

Under power conferred upon it by s 24 of the *Local Government Act 1993* (NSW), Queanbeyan provides goods, services and facilities to the City of Queanbeyan. Queanbeyan obtains water supplies from ACTEW which holds a licence to take water from certain areas under the control of the Territory under the *Water Resources Act 2007* (ACT). ACTEW previously held a similar licence under the *Water Resources Act 1998* (ACT). ACTEW charges Queanbeyan for supplying water to residents and businesses within the City of Queanbeyan. The charge includes costs imposed on ACTEW under Territory legislation.

Pursuant to determinations under the Water Acts, ACTEW was required to pay fees for extracting water from Territory catchments calculated by reference to the amount of water extracted. The determinations increased the water licence fees from 10 cents per kilolitre to 55 cents per kilolitre.

From 1 January 2007, the Territory also required ACTEW to pay a charge imposed by reference to the route length of the infrastructure network for the supply and delivery of water to its customers under the *Utilities (Network Facilities Tax) Act 2006* (ACT).

ACTEW was a Territory-owned Corporation within the meaning of the *Territory-owned Corporations Act 1990* (ACT). Amongst other things, that Act required the shares in ACTEW to be held on trust for the Territory, gave the Territory's executive control over ACTEW's corporate decision-making and regulated its borrowing.

Queanbeyan brought proceedings in the Federal Court of Australia alleging that the Territory had invalidly imposed on ACTEW duties of excise, namely, the water licence fees and the utilities network tax, within the meaning of s 90 of the Constitution, and that these charges were therefore wrongly passed on by ACTEW to Queanbeyan. The primary judge and the majority of the Full Court held that the water licence fees were not taxes. The primary judge also held that the utilities

network tax was a duty of excise and therefore invalid. The Full Court disagreed and held that the utilities network tax was not a duty of excise. Queanbeyan appealed, by special leave, to the High Court of Australia. By a notice of contention, ACTEW contended that the water licence fees and utilities network tax were merely internal financial arrangements between ACTEW and the Territory and therefore could not be duties of excise.

The High Court held that the provisions of the *Territory-owned Corporations Act* indicated that the executive government of the Territory exercised extensive control over the conduct of the affairs of ACTEW. ACTEW was so closely identified with the Territory that it was not distinct from the polity itself. The water licence fees and the utilities network tax, being imposed upon a Territory agency, were merely internal financial arrangements; they could not be "taxes" and thus could not amount to "duties of excise" within the meaning of s 90 of the Constitution.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*