QUEANBEYAN CITY COUNCIL v. ACTEW CORPORATION LTD & ANOR
(C2/2011; C3/2011)

Court appealed from:	Full Court of the Federal Court of Australia [2010] FCAFC 124
Date of judgment:	24 September 2010
Date special leave granted:	8 April 2011

From 1 January 2000 the Australian Capital Territory ("ACT"), pursuant to s78 of *the Water Resources Act* 1998 (ACT), imposed on the first respondent ("ACTEW") a water abstraction charge ("WAC") for water taken by ACTEW from the ACT for supply to its urban customers. ACTEW passed the WAC on to these customers, which included the appellant. The amount of the WAC was fixed pursuant to s 107 of the *Water Resources Act* 2007 (ACT) at 51c per kL.

From 1 January 2007 the ACT, pursuant to s8(1) of the *Utilities (Network Facility Tax) Act* 2006 (ACT), imposed on ACTEW a utilities (network facilities) tax ("UNFT") in respect of its water distribution network (and also for its gas, sewerage and telecommunications networks). The UNFT was imposed on ACTEW by reference to the length of its water distribution network which was situated on land not owned by ACTEW. The UNFT was passed on by ACTEW to its customers, which included the appellant.

The appellant brought proceedings claiming that the WAC and the UNFT were both a duty of excise and beyond the legislative competence of the ACT by reason of s 90 of the *Constitution*. ACTEW cross-claimed for recovery of unpaid amounts of UNFT. The trial judge (Buchanan J) held that the WAC was not a duty of excise because it was not a tax. His Honour held that the UNFT was a tax and was a duty of excise because it is a tax on a step in the sale or distribution of goods, and declared the UNFT Act invalid to the extent that it purports to impose a tax on the water network facility operated by ACTEW. His Honour dismissed ACTEW's cross-claim against the appellant in relation to unpaid amounts of UNFT.

The Full Court of the Federal Court (Keane CJ, Stone and Perram JJ) unanimously allowed the appeal in respect of the UNFT and held that the UNFT was not a duty of excise. Keane CJ, with whom Stone and Perram JJ agreed, held that the UNFT was not an impost on a step in the production or distribution of water, and that the trial judge, by ignoring the circumstance that the UNFT does not select the water network for special treatment, failed to appreciate the point that an indicator that the water in the network was a target of the UNFT was absent. In relation to the WAC, Keane CJ and Stone agreed, for different reasons, that the WAC was not a tax and therefore not a duty. Keane CJ held that the WAC was sufficiently akin to a profit a prendre or royalty that it could not be called a tax, and that it was a condition of appropriating a resource rather than a tax upon an activity. Stone J held that the WAC is not a mere licence, it is in substance and in form also a fee for the right to take water. Perram J would have remitted the issue of the WAC to the trial judge to determine whether the price charged by the ACT bears a discernible relationship to the value of the water (citing *Air Caledonie International v Commonwealth*), but for that valuation to remove from the analysis monopoly pricing (citing *Airservices Australia v Canadian Airlines International Ltd*). His Honour found that the trial judge had erred in rejecting the expert evidence on pricing, and that the question of whether the WAC was or was not a duty or excise could only be determined once the valuation of water exercise had been undertaken.

A notice of constitutional matter has been filed in each appeal. The Attorneys-General for the Commonwealth, South Australia, Victoria, New South Wales, Western Australia and Queensland have filed submissions as interveners.

The grounds of appeal include:

- Whether the Full Court erred in failing to hold that the WAC was a duty of excise and invalid as contrary to s 90 of the Constitution;

- Whether the majority of the Full Court erred in failing to hold that the UNFT was a duty of excise and invalid as contrary to s 90 of the Constitution.