IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C2 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

(Re Water Abstraction Charge)

Filed on behalf of the First Respondent
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Part I: Certification

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

Part II: Issues

2. Adopting the approach of the appellant (**QCC**), the first respondent (**ACTEW**) has addressed the issues regarding the water abstraction charge (the **WAC**) in this appeal and the issues regarding the Utilities Network Facility Tax (**UNFT**) in the C3/2011 appeal. The following issues arise as regards those determinations of the WAC impugned by the appellant:

(a) is the WAC, as a charge for the acquisition or use of a valuable public resource, nevertheless to be characterised as a tax if it has "no discernible relationship" with the value of what was acquired or obtained by ACTEW?

(b) if the answer to the first question is "yes", did the primary judge and the Full Court err in rejecting the appellant's claim that the WAC exhibited no such discernible relationship from 1 July 2006?

(c) is the WAC otherwise not properly characterised as a tax, on the basis that ACTEW was not in any relevant sense compelled to acquire water from the ACT or because the WAC was an aspect of the internal financial arrangements between the ACT and ACTEW?

(d) if properly characterised as a tax, is the WAC nevertheless not an excise within the meaning of s. 90?

(e) if the WAC is an excise, was QCC entitled to recover from ACTEW the amounts sought in its restitution claim?

Part III: Notice under sec 78B of the *Judiciary Act 1903*

3. ACTEW does not consider that it is necessary that further notice be given pursuant to s. 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The summary of material facts provided by the appellant is largely accurate. However, there are some matters which require qualification or further elaboration and some matters which are contentious.

5. The Legislative Assembly and the ACT Executive have powers with respect to water resources.[1] Exercising legislative power, the right to the use, flow and control of all water of the Territory is vested in the Territory: s. 7 of the *Water Resources Act 2007* (ACT) and s. 13 of the *Water Resources Act 1998* (ACT).[2] As this Court held in *Thorpes Ltd v Grant Pastoral*[3] (*Thorpes*), in relation to similarly worded provisions, those features of the statute suggest that its "real object" is "to enable the Crown, in a country in which water is a comparatively scarce and important

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[1] See ss. 22, 37 and Schedule 4 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[2] Referred to in these submissions as the '**2007 Water Act**' and '**1998 Water Act**' respectively.

[3] (1955) 92 CLR 317, at 331 per Fullagar J, with whom Dixon CJ and Webb J agreed. See also *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 580 per Gleeson CJ and Gummow J.

commodity, to exercise full dominion over the water of rivers and lakes and to undertake generally the conservation and distribution of water." It was also there suggested that some common law rights regarding water survived those vesting provisions, with the Crown receiving "superior" or "overriding rights".[4] However, it appears that the better view is that, by operation of those provisions, all common rights in relation to water were vested in the Crown or abolished.[5] It has also been said that such provisions employ language which is consonant with a recognition that water is a "common resource": *ICM* at [73] per French CJ, Gummow and Crennan JJ.

6. Section 107 of the 2007 Water Act (s. 78 of the repealed 1998 Water Act) confers upon the Minister power to determine "fees for this Act". Further, s. 56(2) of the *Legislation Act 2001* (ACT) provides that those powers may be exercised to determine a fee "in relation to any matter under or related to" the Water Acts. Acting under those provisions, the Minister made various determinations imposing a WAC. Only those determinations levying the WAC at amounts in excess of 25 cents per kilolitre remain in issue between the parties.[6] By those impugned determinations, the ACT has levied the WAC at rates of 55 cents per kilolitre of water delivered and, more recently, 51 cents per kilolitre of water abstracted. In making those determinations, the Minister was confined to achieving the objects of the power. Relevantly, those objects include matters related to environmental protection, matters related to resource management and ensuring that the water resources are sufficient to meet the reasonably foreseeable needs of future generations: s. 6 of 2007 Water Act and s. 3 of the 1998 Water Act.

7. The key concept of "taking water" is defined broadly in s. 11 of the 2007 Water Act and in the dictionary to the 1998 Water Act. The Water Acts regulate activities constituting "taking". The 2007 Water Act requires that the Minister determine water management areas for "managing the water resources of the Territory": s. 16(1). The Minister must also determine the total amount of surface and ground water that is available for "taking" in each such area: s. 17(1). In determining those amounts, the Minister must have regard to certain specified mandatory considerations related to the water necessary to maintain aquatic ecosystems, the total water resources of the Territory and "sustainable yield".[7] The Minister is required to have regard to those determinations (and other matters) when considering whether to grant a "water access entitlement" under s. 21(1) of the 2007 Water Act (see similarly ss. 28 and 29 of the 1998 Water Act).

8. In addition, the Water Acts create a scheme of licensing to regulate the taking of water from

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[4] See the passages from *Thorpes* at 331, extracted by the primary judge at [98]-[99].
[5] *ICM Agriculture Pty Limited v Commonwealth* (*ICM*) (2009) 240 CLR 140 at [54] and [72] per French CJ, Gummow and Crennan JJ and (although not expressing a concluded view on the issue) at [116] per Hayne, Kiefel and Bell JJ. See also Stone J in the Full Court at [161].
[6] See the determinations identified in footnotes 4 and 5 of the appellant's submissions.
[7] See s. 17(2). As regards the "environmental flow guidelines": see Part 3 of the 2007 Water Act and ss. 5 to 11 of the 1998 Water Act. In essence, environmental flow is the flow of water necessary to maintain aquatic ecosystems: s. 12(1) of the 2007 Act and s. 5(1) of the 1998 Water Act. See also, as regards the notion of "sustainable yield" *ICM* at [50] per French CJ, Gummow and Crennan JJ.

particular places. It is an offence to take water from a particular place without a licence: s. 28 of the 2007 Water Act and s. 33 of the 1998 Water Act. A person may apply for a licence to take water from a particular place: s. 29 of the 2007 Water Act (s. 35 of the 1998 Water Act). The power to grant such a licence is conditioned upon the EPA being satisfied that (inter alia): (a) the applicant holds a relevant water entitlement; (b) the amount of water to be taken is not more than a reasonable amount (having regard to any determination made by the Minister under s. 18 of the 2007 Water Act); and (c) it is appropriate to do so, having regard to, inter alia, the specified mandatory environmental considerations.[8] The WAC is imposed upon those holding such licences.

9. As to what is said in AS 23.1, it is true that Perram J accepted that, as a matter of practicality, the possibility of ACTEW obtaining water other than under its licence was "exiguous and remote" (at [192]). However, it is doubtful that Keane CJ accepted that proposition (see at [74]-[76]) and Stone J expressed no view on that matter. As to what is said at AS 23.8, no member of the Full Court gave detailed consideration to the question of whether, even if a tax, the WAC was nevertheless not an excise,[9] although that was a matter put in issue by ACTEW in a notice of contention.

Part V: Legislation

10. The appellant's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Argument

A. The "no discernible relationship" test

11. The appellant correctly observes (see AS [53]), that differing views were expressed below regarding the application of the "no discernible relationship with value" test in a case such as the present and that the ratio of the decision of the Full Court is difficult to ascertain. For the reasons given below, ACTEW submits that the view of Keane CJ is to be preferred and that the test was not applicable.

The special case of services

12. The obiter dicta[10] in *Air Caledonie v Commonwealth* (1988) 165 CLR 462 (***Air Caledonie***) at 467 support the proposition that the no discernible relationship test should be applied in the case of a putative fee for services. However, the Court did not there say that the test should be deployed in the characterisation of all tax like exactions. That omission should be understood to have been intended by their Honours. The test applies to putative fees for services as a special case. Nowhere was it suggested in *Air Caledonie* that the no discernible relationship test was applicable

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[8] See ss. 30(2)(a),(c) and 30(3) of the 2007 Water Act and ss. 35(7) and (8) of the 1998 Water Act.
[9] See, however, the doubts expressed by Perram J at [199]-[201] and [203].

to the other examples of "special types of exactions which may not be taxes even though the positive attributes [referred to by Latham CJ in *Matthews v Chicory Marketing Board (Vic)*[11]] are all present" – the examples given being a charge for the acquisition or use of property, a fee for a privilege and a fine or penalty imposed for criminal conduct or breach of statutory obligation. That test can have no sensible application, for example, to the issue of whether an exaction is a fine or penalty as opposed to a tax. The question of characterisation is determined by whether liability to pay the exactions arises from any failure to discharge antecedent obligations by the persons upon whom the exactions fall.[12] Section 90 does not require, in addition, that penalties or fines have some form of relationship to (for example) the social harm caused by the proscribed conduct or an economic assessment of that harm: those are matters solely for the state or territory parliament.

13. Contrary to what may be suggested by the reasons of Perram J (at [191]) and Stone J (at [171]), there are also strong indications in the reasons given in *Air Caledonie* that the no discernible relationship test has limited application to the case of a "privilege" granted by statute. At 468-469, their Honours discussed what might have been the case had the fee been exacted only in respect of non-citizens entering Australia. As the Court observed, a charge of that nature might have been characterised as a fee for the privilege of entering Australia. However, it was not suggested that the resolution of whether such a fee was a "tax" would depend upon whether there was or was not a discernible relationship between the fee and the "value" placed upon that privilege or the "cost" to the public purse of permitting such persons to enter or remain in Australia.

14. Clearly then, a degree of caution is required in seeking to extrapolate from the approach applied in the case of a putative fee for services. Indeed, even within that category of exactions, the absence of a discernible relationship with the value of a service does not necessarily indicate that the charge has the character of a tax.[13]

15. The reason the no discernible relationship test is generally (but not always) required to be satisfied in the case of a fee for services arises from the circumstances surrounding an exaction of that nature. When considering government activity said to involve the provision of a service, the Court may be dealing with: (a) the provision of "services" to the community at large, in the sense that the general public derives a benefit from the governmental activity; or (b) the provision of services to particular individuals; or (c) the provision of services to both the community and particular individuals.[14] In such cases, difficulties will naturally arise in determining whether the fee relates to particular identified services provided to the particular person required to make the

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[10] The outcome of *Air Caledonie* did not turn upon the application of the "no discernible relationship" test and the passage at 467 is properly regarded as obiter. See eg *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 (*Airservices*) at [305] per McHugh J and at [443] per Gummow J.

[11] (1938) 60 CLR 263.

[12] *MacCormick v Commissioner of Taxation* (1984) 158 CLR 622 at 639 and *Northern Suburbs Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 (*Northern Suburbs*) at 571.

[13] See eg *Airservices* at 192, [141] per Gaudron J and 239-40, [312] per McHugh J.

payment[15] or is rather levied to defray the general expenses of a public authority charged with the performance of functions which benefit the class of persons from whom it is exacted.[16] Indeed, in *Air Caledonie* the Court observed that in one sense all taxes exacted by a national government and paid into national revenue can be described as "fees for services", in the sense that they are the fees which the resident or visitor is required to pay as the *quid pro quo* for the totality of benefits and services which she or he receives from governmental sources (at 469). The no discernible relationship test is of utility in determining whether an impugned exaction is a "fee for service" in the narrower sense – that is whether it is *for* a particular service provided to the particular individual, or is instead for the conglomeration of "services" provided by government to the public at large: *Airservices* at 234, [298] per McHugh J.

16. Apart from what was said to be a "comment" made by three justices in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (***Harper***), all of the High Court authorities dealing with the no discernible relationship test (or a test of that nature) do so in the context of charges that were said to be fees for services.[17] Moreover, there are strong indications in some of those authorities that such a test would not have been apposite if the issue involved an exaction defended on the basis that it was a fee for the use or acquisition of property – see in particular *Parton* at 258[18] and, in a non-constitutional context, *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 580 (***Marsh***).[19]

17. That is explicable as a matter of principle by reason of the fact that very different considerations apply where the charge is said to be for the acquisition or use of property such as goods or commodities. It will be clear in such a case that the person has obtained something as the *quid pro quo* for the charge, being the relevant proprietary right or right of use. A similar point was made by Brennan J in distinguishing the facts in *Harper* from the franchise cases at 335.5.[20]

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[14] See *IW v City of Perth* (1997) 191 CLR 1 at 15-16, per Brennan CJ and McHugh J and at 44 per Gummow J.

[15] Or, in the case of a class of integrated services provided to particular group of users (as in *Airservices*), that the charge relates to that discrete class of services.

[16] See *Parton v Milk Board* (1949) 80 CLR 229 (***Parton***) at 258-9; *Swift v Boyd Parkinson* (1962) 108 CLR 189 (***Swift***) at 200 per Dixon CJ; *Logan Downs Pty Limited v Queensland* (1977) 137 CLR 59 (***Logan Downs***) at 63 per Gibbs J[16] and *Airservices* at 189-90, [133] per Gaudron J

[17] See eg *Parton* 258-9; *Swift* at 200 per Dixon CJ (with whom Kitto and Windeyer JJ agreed) and at 204 per McTiernan J (in dissent); *Harper v Victoria* (1966) 114 CLR 361 at 378; *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 (***General Practitioners***) at 562; *Air Caledonie* at 467 and *Airservices* at [92], [135], [141], [314] and [510]-[515]. See also *Logan Downs* at 63 and in a non-constitutional context, *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 581.

[18] "There is nothing comparable with the facilities for which the wharfage rates were imposed in *Melbourne Harbour Trust Commissioners v Colonial Sugar Refining Co Limited* [(1926) VLR 140]". Significantly, in *Melbourne Harbour Trust Commissioners*, the *Melbourne Harbour Trust Act 1915* (Vic) vested in the Commissioners the whole of the bed and soil and shores of the waters of the Port of Melbourne (s. 46) and the exclusive management and control of the port, shipping, wharfs and docks (s. 48).

[19] "Here the land from which material may not be taken is private land. It is not in the ownership of the Crown or of the Board or Shire. The power to regulate quarrying is not incident to the ownership of the land or of the material which could be removed therefrom".

[20] "[A fee to obtain the privilege in issue in *Harper*] may be distinguished from a fee exacted for a licence merely to do some act which is otherwise prohibited (for example, a fee for a licence to sell liquor) where there is no

18. As such (and unlike a fee for services) no difficulty arises in determining whether a charge for the acquisition or use of property is an exaction which is *for* such a right (cf AS [59]). Either a person acquires the relevant proprietary right or right of use or they do not.

19. In asserting that the test applies to a fee for the acquisition or use of property (even, it would seem, where the State or Territory is selling such property in competition with private competitors who would be subject to no such limitation), QCC relies principally on *Harper*. However, that authority does not assist it. Four members of the Court in *Harper* held, without qualification, that the relevant exaction was not a tax because it was the *quid pro quo* for the property which was lawfully able be taken under the statutory right or privilege in issue in that case (see Mason CJ, Deane and Gaudron JJ at 325.8) or was a charge for the acquisition of a right akin to property (Brennan J at 335.4). It is clear that those four members of the Court did not see any occasion to consider, in addition, the question of discernible relationship with value. That is unsurprising, given that the obiter comments in *Air Caledonie* (decided the year before) had suggested that that test was to be applied (and applied only) to putative fees for services.

20. It is incorrect to suggest that that omission was explicable on the basis that there was no argument in *Harper* that the fee did not bear a discernible relationship to the cost or value of the goods acquired (contra AS 56). That is plain from the submissions in reply of counsel for the plaintiff.[21] It is also incorrect to suggest that the "discernible relationship to value was made manifest on the face of the legislative measure". For the reasons given below (see at para [31]) any such relationship for at least two of the three years in issue was remote and not at all self evident (contra AS [56]). In those circumstances, had their Honours considered that the "no discernible relationship with value" criterion was of importance, one would have expected them to have addressed that matter. They did not and it is not.

21. True it is that such a fee may nevertheless be characterised as a tax if it is revealed as "a mere device for tax collecting" (see Mason CJ, Deane and Gaudron JJ in *Harper* at 325). But that suggests no more than that a consideration of the substance of a purported charge for the acquisition or use of property may, in a particular case, reveal it as an artifice designed to conceal the imposition of a tax (*Attorney-General for NSW v Homebush Flour Mills* (1937) 56 CLR 390[22] providing a possible example). One does not erect upon that extreme possibility a more general requirement for an examination of discernible relationship with value beyond the case of fees for services (contra AS [56]).

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resource to which a right of access is obtained by payment of the fee". Those features distinguish such a case from the exaction in issue in *Bath v Alston* (1988) 165 CLR 411(cf Perram J at [191]).

[21] See (disputing any relationship with cost) at 324.7 of the report and the transcript of 7 June 1989 at p 461-2 and (disputing any relationship with value) the transcript of 7 June 1989 at p 464-5.

[22] The suggestion that the facts of that case are in any way comparable to those of the current matter is incorrect. For example, nowhere was it suggested in *ICM* that the vesting provisions in the similarly worded provisions considered in that matter were an "artifice" or a "device".

22. QCC also seeks to invoke what was said by various members of this Court in *Airservices*. However, the issues in *Airservices* related to putative fees for services and arose in a specific statutory context – s. 67 of the *Civil Aviation Act 1988* (Cth) required that the amount of the charge in issue be "reasonably related to the expenses incurred in relation to the matter to which the charge relates and ... not be such as to amount to taxation". There was no occasion to reconsider the correctness of what had been decided in *Harper*. Hayne J (at [516]) did no more than agree with Gaudron J's reasons for concluding that the impugned determination did not "amount to taxation" within the meaning of that statute. It is an overstatement to suggest that his Honour thereby "referred approvingly" to the reasons of Dawson, Toohey and McHugh JJ in *Harper*. Moreover, McHugh J's reasons in *Airservices* suggest that his participation in the "comment" in *Harper* was premised on the notion that the charge in issue was a putative fee for services: see at 234, [297]. His Honour's discussion of the utility of the discernible relationship test (at [310]-[318]) is also, notably, limited to fees for services.

23. As to what is said by QCC at AS [61]-[62] regarding the object of s. 90, it has never been suggested that s. 90 is directed to preventing States or Territories from charging such amounts as they think fit for their property, whether charging directly or by means of government enterprises which (as here) they own and control (see further below). QCC's contrary submission appears to rest upon a novel and internally contradictory conception of the place of s. 90. On the one hand, QCC appears to suggest that s. 90 is directed to the fostering or protection of a particular type of national market – a free market or *laissez-faire* economy, which is threatened by ongoing State and Territory control of natural resources (see particularly AS 61and 62.2). However, as was made clear in *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418, ss. 90 and 92 are rather directed to the distinctly different object of implementing a particular scheme of political economy,[23] focussed upon the preservation of national unity. It is difficult to see how that object necessitates a construction of s. 90 which would fundamentally alter matters such as the capacity of the States and Territories to exact a royalty, a capacity which appears to have been assumed to exist (notwithstanding s. 90) in *Harper*. On the other hand, QCC's submissions may suggest that s. 90 is in fact concerned with the development of "command economy" markets for resources in which the Commonwealth sets the price, perhaps buttressed by the use of its powers under s. 51(xxxi) to compel reluctant States or Territories to "sell" into those markets. It seems unlikely that the object of preserving national unity would be much advanced by permitting the States and Territories to be placed in that bind, in which the Commonwealth may prohibit them from keeping their natural resources, whilst simultaneously dictating that they not be sold higher than a particular price (perhaps with some form of knock on effect upon the guarantee of just terms).

Resolution of the current matter if the discernible relationship test is limited to services

24. If ACTEW is correct in submitting that, at best, the "no discernible relationship test" may in some cases provide a partial guide to determining whether a fee for services is a tax, the resolution of the issues in this part of QCC's appeal are straightforward. The WAC may be characterised as a fee for one or more of the valuable rights identified in paras 1.1-.1.4 of ACTEW's notice of contention (**NoC**).[24]

25. The primary judge found that all water in the Territory and in the Googong Dam is vested in the ACT, which may exercise "full dominion" over that resource and has the exclusive right to its use and control: at [100]. None of those findings are challenged by QCC. The primary judge also concluded that those interests were "more direct than the interest and role of the Tasmanian government" in *Harper*. Indeed, *ICM* may suggest that the effect of the Water Acts was to vest all common law rights in water in the ACT.[25] In such circumstances, the WAC as it applies to that water is properly characterised as a fee for the use or acquisition of property or as a charge akin to price of a profit à prendre: *Harper* at 325 per Mason, Deane and Gaudron JJ and at 333-4 and 335.4 per Brennan J and see grounds 1.1 and 1.4 of ACTEW's NoC.

26. Alternatively, if the peculiar nature of water suggests that such proprietary analogies are in fact inapposite,[26] the WAC is readily accommodated within what was decided in *Harper* for the following reasons: first, the ACT has restricted use of the resource to the exclusive but controlled preserve of those who hold licences; secondly, but for that restriction, the resource would be available for exploitation by the public (water being a common resource: see again *ICM* at [55] and [73]); thirdly, ACTEW (and QCC) are users of that resource; and fourthly, the WAC is an important part of a legislative scheme directed to the management of the use of that resource – see the submissions above regarding the Water Acts and the manner in which the WAC fits within those statutory schemes. Accordingly, the WAC (including when levied at a rate above 25 cents per kilolitre) is properly regarded as the *quid pro quo* for the right which ACTEW obtains to take water which the Water Act licences have conferred upon it: *Harper* at 325 per Mason, Deane and Gaudron JJ and 334-335 per Brennan J and see paras 1.2 and 1.3 of the NoC.

27. Either way, it is clear that ACTEW has obtained something of value in exchange *for* the WAC, being the relevant proprietary right or right of use. There is thus no utility in seeking to apply the "no discernible relationship" test, being a test which may be of assistance in resolving that issue in the more difficult case of putative fees for services. If that be accepted, it follows that the WAC is not a tax and the appeal should be dismissed.

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[23] See at [22]-[23] and [37]-[39].

[24] While those matters accord broadly with the reasons of Keane CJ, it is (as submitted above) not entirely clear that his Honour's reasons represent the ratio decidendi of the Full Court in light of the differing emphasis in reasons of Stone J. That is why those matters are included in the NoC.

[25] See at [54] per French CJ, Gummow and Crennan JJ.

[26] See the reasons of Stone J at [161]-[168] and of Perram J at [184] and [199]-[201] and the authorities to which their Honours refer.

28. Indeed, the position may be even clearer in the current matter, in that the WAC is more obviously in the nature of a royalty than the exaction in issue in *Harper* (see NoC 1.4). It is apparent that the plaintiff in *Harper* (and, by inference, the Court) proceeded on the basis that if the charge was in fact a royalty, then it was clearly not a tax.[27] Brennan J seemingly accepted that proposition in terms at 333.[28] Indeed, as Perram J noted (at [203]) in the Full Court, there are considerable difficulties with the proposition that royalties for the right to extract state owned resources, to the extent they contain an element of a monopoly rent, are duties of excise.[29] Yet, QCC embraces that radical development, which is the logical endpoint of its argument: AS [61]-[62]. ACTEW submits that, in fact, those matters in fact point to the irrelevance of the "no discernible relationship" test as regards exactions other than fees for services, including royalties (see Perram J at [203]). Returning to *Harper*, the plaintiff's argument was that the exaction was not a royalty, by reason of the fact that the State did not own the resource (see eg at 319, transcript 6 June 1989 pp351-2). Whether that be right or wrong,[30] the position is quite different here where all relevant rights which could be said to be the subject of a grant made in connection with the payment of a royalty have been vested in the Territory.[31]

Even if the "no discernible relationship with value" test is to be applied in the current matter, the WAC was not on that analysis a tax

29. To the extent that such an analysis is required, the primary judge and Keane CJ and Stone J correctly concluded that the WAC (as levied at amounts greater than 25 cents per kilolitre) is not a tax because it could not be said that there was no discernible relationship with the value of what is acquired.

30. As QCC correctly accepts (at AS[75]), a broad approach is necessary in that regard. An attempt to apply a finely attuned eye to the balancing of value and the quantum of the charge is plainly inappropriate given that one is not dealing with bright line distinctions: *Harper* at 337. However, the authorities go considerably further than that. First, it is plain (see the word "may" in the reasons of Dawson, Toohey and McHugh JJ in *Harper*) that the absence of a discernible relationship with value is at most a relevant factor and not a determinative one. Secondly, related to the first proposition, the absence of any such relationship may be of very little moment, depending

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[27] See the submissions of the plaintiff recorded at 319 and 324 of the report, the transcript of 6 June 1989 at pp 351-353 and the transcript of 7 June 1989 at pp 458-9.

[28] "A royalty, in the sense of a payment made to the owner of land for the right to take away things which are part of or attached to the soil ...is not a tax and, not being a tax, cannot be a duty of excise". It is apparent that his Honour was not, at that point, merely reciting the argument of the defendant.

[29] See eg the *Mining Act 1992* (NSW); the *Forestry Act 1916* (NSW); the *Mining Act 1978* (WA); the *Mineral Royalty Act 1982* (NT); the *Mining Act 1971* (SA) and the *Mining Regulations 1998* (SA); the *Mineral Resources Act 1989* (QLD); the *Petroleum and Gas (Production and Safety) Act 2004* (QLD); the *Mineral Resources (Sustainable Development) Act 1990* (Vic) and the *Mineral Resources Development Act 1995* (Tas).

[30] See as to the nature of a royalty, *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 497, 517-8 and 530-1 and *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR, at 641-2.

[31] See, again, *ICM* at [54], [116] and [146] and cf the position in *Harper* as described by Brennan J at 334.

upon the context: see *Airservices* at 191-2, [139]-[141], per Gaudron J; at 234, [298] per McHugh J and at 286, [457] per Gummow J. See also *Marsh* at 581.

31. Thirdly, as submitted above, the real inquiry (which is potentially obscured by an overly literal or strict application of a discernible relationship test) remains whether the exaction can be said to be a fee *for* the provision of the service or use or acquisition of property: *Airservices* at 234, [298] per McHugh J. So understood, the relationship between cost and value need only be "discernible" in the sense of "evident" or capable of being recognised.[32] The corollary is that, provided that there is some form of relationship between the exaction and cost or value, the conclusion that there is "no discernible relationship with value" will be excluded.[33] It is important, in that regard, that the test is expressed in the negative – "no discernible relationship": *Air Caledonie* at 467. That is, it must be impossible for the Court to discern any form of relationship at all.

32. Those propositions are best illustrated by the facts of *Harper* itself (upon which QCC places great store). At the time of the events which prompted the litigation in *Harper* the licence fee was not one which bore an obvious relationship to the value of what was acquired.[34] Nor did it bear any relationship to any costs incurred by government in maintaining the resource (eg the costs of husbandry or research referred to by counsel for the plaintiff). Rather, flat fees were levied on two bases: $28,200 where the quantity of abalone authorised to be taken did not exceed 15 tonnes and $40,000 where the licence authorised the taking of abalone exceeding that tonnage.[35] As Keane CJ observed in the Full Court (at [72]), that suggests that even the "most exiguous" relationship will suffice to exclude the conclusion that there is "no discernible relationship".

33. Having regard to those matters, the suggestion that there is no discernible relationship with value is readily rebutted in the present matter.

34. Some indication of the "value" of goods (to the extent water is aptly so described) may be found in the formulation in *Spencer v The Commonwealth* (1907) 5 CLR 418 at 432 436–437 and 440 et seq – that is, what a willing purchaser will pay and what a not unwilling vendor will receive for the property, or its "market value".[36] The uncontroverted evidence of Mr Knee indicated that, if ACTEW were to obtain water from alternative sources, it would have to pay an amount higher than or comparable to that which it has paid the ACT.[37] So too would QCC.[38] Furthermore, the demand for water is price inelastic; that is, ACTEW's customers and therefore ACTEW would be willing to

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[32] See by way of analogy *Marsh v Shire of Serpentine-Jarrahdale* (1966) 120 CLR 572 at 581 per Barwick CJ.
[33] *Harper v Victoria* (1966) 114 CLR 361 at 378.
[34] Cf the terms of reg 17A as it applied before 9 December 1987 and during the period 9 December 1987-13 December 1988, as extracted in the reasons of Brennan J at 326-7.
[35] See reg 17A as it applied after 13 December 1988, as extracted in the reasons of Brennan J at 328. It is apparent that the discussion of that regulation in *Airservices* (see at [297]-[298] per McHugh J and at [447] per Gummow J) relates to reg 17A as it applied from 9 December 1987 to 13 December 1988.
[36] See *Airservices* at [444], per Gummow J and the authorities to which his Honour there referred.
[37] See para 37 of his affidavit of 29.08.08 and paras 2-10 of his affidavit of 05.02.09.

pay more for water than they have paid. Indeed, the customers of QCC already pay more than QCC pays to ACTEW.[39] Accordingly, even if the value of water in the Queanbeyan/ACT region is assessed solely by reference to the market value for supply of water in the ACT region, the WAC was less than or comparable to value.[40]

35. However, the concept of "value" in the current context is not restricted to market value – consideration may also be had to non-market values,[41] which may involve the weighing of social, political, economic and environmental considerations. As such, a price incorporating an element determined by government to more fully reflect the "true economic value"[42] of a scarce resource will, even if it exceeds the price currently paid in the market, have a relationship with the value of that resource. As QCC accepted,[43] the "genuine assessment" of the ACT government was that the impugned increase in the WAC was justified on that basis. To deny to the States and Territories the power to charge for water on that basis (or the power to alter those charges over time) would put a significant dent in the regime which has been developed for the management and conservation of water in Australia, a regime which, as this Court observed in *ICM*, has its roots in pre-federation water legislation and has been evolving since.[44] That such matters are included in the concept of value seemed to be accepted by Dawson, Toohey and McHugh JJ in *Harper* at 336, where their Honours said:

> In discerning that relationship, it is significant that abalone constitute a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence.

36. Relevantly, in that regard, in setting the amount of the WAC the Minister was required or at least permitted to take into account matters such as environmental protection, resource management and the importance of ensuring that there is sufficient water to meet the reasonably foreseeable needs of future generations (see the objects in s. 6 of the 2007 Water Act) as well as the broader object underlying the Act, being to control access to a comparatively scarce and important resource (see above). It is, of course, possible that a fee taking into account such matters might be set at so high a level so as to indicate that there is no discernible relationship with those broader notions of value.[45] In *Harper*, Dawson, Toohey and McHugh JJ observed that such a charge would not avoid invalidity "merely" because it serves the purpose of conserving a natural public resource. However,

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[38] See para 48 of the affidavit of Mr Fogarty of 26.05.08.
[39] Mr Fogarty's evidence at transcript p130, lines 16-21.
[40] See the figures in table 1 and table 2 of Knee affidavit 05.02.09.
[41] See eg the reasons of Gummow J in *Airservices* at [447], referring to *Harper* and the possibility of having regard to "non-market values".
[42] See the 2006-7 ACT Budget Papers, which Keane CJ extracted at [33] and to which Stone J referred at [175].
[43] See the reasons of Keane CJ at [34].
[44] See, in that regard, Gardner et al *Water Resources Law*, LexisNexis Butterworths Australia (2009) at p44 (para 3.13) and clause 73 of the *Intergovernmental Agreement on a National Water Initiative* (being the intergovernmental agreement referred to in s4 of the *National Water Commission Act 2004* (Cth) – see also the references to that agreement in *ICM* at [12], [15] and [95]).
[45] As Stone J observed at [175], referring to *Hematite* as an analogy.

in the sentence immediately preceding, their Honours had made clear that in that area of discourse, one is necessarily dealing with distinctions that are often difficult to draw. Beyond matters of broad impression, that involves questions which are, in their minutiae, primarily a matter of government policy and which do not govern validity: see *ICM* at [90] per Hayne, Kiefel and Bell JJ and (in the Full Court) Keane CJ at [93]-[94]. The magnitude of the fee in the current matter was not such that it was impossible to discern a relationship with those broader notions of value.

37. A clear example of the difficulties that might otherwise arise is the debate QCC seeks to have the Court enter regarding the efficacy of demand management through the application of a fee as compared to water restrictions (see AS [92]-[96]). The issue of whether s. 90 is engaged is not determined by the question of whether the use of a fee as part of a "system for preserving a natural resource"[46] is the most effective or efficient means of achieving those ends. Indeed, there is no reason that the ACT might not legitimately seek to address demand through a combination of water restrictions and a pricing regime, just as, in *Harper*, the Tasmanian legislature applied a quota and a licence fee –see at 326.[47] Nowhere was it suggested in *Harper* that the fee was only valid to the extent that the quota did not provide an effective alternative (contra AS 96.2).

Monopoly power

38. QCC argues that it is necessary to bring to account the fact that the prices in the local market for water are distorted as a result of the ACT's exercise of "monopoly power". It asserts that, in those circumstances, value is to be assessed, primarily, by reference to cost (referring to what was said by McHugh and Gummow JJ in *Airservices*): AS [64]-[74]. There are a number of difficulties with that argument.

39. First, the matters in issue here are quite different to the air traffic services and other services provided by the Civil Aviation Authority. Those were services which an aircraft operator was required by law to acquire if she or he wished to fly in Australian airspace: see eg at 232, [289] per McHugh J and the provisions to which his Honour referred. In contrast, as Keane CJ observed at [74]-[75], there was no legal obligation upon ACTEW to acquire water from the ACT if it wished to supply water to QCC and consumers in the ACT. That it may be uneconomical to do so says no more than that the WAC is not set so high as to lead to ACTEW, QCC and other consumers making a rational economic choice to acquire their water from elsewhere. But the making of such choices is precisely the behaviour which takes place in a market and from which value is relevantly "discerned". A market, in that sense, is the field of actual and potential interactions between producers and consumers where, given the right incentive (including a change in price), substitution will occur: see eg *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374 at [252] per McHugh J. In the current matter, the potential for supply side substitution and thus competition clearly exists

[46] *Harper* at 325 per Mason CJ, Deane and Gaudron JJ.

(cf *Airservices* at [299] per McHugh J), notwithstanding the fact that (in light of the current price of water) no-one on the demand side has yet availed themselves of those alternatives. Formidable barriers to entry do not deprive the prices charged in a market of their capacity to measure the value of the goods in question.

40. Gummow J's reference in *Airservices* at [444] to an "efficient market" is not to be misunderstood as a market free from any form of distorting influence. As noted above, the creation of such markets is not the object of s. 90. Further, as is clear from the authorities to which his Honour referred,[48] that term was used in the economic sense of a market in which all buyers and sellers have access to all currently available information that affects the property. The market described above plainly falls within that description and provides an appropriate basis for determining value.

41. Second, and in any event, the appellant's argument is founded upon a non sequitur. It does not follow, from the proposition that a charge reflects the exercise of monopoly power, that it thereby ceases to have a relationship with the value of what is obtained. As Keane CJ observed, it is nevertheless the case that there exists a "relationship" between the price the seller seeks and the price the buyer is willing to pay, being a relationship which persists up to the point at which an inelastic demand curve turns against the seller.

42. Third, the lack of a discernible relationship with value (if there be none) in the case of a natural monopoly does not necessarily indicate that the charge has the character of a tax: see McHugh J in *Airservices* at 239-40, [312]. Here, as there (see at [313]-[314]), there are a number of broader matters in the surrounding circumstances and statutory context which pointed to the WAC not being a tax. The most significant of those is the fact that water is a "common resource" or "common property",[49] vested in the ACT for the common benefit of the public. The WAC is simply the "price" exacted by the public, through its laws, for the appropriation of that resource: *Harper* at 325 per Mason, Deane and Gaudron JJ. It is not at all apparent why, in setting that "price", the ACT (on behalf of the public) should be limited in its capacity to realise the value of such an asset, where a private citizen would not be subject to any such constraint. Indeed, even in the case of a compulsory exaction in the form of a fee for services, there is no prohibition against such a fee including an element of profit margin: *Airservices* at 172, [72] per Gleeson CJ and Kirby.[50] As Perram J noted at [193], there are some difficulties in accepting that proposition and yet insisting that any such margin be limited to a reasonable rate of return. It is unlikely that the gauging of reasonable rates of return by a court would be the means by which a mineral royalty demanded by a State was either a lawful price charged by an owner or an unlawful excise.

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[47] Note also that Dawson, Toohey and McHugh JJ specifically referred to the availability of alternative means of protecting resources (at 337).

[48] Note particularly *Kenny & Good v MGICA (1992) Ltd* (1999) 199 CLR 413 at 436, [50] per McHugh J.

[49] See *ICM* at [55] and [73] per French CJ, Gummow and Crennan JJ [109] per Hayne, Bell and Kiefel JJ.

Value determined by reference to an unrelated market?

43. QCC also argues that market value, to the extent it is taken into account, is to be established by reference to "temporary trades" in the market regulated by the *Murrumbidgee Regulated River Water Sharing Plan 2003* (NSW). That evidence was part of the report of Professor Grafton, an expert economist called by the ACT. ACTEW's position is and was that that evidence (and the evidence of QCC's expert, Dr Beare) is entirely irrelevant to the issues in these proceedings.[51] In any event, there are a number of difficulties with QCC's reliance on that material.

44. First, as Mr Knee explained,[52] ACTEW is unlikely to purchase temporary entitlements if it were to obtain water from an alternative source. ACTEW would be more likely to purchase "high security water entitlements". Mr Knee used the prices for that species of water entitlement in his analysis, which, as noted above, led him to conclude that ACTEW would pay an amount higher than or comparable to the WAC. Secondly, it is not at all apparent why one would seek to derive value from an unrelated downstream market, where one has evidence of value from the actual market in question (see above). Thirdly, even if regard is had to that evidence, it suggests that the price of water is highly volatile and increased by approximately 25 cents over a two year time period, being a fourteen fold increase (see the prices referred to in AS [80]-[81]). In those circumstances, it cannot be the case that the increase in the WAC (by a similar amount) lacks any discernible relationship with value. Quite apart from the broad brush approach required in connection with the "no discernible relationship" test, "market value" is itself a concept involving the use of assumptions, making it unlikely that it will reflect "true value with nicety".[53] The validity of the determination could not depend upon the Minister studiously following or anticipating the fluctuating market put forward by QCC as the appropriate measure of value.

Cost analysis

45. QCC also says that the absence of discernible relationship with value may be demonstrated by having regard to the analysis and recommendations of the Independent Pricing and Regulatory Commission and those of its successor, being the Independent Competition and Regulatory Commission. QCC draws particular attention to the fact that the ACT increased the quantum of the WAC from the amount recommended by those agencies, without undertaking any further analysis of costs of use of the resource.

46. QCC seeks to support that submission by drawing an analogy with *Harper* (AS [88]). However, properly analysed, *Harper* supports the contrary proposition. In increasing the 1987/8 fee of $18,079 to a flat fee of to $40,000 in 1988/9, the Tasmanian government departed from a fee which did expressly relate to market value (see the formula for the 1987/8 fee on p327 in the

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[50] Note also McHugh J at [317] and Gummow J at [450].
[51] As are the submissions on that material at AS [92]-[105].
[52] In paragraph [8] of his affidavit of 5 February 2009.
[53] See, referring to *United States v Miller* (1943) 317 US 369 at 374, Gummow J in *Airservices* at footnote 404.

reasons of Brennan J), in favour of the flat fee structure described above (see para [32]). Nothing on the face of the later measure revealed any connection between the doubled fee and the value of what was being acquired (contra AS [88]). Nor, it would seem, did Tasmania seek to justify that twofold increase from a fee on its face based upon market value by reference to any "careful and independent" analysis of underlying costs or value. No member of the Court suggested that those circumstances indicated that there was no longer a discernible relationship with value. The Minister in the current matter was similarly not bound to act upon the recommendations or analysis of the ICRC/IPARC; to continue to act upon such recommendations until she or he obtained an updated analysis; to justify any departure from those recommendations; or to seek to relate any increase to the earlier calculations of those bodies (contra AS [87], [89]). To submit otherwise misunderstands the locus of decision making relevant to the current matter.

47. In addition, as regards the issue of cost, QCC points to the fact that a higher rate of WAC applies to water taken for urban water supply than taken for other purposes (that is, bores and other small scale water extraction facilities on farms): AS [91]. However, as Gleeson CJ and Kirby J pointed out in *Airservices* at 177-8, [89]: "In Australia, postal services, transportation services, educational services, and health services, amongst others, and many facilities, are provided by governments, or government instrumentalities, in circumstances where charges are imposed which take account of such factors as price sensitivity or capacity to pay, or which seek to equalise costs between, for example, rural and urban consumers . . ." (emphasis added). In setting the amount of the WAC, the Minister was quite entitled to have regard to such matters, particularly given that the objects of the Water Acts included that of ensuring "that management and use of the water resources of the Territory sustain the physical, economic and social wellbeing of the people of the ACT".[54]

B. Not a tax because it was not a compulsory exaction

48. By ground 1.7 of its notice of contention, ACTEW contends that the water abstraction charge was not a tax because ACTEW was not in any relevant sense compelled to acquire water from the ACT. This Court is yet to authoritatively determine that practical compulsion will suffice for the purposes of satisfying Latham CJ's first positive attribute of a tax.[55] Even if practical compulsion is sufficient, the question is what, as a matter of form or substance, is the nature of any "statutory compulsion"[56] directed at ACTEW? Properly analysed, the Water Acts did not in their

[54] Section 6(a) of the 2007 Water Act and s. 3(a) of the 1998 Water Act.

[55] McTiernan J's comments to that effect in *Harper v Victoria* (1966) 114 CLR 361 were plainly obiter. His Honour's decision rested upon his conclusion that the exaction was a fee for services (at 377). The other members of the Court did not address the issue. In *General Practitioners Society v Commonwealth* (1980) 145 CLR 532, only Aickin J expressly held that practical compulsion would be sufficient (at 568). Gibbs J assumed the correctness of that proposition, but expressly refrained from deciding the point (at 561). See also, in the context of s. 67 of the *Civil Aviation Act 1988* (Cth), *Airservices* at 189, [132] per Gaudron J and at 232, [289]-[290] per McHugh J.

[56] See *Wong v Commonwealth* (2009) 236 CLR 573 at [209] per Hayne, Crennan and Kiefel JJ. See also at

legal or their practical effect compel ACTEW to pay the WAC. The position may have been different if, as in *Airservices*, ACTEW was obliged to acquire water from the ACT as a condition of conducting its business within the ACT. Although it would then be under no legal obligation to abstract water and pay the WAC, the practical effect of the statute would be to impose economic pressure upon ACTEW such that it would be unreasonable to suppose that it could be resisted. That would be analogous to the example given by Aicken J in *General Practitioners* of a prohibition on a Doctor practising at a place other than a designated place – while there would be no obligation to practise in the designated place, the practical effect of the statute would be to compel the Doctor to do so.[57]

49. In contrast, any "compulsion" operating upon ACTEW in the current matter arises from matters which have not in any relevant sense been brought about by the legislation or the impugned determinations. It rather arises from the fact that water is a limited resource and that the costs of establishing alternative sources of supply are high.[58] It is circular reasoning to suggest that, because the WAC has historically been set at a level which has made it uneconomical to pursue those alternatives, ACTEW has had and continues to have no choice but to pay that fee.[59]

C. The WAC was an aspect of the internal financial arrangements between the respondents and not a tax

50. Related to the last point, the WAC, considered as a matter of substance, is not so much a compulsory exaction as a financial arrangement between the ACT and its statutory creature, which it owned and controlled (NoC 1.5).[60] Before the primary judge and the Full Court, it was common ground that the WAC would not infringe s. 90 if the water were supplied directly to consumers by the ACT rather than by ACTEW. In such circumstances, the ACT could charge consumers whatever it wished for the water vested in it. Any requirement for the organ of government responsible for water supply to remit to the revenue an amount related to the water taken would be no more than a financial arrangement internal to government. It is only the circumstance that the WAC is imposed upon a "territory-owned corporation"[61] which gives QCC's arguments any apparent purchase.

51. However, on closer analysis, the substance of the matter is that the WAC is an internal arrangement of that nature. ACTEW's voting shareholders are ministers of the ACT government: see Knee affidavit 29.08.08 at page 28 to 32 of RMK1. Those persons are appointed by the Chief

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[61] and [67]-[68] 209].

[57] At (1980) 145 CLR 532, p 566. Similarly, while the plaintiff in *Harper v Victoria* was under no obligation to present the eggs for grading, the legislation provided that they were unable to be sold by retail in Victoria unless they were so graded: see the description of the legislation in the reasons of Barwick CJ at (1966) 114 CLR 361, 368-71.

[58] See Fogarty affidavit 26.05.08 at [48], Knee affidavit 29.08.08 [37] and Knee affidavit 05.02.09 at [2] to [10].

[59] Cf the reasons of the primary judge at [110] and of Perram J at [192].

[60] Contrary to what was said by Keane J at [51], that matter was put by ACTEW – see ACTEW's submissions on the WAC at [35]-[41].

[61] See s. 6 and schedule 1 of the *Territory-owned Corporations Act 1990* (ACT) ("ToC Act").

Minister and hold their shares on trust for the Territory: ss. 13(1), (4) and (5) of the ToC Act. They may also require ACTEW to comply with directions and with general government policies: ss.17 and 17A. The main objectives of a Territory owned corporation include "to maximize the sustainable return to the Territory on its investment in the corporation...": s. 7(1)(b) of the ToC Act. Further, ACTEW's liability to pay taxes, fees and charges under Territory law arises solely from the fact that it is a prescribed territory entity under s. 9 of the *Taxation (Government Business Enterprises) Act 2003* (ACT).[62]

52. It may be accepted that the constitutional conception of a tax extends beyond the levying of an exaction as between a sovereign and its subjects (for example, to levies imposed by the Commonwealth upon the states).[63] However, "compulsion" (if there be any in the current matter) applied to one's own statutory creature is not properly regarded as compulsion at all for the purposes of s. 90. Indeed, were it otherwise, one might arrive at the absurd result that matters such as the "efficiency dividend" applied to Commonwealth government agencies represented some form of taxation, requiring a s. 51(ii) law which complies with s. 55 of the *Constitution*.

D. Limited relevance of any revenue raising purpose to the tax issue

53. QCC seeks to place much weight upon material said to establish the existence of a "revenue raising purpose" (at [36]-[52]). There are a number of difficulties with those submissions. First, s. 90 says nothing about "purpose" and the constraints which apply to State and Territory legislatures are directed to the proper characterisation of exactions as duties of excise, rather than any underlying purpose.[64] It has been held that the "motives" or "purposes" of the legislature are of little if any relevance in that process of characterisation: *Northern Suburbs* at 570[65] and *Airservices* at 261, [374] per Gummow J.[66] Nor do McHugh J's comments in *Airservices* at [312]-[313] assist QCC (contra AS [40] and footnote 25). Nowhere did his Honour suggest that the Court should consider material of the sort said by QCC to show the purposes or motives of the executive. In particular, his Honour did not suggest that one should try to divine what was in the minds of members of Parliament or members of the executive through the selective quoting of extrinsic materials. QCC seeks to have this Court engage in "some attempted exercise in psychoanalysis of those associated with the making of the law" (*APLA v Legal Services Commissioner* 224 CLR 322 per Hayne J at [423]).

54. Secondly, the "usual extrinsic materials" upon which QCC seeks so to rely is, on closer scrutiny, far from usual. It includes: a Treasury email and minute (see AS [45]); a budget "fact sheet" (AS [46]); and budget papers (AS [48] and [49]). That material is simply irrelevant. Further,

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[62] See cl 3 of the *Taxation (Government Business Enterprises) Regulation 2003* (ACT).
[63] See *Victoria v Commonwealth* (1971) 122 CLR 353.
[64] See, in the context of s96, *ICM* per French CJ, Gummow and Crennan JJ at [36].
[65] "...in the characterisation of a law with respect to taxation, the legislative purpose has limited relevance".
[66] "...the character of the provisions of the Act in question is to be determined by their operation, not by whether they were made with an objective which might be the raising of revenue".

before the primary judge, some of that material was objected to on the basis of Parliamentary privilege.[66] For that additional reason, it may not be relied upon by QCC.[67] Thirdly, even if that material was admissible and did in some way bear upon the operation of the WAC in the sense discussed by Gummow J in *Airservices*, the presence or absence of an objective of raising revenue is not a universal determinant of the character of an exaction (as QCC accepts – AS [38]).[68]

E. Not, in any event, an excise

55. By ground 2 of its notice of contention, ACTEW contends that even if the WAC is a tax, it is not an excise. That argument was not addressed by the Full Court and was not addressed by the trial judge in any detail.[69] As regards the analysis to be applied in determining whether a tax is an excise, see ACTEW's submissions regarding the UNFT in C3 of 2011at [34]-[39].One of the matters to be taken into account in assessing the "closeness of the connection" or relationship between the tax and a step in the production, manufacture, sale or distribution of the relevant commodity is whether the exaction is part of a statutory scheme which is "truly regulatory" or has a "regulatory purpose".[70]

56. The statutory context in which the WAC is applied is described above. Having regard to the scheme of the Water Acts and their objects, the WAC is properly regarded as a significant element in the regime for the management of a scarce public resource. The magnitude of the fee does not suggest otherwise.[71] Further, as noted by Perram J, there are some difficulties in accommodating a tax on water within the constitutional conception of an excise, given that one is dealing with common property not especially amenable to private ownership and best vested in a sovereign state.[72] Quite apart from the question of whether that means that water is therefore not tangible personal property and can never be the subject of an excise duty,[73] those matters point to the fact that one is not in this case dealing with the heartland of s. 90 (exactions upon a process of production, manufacture, sale or distribution of a commodity). Taken together, those matters indicate that the WAC is not a tax on such a step.

F. Recovery of WAC from ACTEW

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[65] "...the character of the provisions of the Act in question is to be determined by their operation, not by whether they were made with an objective which might be the raising of revenue".

[66] The answer to the question on notice (referred to in footnote 28); and the Budget speech (referred to footnotes 31 and 33). The primary judge did not refer to that material in his reasons and (apparently on that basis) found it unnecessary to rule on those objections. The Full Court did not consider that issue.

[67] See *Commonwealth v Vance* (2005) 158 ACTR 47 at [36]-[43]. The ACT Assembly has the same privileges as the Commonwealth Parliament: s. 24(3) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[68] *Airservices* at 178, [91] and *Northern Suburbs* at 568-9. See also the reasons of the primary judge below at [76] and [109].

[69] See at [126].

[70] See *Dennis Hotels Pty Limited v Victoria* (1960) 104 CLR 529 at 576 per Taylor J; *Phillip Morris v Commissioner of Business Franchises (Victoria)* (1989) 167 CLR 399 at 452, 461 and 463 per Brennan J; *Capital Duplicators Pty Limited v ACT [No 2]* (1993) 178 CLR 561 at 596-7; *Ha* at 501.

[71] Cf *Phillip Morris* per Brennan J at 463 and *Capital Duplicators* at 596.

[72] At [199]-[201].

[73] Which, as his Honour observes, was not argued by the respondents below.

57. In the alternative, that is, if QCC's appeal in relation to the WAC be allowed, ACTEW relies upon s. 21A of the *Limitation Act 1985* (ACT)[74] (**Limitation Act**), which operates to preclude recovery of any amounts sought in QCC's claim in relation to the WAC, other than those the subject of a claim instituted within 6 months after the date the amount was paid.[75] That is a question of construction.[76] ACTEW submits there is nothing in the text or context of the Limitation Act indicating that s. 21A was directed solely at claims between a government and a taxpayer. Rather, the language of subsection (1) refers to "[a]n action" regarding certain subject matter. Those general terms do not restrict the scope of the provision to particular parties. Section 21A stands in contrast to s. 54 of the same Act, introduced by the same amending legislation, which is directed to "An action against a State or another Territory for recovery of a revenue amount . . .". Further, there is nothing in the definition of "revenue amount" which would indicate that s. 21A does not apply to a case where a third party is contractually liable to make payments in respect of an exaction which is a tax.[77] As in *Roxborough v Rothmans of Pall Mall Australia Limited*,[78] the arrangements between the parties in such a case involve more than simply the passing on of the "burden" of the tax in an economic sense. It was the tax itself which was passed on by the express terms of the contracts which governed the relationship of the parties in that case (see at 528 of *Roxborough*).[79]

58. As regards the restitutionary claim more generally, the appellant relied chiefly upon *Roxborough* to sustain that claim (see Keane CJ at [9]). However, by reason of the following matters, very different considerations apply here: **first**, ACTEW has paid the disputed amounts to the ACT: Knee affidavit 29.08.08 at [21]: the fee was incurred by ACTEW, unlike the position of the wholesaler respondent in *Roxborough*: see at [4] and [24]; **secondly**, there has been no 'failure to incur an expense' resulting in a failure of a severable part of the consideration as in *Roxborough*: see at [17]; **thirdly**, QCC has collected amounts equivalent to the WAC from its ratepayers: Mr Fogarty's oral evidence, transcript p130, lines 9-12. Hence, if ACTEW were required to pay those amounts to QCC, QCC would have recovered them twice; **fourthly**, in those circumstances, ACTEW would have no action for recovery of those monies from the ACT by reason of s. 21A of

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[74] Section 21A was inserted in the Limitation Act in November 1993, by the Limitation (Amendment) Act 1993 A1993-82, in response to *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 and in anticipation of *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561.

[75] There was one payment of $149,005.54 which was made within the s. 21A limitation period. ACTEW submits that s. 21A applies to all the payments except the $149,005.54.

[76] It has not been suggested that the operation of s. 79 of the *Judiciary Act 1903* affects the question of construction.

[77] Cf the reasons of the primary judge at [170].

[78] (2001) 208 CLR 516.

[79] The Pricing agreements in the present matter are agreements of that nature: see for example the terms which provide for ACTEW to "pass through" the WAC to the applicant in the agreements: Knee affidavit 29.08.08 at RMK1 page 104 (2002); page 106 (2003); page 107 cl 2.1 (2004); page 110 cl 1.7 (2004); page 111 (2005); page 114 cl 4.1 (2006); page 116 cl 5.1 (2007). See also the references to the payments of amounts "on account" of the WAC page 120 cl 3 and following (2008-2013).

the limitation Act: compare *Roxborough* at [18];[80] and **fifthly**, there has been no failure in performance by ACTEW of any promise it made: see *Roxborough* at [104]. ACTEW does not have an obligation to make just restitution in those circumstances – it cannot be said that QCC has the "superior claim": *Roxborough* at [27].

59. Moreover, this is not a case where "money or other property contributed by one party on the basis and for the purposes of [a joint] relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it": *Roxborough* at [100] per Gummow J. In the first place, as submitted above, ACTEW will not enjoy any windfall if the status quo is maintained. Furthermore, unlike *Roxborough*, the parties did contemplate what would happen if the WAC were found to be invalid. QCC made plain[81] that it considered that it was not obliged to pay the WAC but nevertheless paid it to ACTEW and recovered corresponding amounts from its ratepayers. It follows that the state of affairs contemplated by the parties in structuring their contractual relationship with each other (and their relationships with third parties) would not be altered were the WAC to be found invalid: compare *Roxborough* at [17]. It matters not that that that substratum for the dealings between the parties was not (at least until later) reflected in the terms of their agreements: *Roxborough* at [16]. In those circumstances, this Court should prevent "double satisfaction and unjust enrichment by recovery of more than what in truth was due" (*Roxborough* at [99] per Gummow J). That requires that the relief sought by QCC be refused.

60. In any event, the change of position defence is applicable to the present facts.[82] ACTEW acted to its detriment in reliance upon terms of the pricing contracts and on the faith of the receipts from QCC in making payments of the WAC to the ACT government: see Knee affidavit at [21]. That makes out the defence.[83] It is relevant in that regard that s. 21A would prevent ACTEW recovering from the ACT the amounts claimed by QCC in its restitution claim.

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[80] Referring to United States authority where the tax was recovered from the government.
[81] See eg correspondence between Chapman and Costello 4.07.06 and Pangallo and Stanhope 7.08.06.
[82] See *Commissioner of State Revenue (Vic) v Royal Insurance Australia Limited* (1993) 182 CLR 51 at 65 per Mason CJ.
[83] See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379-380 and 385-6.