IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C2 and C3 of 2011

BETWEEN

QUEANBEYAN CITY COUNCIL
Appellant

ACTEW CORPORATION LTD
First Respondent

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS IN REPLY TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH

(on the Water Abstraction Charge)

Filed on behalf of the First Respondent
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1. These submissions are in a form suitable for publication on the internet. They are filed in accordance with the leave granted by the Court by order made 15 June 2011 and reply to certain submissions made by the Attorney-General of the Commonwealth (**the Commonwealth**) on the Water Abstraction Charge (**WAC**).

Compulsion

2. The Commonwealth submits that the WAC is relevantly compulsory because "once ACTEW takes water from areas controlled by the ACT, it is required by law to pay the WAC" (CS [29]). If the requirement for compulsion amounted to nothing more than that, it would seem to be an eviscerated criterion which would readily be satisfied by almost every government fee or charge – for such charges are almost inevitably supported by a legal obligation to pay (and associated sanctions for non-payment), once the relevant criteria attracting the charge are satisfied. If that were sufficient to describe an exaction as relevantly "compulsory", then that criterion would provide almost no assistance in distinguishing exactions which are taxes from those which are not. Such an outcome seems improbable, given the prominence accorded to that element in the authorities and its place as an "essential feature"[1] of taxation.

3. It may be accepted that there will be an element of practical compulsion (to the extent practical compulsion is sufficient for the purposes of s90) if a charge is imposed as a "precondition to engaging in a field of endeavour or enterprise" (CS at [27]). Compulsion of that nature may be seen in the legislation in issue in *Harper v Victoria* (1966) 114 CLR 361, *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 and *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133: see ACTEW's submissions in chief on the WAC at [48]. That also explains the franchise cases to which the Commonwealth refers at CS [27].

4. However, having correctly identified that principle, the Commonwealth fails to apply it to the facts which arise in this matter, where it is and has always been possible for ACTEW to "engage in" the relevant "field of endeavour" (urban water supply) without obtaining water from the ACT and without paying the WAC.[2] The Commonwealth's argument on this issue seemingly reduces to the proposition that the relevant "enterprise" or "endeavour" is the abstraction of water from areas controlled by the ACT. That is self evidently an artificially narrow view of ACTEW's water supply business, which is inconsistent with the evidence[3] and which fails to take account of the substance of the matter. Alternatively, the Commonwealth's submission may rest upon an elision between the notion of an "enterprise" or "endeavour" (at CS[27]) and that of an "activity" (at CS [29]). Almost any transaction between a subject and the government may be said to be an "activity" in the broad sense apparently there intended by the Commonwealth. Again, that would suggest that the effect of the Commonwealth's submissions would be to enlarge the notion of compulsion such that it would cease to be of any utility in drawing the line between taxes and other government exactions.

5. On a related point, the Commonwealth seemingly accepts that an exaction imposed by government upon its own statutory creature will lack the requisite degree of compulsion – accepting that, for example, a dividend payable under the *Territory-owned Corporations Act 1990* (ACT)[4] would not amount to taxation.[5] However, it nevertheless contends that the WAC is a compulsory exaction, seemingly on the basis that what is involved is a law of "general application that applies to private persons and statutory corporations alike".

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[1] *Victoria v Commonwealth* (1971) 122 CLR 353 at 416 per Gibbs J and *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* [1933] AC 168 at 175.

[2] The Commonwealth's contrary contention at CS [56] suffers from the circular reasoning identified at [49] of ACTEW's submissions in chief and overlooks the evidence referred to in that paragraph.

[3] See eg Mr Knee's first affidavit at paras [10] and [13], **AB 1, 256-7.**

[4] See ss 11 and 32 and item 6 of part 3.1 of Schedule 3 and **AB 1, 298-9** (clauses 83 and 87).

[5] Notwithstanding what is said by the Commonwealth at footnote 54, it is by no means clear that the fact that the efficiency dividend is dealt with through annual reductions in appropriations renders "inapposite" the example given by ACTEW at [52] as a matter of substance: see, for example, *Commonwealth and the Central Wool Committee v Colonial Combing, Spinning and Weaving Company Limited* (1922) 31 CLR 421 at 444-5 and 460-1. Note also that the efficiency dividend previously applied to external receipts received by Commonwealth agencies.

6. That overlooks some important matters of substance. **First**, the particular exactions the subject of this challenge are the "abstraction fee[s] for water taken for the purposes of urban water supply..." (emphasis added).[6] **Secondly**, ACTEW is the only entity which has held a licence to abstract water for that specified purpose[7] and thus the only entity to which those impugned charges could apply.[8] **Thirdly**, those charges are set at a higher rate than other charges for the abstraction of water.[9] **Fourthly**, ACTEW is the only entity licensed under the *Utilities Act 2000* (ACT) to provide the utility services identified in s11 of that Act[10] and its water network is the only means by which water abstracted for urban water supply might be distributed in the ACT. **Fifthly**, the obligation upon ACTEW to pay the WAC arises by reason of the fact that it is a prescribed territory entity under s9 of the *Taxation (Government Business) Act 2003* (ACT).[11]

7. It is plain in those circumstances that one is not dealing with a "law of general application", still less one that applies to "private persons and statutory corporations alike". Rather, the second respondent (acting through the Minister) has imposed a particular charge, at a particular rate upon a particular entity, being one it owns and controls. That might be described as a voluntary assumption of an obligation, but is certainly not a compulsory exaction as a matter of substance. To the extent that the Commonwealth suggests otherwise, it cannot be material that the same Ministerial Determinations impose other charges, unless one is invoking some form of problematic distinction founded upon the form of those instruments.

Relationship with value

8. The Commonwealth correctly observes (at CS [33]-[34]) that the question of whether a charge is falls within the "special types of exaction" identified in *Air Caledonie v Commonwealth* (1988) 165 CLR 462 (***Air Caledonie***) at 467 is to be approached as a matter of substance and having regard to all relevant factors. However, as the disparate nature of those examples suggests, what may be a relevant factor in one case, may not be at all relevant in another (cf CS [34]). Again, to take the obvious example, whether an exaction is properly characterised as a fine or penalty will not turn upon matters such as relationship with "value" (factor (c) at CS [34]) or "choice" (factor (b) at CS [34]) and will have little to do with the "consequences of a failure to pay the charge" (factor (d) at CS [34]): see ACTEW's submissions in chief at [12]. There are dangers in seeking to develop such a one size fits all taxonomy of relevant factors. It is erroneous reasoning of that nature which is at the heart of this case: it simply does not follow from the fact that the "no discernible relationship with value" test has been applied as a partial guide in the case of fees for services that an inquiry of that nature will be relevant or helpful in the characterisation of all "special types" of exaction.

9. The difficulties in applying an inquiry of that nature to charges for the acquisition or use of property are most acutely evident in the case of royalties payable to a state (accepting, as the Commonwealth correctly does, that an exaction of that nature is plainly not a tax –see CS [35]). Taking the example of a mineral royalty, it will be inherently difficult to identify relevant "costs" incurred by the State in respect of the resource (as the Commonwealth seemingly accepts at CS [64]) and it has not hitherto been suggested that a State may not include in such exactions amounts which may be described as "monopoly rents". As such, it may well be the case that an exaction of that nature bears no relationship to either cost or to any but the broadest notions of "value": see ACTEW's submissions in chief at [28]. It is only by engrafting upon that inquiry an analysis of the "relationship between the fee and the quantity...of what is taken" (CS [37]) that the Commonwealth can say that a royalty "invariably" exhibits such a relationship. If the Commonwealth's explanation of the position of royalties under s90 rests upon the notion that such an exaction will by definition have some relationship to at least the quantity (but not necessarily the value) of the extracted

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[6] See eg **AB 4, 1485**.

[7] ACTEW's licences appear at **AB1, 331**, and **AB 6, 2340, 2364, 2413, 2442, 2493, 2515, 2542 and 2579**.

[8] See clause 5 of each of the determinations: **AB 4, 1482, 1624** and **AB 5, 2149**.

[9] See eg the last two entries which appear on **AB 4, 1485**.

[10] See **AB 1, 310** at clause 4.1 (**AB 1, 314**) and item 3 of the schedule at **AB 1, 322** (the reference to item 4 in clause 4.1 appears to be a typographical error) and **AB 6 2595** at clause 4.1 (**AB 6, 2599**) and item 3 of the schedule at **AB 6, 2607**.

[11] *Taxation (Government Business Enterprises) Regulation 2003* (ACT), clause 4.

resource,[12] then it seems to involve the elevation of a criterion founded upon the form of the legislation (see also CS [65]).[13] That may, in turn, promote the very drafting or "circuitous"[14] devices about which the Commonwealth expresses concern: CS [11] and [38].

10. The better view is that such matters are simply not relevant where the exaction is one which is for the acquisition or use of property or for a right or privilege involving access to a natural resource (for the reasons given in ACTEW's submissions in chief at [12]-[28]). The exaction is no more than the "price" to obtain such property or rights[15] and that is so regardless of whether the acquirer must, as a matter of practicality, obtain the property or rights to engage in a particular field of endeavour[16] and regardless of whether the price might on some measures be said to be "inflated" (cf CS [54]-[56] and note also the submissions of the Attorney General of South Australia at [10]).

"Traditional" royalties?

11. Related to the last point, the Commonwealth and the Attorney-General for Queensland suggest that some form of analogy may be drawn between the WAC and the royalty which was the subject of some observations in *Yanner v Eaton* (***Yanner***).[17] So much may be accepted.[18] However, perhaps reading too much into those observations, the Commonwealth seeks to draw a distinction between a royalty of that nature and mineral royalties exacted by a State, the latter said to fall within the category of "traditional royalties": CS [37]-[38]. In so far as that submission may suggest that royalties payable to a State in respect of natural resources have "traditionally" depended upon beneficial ownership of the relevant resource, that is a proposition which requires further examination.

12. The word "traditional" is taken from the passage in the reasons of the plurality in *Yanner* (at [27]), referring to "royalties imposed by a proprietor for taking minerals or timber from land". Seemingly drawing upon the discussion in *Stanton v Federal Commissioner of Taxation*[19] at 641, their Honours contrasted that class of case with royalties payable in respect of other rights such as piscary and warren, which (as noted in *Yanner* and *Stanton*) did not make the voyage from England

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[12] See CS [36], referring to *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 497 and *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 642. See also *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235 at 241 per Latham CJ and at 246 per McTiernan J.

[13] Note, in any event, that a levy based upon the "occasions" upon which a right is exercised (see *Stanton* at 642; *Tape Manufacturers* at 497 and *Federal Commissioner of Taxation v Sherritt Gordon Mines Limited* (1977) 137 CLR 612 at 626 per Mason J, with whom Gibbs J agreed) may have only a remote relationship to the quantity or the value of what is taken.

[14] The notion of a "circuitous device" is not without difficulty: see, in the context of s 92, *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 575-578 per Mason J and *Cole v Whitfield* (1987) 165 CLR 360 at 401 (per curiam). In the context of s 51(xxxi), that concept has been understood as meaning no more than that one must examine the practical operation of the particular Commonwealth law and determine whether such a law indirectly effects an acquisition of the substance of a proprietary interest (see eg *ICM Agriculture Pty Limited v Commonwealth* (2009) 240 CLR 140 at 169-70, [44] per French CJ, Gummow and Crennan JJ and *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 at 183-184 per Black CJ and Gummow J). A similar approach is, of course, required in the context of s90 (*Ha v New South Wales* (1997) 190 CLR 465 at 498). However, as in *Waterhouse* (where one was similarly dealing with a prohibition on the doing of certain acts, otherwise than in accordance with a permit – see CS [38]), no question of such a device arises here, given that the operation of the Water Acts and the WAC determinations is plain on the face of those instruments: see ACTEW's submissions in chief at [24]-[28].

[15] See *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (***Harper***) at 325.6 per Mason, Deane and Gaudron and 335.4 per Brennan J and ACTEW's submissions in chief at [17] and [42].

[16] See *General Practitioners* at 562 per Gibbs J and *Airservices* at 190 [133] per Gaudron J and at 232 [289]-[290] per McHugh J.

[17] (1999) 201 CLR 351.

[18] A similar analogy regarding the effect of the vesting provisions has been proposed by Gardner et al *Water Resources Law* LexisNexis (2009) at 192-3, referring to both *Yanner* and US authorities dealing more directly with water.

[19] (1955) 92 CLR 630

to Australia. Those "non-traditional"[20] royalties do not depend upon "full beneficial" or "absolute" ownership of the subject matter.[21] They may rather be seen to rest upon the notion that ownership of the land confers the power to determine who may enter on the land and under what conditions, meaning that a landholder has effective power or control over the taking of those natural resources.[22] Significantly, the discussion in *Stanton* of both categories concerned royalties payable as between subjects.[23]

13. Consideration of the Australian historical context reveals a distinctly different tradition as regards mineral royalties payable to the States. For example, from 1855 the power of the New South Wales legislature to make provision for royalties in respect of minerals on Crown land rested upon s 2 of the *New South Wales Constitution Act 1855* (Imp),[24] which vested in the New South Wales legislature the "Management and Control" of waste lands of the Crown in New South Wales and the revenues arising from them "including all Royalties, Mines and Minerals".[25] As Brennan J observed of those arrangements in *Mabo v Queensland (No 2)*,[26] "[t]he management and control of the waste lands of the Crown were passed by Imperial legislation to the respective Colonial Governments as a transfer of political power or governmental function not as a matter of title"[27] (cf CS [37]). That is not a revised view that rests upon the rejection of the notion that the Crown became beneficial owner of colonial land on first settlement. It rather reflects a long established understanding of the nature of those arrangements, being one which existed around the time of Federation. For example, in 1913, Isaacs J said "[t]he express statutory control of the sale and other disposal of the wastelands...was transferred to the colony not as a matter of *title*...but as a matter of government function" (original emphasis).[28] To somewhat similar effect, in 1923, Higgins J observed that the State occupied the position of an "administrator (with power to appropriate the proceeds [of any sale of Crown land or resources in the land])" rather than that of an "owner".[29] There are obvious analogies with the position of the second respondent vis-à-vis water under the vesting provisions in the *Water Resources Act 2007* (ACT) and the now repealed *Water Resources Act 1998* (ACT).

14. Exercising its powers of management and control, the New South Wales legislature made provision for a series of royalties and other charges in respect of the mining of minerals on public land,[30] none of which appear to have been challenged on the basis that the colony and then the State was not in fact the beneficial owner. The Commonwealth's suggested category of "non-traditional" royalties is in fact steeped in tradition as regards Australian resources in public stewardship.

15. The charging of royalties in respect of mineral resources, purely as an incident of the powers

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[20] That is, in an Australian context. Such matters have an ancient lineage in the United Kingdom – see eg Blackstone's *Commentaries on the Laws of England*, Book the second (1771), Exshaw et al (Dublin), pp34 and 38-40.

[21] *Yanner* at 367-8, [22]-[24] per Gleeson CJ, Gaudron, Kirby and Hayne JJ and at 386-7, [80] per Gummow J. Rather, a landowner who has not licensed the right to hunt, take or kill *ferae naturae* has a qualified property *ratione soli* in them, for the time being while they are on that land.

[22] See the submission put by Sir Keith Mason QC in *Harper* as recorded at 323. Of course, strictly speaking, "warren" (until abolished by s1(b) of the *Wild Creatures and Forests Act 1971* (UK)) was a right of franchise, the origin of which was a grant by the Crown in the exercise of the royal prerogative.

[23] At 641.

[24] (18 and 19 Vict c54).

[25] See, discussing the effect of that provision upon the incident of the prerogative identified in the *Case of Mines* (1568) 1 Plow 310; *Cadia Holdings v New South Wales* (2010) 84 ALJR 588 at [25] per French CJ.

[26] (1992) 175 CLR 1.

[27] At 53.

[28] *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 453, 456, to which Brennan J referred with apparent approval in *Mabo No 2* (at 53, footnote 47).

[29] *Commonwealth v New South Wales* (1923) 33 CLR 71 at 62 per Higgins J. His Honour was in dissent, but not on this point - see the reasons of Knox CJ and Starke J at 19 (seemingly accepting that the State's "ownership" was "popular rather than legal") and at 22.

[30] See eg ss 3 and 6 of the *Gold Fields Management Act 1857* (NSW) (20 Vic, No 29); ss4 and 7 of the *Gold Fields Act 1861* (NSW) (25 Vic, no 4); ss 14, 37, 56(5) and 63 *Mining Act 1874* (NSW) (37 Vic, No 13); s 7 of the *Crown Lands Act 1884* (NSW) (48 Vic, no 18); s 2 *Mining Act Further Amendment Act 1884* (NSW) (48 Vic, No 10); and ss 9, 36 and 40 of the *Mining Act 1906* (NSW) (6 Edw, No 7).

of management and control conferred upon colonial legislatures,[31] was obviously known to the framers. Moreover, the exaction of other charges in respect of the right to access those resources, bearing no relationship to either quantity or value, was equally well established at that time (cf CS [35]). For example, the fee for the "miner's right", being a flat fee which was payable regardless of the value or quantity of what was taken by a prospector, was first imposed in New South Wales in 1857.[32] Indeed, prior to the introduction of that regime, licence fees for the prospecting of gold were levied at "substantial"[33] rates (also unrelated to value or quantity), for the purpose of driving the less successful prospectors caught up in the gold rush back to their normal jobs[34] – which may be viewed as a form of "demand management". Yet, nowhere in the Convention Debates or the authorities of this Court does one find any suggestion that such exactions (be they royalties or other charges levied by a State in respect of access to mineral resources under its control) could be excises within the meaning of s90[35] or that the constitutional prohibition might be engaged, depending upon the relationship with the value or quantity of what was taken.

16. The position is no different as regards water, for which charges were also levied prior to Federation,[36] again, purely as an incident of powers of management and control.[37] It is too broad a proposition to suggest that such an arrangement may be open to question because the Territory "vest[ed] property in itself, and then purport[ed] to charge for the right to access that property": cf CS [39], citing *Homebush Flour Mills*. The facts of that case involved the compulsory acquisition of property from the millers; with provision for them to "re-purchase" the flour; where the option not to do so was "unreal"; and where the terms of the Act pointed to a legislative object that the difference between the "fair and reasonable price" (paid by the government) and the "standard price" (paid by the miller) would produce a fund to be applied to a public purpose (that being the tax).[38] It is not merely the "long history of public stewardship of water" (CS [42]) which indicates that that authority has no bearing on the current matter. The current facts bear no possible resemblance to that extreme case, particularly where the ACT has not acquired any relevant rights formerly held by ACTEW or QCC, let alone sought to compel the "re-sale" of such rights to those who previously held them.

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[31] Note that pre-Federation mining regulation in New South Wales followed a similar legislative trajectory to that taken in Victoria: see O'Hare, "A History of Mining Law in Australia", (1971) 45 *Australian Law Journal* 281 at 286-7 and see s2 of the *Victoria Constitution Act 1855* (Imp) (18 and 19 Vict c 55), containing a similar vesting provision to that found in the *New South Wales Constitution Act 1855* (Imp).

[32] Sections 3 and 4 of the *Gold Fields Management Act 1857* (NSW) (20 Vic, No 29), providing for a fee of ten shillings in respect of a twelve month entitlement. On no view was that fee a royalty – like the fee in *Stanton*, it was payable whether the miner exercised the right or not and was not calculated by reference to the quantity or value of what was taken. As to the position in the other colonies, see O'Hare, op cit at 290-1.

[33] *Cadia Holdings* at [84] per Gummow, Hayne, Heydon and Crennan JJ. See, in the context of NSW, s5 of the *Gold Fields Management Act 1852* (NSW) (16 Vic, no 43) which provided that the licence fee was thirty shillings per calendar month. In the case of "persons not the subjects of the British Crown" the licence fee was sixty shillings per calendar month (s8). See also O'Hare, op cit at 285.

[34] G Blainey *The Rush that Never Ended, The History of Australian Mining* MUP Fifth edition (2003) at 21.

[35] For example, exactions of that nature do not appear in the examples given in Quick and Garran at 837-8 nor in the various historical manifestations of "excises" given by Dixon J in *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 293-299. Of course the historical usage of the term "excise" does not point to an exact application (*Matthews* at 293) and there is no common use of the term in the convention debates which might otherwise illuminate its precise meaning (see *Ha* at 493). Nevertheless, it is at least tolerably clear that such exactions were never understood to be within the somewhat amorphous category of excises.

[36] See eg ss9 and 21of the *Water Rights Act 1896* (NSW) (60 Vic, no 20) (**Water Rights Act**) (and the schedule to that enactment) and ss 35(6), 134 and 136(2) of the *Irrigation Act 1886* (Vic) (50 Vict, No 898) (**Irrigation Act**).

[37] See s1 of the Water Rights Act and s4 of the Irrigation Act.

[38] *AG (NSW) v Homebush Flour Mills Limited* (1937) 56 CLR 390, per Latham CJ at 397-8 and 399-400.

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