IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No C3 of 2011

BETWEEN

QUEANBEYAN CITY COUNCIL
Appellant

ACTEW CORPORATION LTD
First Respondent

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent

RESPONDENT'S SUBMISSIONS

(Re Utilities Network Facilities Tax)

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 Utilities Network Facility Tax (**UNFT**) in this appeal and the the issues regarding water abstraction charge (the **WAC**) in the C2/2011 appeal.

3. The following issues arise as regards the UNFT which was imposed pursuant to the *Utilities (Network Facilities Tax) Act* 2006 (ACT) (**'UNFT Act'**):

(a) is the UNFT properly characterised as a charge for the privilege for the use and occupation of property and not a tax?

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

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

4. Consideration has been given to the question whether notice pursuant to s. 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Facts

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

6. QCC correctly observes that the definition of a "utility network" in s. 7 of the UNFT Act includes a water network under the *Utilities Act* 2000 (ACT) (**'Utilities Act'**). However, importantly, a utility network also includes an electricity transmission network, an electricity distribution network, a gas transmission network, a gas distribution network, a sewerage network and a telecommunications network. It also includes any other prescribed network.

7. Self-evidently, the value of the goods or commodities (to the extent they are aptly described as such for the purposes of s. 90) conveyed by each of those networks is likely to be substantially different at any given point in time and will fluctuate over time. Nevertheless, the owner of each network will pay the same rate of UNFT: see ss. 6 and 8 of the UNFT Act.

8. QCC (AS [10]) correctly observes that s. 12 of the Utilities Act provides that a "water network" consists of certain specified infrastructure. It is also of some significance that that provision excludes from the scope of that term infrastructure that is outside the "network boundary": s. 12(3). Network boundary is defined in s. 16 of the Utilities Act and is to be

ascertained in accordance with the relevant industry code. The applicable industry code[1] relevantly provides:

> The connection point between the water connection pipe of the Water Utility and the plumbing system of the Customer is the designated boundary. This is typically the outlet to the first isolating valve inside of the lease boundary where such a valve is in close proximity (1 metre) to the lease boundary.

9. As QCC accepts (AS 9.1), the UNFT is calculated by reference to that part of a network facility that is affixed to land which is not the subject of relevant private rights or interests held by the utility or the owner of the network. That is, the UNFT is calculated by reference those parts of the network for which there does not exist a lease, a licence granted by the Territory or any right prescribed by regulation in relation to the use of the land for the utility network: see the exclusions in s. 6(2) of the UNFT Act.

10. Apart from legislation, those parts of the utility network would self evidently occupy a precarious position. However, by Part 7 of the Utilities Act, the legislature of the ACT has conferred upon public utilities the following rights which are enforceable as against owners, lessees and occupiers of land:[2]

(a) the right to maintain network facilities: see s. 106 of the Utilities Act. The term "maintenance" is defined broadly so as to include the alteration, removal, repair or replacement of any part of the network facility: s. 106(2) of the Utilities Act. The utility may do anything necessary or desirable for that purpose, including entering and occupying land and undertaking various works: s. 106(1)(a) and (b);

(b) the right to require an owner, lessee or occupier of land, by written notice, to take whatever action is necessary to stop interference with the network or network facility or to remove the likelihood of interference: see s. 125(1) and (2).[3] Such a notice may be issued where the utility is satisfied that a structure or activity on, under or over land or water interferes, or is reasonably likely to interfere, with the network or a network facility. If the recipient of a notice fails to comply with it, the utility may do whatever is necessary to stop the interference or remove the likelihood of the interference: s. 125(5). The utility may proceed without notice in urgent circumstances: s. 125(7).

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[1] *Water and Sewerage Network Boundary Code*, December 2000, clause 3.3 (1).

[2] See definitions of "land-holder" and "owner" in the dictionary to the Utilities Act.

[3] "Interference" is non-exhaustively defined in s. 123 of the Utilities Act to include an action that interferes with the safe or efficient operation of the network.

11. Those statutory rights are complemented by:

(a) powers of entry: see s. 116 of the Utilities Act and the definition of "network operations" in s. 103;

(b) a procedure for obtaining Court orders in cases where those authorised by a utility are obstructed in the exercise of functions relating to particular premises: s. 119 of the Utilities Act;

(c) relevant offence provisions - see particularly s. 124 of the Utilities Act which creates an offence of interfering with a network, or a network facility, unless authorised to do so by a responsible utility;

(d) a provision avoiding any presumption that might otherwise arise that the owner or occupier of land to which a network facility is affixed has a proprietary interest in the facility: s. 120(1) of the Utilities Act; and

(e) provisions conferring power on the Minister to make declarations to sever network facilities from land owned or occupied by a person other than the utility or network owner and to vest the network facility in a specified person or entity: s. 121(1) and (2) of the Utilities Act and s. 10(1) of the *ACTEW/AGL Partnership Facilitation Act* 2000 (ACT). The person in whom the network facility is vested by the making of such a declaration has the right to have the network facility remain on, under or over the land in question and the right to use and maintain the network facility: see s. 122(7) of the Utilities Act and s. 10(7) of the *ACTEW/AGL Partnership Facilitation Act* 2000 (ACT).

12. As to what is said in AS 13, there was no evidence below that the "route length" (defined in the UNFT Act Dictionary to mean the "length of the horizontal projection of the facility on land") included "National Land" within the meaning of s. 27(1) of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) ("**Planning and Land Management Act**").

Part V: Legislation

13. QCC's statement of applicable constitutional provisions, statutes and regulations is accepted.

Part VI: Argument

A. Not a tax (see ground 4 of ACTEW's Notice of Contention)

The UNFT is a charge for the right to use and occupy land

14. It may be accepted that the UNFT has the "positive attributes" identified in *Air Caledonie v Commonwealth* (1988) 165 CLR 462 (***Air Caledonie***) at 466 which give a charge the character of a tax.

15. However, the exclusion of such parts of a "network facility" as are the subject of the rights identified in s. 6(2) of the UNFT Act points to the object of the charge: it is a charge for the right to use and occupy land conferred by the provisions of Part 7 the Utilities Act. The effect of those provisions (identified in paras [10]-[11] above) is to confer upon each utility the right to use or occupy land to which it is not otherwise entitled (compare *Hematite Petroleum Pty Ltd v Victoria* (1981) 151 CLR 599 (***Hematite***) at 634 per Mason J and at 659 per Brennan J). Where parts of a utility network are affixed to land owned or occupied by a person other than the utility, those provisions ensure that the infrastructure is not subject to interference and may be repaired or replaced as required. As such, the fee calculated under s. 8 of the UNFT Act should be characterised as the payment by the utility for those valuable privileges or rights granted by the legislature of the ACT rather than as a tax.

16. A fee of that nature falls readily within the examples given in *Air Caledonie v Commonwealth* (1988) 165 CLR 462 (*Air Caledonie*) at 467 of exactions which, although bearing the positive attributes of a tax, are nevertheless not taxes. In particular, it falls within the category of a "fee for a privilege". As such, ACTEW says that the appeal should fail on the basis that the fee was not a tax (see ground 4 of ACTEW's notice of contention). In the Full Court (at [124]), Keane CJ (with whom Perram and Stone JJ relevantly agreed) observed that there was "some force" in that argument, but did not need to determine it, by reason of his conclusion that the fee was not an excise.[4]

17. QCC disputes that characterisation, asserting that the fee is "in substance a fee for the exercise of legislative power", which is said by QCC to belong to a different "genus" to a fee for a service, use of property or a privilege (AS [27]-[28]). The distinction sought to be drawn in that regard is elusive, unsupported by principle and is, in any event, inconsistent with this

[4] His Honour also there said that it was difficult not to give weight to the fact that the circumstances that the exaction was described as a tax. However, the question of whether an exaction is or is not a "tax" is to be approached as a matter of substance, not of form: see eg *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 332 per Brennan J and, more generally as regards s. 90, *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 (***Phillip Morris***) at 433 per Mason CJ and Deane J and *Ha v New South Wales* (1997) 189 CLR 465 at 498-9 per Brennan CJ, McHugh, Gummow and Kirby JJ. As such, the use of the words "tax" or "tax act" is inconclusive.

Court's analysis of s. 90. For example, the Court in *Air Caledonie* appeared to accept that if the fee in that case had been limited to non-citizens, it may have been able to be characterised as a fee for a privilege (being the privilege of entering Australia) or as a licence fee (see at 469). Yet the granting of such a privilege or licence would equally be no more than the exercise of the legislative power of the Commonwealth.[5] The same may be said of the fee for the right or privilege considered in *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 (*Harper*) - as Brennan J observed at 334, the argument the defendants embraced (and which he accepted):

> ...depends not on proprietary rights in the seabed but on the exercise of legislative power over the abalone fishery in State fishing waters.[6]

18. Whether there were or were not "competing rights involved" in *Harper* (see AS [28]), the relevant benefit or privilege involved "public property" and Brennan J's reasons did not turn upon any conclusion that the Crown held radical or freehold title to that resource (at 335). It was, to adapt the words of QCC, a transfer of a privilege "by" the government from a natural resource which was common property; as opposed to a transfer of a privilege "from" the government, in the sense that those rights or benefits were "its own" (cf AS [27]).

19. In any event, the examples given in *Air Caledonie* are just that: examples. There is no need to shoehorn the current facts – it is sufficient that the owner of a network receives some form of valuable benefit or right from the government as the *quid pro quo* for its fee, regardless of the circumstances in which that came to pass.

The issue of National land is irrelevant

20. QCC also argues that a difficulty arises because, it is said, the fee applies to "National Land" within the meaning of the Planning and Land Management Act. On that basis it is seemingly said that the fee as a whole cannot be characterised as a fee for a relevant privilege, because the ACT had no rights to confer the benefit of installing utility infrastructure over National Land and no right to charge for having given away that benefit (AS [26]).

21. There was in fact no evidence as to how the "route length" of ACTEW's water network was calculated and whether that calculation included infrastructure over National Land and if so how much. Such matters formed no part of QCC's pleaded case.

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[5] Section 51(xix) and/or s 51(xxvii).

[6] Mason CJ, Deane and Gaudron JJ (at 325) expressed their general agreement with Brennan J. Their separate reasons suggest that they similarly viewed the grant of the privilege as an exercise of legislative power (eg "entitlement of a new kind"). Dawson, Toohey and McHugh JJ expressed their agreement with Brennan J (at 336). Their "comment" does not relate to the locus of the relevant rights.

22. In any event, QCC's submissions on those issues cannot be sustained in light of the following matters: **Firstly**, the fee simple of all land in the Territory remains vested in the Commonwealth.[7] **Secondly**, the Planning and Land Management Act distinguishes between "National Land" and "Territory Land": ss. 27 and 28. **Thirdly**, by s. 28 of the Planning and Land Management Act "Territory Land" is any land in the Territory that "is not National Land". **Fourthly**, the powers of the ACT executive under the Planning and Management Act[8] extend only to Territory Land. **Fifthly**, National Land is managed by the Commonwealth Minister for Finance or by the National Capital Authority: ss. 4 of the *National Land Ordinance* 1989 and s. 6(g) of the Planning and Management Act. **Sixthly**, the ACT executive has responsibility for the management of Territory Land and (while the Commonwealth remains owner of the fee simple) may grant lesser estates or interests in that land: see s. 29 of the Planning Act and *Attorney-General (ACT) v Commonwealth* (1990) 26 FCR 82 at 86.[9] **Seventhly**, the ACT Legislative Assembly has power to make laws with respect to the exercise of those powers (concerning Territory Land) and the powers of the ACT executive are constrained by any such enactments: see s. 22(2) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Self-Government Act**) and s. 29(2) of the Planning and Land Management Act. It does not have powers to make laws in respect of National Land.

23. It is well established that the operation of general language in a statute should (unless a contrary intention appears) be confined to a subject matter under the "effective control" of the relevant legislature: see the principle of construction identified by in *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 423–4 Dixon J; *Wanganui Rangitikei Electric Power Board v Australian Mutual Provident Society,* (1934) 50 CLR 581 at 600-1 per Dixon J and *Meyer Heine Pty Limited v China Navigation Co Limited* (1966) 115 CLR 10 per Tayor J at 30-2.[10] For the reasons given in the preceding paragraph, the ACT legislature has no effective control over National Land – its powers are rather limited to Territory Land. As such, the word "land" in the UNFT Act is to be understood as confined to Territory Land, and does not extend to National Land. If the ACT legislature had intended to

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[7] See the *Seat of Government Surrender Act 1909* (NSW) and the *Seat of Government Acceptance Act 1909* (Cth).

[8] See definition of "Executive" in s. 4 of the Planning and Land Management Act, which refers, in turn to s. 3 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[9] Note also that those powers are to be exercised "on behalf of the Commonwealth".

[10] It may be that that principle is more readily displaced when one is dealing with legislatures of the Federation as opposed to those of nation states, particularly where there is some form of cooperative scheme or the legislation is directed to a mischief that is common between polities: see Pearce and Geddes *Statutory*

displace that principle, one would have expected it to have used clear words (see eg the express references to "National land" in ss. 107 and 233 of the Utilities Act and the definition of "Public land" in the dictionary to that Act). It could not be the case, in light of the particular arrangements for the ownership and management of land in the ACT described above, that any reference in an ACT statute to "land" is to be understood to include all land within the boundaries of the Territory.

24. Indeed, far from supporting the construction for which QCC contends, the terms of the UNFT Act point in the other direction. The words of the exception in s. 6(2)(b) of the UNFT Act suggest that the "land" to which the Act applies is land in respect of which the Territory may potentially grant a relevant licence. That is, land over which the ACT exercises some form of dominion. That necessarily excludes National Land (see the fourth, sixth and seventh propositions in paragraph [22] above).

The issue of "private land" is also irrelevant

25. Somewhat more tentatively, QCC suggests that the fact that the UNFT Act does not exclude "private" leasehold land also weighs against characterising the fee for the privilege identified above (AS [24] and [27]).

26. As submitted above, land in the ACT cannot be "privately" held in the sense of private persons acquiring the fee simple (which remains vested in the Commonwealth). It is rather held pursuant to leasehold interests: see the *Land (Planning and Environment) Act 1991* (ACT) and the now repealed *City Area Leases Act 1936* (ACT). However, even if land in the ACT were held under a different form of tenure, the legislative powers of the ACT legislature are sufficient to empower it to grant to persons in the position of ACTEW rights to use or occupy land held under "private" leasehold: see *Durham Holdings Pty Limited v New South Wales* (2001) 205 CLR 399 at [9]-[14], s. 22(1) and (2) of the Self-Government Act and s. 29(1) of the Planning and Land Management Act. That is what it has done. The UNFT is properly characterised as a charge or a fee for those rights. It matters not that that may involve an infringement of the owner's right of quiet possession (contra AS [27]). It is precisely because of the existence of such potentially competing rights that the rights securing the utility owner's rights to use and occupy land are of value and that the UNFT is properly regarded as the *quid pro quo* for those rights.

Interpretation in Australia (2006) Butterworths at 168-9 referring to *Dempster v NCSC* (1993) 10 ACSR 297. However, there are no such matters which would weigh against the application of the principle here.

27. It may also be noted (see above at para [8] regarding the definition of network boundary) that the extent of any encroachment by ACTEW's water network upon "private leasehold land" is unlikely to be significant.

Licence provisions of the Utilities Act

28. QCC also seeks to rely upon the proposition that ACTEW's right to operate its network facility depended upon the possession of a valid licence which was granted under the Utilities Act and did not depend upon the UNFT Act. QCC refers, in particular, to ss. 21, 44 and 45 of the Utilities Act (AS [30]). The difficulty with that reasoning is that (unlike the provisions of Part 7 of the Utilities Act referred to above) the provisions of the Utilities Act relied upon QCC do not relate to the use or occupation of land. The existence and locus of the right to operate the water network is immaterial to the whether the UNFT is properly characterised as a fee for the privilege of use and occupation of land.

29. The requirement in s. 21 of the Utilities Act for ACTEW to hold a licence is engaged by the fact that ACTEW provides certain "utility services".[11] It follows that the requirement to hold a licence under s. 21 of the Utilities Act applies regardless of whether ACTEW is otherwise entitled to place upon Territory Land the infrastructure comprising its "water network". For example, the requirement to obtain such a licence would apply even if the entirety of ACTEW's water network was located on land leased by ACTEW for that purpose.[12] Indeed, that is reflected in the licence fee payable by each utility, which is determined by the Independent Competition and Regulatory Commission ('**ICRC**') pursuant to s. 45 of the Utilities Act. By s. 45(2), the annual licence fee for a particular utility is the amount considered by the ICRC to be a reasonable contribution towards the costs of services provided by organs of the ACT government which are referable to ACTEW's utility service.[13] None of those matters concern the right to use or occupy Territory Land. Rather, those rights

[11] Relevantly, s. 11 provides that the following services are "utility services": (a) the collection or treatment of water, or both, for distribution through a water network; (b) making a water network available for the provision of water connection services; (c) the distribution of water through a water network; (d) a water connection service; and (e) the supply of water from a water network to premises for consumption.

[12] It follows that the reference to *Hematite* in AS [31] is not to the point.

[13] The costs of the chief executive in relation to the technical regulation of utilities under part 5 of the Utilities Act; (b) the exercise of the ICRC's functions in relation to utility services; and (c) until 2 February 2009, the costs of the Essential Services Consumer Council in relation to utility services (see parts 11 and 12 of the Utilities Act as in force prior to 2 February 2009). The requirement to have regard to the last mentioned cost item was omitted by the amendments made by the *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008 (No 2)* (see schedule 1, Part 1.103, item 1.520). Note also that since 22 December 2009 the ICRC has been required to have regard to the costs incurred or expected to be incurred by the ACT Civil and Administrative Tribunal ("ACAT") in hearing and deciding matters to which a utility is a party (see *Justice and Community Safety Legislation Amendment Act 2009 (No 4)*, schedule 1, part 1.6 and the functions of ACAT under Part 12 of the Utilities Act, as currently in force).

or privileges are the subject of the charge in the UNFT Act, which, on its face, operates directly on the length of such part of the network facility that is not the subject of relevant private rights or interests held by the utility.

30. The ACT Parliament has made the exercise of those rights or privileges subject to the payment of the UNFT. The UNFT Act creates a liability to pay the charge in respect of the network facility at the rate specified in s. 8. The time for payment is provided for in s. 51 of the Taxation Administration Act and, by s. 48, any amount unpaid may be recovered by the Commissioner. Knowing avoidance of the payment of UNFT is an offence: s. 65(1) of the Taxation Administration Act. The fact that non-payment does not have a direct nexus with the "right to operate" the water network is not to the point (cf the reasons of the trial judge at [135], extracted by QCC at AS [30]).

31. It is also immaterial that those rights and privileges are conferred by Part 7 of the Utilities Act, and are in that sense "separate" from the imposition of the UNFT (cf AS [30]). As QCC accepts, when it suits it to do so, the issue must be approached as a matter of substance, not form. It is similarly immaterial that those rights and privileges existed prior to the enactment of the UNFT Act (contra AS [30]). The same may be said of the right to exploit the Tasmanian abalone fisheries in *Harper*, which was formerly in the public domain: see at 325 and 334-5.

Revenue raising purpose

32. For the reasons given by ACTEW in its submissions regarding the WAC at [53]-[54], the material upon which QCC seeks to rely regarding "revenue raising purpose" at AS [32]-[36] is of little, if any, relevance to the question of whether the UNFT should be characterised as a tax. Consideration of what members of parliament understood regarding the initial proposals for the UNFT Act (or the evolution of those proposals) does not assist in ascertaining the Parliamentary purpose underlying the Act as passed. Even if they did, the ambiguous material there referred to could not be substituted for the text of the UNFT Act, which should be construed in the manner outlined above. The foundation for the judicial task remains the language of the Act and not extrinsic materials (particularly of that nature).[14] Revenue may be raised by taxes, by sale of property or by charging for rights, privileges or services. Any such purpose is therefore inherently inconclusive.

[14] *Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 126 [29] and *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

B Not, in any event, an excise

33. Even if it be assumed that the UNFT is a tax, QCC's appeal should be dismissed because the UNFT is not an excise.

General principles regarding the identification of excises

34. It is uncontroversial that duties of excise are a tax on a step in the production, manufacture, sale or distribution of goods (see AS [40]). It is also uncontroversial that that matter is to be approached as a matter of substance (see AS [42]). That is not a recent innovation which commenced with *Ha v New South Wales* (1997) 189 CLR 465. Such an approach was foreshadowed or adopted in earlier authorities of this Court,[15] including (of particular relevance to the current matter) the reasons of the majority in *Hematite Petroleum v Victoria* (1981) 151 CLR 599.[16]

35. The distinction between a tax which is an excise and one which is not is nevertheless an elusive one, which is not susceptible to sweeping statements of principle or bright line tests. The range of factors which were identified as potentially relevant to that question by Barwick CJ in *Anderson's*[17] illustrates that point. So too do the qualifications made by his Honour at the beginning of that passage – that is, that the potentially relevant factors identified by his Honour may not be present in every case and "may have different weight or different emphasis in different cases".

36. In distinguishing between an excise and a "mere licence fee" in the franchise fee cases, this Court has accepted the proposition enunciated by Kitto J that a distinction is to be drawn between an excise and a fee which:

> has no closer connexion with production or distribution than that it is exacted for the privilege of engaging in the process at all.[18]

37. That statement is undisturbed by the re-orientation in more recent authorities to a focus upon substance[19] and is not to be understood as some form of mechanical or formulaic test for excises.[20] What it rather does is point to the nature of the analysis which is to be

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[15] See eg *Peterswald v Bartley* (1904) 1 CLR 497 at 511; *Commonwealth and Oil Refineries Limited v South Australia* (1926) 38 CLR 408 at 423; Andersons Pty Limited v Victoria (1964) 111 CLR 353 at 365-6; *Gosford Meats Pty Limited v New South Wales* (1985) 155 CLR 368 (***Gosford Meats***) at 384 per Mason and Deane JJ; *Phillip Morris* at 433 per Mason CJ and Deane J.

[16] See at 633.5 and 634.4 Mason J; 639.8 Murphy J; 659.8 Brennan J; and 662.2, 667.9 and 668.6 Deane J.

[17] At 365.

[18] See *Dennis Hotels* (1960) 104 CLR 529 (***Dennis Hotels***) at 560.

[19] Kitto J's statement was adopted or applied, for example, in *Gosford Meats Pty Limited v New South Wales* (1985) 155 CLR 368 at 404 per Brennan J; *Phillip Morris* at 435-6 per Mason CJ and Deane J and at 445-6, 453, 456-7 and 460-1 per Brennan J. It was also cited with apparent approval in *Ha* at 501.

[20] See, in particular, the suggested approach of Mason CJ and Deane J in *Phillip Morris* at 435-6.

undertaken more generally in distinguishing excises from other taxes. One is to scrutinise the various factors relevant to whether a tax is an excise (including those identified by Barwick CJ in *Andersons*) in order to assess the "closeness of the connection" or relationship between the tax and a step in the production, manufacture, sale or distribution of the relevant commodity.[21] That, self evidently, involves matters of degree.[22]

38. There is, for example, some degree of connexion between a payroll tax exacted from a manufacturer of widgets and the production and manufacture of those widgets, in the sense that a greater number of staff will tend to be required as the rate of widget production rises. Yet that relationship is plainly insufficient to render a payroll tax an excise: see the comments of Mason CJ, Brennan and McHugh JJ in *Mutual Pools v Staff Pty Limited v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454 (a point which QCC correctly accepts – at AS [79]). Nor, without more, will a land tax bear a sufficient connection or relationship: *Mutual Pools*, ibid per Mason CJ, Brennan and McHugh JJ and see *Ex p Clyne; re Richter* (1966) ALR 583. That is so even though a generally applicable land tax will apply to land used for production of commodities.

39. The difficulty for QCC is that any such relationship that exists between the exaction and production or distribution of water in the current matter is similarly weak and not sufficient for the purposes of s. 90.

Significance of Hematite

40. In the Full Court below, QCC relied chiefly upon bringing the facts of this matter within what was held in *Hematite*.[23] It was only in that sense (and then only by QCC) that *Hematite* was used as a "template" (cf AS [44]). No criticism can attach to the Full Court for dealing with those arguments. Indeed, although disavowing use of *Hematite* in that way, QCC makes extensive submissions in this Court seeking to bring itself within that authority.[24]

41. The importance of *Hematite*, for current purposes, should be understood in light of the principles outlined above. It provides an illustration of the matters which may, in a case such as the present, indicate that there is a sufficiently close connection or relationship between the impugned exaction and a step in the production or distribution of the relevant commodity.

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[21] *Phillip Morris* at 435-6 per Mason CJ and Deane J and at 453 per Brennan J.
[22] Ibid, per Mason CJ and Deane J.
[23] See eg QCC's submissions before the Full Court at paras [79], [81], [83]-[84], [94]-[97], [104]-[105] and [111].
[24] See at AS [47], [50], [60], [70], [77]-[78].

42. However, as Professor Lane has observed, *Hematite* was a "special" case,[25] turning on unique facts which are very different to those of the present matter. That is certainly how it has been understood in more recent authorities. For example, in *Airservices Australia v Canadian Airlines International Limited* (1999) 202 CLR 133 (***Airservices***) at [88], 177 Gleeson CJ and Kirby J summarised the nature of the exaction in issue in *Hematite* as follows:

> It was "an enormous impost laid directly by the legislature on three specified pipelines" [citing the reasons of Wilson J at 647]. It was a means of raising revenue from the production of oil.

10 43. As to the "enormous" magnitude of the impost, the effect of the amendment impugned in *Hematite* was to alter the magnitude of the fee from $35 or $40 per kilometre (the generally applicable licence fee) to $10 million (applicable only to the three trunk pipelines, which carried liquid hydrocarbons).[26] It was those features in particular which pointed to the existence of a relationship between the impost and a step in the production or distribution of the liquid hydrocarbons conveyed through the pipes.[27] The only explanation for that otherwise inexplicable singling out of the hydrocarbon carrying pipeline was that the "fee was imposed in virtue of the quantity and value of the hydrocarbons produced" and was a "convenient means of taxing what [the pipelines] convey".[28]

44. However, no such features exist here which would point to the existence of a
20 relationship between the UNFT and the process of production or distribution of water.

45. That was the very point made by Keane CJ at [138], where his Honour observed (in terms that bear repeating):

> In *Hematite*, the principal feature of the legislative scheme by reason of which the incidence of the licence fee could be seen to fall on the step of transporting the hydrocarbons in the course of their production was the vast disparity between the fee for the pipeline carrying the hydrocarbons and the fees charged in respect of other pipelines: it was the activity of transporting the hydrocarbons that attracted the impost the size of which was inexplicable otherwise than by reference to that activity. Insofar as the trial judge in this case ignored the circumstance that the UNFT does not select
30 the water network for special treatment, his Honour failed to appreciate the point that, in the present case, an indicator that the water in the network was, as a matter of substance, the target of the UNFT was absent.

46. Those were the matters to which his Honour was referring when he said, in the immediately preceding paragraph "there is no relationship **at all** between the UNFT and the

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[25] PH Lane, *Lane's Commentary on the Australian Constitution* 2nd edition LBC 1997 at 682.
[26] See at 613 per Gibbs CJ.
[27] See particularly Mason J at 634 and Deane J at 667-8.
[28] Mason J at 634-5. The submissions of the appellant at AS[50] overlook the context in which that passage of his Honour's reasons appears.

quantity or value of water which passes through the network" (original emphasis). It seems to be suggested by QCC that his Honour was there overlooking the fact that the requisite relationship for the purposes of s90 need not be a precise arithmetic one (AS [65]). Although the absence of such a relationship is important,[29] his Honour plainly did not confine himself to such an analysis (see at [137] - "there is not only no arithmetical relationship..."). His Honour was rather directing himself to the absence of any matters of substance (akin to the unusual features of *Hematite*) which would allow him to conclude that the fee was a convenient means of taxing what was conveyed.

Levy is on ownership and not on operation

10 47. QCC's difficulties in establishing the requisite relationship may be seen to stem from a more fundamental problem (identified by Keane CJ at [136], [139] and [145]-[151]): that is, that the UNFT falls indiscriminately upon the ownership of a network facility on particular land: s. 8(1) of the UNFT Act and see also the definition of "owner" in the dictionary. It is not determined by reference to the operation of the facility, and is therefore one step removed from the process of production and distribution: compare *Hematite* at 634-5 per Mason J, 659 per Brennan J and 668 per Deane J. Indeed, it is notable that QCC seeks to elide between those two quite different concepts. At AS [50] QCC identifies the relevant step in the production and distribution of water as being the "use" of the pipelines. But nowhere, apart from the assertion in AS [50], does QCC explain how it is that the UNFT Act levies an
20 exaction upon that step as opposed to the ownership of specified infrastructure on certain land.

48. As submitted above, the essence of the inquiry for the purposes of s. 90 requires consideration of the closeness of the connection between the exaction and the process of production, manufacture, sale or distribution. Unless it happens to be the case that the owner and operator of a network are the same person, the person who is liable to pay the UNFT will have no role or interest in the production, manufacture or distribution of any commodities carried via the network. A tax upon ownership of the network is, at best, peripheral to those processes.

49. That is not merely a matter of form (cf AS [57]). In approaching the issues in
30 *Hematite* on the "broader" substantive basis, Brennan J described the fact that the exaction was imposed upon the "operation" of the pipelines as the "determinative fact": at 659.8, see

[29] The form of the legislation, of course, remains a relevant (although not decisive) factor when considering whether an exaction is an excise – see eg *Andersons* at 365.

also the reasons of Mason J at 634 (the second "significant feature") and of Deane J at 668. Indeed, the practical operation of the fee in the current matter illustrates the importance of that distinction as a substantive matter. Although ACTEW is the holder of the relevant utilities licence, the day to day operation of ACTEW's water network is undertaken by a partnership known as "ActewAGL Distribution", being a partnership between Jemena Networks Pty Limited and Actew Distribution Limited (a wholly owned subsidiary of ACTEW): see para 9 of Mr Knee's affidavit of 29 August 2008, which evidence was uncontroverted. QCC's appeal to "basic practice all over Australia" (AS [56]) is overstated.

50. Further, the authorities of this Court (including those upon which QCC seeks to rely) do not support the proposition that a levy on the ownership of a productive asset (without more) is sufficiently close to the activity of production, manufacture or distribution, of goods to be regarded as an excise: see Keane CJ at [145].

51. One starts with the example of a land tax. As QCC correctly observes, a tax may contravene s. 90, even though it is not in every instance an excise.[30] Yet, it has never been suggested that a land tax is an excise in its application to the owner of a factory or (for that matter) in its application to the owner of land devoted to the carrying of commodities via pipelines:[31] see again *Mutual Pools*. The relationship with what is produced is simply not sufficiently close.

52. The position is no different where the levy is exacted by reference to the ownership of infrastructure placed on land, even if it is used for production or distribution of commodities. It is of some significance, in that regard, that the scheme in *Hematite* involved a further fee for the granting of a separate permit which did authorise the plaintiffs to own the pipeline: see para 4 of the statement of claim (at p601) and ss. 8 and 12 of the *Pipelines Act 1967* (Vic) (as then in force). Nowhere was it suggested that that fee was a duty of excise. Again, the relationship with what is produced or distributed in such a case is not sufficiently close.

53. *Matthews v Chicory Marketing Board (Vic)*,[32] on which the applicant relies, is, in fact, consistent with those propositions. The impugned levy in that case was payable by each chicory producer in respect of the area that that person planted. In such a case there is a "natural, although not necessary" relationship with the quantity of the commodity produced,

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[30] See eg *Western Australia v Chamberlain Industries Pty Limited* (1970) 121 CLR 1 at 15 per Barwick CJ and *Logan Downs Pty Limited v Queensland* (1977) 137 CLR 59 at 71 and 78.

[31] Such land would, for example, prima facie fall within the definition of "commercial land" under the *Land Tax Act 2004* (ACT) (s9(4)) and the owner would be liable to pay land tax in respect of that land (ss. 9(1) and 17).

[32] (1938) 60 CLR 263.

such that the tax "bear(s) a close relationship" to production of goods.[33] But, as submitted above, such a relationship would not be disclosed in the case of a land tax, in so far as it applies to land owned by a chicory producer. Nor would, for example, such a relationship exist in the case of a registration fee in respect of ownership of tractors used to plant the crop or the trucks used to carry it. Indeed, as Perram J observed, at [180], that would be so even if such a fee was determined by reference to the "potential load which could be carried by a truck and the number of miles travelled", referring to *Hughes v Vale*.[34] The position is even plainer in the current matter, where there is no equivalent to "potential load" and the exaction is applied uniformly to different networks regardless of the nature, weight, value or quantity of the commodities carried (see Dixon CJ at 75 and contra AS [66]).

54. *Logan Downs* takes QCC no further (cf AS [54]). The tax on livestock in that matter fell upon things that were themselves articles of production,[35] or at least the things that were to be converted to a product.[36] As in *Matthews*, there was an obvious or natural relationship with the value or quantity of what was produced. In contrast, the relevance of the ownership of the water network to those matters in the current case is not at all apparent. There is no trade in network facilities: see Keane CJ at [151].

Other matters present in Hematite and absent from the current matter

55. As Keane CJ observed (at [136]) the facts of *Hematite* are distinguishable from the current matter on a number of bases, including but not limited to those identified above (the magnitude and discriminatory nature of the fee and the fact that it falls upon ownership). QCC takes issue with each step of his Honour's reasoning (at [81]), but for the following reasons, its submissions should be rejected.

56. As to the **first point of distinction** (that the fee is payable by the owner rather than the operator), for the reasons given above his Honour was correct to regard that as a significant point of distinction (particularly when Brennan J described it as the "determinative fact").

57. As to the **second**, for the reasons given at [15]-[31] above, there is no difficulty with his Honour's conclusion that the UNFT was imposed by reference to the conferral of the right to use and occupy land. As his Honour observed, in contrast Mason J attributed significance to the fact that the taxpayer in *Hematite* was otherwise entitled to use the pipeline, having obtained the separate permit referred to above: at 634 (the second "significant feature").

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[33] *Matthews* at 303 and 304 per Dixon J.
[34] (1953) 87 CLR 49 per Dixon CJ at 75, with whom Williams J (at 87) and Webb J (at 90) agreed.
[35] See Stephen J at 70.
[36] See Mason J, with whom Barwick CJ agreed, at 78.

58. As to the **third** (that the impost is referrable to the length of the land occupied) QCC argues that, nevertheless, there is some form of relationship with the value or quantity of the water carried (relying upon the two arguments outlined above). For the reasons given at [63]-[72] below, those matters do not demonstrate a sufficiently close connection or relationship for the purposes of s. 90.

59. QCC argues that the **fourth point of distinction** involves the erection of a new test in lieu of an analysis of the relationship between the exaction and the process of production, manufacture, sale or distribution. His Honour was suggesting no such thing. That is apparent from the fact that he proceeded, in the next three paragraphs ([137]-[138]) to deal with the absence of any such relationship in the current matter.

60. QCC argues that the **fifth point of distinction** (the fee is not a condition upon the transportation of water) is a matter of "form, not substance". However, again, that was a matter which was significant in the substantive analysis of the fee in *Hematite*: see particularly Mason J at 634 (the fourth "significant feature") and Deane J at 669.

61. As to the **sixth point of distinction**, the significance of the absence of any discrimination is two-fold. First, as submitted above, the singling out of the trunk pipelines (together with the enormous magnitude of the fee) was at the heart of the reasoning in *Hematite*. Secondly, it is a further matter which indicates that there is no sufficient connection between the UNFT and the value or quantity of what was carried (contra AS [58]-[65]). The UNFT Act applies uniformly to all "utility networks"- electricity transmission networks, electricity networks for the distribution of electricity, gas transmission networks, gas distribution networks, sewerage networks, telecommunications networks any other network prescribed by regulation – see s. 7 of the UNFT Act. It is plain that the value (if any) of the goods or commodities (if they be such) conveyed by each of those networks is likely to be substantially different at any given point in time and that their quantity will fluctuate over time. Nevertheless, the owner of each network will pay the same rate of UNFT: see ss. 6 and 8 of the UNFT Act. Neither *Chamberlain Industries* nor *Logan Downs* require that the Court ignore those relevant matters (an error made by the primary judge, acting upon the submissions of QCC[37]).

62. As Mason J made clear (at 634) it was the coexistence of those various matters which led to the conclusion that the fee was an excise. The absence of all or almost all of those features here indicates that the current facts are quite remote from that "special" case.

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[37] See at [160]-[162].

The matters said by QCC to establish the requisite relationship are not sufficient

63. That is not to say that matters other than those considered significant in *Hematite* may not point to a relationship between the impost and the process of production and distribution of water. But, those upon which QCC seeks to rely are not at all compelling.

64. First, it is said, one need look no further than the terms of the statute, which are said to disclose a relationship with the water conveyed. QCC relies in that regard upon a passage from Mason J's reasons in *Hematite* at 635. That passage requires close attention. His Honour there noted that the definition of the term "trunk pipeline" made "specific mention" of the pipeline licence numbers issued in relation to each of the hydrocarbon carrying pipelines. That incorporated by reference the terms of the pipeline licences, which in turn referred to hydrocarbons. But that needs to be understood in light of the matters referred to above – that was the mechanism by which the hydrocarbon carrying pipelines were singled out for special treatment (hence his Honour's emphasis on the fact that they were "specifically mentioned"), that matter being at the heart of the conclusion that the requisite relationship existed.

65. QCC's argument really comes down to the proposition that a sufficient relationship is established by the fact that the UNFT Act refers to a "water network" in s7, which term is defined by reference to the Utilities Act (see s. 12(2) of that Act). However, on that argument, the licence fee levied under s45 of the Utilities Act would be equally vulnerable to s90, the term "utility" in that section also being tied to s. 12: see the definition of "utility" in the dictionary and the definition of the relevant "utility services" in s. 11. Indeed, although more remote, such a relationship might similarly be said to arise from the provisions of the *Taxation (Government Business Enterprises) Act 2003* (ACT) (see s. 9) and the *Taxation (Government Business Enterprises) Regulation 2003* (ACT) (see clause 3), which specify that ACTEW (being the owner of the water network) is liable to pay taxes, fees and charges under Territory law.

66. The fact that a statute makes direct or indirect reference to the infrastructure used to carry a commodity is simply insufficient to establish that an exaction is on a step in production or distribution for the purposes of s. 90. If the position were otherwise, it would involve a new species of formalism. Further, there would have been no need for the majority in *Hematite* to engage in the detailed analysis of the substance of the fee, the issues instead being foreclosed by the form of the statute.

67. The only other matter to which QCC points to establish the requisite relationship is the fact that the UNFT is imposed upon a per kilometre basis (see s. 8(1) and the definition of

"route length" in the dictionary). It is said that, as such, there is a nexus between the volume of water produced and distributed and the amount of the fee. QCC places particular reliance upon the "self evident" fact that more pipeline is required to service more customers and that as Canberra grows new pipeline will need to be laid to service additional water consumers.

68. There are a number of difficulties with that argument.

69. First, "volume" depends critically upon the internal width of the pipe, as well as its length. Yet the UNFT Act treats all pipes, wide and narrow bore, alike.

70. Secondly, as QCC concedes (AS 64.4), there is considerable variation in the volume of water flowing through the network, as is demonstrated by the following table showing total water consumption over time:[38]

YEAR	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
ML	73,001	60,361	57,929	62,834	65,928	65,567	52,258	51,719	59,077	51,060	43,556

71. The period 2003-2008 is of particular significance to the argument put by QCC regarding the need for additional pipeline as Canberra grows. Assuming that to be so (that not being a matter QCC sought to prove below), had the UNFT been payable for that 5 year period[39] ACTEW would have been paying progressively larger amounts of UNFT in a period where the volume of water used decreased (save for the 2005/2006 period). Moreover, as submitted above, UNFT is and was payable on exactly the same basis as the fees paid by all other "utility networks", for whom the (variable) volume of the water in ACTEW's water network has no meaning at all.

72. Taken together, those matters indicate that any relationship between the UNFT and the volume of the water in ACTEW's water network is, at most, very weak. The "relationship", such as it is, is analogous to the case of the payroll tax discussed above. A payroll tax applied to ACTEW (or the relevant subsidiary operating the water network) would equally be expected to increase as Canberra grows and the number of consumers of water increases. In particular, one would expect more staff to be required to maintain the network. Yet, as was made clear in *Mutual Pools*, such a relationship will not be sufficient for the purposes of s. 90. Nor do the matters to which QCC points at AS [79.1] avoid that difficulty – both the UNFT

[38] See at Exhibit R2 in the Federal Court of Australia - ACTEW'S Basic Statistic about undated Consumption and Storage.

[39] The UNFT was of course only payable from 1 January 2007.

and a payroll tax apply uniformly to a disparate range of entities producing a wide "range of goods and services".

Entry into price/passing on

73. QCC also seeks to rely upon inferences regarding the "intention" of the ACT (which appears, from the context, to be a reference to the "intention" of some or all of the members of the ACT legislature) ([74]); the actions of the ACT Executive ([73]), and the accounting practices of ACTEW ([75]) for the proposition that "the UNFT was always intended to be, was permitted to be and was passed on to consumers" (AS [72]).

74. Such matters could not bear upon the issue of whether the UNFT is a duty of excise. The legislature's purposes or intentions as regards the raising of revenue is of little if any relevance to the characterisation of a charge as a tax (see above). What the legislature did or did not think about who would ultimately bear the costs of a levy is equally irrelevant to the question of whether it is a duty of excise. Still less could the actions or intentions of ACTEW or the ACT Executive be relevant to the determination of such matters. The UNFT was either valid or invalid when enacted. Subsequent action (be it on the part of ACTEW or the ACT government) could not render the UNFT Act invalid if it was valid when enacted. Indeed, QCC's reference to what was "intended by the ACT" (at [74]) may suggest some confusion as to the respective roles of the executive and the legislature. In either case, nothing said in *Hematite* by Deane J at 668 or Mason J at 634 suggests that the material upon which QCC relies is relevant in the context of s. 90 – their Honours' reasons rather refer to the objective features of the legislation, such as the magnitude of the levy and its recurrent nature.

75. Further, Keane CJ (at [140]-[142]) was undoubtedly correct in observing that the passage from Mason J's reasons extracted at AS [70] is apt to be misunderstood if read in isolation or out of context. In particular, that passage does not (properly analysed) support the proposition that it is sufficient that a tax is likely to be passed on to consumers in order to characterise the tax as an excise (an error which, as Keane CJ held, had been made by the primary judge). Nor does regard to the object of s. 90 suggest that that is the case: see again, *Mutual Pools* and the examples of capital gains tax, payroll tax and land tax, all of which have the potential to enter into the price of a commodity. A fee is just another cost which trading conditions may permit to be passed on in full or in part. "Indirectness" has never been more than "one factor" in favour of characterising an exaction as an excise[40] (and, even then,

[40] *Dennis Hotels* at 590 per Menzies J and the authorities there referred to. See also *Anderson's* at 365 per Barwick CJ.

one which has difficulties[41]) and the same is true of the related notion of entry into price. There is nothing to indicate that Keane CJ failed to consider those matters (contra AS [79]).

76. For the reasons above, QCC's appeal should be dismissed with costs.

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[41] *Dennis Hotels* at 553 per Fullagar J and 590 per Menzies J; *Dickenson's Arcade Pty Limited v Tasmania* (1974) 130 CLR 177 at 222-3 per Gibbs J and *Phillip Morris* at 435 per Mason CJ and Brennan J.