IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C3 of 2011

BETWEEN:

QUEANBEYAN CITY COUNCIL

Appellant

ACTEW CORPORATION LIMITED

First Respondent

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)

Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

(Re the Utilities (Network Facilities Tax))

Filed on behalf of the Commonwealth Attorney-General by:

Australian Government Solicitor
50 Blackall Street Barton ACT 2600
DX5678 Canberra

Date of this document: 7 June 2011
Contact: Danielle Forrester

File ref: 11025263
Telephone: 02 6253 7527
Facsimile: 02 6253 7303
E-mail: danielle.forrester@ags.gov.au

PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

3. Section 90 of the Constitution prohibits States or Territories from (amongst other things) imposing a tax on the production, manufacture, sale or distribution of goods, including water.

4. Following the approach adopted by the parties, the Commonwealth makes submissions on the Water Abstraction Charge (**WAC**) in proceeding C2 of 2011 and submissions on the Utilities (Network Facilities Tax) (**UNFT**) in proceeding C3 of 2011.

5. The Queanbeyan City Council (**QCC**), challenges the validity of the UNFT, which is imposed by the *Utilities (Network Facilities Tax) Act 2006* (ACT) (**UNFT Act**) by the ACT on owners of network facilities, including a water network, to the extent these are on land in the ACT.

6. In summary, in relation to the UNFT, the Commonwealth submits that:

   (1) The question whether a tax is "on goods" and therefore an excise, must be resolved as a matter of substance. The relevant factors in determining whether a tax is an excise include whether the charge is levied on an essential step in the production, manufacture, sale or distribution of goods, and the connection between the amount of the charge and the quantum or value of the goods (such a connection not being essential).

   (2) The UNFT has the positive characteristics of a tax, and water, at least when it has been abstracted, is a good. The Commonwealth makes no further submission as to the characterisation of the UNFT having regard to the above principles.

PART III: Not applicable.

PART IV: RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

7. The Commonwealth accepts QCC's statement of the applicable constitutional and legislative provisions.

Part V: ARGUMENT

A. Duties of excise

8. The Commonwealth refers to paragraphs 8 to 19 of its submissions on the WAC (C2 of 2011) regarding the purpose of s 90, the characteristics of a tax and the nature of a duty of excise.

B. The UNFT

9. The Commonwealth submits the UNFT has the positive characteristics of a tax. Its submissions as to whether the UNFT is nonetheless to be characterised as a special exaction that is not a tax are confined to the general principles outlined in paragraphs 8 to 19 of its submissions in relation to the WAC. The Commonwealth's further

submissions on whether, if the UNFT is a tax (and not a special exaction) the UNFT is a duty of excise, are confined to the identification of the relevant principles to be considered in determining that question. The Commonwealth nevertheless submits, for the reasons set out in paragraph 13 of its submissions on the WAC that water, at least when it has been abstracted, is a "good" for s 90 purposes.

Tax

10. The UNFT is imposed under the UNFT Act. It is a compulsory exaction of money for public purposes. It is plainly a tax unless it can be shown to be a "special exaction" (a charge for the privilege for using and occupying property). It is also relevant to the characterisation of the UNFT that the legislature chose to call the UNFT a tax. While the Full Court was correct in recognising that "the labelling of the exaction as a tax should not be decisive of its substantive character", it was also correct in observing that it is "difficult not to give weight to the circumstance that the impost is described as a tax in the legislation which imposes it".[1]

Excise

11. In *Ha v New South Wales* (***Ha***) the majority described the "principle that an inland tax on a step in production, manufacture, sale or distribution of goods is a duty of excise" as "long established".[2] The question whether a tax is an excise therefore depends upon whether it is a tax "on", "upon" or "in relation to" goods[3] or "upon the taking of a step" in the process of bringing goods into existence and passing them down the line to the consumer.[4] Water, at least when it has been abstracted, is such a good.[5]

12. Where a tax is imposed directly on a step in the production, manufacture, sale or distribution of goods, and is quantified by reference to the volume or value of those goods, that tax is clearly an excise. The analysis is more difficult where:

    (a) the tax is not imposed by reference to the taking of a step in the production, manufacture, sale or distribution of goods but takes the form, for example, of a fee for a licence to operate plant and equipment forming part of the machinery of distribution and production; or

    (b) the amount of the tax is not expressly referable to the volume or value of the goods produced.

13. The characterisation of a tax as an excise turns on questions of substance rather than form.[6] The purpose of s 90 would be undermined if the operation of that section could be avoided by circuitous or drafting devices such that a tax could avoid characterisation as an excise simply by selecting a criterion of liability that was not

---

1 *Australian Capital Territory v Queanbeyan City Council & Anor* (2010) 188 FCR 541 (**Full Court Appeal**) at 572 [124] (Keane CJ).

2 (1997) 189 CLR 465 at 490.7 (Brennan CJ, McHugh, Gummow and Kirby JJ). See also at 499.8 (Brennan CJ, McHugh, Gummow and Kirby JJ).

3 *Mutual Pools & Staff Ltd v FCT* (1992) 173 CLR 450 at 467.5 (Dawson, Toohey and Gaudron JJ), citing *Browns Transport v Kropp* (1958) 100 CLR 117 at 129; *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 304 (Dixon J).

4 *Hematite Petroleum v Victoria* (1983) 151 CLR 599 at 655.5 (Brennan J, considering that the debate concerning the criterion of liability under statute versus the practical effect of the legislation left untouched Kitto J's formulation in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529).

5 See paragraph 13 of the Commonwealth's submissions in relation to the WAC (C2 of 2011).

6 *Ha v NSW* (1997) 189 CLR 465 at 498.8 (Brennan CJ, McHugh, Gummow and Kirby JJ).

directly referrable to the quantity or value of goods.[7] To focus on the criterion by which a tax applies in determining whether it is an excise would be to return to the discredited test expounded in *Bolton v Madsen*.[8] It would "expose the constitutional provision made by s 90 to evasion by easy subterfuges and the adoption of unreal distinctions".[9]

14. The substance of a tax is identified by reference to a multi-factorial approach. Thus:[10]

> [I]n arriving at the conclusion that the tax is a tax upon the relevant step, consideration of many factors is necessary, factors which may not be present in every case and which may have different weight or emphasis in different cases. The 'indirectness' of the tax, its immediate entry into the cost of the goods, the proximity of the transaction it taxes to the manufacture or production or movement of the goods into consumption, the form and content of the legislation imposing the tax – all these are included in the relevant considerations.

The relevant features of the UNFT

15. The UNFT is imposed on the "owner of a network facility" on land in the ACT (s 8(1)). "Owner" is defined to mean the "legal owner, whether or not the legal owner also has rights to operate the facility" (UNFT Act, Dictionary).

16. A "network facility" is defined, subject to the exclusions in s 6(2) that are discussed below, to mean any part of the infrastructure of a "utility network" (s 6(1)).

17. A "utility network" is defined (s 7) to include electricity networks, gas networks, a sewerage network and a "water network" under the *Utilities Act 2000* (ACT), a telecommunications network and any other network prescribed by regulations. A "water network" consists of infrastructure used, or for use, in relation to the collection and treatment of water for distribution to premises of another person, and includes, amongst other things, pipes.[11]

18. The UNFT is not payable in relation to any part of a "network facility" that is "affixed to land for which any of the following is in force in relation to the use of the land for the utility network: (a) a lease; (b) a licence granted by the Territory; (c) any right prescribed by regulation" (s 6(2)). Thus, where the owner or operator of a utility network has a lease in relation to the use of land for that network, the UNFT is not payable in respect of any part of the network on that land.

19. The rate of the UNFT is calculated under s 8(1) as the "route length" multiplied by the "determined rate". "Route length" is defined as the "length of the horizontal projection of the facility on the land". The "determined rate" is a rate determined under s 139 of the *Taxation Administration Act 1999* (ACT). The determinations that have been made for the purposes of s 8 fix a single rate per kilometre of network route length for all network facilities (ranging from an initial rate of $355 in 2006 up to $749 on 30 March 2011). Accordingly, the same amount is payable per kilometre of infrastructure

---

7 The Commonwealth refers to its submissions on the identification of "circuitous devices" and "drafting devices", as set out in paragraph 11 of its submission in relation to the WAC (C2 of 2011).

8 (1963) 110 CLR 264 at 271-273.

9 *Hematite* (1983) 151 CLR 599 at 633 (Mason J) and 664 (Deane J), both quoting *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 304 (Dixon J).

10 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365.7 (Barwick CJ), applied in *Hematite* (1983) 151 CLR 599 at 629.7 and 633.8 (Mason J), 658.6 (Brennan J), 666.4 (Deane J).

11 *Utilities Act*, s 12(2).

for electricity networks, gas networks, water networks, sewerage networks and telecommunication networks.

Relationship to quantity or value

20. The relationship between the amount of a tax and the volume or value of goods has long been considered an important factor in determining whether a tax is an excise. It is not, however, determinative.

21. In *Matthews v Chicory Marketing Board (Vict)* (***Matthews***), Dixon J held that a levy imposed by reference to the area of land planted (rather than by reference to the volume or value of chicory produced) was an excise because the "basis adopted for the levy [number of half acres planted] has a natural, although not a necessary, relation to the quantity of the commodity produced."[12] That led Dixon J to conclude that "[b]y adopting area planted as the criterion of the amount of the levy upon each producer the board has taxed the production of the commodity".[13] Latham CJ (dissenting) likewise focused on the existence of a relation to quantity or value, but held that the requisite relationship did not exist in circumstances where the tax may be payable even if no chicory was produced.[14]

22. By contrast, other members of the majority in *Matthews* gave less emphasis to the relation between a tax and the quantity or value of goods. These Justices focused instead on the imposition of the levy on planting, that being an essential step in the production of chicory.[15] For Rich J, even though a crop may fail the levy was still a "tax ... aimed at production."[16] Similarly, Starke J considered that the levy was imposed "in respect of" commodities and that the absence of a direct relation to quantity or value did not change the fact that the tax was "in respect of the commodity produced for sale" and not a tax upon the producer "irrespective of the production of the commodity".[17]

23. In *Hematite Petroleum v Victoria* (***Hematite***),[18] the majority held that a proportionate relationship between the amount of a tax and the value or quantity of goods in respect of which the tax was imposed was not an essential criterion of an excise. The $10m pipeline fee at issue in that case was held to be an excise even though there was not even an approximate relationship between the value of the goods that flowed through the relevant pipelines and the amount of the fee, because while there was a continuous flow of liquid gas and crude oil through the relevant pipelines,[19] the material before the Court did not establish that gas and oil flowed at a constant rate, or that the rate of flow bore any relationship to the rate of flow during any earlier period.[20]

---

12 *Matthews* (1938) 60 CLR 263 at 303.5.

13 *Matthews* (1938) 60 CLR 263 at 303.7.

14 *Matthews* (1938) 60 CLR 263 at 277.4 (in explaining the understanding of the word "excise" in Australia at the time of Federation) and at 277.7 ("if ... a tax has no relation to the quantity or value (however measured) of goods, it cannot be said to be an excise duty").

15 See, for example, *Matthews* (1938) 60 CLR 263 at 281.5 (Rich J).

16 *Matthews* (1938) 60 CLR 263 at 281.6.

17 *Matthews* (1938) 60 CLR 263 at 286.3ff.

18 (1983) 151 CLR 599.

19 *Hematite* (1983) 151 CLR 599 at 654.2 (Brennan J).

20 *Hematite* (1983) 151 CLR 599 at 657.2 (Brennan J).

24. Brennan J explained the significance of the relationship between the amount of a charge and the value or volume of goods in characterising a tax as an excise in these terms:[21]

> Though the presence or absence of a proportionate relationship between a tax and a quantity or value of goods is a relevant and important factor for consideration in ascertaining whether the tax is imposed upon or in respect of goods, such a relationship is neither an exhaustive nor an universal criterion for determining whether a particular tax is a duty of excise ...
>
> In principle, it is sufficient to establish that a tax is a duty of excise if it is a tax, however calculated, upon a step in the process of production, manufacture or distribution ...
>
> 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 a 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.

25. Deane J stated that "[i]t is also established that a tax may be a duty of excise notwithstanding that it is not calculated by reference to the quantity or value of the goods manufactured or produced."[22] Likewise, Murphy J held that the fee was a tax on the operation of the pipeline, which was an integral step in the production process, and expressly stated that a "fixed fee may still be an excise even if it is not assessed according to the quantity or value of the production".[23] Mason J said:[24]

> 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.

26. By contrast, for Gibbs CJ and Wilson J, who dissented, the absence of a "natural ... [or] necessary relationship between the fee fixed and the quantity or value of the hydrocarbons conveyed" led their Honours to conclude that the licence fee was not an excise.[25]

27. In assessing whether there is a relationship between the amount of the UNFT and the volume or value of water sold by ACTEW in the present case, route length would be relevant to the volume or value of water that flows down the pipes if, for instance, it provided a reasonable proxy for the number of customers, and therefore for demand for water. But it may not provide such a proxy. Length would have some relationship to the number of customers; an increased length of pipe would enable new customers and new suburbs of Canberra to be served. But this says little about population density or demand, which would also be relevant to the relationship

---

21 *Hematite* (1983) 151 CLR 599 at 657.3, 657.7 and 658.3. See also *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 428 (Mason CJ and Deane J) and 462 (Brennan J).

22 *Hematite* (1983) 151 CLR 599 at 665.4.

23 *Hematite* (1983) 151 CLR 599 at 640.3.

24 *Hematite* (1983) 151 CLR 599 at 632.7.

25 *Hematite* (1983) 151 CLR 599 at 623.5 (Gibbs CJ) and 647.5 (Wilson J, stating that he found it "impossible to accept" that "the requirement of a relationship to the quantity or value of goods has been no more than an aid in identifying a duty of excise".)

between network length and the quantity or value of water passing along the pipes.[26] In addition, variations in the rate of flow may affect whether there is a relationship between the length of pipe and the amount or value of the water flowing through those pipes (the amount of water flowing through the pipes turning on the diameter of the pipes and the water pressure rather than on pipe length). Further, the exclusions in s 6(2) of the UNFT Act from the definition of "network facility" mean that not the whole of the network length is subject to the tax. Those exclusions potentially disrupt the asserted relationship between network length and production volume, depending on how the exclusions operate in practice.

10 28. It was principally on the basis that "there is no relationship *at all* between the UNFT and the quantity or value of water which passes through the network"[27] that the Full Court held that the UNFT was not an excise. However, having regard to the majority approach in *Hematite*, it was clearly also necessary to consider other factors.

Other factors

29. Keane CJ attributed some significance to the fact that the UNFT was imposed by reference to the ownership of the water network and the occupation of land by the network. His Honour said 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".[28]

20 30. Reasoning of that kind cannot be taken too far, because it focuses on the form in which a charge is imposed rather than on matters of substance. Where a tax is imposed on the ownership or operation of equipment that can be used only for the manufacturer or distribution of a good, the starting point should be that the tax is "on" that good. A tax on equipment of that kind is readily characterised as a tax on the goods that are manufactured or distributed using that equipment, because by definition the equipment will not be owned or operated for any other purpose.[29]

31. The above reasoning might suggest that, because ACTEW's water network cannot be used for any other purpose, a tax on the ownership of that network is properly characterised as a matter of substance as a tax on the water that the network carries.

30 32. In this case, however, there is a strong contrary indicator. The UNFT is imposed at a single fixed rate with respect to all network facilities, irrespective of whether they carry water, electricity, gas, telecommunications or sewage. As the value of those "goods" is highly variable (or, in the case of sewage, non-existent), it is less likely that a charge levied at a fixed rate on distribution networks irrespective of the goods that are carried by those networks (or, indeed, whether they carry goods at all) is properly characterised as a tax "on goods".[30] That is not to say that a tax that applies at a fixed percentage of the value of all goods uniformly (such as the GST) is not an excise, because the amount of such a tax is referrable to the value of goods.

---

26 These submissions assume that, correctly construed, the reference in the Dictionary of the UNFT Act to the "length of the horizontal projection of the facility on the land" is a reference to the projection of the facility in *one* direction only (e.g. the length of the pipe), and not a reference to the projection of the facility in *two* planar directions (e.g. the length of the pipe multiplied by its width).

27 Full Court Appeal at 575 [137].

28 Full Court Appealat 572 [128].

29 *Hematite* (1983) 151 CLR 599 at 634.6 (Mason J), 659.5 (Brennan J), noting that the operation of the relevant pipelines was not "anything but a step in the production, manufacture and distribution of the products sold by the plaintiffs".

30 Compare *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 75.7 (Dixon CJ).

33. In *Hematite*, the Court focused on matters of substance in characterising the pipeline fee as an excise. One factor that had an important bearing on that conclusion was that the fee for the three "trunk pipelines" was $10m, but the fee imposed on all other pipelines in the State was just $40 per kilometre. The huge differential between pipeline fees provided a basis for concluding that the fee on the trunk pipelines was, in fact, a charge upon the high value goods that passed through those pipelines, rather than on the pipelines themselves.[31] There is no such differential operation in this case, as the Full Court correctly pointed out.[32]

34. Finally, the fact that the UNFT is passed on to ACTEW's customers and then to consumers is a relevant factor in determining whether it is an excise, but it is not determinative.[33] All costs incurred by a producer are, in one way or another, passed on in the commercial chain. Where one of the costs is a sizeable government tax, the producer may choose to itemise that item to disassociate itself from that component of the price. In itself, that says little or nothing about whether a tax is an excise.

Dated: 7 June 2011

Robert Orr QC
Acting Solicitor-General of the Commonwealth
T: (02) 6253 7129
F: (02) 6253 7304
robert.orr@ags.gov.au

Stephen Donaghue
T: (03) 9225 7919
F: (03) 9225 6058
s.donaghue@vicbar.com.au

Catherine Button
T: (03) 9225 6766
F: (03) 9225 8395
cbutton@vicbar.com.au

31 *Hematite* (1983) 151 CLR 599 at 634.6 (Mason J), 659.1 (Brennan J), 667.4 (Deane J).
32 Full Court Appeal at 575 [138].
33 *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129, referred to by QCC in its submission on the UNFT at [69] (C3 of 2011). See also *Ha v NSW* (1997) 189 CLR 465 at 497 (Brennan CJ, McHugh, Gummow and Kirby JJ). The Full Court correctly so held: at 576 [142] (Keane CJ)].