HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

QUEANBEYAN CITY COUNCIL APPELLANT

AND

ACTEW CORPORATION LTD & ANOR RESPONDENTS

Queanbeyan City Council v ACTEW Corporation Ltd [2011] HCA 40
5 October 2011
C2/2011 & C3/2011

ORDER

Matter No C2/2011

1. *Set aside sub-paragraphs 8(a) and 8(b) of the Order of the Full Court of the Federal Court of Australia made on 29 October 2010 and, in their place, order that each party bear its own costs of the appeal and the cross-appeal to that Court.*

2. *Otherwise, appeal dismissed.*

Matter No C3/2011

1. *Set aside sub-paragraphs 8(a) and 8(b) of the Order of the Full Court of the Federal Court of Australia made on 29 October 2010 and, in their place, order that each party bear its own costs of the appeal to that Court.*

2. *Otherwise, appeal dismissed.*

On appeal from the Federal Court of Australia

Representation

P J Hanks QC with J K Kirk and P D Keyzer for the appellant in both matters (instructed by Williams Love & Nicol)

B W Walker SC with C L Lenehan for the first respondent in both matters (instructed by HWL Ebsworth Lawyers)

J T Gleeson SC with C C Spruce for the second respondent in both matters (instructed by ACT Government Solicitor)

Interveners

R G Orr QC, Acting Solicitor-General of the Commonwealth with S P Donaghue and C G Button intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with A J Sefton intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor (WA))

M G Sexton SC, Solicitor-General for the State of New South Wales with J G Renwick intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with E F Handshin intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor (SA))

M G Hinton QC, Solicitor-General for the State of South Australia with S D Gates intervening on behalf of the Attorney-General of the State of Tasmania (instructed by Crown Law (Tas))

S G E McLeish SC, Solicitor-General for the State of Victoria with K L Walker intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Queanbeyan City Council v ACTEW Corporation Ltd

Constitutional law (Cth) – Duties of excise – *Water Resources Act* 1998 (ACT) and *Water Resources Act* 2007 (ACT) imposed licence fees upon first respondent for extracting water from Australian Capital Territory water catchments, and *Utilities (Network Facilities Tax) Act* 2006 (ACT) imposed charge upon first respondent calculated by reference to route length of its water infrastructure network – First respondent passed on cost of imposts to appellant – *Territory-owned Corporations Act* 1990 (ACT) provided that first respondent was a "territory-owned corporation" and regulated share ownership, corporate decision-making and corporate borrowing of first respondent – Section 8(1) also provided that first respondent is not "the Territory" only because of its status as a "territory-owned corporation" – Whether first respondent identified with government of Australian Capital Territory – Whether imposts are duties of excise – Whether imposts are financial arrangements internal to government of Australian Capital Territory.

Words and phrases – "compulsory exaction", "duties of excise", "extensive control", "identified with the Territory", "tax".

Constitution, ss 90, 122.
Australian Capital Territory (Self-Government) Act 1988 (Cth), Pts III, IV, VII.
Territory-owned Corporations Act 1990 (ACT), Pts 2, 3, 4, ss 6-8, Sched 4.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. These appeals from the Full Court of the Federal Court (Keane CJ, Stone and Perram JJ)[1] were heard together. They involve matters of constitutional law, but, as is often the case in such litigation, close attention first is required to the terms of the legislation to which the relevant constitutional law principles are to be applied.

Queanbeyan City Council

2 By force of s 220 of the *Local Government Act* 1993 (NSW) ("the Local Government Act"), the appellant ("Queanbeyan") is a body politic of the State of New South Wales with perpetual succession and the legal capacity and powers of an individual. Pursuant to s 219 of the Local Government Act, Queanbeyan is constituted as the council for the area of the City of Queanbeyan. This area adjoins that of the Australian Capital Territory ("the Territory"), the second respondent.

3 Section 24 of the Local Government Act empowers Queanbeyan to provide goods, services and facilities to the local community. To that end, Queanbeyan obtains water supplies from the first respondent ("ACTEW"). Queanbeyan contends that by its laws the Territory has invalidly imposed on ACTEW charges which answer the description of duties of excise within the meaning of s 90 of the Constitution, and that these charges have been wrongly passed on by ACTEW to Queanbeyan. The occasion for the litigation thus is presented by the interaction between s 90 of the Constitution and the position of the Territory, for which provision is made in s 122 of the Constitution.

The Self-Government Act

4 In *Berwick Ltd v Gray*[2] Mason J, with whom Barwick CJ, McTiernan J and Murphy J agreed, said of the power conferred upon the Parliament by s 122 that it was wide enough to enable the Parliament "to endow a [t]erritory with separate political, representative and administrative institutions, having control of its own fiscus." Thereafter, s 7 of the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) ("the Self-Government Act") established the

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1 *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541.

2 (1976) 133 CLR 603 at 607; [1976] HCA 12.

Territory "as a body politic under the Crown". The term "Territory" is used in the Self-Government Act sometimes to mean that body politic and on other occasions is used in a geographic sense (s 3).

5 Part III (ss 8-21) of the Self-Government Act established the Legislative Assembly of the Territory, and Pt IV (ss 22-35) provided for its powers. Pt V (ss 36-48) established the "Australian Capital Territory Executive" (s 36). This has the responsibilities of executing and maintaining enactments and subordinate laws, of exercising powers vested in the Executive (including those vested by or under an agreement or arrangement with the Commonwealth), and of governing the Territory with respect to matters in Sched 4 (s 37). Among the matters listed in Sched 4 is "Water resources".

6 Part VII (ss 57-65) is headed "Finance". With respect to the Territory fiscus, Pt VII does not create a "Consolidated Revenue Fund" in terms corresponding to ss 81 and 82 of the Constitution. However, the effect of ss 57 and 58 of the Self-Government Act is that revenue, loans and other monies received by the Territory may be invested as provided by an enactment, and are not to be issued or spent except as authorised by an enactment. The Commonwealth is to conduct its financial relations with the Territory by treating it on the same basis as the States and the Northern Territory, but having regard to "the special circumstances" arising from the existence in the Territory of the national capital and the seat of government of the Commonwealth (s 59).

Sections 90 and 122 of the Constitution

7 In *Berwick Ltd v Gray*[3], the power conferred upon the Parliament by s 122 of the Constitution, later exercised in enacting the Self-Government Act, had been described as a "plenary power". That expression appears to have its origin in 19th century Privy Council decisions which rejected submissions that certain colonial legislatures, being "delegates" of the Imperial Parliament, were incompetent to pass what would now be identified as delegated legislation[4]. The expression is apt to mislead, or at least to confuse, when applied to the structure

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3 (1976) 133 CLR 603 at 607.

4 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 604-605; [1997] HCA 38.

created for Australia by the Constitution[5]. So it proved to be the case when in *Berwick* it was applied to s 122. For it is established by subsequent authorities, the most recent of which is *Wurridjal v The Commonwealth*[6], that s 122 is not disjoined from the body of the Constitution.

8 The genesis of the present dispute is a proposition founded in another of these authorities, *Capital Duplicators Pty Ltd v Australian Capital Territory*[7]. This decision established that, while the endowment upon the Legislative Assembly of the Territory by s 22 of the Self-Government Act of the power to make laws for its peace, order and good government is supported by s 122 of the Constitution, s 122 is constrained so as to preclude conferral by the Parliament of power upon the Legislative Assembly to impose duties of excise within the meaning of s 90 of the Constitution[8].

The Territory water supply

9 Something now should be said respecting the Territory water supply. At the time of the *Seat of Government Acceptance Act* 1909 (Cth) ("the Acceptance Act"), s 4 of the *Water Rights Act* 1902 (NSW) vested in the Crown the right to the use and flow and to the control of the water in all rivers and lakes flowing through or past or situated within the land of two or more occupiers. The effect of s 6 of the Acceptance Act was that the New South Wales law continued in force in the Territory until other provision was made. Section 13 of the *Water Resources Act* 1998 (ACT) ("the 1998 Water Act") vested in the Territory the rights to the "use, flow and control" of all water of the Territory, subject to an exception not here relevant. The 1998 Water Act was replaced by the *Water Resources Act* 2007 (ACT) ("the 2007 Water Act"), which, in s 7, makes similar provision. The rights vested in the Territory by these statutes are exercisable by the responsible Minister on behalf of the Territory.

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5 *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 117 [186]; [2006] HCA 52.

6 (2009) 237 CLR 309; [2009] HCA 2.

7 (1992) 177 CLR 248; [1992] HCA 51.

8 (1992) 177 CLR 248 at 277-279, 289-290.

10 The primary judge (Buchanan J) said[9] of the present situation that all of the water abstracted by ACTEW lies or flows in areas under the direct control of the Territory, and continued:

> "The [Territory] controls two water catchment areas, one in the [Territory], known as the Cotter Catchment, and one in New South Wales. The New South Wales catchment is the Googong Dam Area which was acquired by the Commonwealth in October 1973 for the purpose of the provision of facilities for the storage of water and its supply for use in the [Territory]. The *Canberra Water Supply (Googong Dam) Act* 1974 (Cth) vested the rights to use and dispose of all waters in the Googong Dam Area in [the Commonwealth] but gave the [Territory] Executive the power to exercise such rights (s 11(2)). Recently the [Territory] has been granted a 150 year lease by the Commonwealth over the Googong Dam Area. Water is also taken from the Murrumbidgee River within the [Territory]."

Nothing in this litigation involves the use and flow of the water in Lake Burley Griffin.

ACTEW

11 Something now should be said of the provenance of ACTEW. The Electricity and Water Ordinance 1988 was made under s 12 of the *Seat of Government (Administration) Act* 1910 (Cth), and established as a body corporate the Australian Capital Territory Electricity and Water Authority ("the Authority") (s 4). The functions of the Authority included the supply of electricity and water (s 5). The capital of the Authority was payable to the Commonwealth in accordance with s 39(2), and provision was made by s 41 for the payment of dividends to the Commonwealth.

12 Thereafter, s 4 of the *Electricity and Water (Corporatisation) (Consequential Provisions) Act* 1995 (ACT) vested the rights and liabilities of the Authority primarily in ACTEW. On 30 May 1995, the Australian Securities Commission issued a certificate of registration of ACTEW under the provisions of Pt 2.2, Div 1 of the *Corporations Act* 1989 (Cth), providing for its incorporation by registration as a public company limited by shares. Section 6(1)

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9 *Queanbeyan City Council v ACTEW Corporation Ltd* (2009) 178 FCR 510 at 514 [11].

of the *Territory-owned Corporations Act* 1990 (ACT) ("the Territory-owned Corporations Act") provides that, as a corporation identified in Sched 1, ACTEW is a Territory-owned corporation. It will be necessary to refer later in these reasons to additional provisions of this statute. These have a particular significance for the outcome of the present appeals.

13 The 1998 Water Act made it an offence for a person to take water without a licence (s 33(1)). Similar provision is made under the 2007 Water Act (s 77A). ACTEW has held a licence under the 1998 Water Act and presently holds a licence under the 2007 Water Act. The current licence authorises ACTEW to provide water services and sewerage services and to take water which lies in or flows in the areas described above as being under the control of the Territory. The 1998 Water Act provided that the licence might be granted subject to conditions (s 35), and s 78 conferred upon the responsible Minister power by determination to set fees payable by licensees. Similar provision is made respectively by ss 31 and 107 of the 2007 Water Act.

14 ACTEW supplies water not only to residents and businesses within the Territory but also to those within the City of Queanbeyan. ACTEW charges Queanbeyan for that water pursuant to a set of principles agreed between them and based in part upon the premise that ACTEW will recover from Queanbeyan its costs of supplying that water. The costs to ACTEW include imposts placed upon it by Territory legislation.

The water licence fees and the utilities tax

15 Argument in the litigation has fixed upon two determinations, the first made by the responsible Minister under s 78 of the 1998 Water Act on 18 December 2003, and the second made by the responsible Minister on 31 July 2007 under s 107 of the 2007 Water Act. The significant provision in each determination is the fixing of the fee for what is identified as a licence to take water "for the purposes of urban water supply". It is not suggested that there is any urban water supplier in addition to ACTEW. These fees ("the water licence fees") previously were calculated on the basis of water charged to users per kilolitre, but are now calculated by reference to the amount of water extracted from the Territory catchments. Water licence fees were charged from 1 January 2000, with the fee imposed on ACTEW fixed at a level of 10 cents per kilolitre. The determinations the focus of this litigation had the effect of increasing that fee to 55 cents per kilolitre. Queanbeyan did not contend that the water licence fees set at the initial level of 10 cents per kilolitre were invalid.

16 Commencing on 1 January 2007, the Territory also imposed upon ACTEW a liability 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. Section 8(1) of the *Utilities (Network Facilities Tax) Act* 2006 (ACT) imposes what it describes as a tax on the owner of each "network facility" on land in the Territory. This term is expressed to include the network consisting of the infrastructure used in relation to the collection and treatment of water (ss 6(1), 7(a)), and thus the ACTEW infrastructure. The rate is determined by the responsible Minister under s 139 of the *Taxation Administration Act* 1999 (ACT). This charge may be described as the "utilities tax". In deciding whether the utilities tax is an excise, it is not to the point that it also may be imposed upon the owners of other network facilities as well as ACTEW[10], and that these other owners may not be identified with "the Territory".

The litigation

17 Buchanan J held[11] that the utilities tax was a duty of excise within the meaning of s 90 of the Constitution. The Full Court[12] decided that, whether or not the utilities tax was a tax in the sense of the Constitution, it was not a duty of excise. With respect to the water licence fees, the primary judge held[13] that these were not taxes, and the majority of the Full Court (Keane CJ and Stone J)[14] agreed. Perram J[15] would have remitted the matter to the primary judge for consideration of what was said to be expert evidence bearing upon the relationship between the fee and the value of that which was acquired by the licensee. Queanbeyan appeals against both holdings by the Full Court. There were interventions by the Commonwealth, Western Australia, New South Wales, Queensland, South Australia, Tasmania and Victoria.

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10 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 78; [1977] HCA 3.

11 (2009) 178 FCR 510 at 543-544 [160]-[164].

12 (2010) 188 FCR 541 at 579 [152], 580 [160], 584 [180].

13 (2009) 178 FCR 510 at 536 [126].

14 (2010) 188 FCR 541 at 564-565 [81]-[83], 583 [177].

15 (2010) 188 FCR 541 at 588-589 [197]-[198].

18 By its Notices of Contention, ACTEW supports the outcome in the Full Court on an additional ground. This is that the imposts were but an aspect of the internal financial arrangements between ACTEW and the Territory. At the hearing of the appeals, Queanbeyan dealt first with this submission. The submission then was elaborated by ACTEW in its oral submissions, with the support of the Territory. Among the interveners, the principal support for ACTEW came from Queensland.

Financial arrangements internal to the Territory government?

19 The description by Latham CJ[16] of a tax as a compulsory exaction of money by a public authority for public purposes, enforceable by law, which is not a payment for services rendered, in some respects requires further analysis[17]. But it may be accepted for present purposes. Here, the relevant "public authority" is the Territory. In the Full Court, Keane CJ observed[18]:

> "When it is said that a tax is a compulsory exaction by a public authority for public purposes, what is in contemplation is an exercise of the power of the government lawfully to take from the governed, as opposed to the internal financial arrangements of the government. On this view, the imposition of the [water licence fees] upon ACTEW is not a tax because it is a governmental financial arrangement."

20 In this Court, Queensland submits, with respect particularly to the Territory, that, of its nature, the exaction of money by a polity for receipt into its fisc cannot be a tax if the exaction is imposed upon an entity which, properly characterised, is indistinct from the polity itself. Further, Queensland submits that ACTEW is so closely identified with the Territory that the exaction of money from ACTEW by the water licence fees and the utilities tax cannot be of the character of taxes as understood in the Constitution and thus these imposts cannot amount to duties of excise within the meaning of s 90.

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16 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 276; [1938] HCA 38.

17 *Roy Morgan Research Pty Ltd v Commissioner of Taxation* [2011] HCA 35 at [36].

18 (2010) 188 FCR 541 at 554 [51].

21 The result is said to be that there is no constraint placed by s 90 upon what otherwise are the powers conferred upon the Territory pursuant to the Self-Government Act to legislate for the imposition of the water licence fees and the utilities tax. It then would follow that Queanbeyan cannot recover its payments to ACTEW representing the passing on to it by ACTEW of burdens illegally imposed upon ACTEW by the Territory laws[19]. Nor could Queanbeyan resist the cross-claim against it by ACTEW to recover unpaid amounts in respect of the utilities tax.

22 For the reasons which follow, these submissions upon what might be called the threshold issue should be accepted. On that ground, the appeals should be dismissed.

Previous authorities

23 In *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employes Association*[20], when delivering the judgment of the Court, Griffith CJ said:

> "[T]he ability of the Colonies to meet their financial obligations in respect of loans was largely dependent upon the successful and profitable employment of the railways. It cannot, in our opinion, be disputed that the State railways were in their inception instrumentalities of the Colonial Governments, and we do not know of any authority for saying that this position was affected by the incorporation of the Railway Commissioners, which, in our opinion, was a matter of purely domestic legislation for the convenience as well of management as of the assertion and enforcement of contractual rights in respect of the commercial transactions involved in the transport of goods and passengers".

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19 cf *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68.

20 (1906) 4 CLR 488 at 535; [1906] HCA 94. See also *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 131-134; [1964] HCA 69.

24 More generally, in *Deputy Commissioner of Taxation v State Bank (NSW)*[21], the whole Court observed:

> "Once it is accepted that the Constitution refers to the Commonwealth and the States as organizations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities."

25 Further consideration of the submissions which seek to identify ACTEW with the Territory is assisted by regard to what was held in several recent decisions of the Court. They are *SGH Ltd v Federal Commissioner of Taxation*[22], *NT Power Generation Pty Ltd v Power and Water Authority*[23], and *McNamara v Consumer Trader and Tenancy Tribunal*[24]. These authorities indicate that much depends upon the particular issue to which the matter of identity between the polity and an instrumentality is directed, and upon the terms by which their alleged identity is expressed by the legislation in question.

26 *McNamara* concerned the position of the Roads and Traffic Authority of New South Wales ("the RTA"). This was constituted as a corporation by a statute which also stated that for the purpose of any other statute it was "a statutory body representing the Crown". The RTA was the landlord of certain leased premises to which the tenant contended there applied the protective provisions of the *Landlord and Tenant (Amendment) Act* 1948 (NSW); that statute stated that it did not bind "the Crown" in right of New South Wales. It was held that the mere statement that the RTA was a statutory body representing

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21 (1992) 174 CLR 219 at 230-231; [1992] HCA 6.

22 (2002) 210 CLR 51; [2002] HCA 18.

23 (2004) 219 CLR 90; [2004] HCA 48.

24 (2005) 221 CLR 646; [2005] HCA 55.

the Crown did not have the effect of attracting rights and privileges otherwise conferred upon the executive branch of government identified as "the Crown"[25]. Further, the Court emphasised, with respect to the notion of "representation" of the Crown, that this required close attention to the functions of the body in question and the degree of control exercisable over it by the executive government; "control" was used to identify the control and direction of the activities of the body in question[26]. Further, a statutory body might be given the privileges and immunity of the Crown for one purpose and not another[27].

27 An issue in *NT Power Generation* was whether Gasgo Pty Ltd, in which the Power and Water Authority ("PAWA") (a body corporate constituted under a statute of the Northern Territory) beneficially owned all the shares, was not bound by s 46 of the *Trade Practices Act* 1974 (Cth) because it was "an emanation of the Crown in right of the Northern Territory"[28]. Critical to the holding that the company was not such an emanation was the consideration that there was nothing in the evidence to indicate that its directors were under any duty to obey directions from PAWA or the Government of the Northern Territory[29].

28 *SGH* concerned the application of that branch of s 114 of the Constitution which forbids the imposition by the Commonwealth of any tax on property of any kind belonging to a State. It was accepted that the term "a State" in s 114 is wide enough to denote a corporation which is an agency or instrumentality of the State[30]. SGH Ltd ("SGH") was formed under a Queensland statute which provided generally for building societies. There were two classes of shares. "A" class shares were held by depositors and "B" class shares by the State Government Insurance Office ("Suncorp"). This was established as a statutory corporation and said by its statute to represent the Crown.

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25 (2005) 221 CLR 646 at 665-666 [53]-[54].

26 (2005) 221 CLR 646 at 656 [26]-[27], 665 [53].

27 (2005) 221 CLR 646 at 669 [65].

28 (2004) 219 CLR 90 at 148-151 [161]-[165].

29 (2004) 219 CLR 90 at 150 [164].

30 (2002) 210 CLR 51 at 80 [57], 102-103 [130].

29 Gleeson CJ, Gaudron, McHugh and Hayne JJ[31] and Gummow J[32] emphasised that while it was right to say that Suncorp controlled SGH, that control was not absolute because Suncorp could not lawfully require SGH or its Board to act in disregard of the interests of the "A" class shareholders. Nor could it control general meetings of members in disregard of the interests of those shareholders. In that way, the control which could be exercised by Suncorp over the affairs of SGH was hedged about by the obligation not to disregard the interests of persons other than the State. It followed that SGH was not "the State" for the purposes of s 114 of the Constitution.

30 Callinan J[33] identified the following matters as relevant, and noted that only the last, the auditing of accounts by the Auditor-General, favoured the characterisation of SGH as the State of Queensland for the purposes of s 114 of the Constitution; the matters were:

> "the absence or otherwise of corporators; an explicit obligation of the corporation to conduct its affairs to the greatest advantage of the relevant polity; the participation of the executive government in the process of formulating policy and making decisions; the right or otherwise of the government to appoint directors, and the source of, and responsibility for their remuneration; the destination of profits; and, the obligation or otherwise of the Auditor-General to audit the accounts of the corporation."

The Territory-owned Corporations Act

31 What was said in these decisions assists in the characterisation of ACTEW. The Territory-owned Corporations Act applies to ACTEW, subject to the modifications specified in Sched 4 (s 4(1)). The effect of Sched 4 is to remove ACTEW from the prohibition imposed by s 14(1) against the acquisition of partly owned subsidiaries. In other respects the statute applies unamended to ACTEW.

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31 (2002) 210 CLR 51 at 71 [26], 73 [32].

32 (2002) 210 CLR 51 at 85 [70].

33 (2002) 210 CLR 51 at 103 [131].

32 The main objectives of ACTEW are spelled out in s 7. As matters of equal importance, they include: operation at least as efficiently as any comparable business; the maximisation of the sustainable return to the Territory of its investment in ACTEW; the display of a sense of social responsibility; and the conduct of its operations in accordance with the object of ecologically sustainable development. Obligations imposed by the Territory-owned Corporations Act are additional to obligations imposed by any other law or by the constitution of ACTEW (s 10).

33 Shares in ACTEW are held on trust for the Territory (s 13(5)), and voting shares can only be held by a Minister authorised to do so by the Chief Minister (s 13(2), (4)). The powers of the voting shareholders are enhanced by provisions in s 17. Where the voting shareholders request ACTEW to act in a way which differs from that favoured by the directors, and the directors have advised the voting shareholders that it would not be in the best commercial interest of ACTEW to act as the voting shareholders wished, nevertheless the voting shareholders may require ACTEW to comply with their wishes (s 17(1)). ACTEW then must comply with that direction and the directors are not taken to be in breach of any duty under a law or the constitution of ACTEW only because of that compliance (s 17(2), (3)).

34 The Auditor-General must be appointed auditor of ACTEW (s 18(1)). Section 27(1) stipulates that ACTEW must not borrow or raise money except in accordance with Pt 4 (ss 24-28A). In particular, the Treasurer, on behalf of the Territory, may lend money to ACTEW on the terms and conditions determined by the Treasurer (s 24), but ACTEW otherwise may borrow money and raise money by other means only within borrowing limits approved by the Treasurer (s 25(1)), and the Treasurer must not delegate that function of approval (s 25(5)).

35 Section 31 imposes what is described as a "borrowing levy" upon ACTEW; it must pay to the Territory amounts determined by the Treasurer in respect of monies it has borrowed from the Territory or otherwise. ACTEW is obliged to pay a dividend only out of profits lawfully available for the purpose (s 32(1)).

36 ACTEW is relieved by s 29 from payment of duties, fees, levies and charges payable under Territory statutes in respect of various activities, including the transfer of assets from the Territory to ACTEW (s 29(5)(d)) and the assumption of responsibility by ACTEW for any liability of the Territory (s 29(5)(e)).

37 Taken together, these provisions of the Territory-owned Corporations Act indicate the extensive control exercised by the Territory executive, and in particular by the Chief Minister, over the conduct of the affairs of ACTEW, and closely identify it with the Territory, being the body politic established by s 7 of the Self-Government Act.

38 In response, Queanbeyan submitted that these considerations, drawn from the range of provisions in the Territory-owned Corporations Act, were outweighed by the significance to be attached to s 8 of that statute.

39 The effect of par (a) of s 8(1) is that ACTEW "is not, only because of its status as a [T]erritory-owned corporation ... the Territory". Section 8(2) is introduced by the word "Accordingly", indicating that what follows does so by reason of the operation of s 8(1) denying to ACTEW the character of "the Territory" where otherwise that would be so only because ACTEW had the "status" of a Territory-owned corporation. Paragraph (a) of s 8(2) then denies entitlement to "any immunity or privilege of the Territory". Paragraph (b) denies that ACTEW is "exempt from a tax, duty, fee or charge payable under an Act"[34]. Section 8 is said by sub-s (4) to have its effect despite s 121 of the *Legislation Act* 2001 (ACT). This appears to be a provision for abundant caution, given the statement in s 121(1) that a statute "binds everyone, including all governments".

40 The following points are to be made concerning the significance of s 8. First, the reference to "status as a [T]erritory-owned corporation" is a reference to the identification of ACTEW (and ACTTAB Limited) as a Territory-owned corporation by force of the specification as such by s 6(1) and Sched 1. It is upon this identification or status that there depends the attachment of the whole structure of the statute. Secondly, that acknowledgement of the status of ACTEW does not deny the consequences which flow from the substantive provisions of the Territory-owned Corporations Act for determination of ACTEW as having the identity of the Territory for the purposes of the Constitution. That is to say, s 8 does not deny that which is otherwise evident from a consideration of the statute as a whole. Finally, the circumstance that, by reason of par (b) of s 8(2), ACTEW is not exempt from imposts payable under laws of the Territory provides the occasion for the very question in issue, namely,

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34 However, s 8(2)(b) must be read with the relief given ACTEW by s 29 from the imposts identified in s 29.

whether the liability for the payment of these imposts is not more than an intramural financial arrangement.

Orders

41 The result is that the threshold issue should be answered adversely to Queanbeyan and each appeal should be dismissed.

42 Upon that contingency, Queanbeyan submitted that there should be no order for costs of the appeals in this Court and that the costs orders in the Full Court should be varied. The Full Court ordered that Queanbeyan pay the costs of the proceeding before the primary judge. Queanbeyan does not seek a change to that order. However, the Full Court also ordered that the costs of the two appeals before it, including a cross-appeal by ACTEW in the appeal concerning the utilities tax, be borne by Queanbeyan. Queanbeyan now seeks a variation so that there be no Full Court costs order in that regard. The result would be that Queanbeyan, ACTEW and the Territory bear their costs of the appeals to this Court and of the proceedings in the Full Court.

43 There was some debate as to whether the issue upon which the respondents have now succeeded had been before the Full Court. An extract from lengthy written submissions by ACTEW to the Full Court was provided to this Court in the course of argument. The extract appears not to be directed squarely to what has become the decisive issue. Further, both Keane CJ[35] and Perram J[36], while alive to the issue, regarded it as not having been argued before the Full Court.

44 In all the circumstances, the position as to costs should be that sought by Queanbeyan.

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35 (2010) 188 FCR 541 at 554 [51].

36 (2010) 188 FCR 541 at 590 [202].

45 HEYDON J. This appeal[37] turns on what may be called the "water licence fees" and "utilities taxes" which the Government of the Australian Capital Territory requires ACTEW Corporation Limited ("ACTEW") to pay. Are they taxes in the nature of excises? The ensuing discussion concentrates on the water licence fees, but the legal position is the same for the utilities taxes.

The case against Queanbeyan City Council

46 The primary case made against Queanbeyan City Council ("Queanbeyan"), highlighted particularly by the submissions of the Attorney-General of the State of Queensland, was that a charge imposed by one organ of government upon another organ of government is not a tax and hence not an excise. A tax involves a government taking money from the governed, as distinct from merely being an incident of the internal financial arrangements of government[38].

47 The structure of ACTEW is regulated by the *Territory-owned Corporations Act* 1990 (ACT) ("the Act"). That is because it is a "territory-owned corporation": s 6(1) and Sched 1 of the Act. The Attorney-General of the State of Queensland pointed out the following features of ACTEW. Its voting shareholders are appointed by the Chief Minister of the Australian Capital Territory: s 13(2) of the Act. The voting shareholders must be Ministers of the Australian Capital Territory Government: s 13(4)(a) of the Act. They hold their shares in trust for the Australian Capital Territory: s 13(5) of the Act. The voting shareholders may require the directors to act in a manner different from that in which the directors intend to act, even if the directors think this is not in the best commercial interests of ACTEW: s 17 of the Act. The directors of ACTEW are under a duty, as far as practicable, to comply with the general government policies the voting shareholders tell them are to apply to ACTEW: s 17A of the Act. Whenever ACTEW borrows money, it is obliged to pay to the Australian Capital Territory whatever amount the Australian Capital Territory Treasurer determines: s 31 of the Act. ACTEW's main objectives include objectives which are public in character, for not only must it operate at least as efficiently as comparable businesses and maximise the sustainable return to the Australian Capital Territory on its investment, but it must show a sense of social responsibility by having regard to the interests of the community in which

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37 The circumstances are described in the plurality judgment.

38 The following authorities were referred to: Cooley, *A Treatise on the Law of Taxation, including the Law of Local Assessments*, (1881) at 1; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 550; *People v McCreery* 34 Cal Rptr 432 at 456 (1868); *People v Austin* 47 Cal Rptr 353 at 361 (1874); *Van Brocklin v Tennessee* 117 US 151 at 166 (1886).

it operates, and by trying to accommodate or encourage those interests, and, if its activities affect the environment, it must operate in accordance with the objectives of ecologically sustainable development: s 7(1) of the Act.

48 Hence the Attorney-General of the State of Queensland submitted that ACTEW is intimately connected to the Australian Capital Territory and cannot properly be described as independent of it. In similar fashion ACTEW argued that, while the Australian Capital Territory had legal personality distinct from that of ACTEW, the will of the Australian Capital Territory was the will of ACTEW. It argued that if ACTEW acted within the authority created by the provisions of the Act it could not avoid acting in accordance with the will of the Australian Capital Territory Government. It argued that a water licence fee was "not a tax on the creature of government [ie ACTEW] the will of which is the same as the will of the government because there is no compulsion involved in the payment by an entity which is subject to and directed by the same will as the entity purporting to impose the tax."

49 To the provisions assembled by the Attorney-General of the State of Queensland may be added several others. Sub-sections (1) and (2) of s 11 compel the voting shareholders of ACTEW to ensure that its constitution contains provisions to the effect of those required by Scheds 2 and 3. Schedule 2 requires the constitution of ACTEW to contain provisions forbidding alteration of the constitution of ACTEW in a manner inconsistent with Sched 2 unless a resolution approving the alteration or addition has been passed by the Legislative Assembly. Schedule 3, broadly speaking, requires the constitution of ACTEW to contain provisions ensuring compliance with the Act. Further, ss 25(1) and 27(1) restrict the power of ACTEW to borrow, from lenders which are not the Territory, within limits approved by the Australian Capital Territory Treasurer. Section 28A provides that ACTEW must not give a guarantee without the consent of the Treasurer of the Australian Capital Territory. The provisions referred to by the Attorney-General of the State of Queensland and other provisions of a similar kind, referred to above, will be collectively referred to below as "the subordinating provisions".

Queanbeyan's submissions

50 Central to Queanbeyan's submissions was s 8 of the Act. It relevantly provides:

> "(1) A territory-owned corporation or subsidiary is not, only because of its status as a territory-owned corporation or subsidiary –
>
> (a) the Territory; or
>
> (b) a representative of the Territory; or

(c) a government entity under the Legislation Act, section 121 (Binding effect of Acts).

(2) Accordingly, a territory-owned corporation or subsidiary is not, only because of its status as a territory-owned corporation or subsidiary –

(a) entitled to any immunity or privilege of the Territory; or

(b) exempt from a tax, duty, fee or charge payable under an Act."

51 Queanbeyan accepted the analysis of the Act made by the Attorney-General of the State of Queensland. But it advanced numerous submissions seeking to bypass that analysis.

52 First, Queanbeyan submitted that since s 8(2) made it plain that ACTEW did not enjoy any immunity that might attach to the Australian Capital Territory, it was subject to the constraints created under the *Water Resources Act* 2007 (ACT), s 30 (and its predecessor, the *Water Resources Act* 1998 (ACT), s 35). By those provisions ACTEW could be prohibited from taking water without a licence, and it was a condition of the licence that a water licence fee be paid. Section 8(2) of the Act made it clear that ACTEW did not enjoy any immunity that might attach to the Australian Capital Territory, and was not exempt from the water abstraction charge. By deciding to take water for urban water supply, ACTEW had subjected itself to the legal consequences of lawfully engaging in that activity, namely the need to obtain a licence and pay the water licence fees. The water licence fees applied "directly, as law – not as some internal financial adjustment".

53 This did not answer the submission of the Attorney-General of the State of Queensland that the water licence fees were no more than the removal of money from one of the pockets of the Australian Capital Territory to another. It does not establish any independence of will.

54 Then Queanbeyan in effect submitted that in enacting the *Water Resources Act* 2007 (ACT) the Territory had shown an intention to impose on ACTEW a liability to pay a tax because it was a member of a class that engaged in a particular activity. In similar fashion the Attorney-General of the Commonwealth, who supported Queanbeyan's position, also argued that the water licence fees were taxes because they were of general application.

55 Even if they are, which is questionable, that means only that qua natural persons, or corporations which are not creatures of the Australian Capital Territory, the fees may be taxes; it does not follow that qua corporations which are its creatures they are taxes.

56 Queanbeyan then submitted that if a tax was something taken by a government from the governed, s 8(2) of the Act revealed that the Australian Capital Territory Government had decided to place ACTEW in the position of the governed. While other provisions in the Act might reveal an intention on the part of the Australian Capital Territory Government to act through ACTEW in relation to the supply of water, s 8 denied that intention and revealed an intention that ACTEW need not be part of itself, but separate from it and subordinate to it so far as taxation obligations were concerned. Section 8 directed ACTEW to be as subject to taxation obligations as anyone else, and the direction could not be ignored.

57 Putting aside the perhaps misleading reliance on "intention", this submission exposes a tension between s 8 and the subordinating provisions. If s 8 stood alone, Queanbeyan's argument would have force. But it does not stand alone. Which provisions, then, prevail? The subordinating provisions are not subject to s 8, and s 8 does not compel them to be read down. They are detailed. There is no reason not to give them full force. They support the conclusion that ACTEW has no will independent of the Australian Capital Territory Government's.

58 Queanbeyan submitted that if the argument of the Attorney-General of the State of Queensland succeeded, governments across Australia would not be able to subject their "corporatised" entities to taxation.

59 But they would be able to subject them to charges having the same financial effect. Indeed Queanbeyan accepted that this would be "a bit of bookkeeping – compulsory bookkeeping, but that is what it would be." The water licence fees are in truth a matter of bookkeeping internal to the Australian Capital Territory Government.

60 Queanbeyan argued that there was a legally enforceable obligation on ACTEW, if it took water, to pay licence fees for it. That was said to demonstrate that the will of the Australian Capital Territory was not identical with the will of ACTEW.

61 This second step does not follow. The existence of a legally enforceable obligation resting on a corporation and the existence of a corresponding right in favour of a government are consistent with distinct legal personality, but do not by themselves demonstrate any independence of will in the corporation. It may be assumed for the sake of considering ACTEW's argument that the Australian Capital Territory Government has created a legal obligation on ACTEW to pay the water licence fees, even though the precise source of the legal obligation was never clearly demonstrated, and if there were no legal obligation, there could be no legal compulsion, and the water licence fees could not be taxes.

62 A further difficulty in the argument that ACTEW is independent from the Australian Capital Territory Government flows from the assumption that ACTEW had a legal obligation to pay the water licence fees. It was submitted that s 106 of the *Water Resources Act* 2007 (ACT) assumes that there may be a fee in the nature of the water licence fee in relation to a licence to take water, and s 107(1) permits the Minister to determine fees. The difficulty is that if ACTEW failed to pay the fees, two powers would be available to the Australian Capital Territory Government. One is the power to suspend the entitlement of ACTEW to take water until the water licence fees are paid, or to cancel the licence: s 106. The second is power to sue for the fees. The proposition that the first power would be exercised – leaving the citizens of the Australian Capital Territory and Queanbeyan without water – is beyond the frontiers of reality. Exercise of the second power is almost equally improbable, for the voting shareholders – Ministers of the Australian Capital Territory Government – could simply issue a direction for payment under s 17 of the Act, and that negates independence of will. But whether payment of the water licence fees is legally binding, or is required by direction from the Australian Capital Territory, is immaterial to the question of whether they are taxes.

63 Queanbeyan argued that s 8(2)(b) was critical in providing that ACTEW is not, *only* because of its status as a territory-owned corporation, entitled to any immunity of the Australian Capital Territory.

64 But the absence of immunity from having to pay the water licence fees says nothing about whether those fees are taxes, and it does not demonstrate any separation of wills between the Australian Capital Territory Government and ACTEW. Section 8(1)(a) provides that a territory-owned corporation "is not, only because of its status as a territory-owned corporation", the Territory. ACTEW has the status of a territory-owned corporation. It has that status not *only* because of the subordinating provisions of the Act. Indeed it does not have that status because of the subordinating provisions of the Act at all. It has that status for one reason only. That reason is s 6(1): a company specified in Sched 1 is a territory-owned corporation, and ACTEW is a company specified in Sched 1. Hence the effect of s 8(1)(a) is that ACTEW is not the Australian Capital Territory *only* because of its status as a territory-owned corporation. It is, however, the Australian Capital Territory by reason of the subordinating provisions of the Act.

65 Section 8(2)(b) provides that ACTEW is "not, only because of its status as a territory-owned corporation", exempt from "a tax, duty, fee or charge payable under an Act." There is no other provision exempting ACTEW from the water licence fees. But the current issue is not whether ACTEW is exempt from a charge: it is whether the charge from which it may or may not be exempt is a tax. Nothing in s 8 immunises or exempts the water licence fees from being characterised as something other than taxes. The subordinating provisions do have the consequence that they are not to be characterised as taxes.

66 Queanbeyan submitted that acceptance of the Attorney-General of the State of Queensland's argument would lead to evasion of s 55 of the Constitution, which requires laws imposing taxation to deal only with the imposition of taxation.

67 This is not so. If the Commonwealth chooses to bring into being a creature which it wholly controls, legislation obliging it to pay the Commonwealth money might be outside s 55, but there would be nothing evasive or undesirable about that if in truth the money payments were not taxes. In that example, as the Australian Capital Territory (the second respondent) submitted, there would be lacking "the necessary element of compulsory exaction by public authority on a relevant other."

A Commonwealth argument

68 The Attorney-General of the Commonwealth argued that the water licence fees were not taxes because ACTEW was a corporation created under the general law.

69 That argument has already been put to and rejected by this Court[39].

The criminal liability of ACTEW

70 Some arguments were put in relation to the potential criminal liability of ACTEW in the event that it took water without a licence. The Australian Capital Territory specifically requested that these arguments not be dealt with in view of the fact that the legislation had changed and in view of the fact that they were not decisive arguments in the present controversy either way. In truth they are not decisive, and for that reason it is not necessary and not desirable to deal with them.

Orders

71 For those reasons the appeals should be dismissed. In all the circumstances, it is just that the costs orders sought by Queanbeyan be made.

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39 *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51; [2002] HCA 18. The argument was put at 62 and rejected at 66-68 [12]-[16] and 75-80 [45]-[56].

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