IN THE HIGH COURT OF AUSTRALIA
CANBERRA OFFICE OF THE REGISTRY

No. C3 of 2011

BETWEEN:

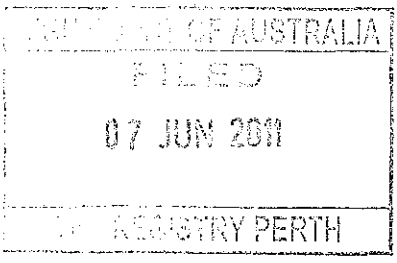
QUEANBEYAN CITY COUNCIL
Appellant

and

ACTEW CORPORATION LTD
First Respondent

and

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent



WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

(RE UTILITIES NETWORK FACILITIES TAX)

Date of Document 3 June 2011

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PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Western Australia intervenes pursuant to s 78B(1) *Judiciary Act* 1903 (Cth).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: APPLICABLE LEGISLATION

4. The legislation applicable to the determination of this matter is set out in the submissions of the Appellant and the Respondents.

PART V: CONTENTIONS

5. Western Australia adopts the submissions of the Respondents in relation to the legal principles applicable to whether the Utilities Network Facilities Tax ("UNFT") is a tax or, if it is a tax, whether it is a duty of excise.

6. Western Australia makes the following supplementary submissions.

7. Duties of excise are taxes on the production, manufacture, sale or distribution of goods. They: [1]

> ". . . are inland taxes in contradistinction from duties of customs which are taxes on the importation of goods. Both are taxes on goods, that is to say, they are taxes on some step taken in dealing with goods."

8. In characterising whether a tax is an excise considerations of substance and effect are required to be taken into account, as well as the terms of the statute.[2] Consideration is required to be given to a range of factors which may vary from case to case, none of which is necessarily decisive. This is done with a view to determining the nature and extent of any connection between the tax and a relevant step and whether "the tax is in substance a tax upon the relevant step".[3]

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1 *Ha v NSW* (1997) 189 CLR 465 at 499 per Brennan CJ, McHugh, Gummow and Kirby JJ.
2 *Ha v NSW* (1997) 189 CLR 465 at 498-499 per Brennan CJ, McHugh, Gummow and Kirby JJ.
3 *Anderson's Pty Ltd v Victoria* (1964) 111 CLR 353 at 365 per Barwick CJ; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 436 per Mason CJ and Deane J.

9. In ascertaining whether a tax is imposed upon or in respect of goods the presence or absence of a proportionate relationship between the tax and the amount or value of goods is a relevant but not determinative factor.[4] No arithmetical relationship is required to be established.[5] In certain circumstances a charge can also be characterised as an excise if it has a "natural, although not a necessary, relation"[6] to the quantity or value of the goods.

10. Mason J observed in *Hematite Petroleum Pty Ltd v Victoria* that:[7]

> "To justify the conclusion that the tax is upon or in respect of the goods it is enough that the tax is such that it enters into the cost of goods and is therefore reflected in the prices at which the goods are subsequently sold."

11. Read in the context of Mason J's overall reasons for decision, that observation does not support a proposition that it is sufficient to characterise a tax as an excise merely because it enters into the costs of goods and their prices when sold.

12. To the contrary, in *Ha v NSW* [8] Brennan CJ, McHugh, Gummow and Kirby JJ acknowledged that the States retain taxing powers which might affect the costs of production and enter into the price to consumers. The fact that a tax may enter the cost of goods is but one factor of possible relevance to the characterisation process.

13. A variety of resources may need to be assembled to enable the process of production, manufacture, sale or distribution of goods to be engaged in. They range from the physical infrastructure and land on which a business may be situated to the human resources required in the process.

14. A tax on a resource (unless it is itself a good) is not to be characterised as a tax on some step taken in dealing with goods (such as production, manufacture, sale or distribution) merely on that account.

15. That a tax may be imposed on a resource does not, without more, establish a sufficient connection to a step in the process for it to be an excise. If that were the case, taxes such as payroll tax and land tax would be excises, which plainly they

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4 *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 657 per Brennan J.
5 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 304 per Dixon J; *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 632 per Mason J, at 657 per Brennan J.
6 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303 per Dixon J.
7 *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 632 per Mason J.
8 *Ha v NSW* (1997) 189 CLR 465 at 497 per Brennan CJ, McHugh, Gummow and Kirby JJ.

are not.[9] This is so despite the potential for the amount of each tax to have a fairly direct relation to the quantity or value of goods that a business might produce. For example, if a business that is dependent on labour, such as a fruit picking business, increases production and employs more labourers, its payroll tax will increase. Equally, if a business that is dependent on land, such as a farm, expands and acquires more land for use in its business, its land tax will increase. The taxes may well flow through to the cost of the goods yet in neither case would the taxes be excises.

16. It follows that a tax imposed on the owner of a pipeline utilised in the production or distribution of goods would not, without more, bear a sufficiently close relationship to a step in the production or distribution process to render the tax an excise.

17. The decisions of *Matthews v Chicory Marketing Board (Vict)*[10] and *Logan Downs Pty Ltd v Queensland* are consistent with that proposition.[11]

18. In *Matthews v Chicory Marketing Board (Vict)* a tax payable in respect of the area planted by a producer was held to be an excise. It was of significance to that decision that the tax was payable by the chicory producer and that there was: [12]

> ". . . no distinction of substance, and scarcely any even of form, between levying a tax upon the area planted and levying a tax upon the act of planting the area."

19. In *Logan Downs Pty Ltd v Queensland* a tax was imposed on owners of livestock in respect of the number of stock held. Whilst the tax was held to be an excise in relation to certain categories of stock, it was of significance that those stock were themselves "articles of commerce in the stream of production", being livestock to be used for their product.[13]

20. Where a tax is imposed by reference to the length of the pipe (or length of pipe on particular land), ordinarily it is not to be expected that it would bear a close or "natural, although not a necessary" relation to the volume of material flowing through the pipe. Rather, it is to be expected that it would be a more remote

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9 *Mutual Pools v Staff Pty Ltd v Federal Commissioner of Taxation* (1992) 173 CLR 450 at 454 per Mason CJ, Brennan and McHugh JJ.

10 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263.

11 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59.

12 *Matthews v Chicory Marketing Board (Vict)* (1938) 60 CLR 263 at 303 per Dixon J.

13 *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 70 per Stephen J, at 78 per Mason J (Barwick CJ agreeing).

connection. Reasons for this include the likelihood of the volume of material flowing through the pipe being affected by factors unrelated to the length of the pipe, such as the width of the pipe, rate of flow through the pipe and varying consumer demand, and the length of pipe being affected by factors unrelated to the volume of material flowing through the pipe, such as the distance between the source of supply and consumers.

21. The relationship is even more remote than existed in *Hughes and Vale Pty Ltd v NSW*.[14] There a charge levied on road transport companies calculated by reference to the weight of a vehicle and weight it could carry, and the distance it travelled, was held not to be an excise but "a tax on the carrier because he carries goods by motor vehicle".[15]

22. Whilst in *Hematite Petroleum Pty Ltd v Victoria*[16] it was held that a licence fee imposed in relation to a pipeline carrying hydrocarbons was an excise, the facts of the case were exceptional. In particular, a critical factor in the decision was the magnitude of the selective $10 million fee imposed in relation to pipelines that carried hydrocarbons, compared to the minimal fee imposed in relation to other pipelines. As Mason J concluded:[17]

> "The fee . . . is an exaction of such magnitude imposed in respect of a step in production in such circumstances that it is explicable only on the footing that it is imposed in virtue of the quantity and value of the hydrocarbons produced . . ."

DATED: 3 June 2011

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14 *Hughes and Vale Pty Ltd v NSW* (1953) 87 CLR 49.

15 *Hughes and Vale Pty Ltd v NSW* (1953) 87 CLR 49 at [75] per Dixon CJ (Williams J agreeing at [87]).

16 *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 634-635 per Mason J, at 659 per Brennan CJ, at 669 per Deane J.

17 *Hematite Petroleum Pty Ltd v Victoria* (1982) 151 CLR 599 at 634-635 per Mason J (see also at 659 per Brennan CJ, at 667-668 per Deane J).