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

ON APPEAL FROM THE FULL COURT, FEDERAL COURT OF AUSTRALIA

BETWEEN:

QUEANBEYAN CITY COUNCIL
Appellant

ACTEW CORPORATION LIMITED
First Respondent

AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)
Second Respondent

APPELLANT'S REPLY
(*Re Utilities Network Facilities Tax*)

Filed on behalf of the Appellant on 7 June 2011 by:
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1. These submissions are in a form suitable for publication on the internet.

A. THE UNFT IS A TAX

Not a payment for the privilege of using/occupying Territory land

2. The Respondents argue that the UNFT "is a charge for the right to use and occupy land conferred by the provisions of Part 7 of the Utilities Act": ACTEW, [15]; see also ACT, [15] and [21]-[26]. The ACT refers at [19] to the original Budget announcement that the ACT would introduce a fee for a "utility land use permit". But, when the UNFT Act was enacted, it involved no such permit and no such fee.

3. The Respondents argue that the ACT was entitled to and did charge for providing the right to use and occupy private leasehold land. Yet the key right in this respect must be the right to install network facilities on private leasehold land – a right granted by s 105 of the *Utilities Act 2000*. Pursuant to s 105(3), a utility may not exercise that right on land it does not own, unless either "it owns an appropriate interest in the land" or "the owner of the land agrees to the undertaking". The reference to "owner" here extends to the owner of private leasehold interests (so much is evident from the context, and the definitions of "owner", "premises", "land-holder", "private land" and "public land"). Rights to maintain the facilities (under s 106) are necessarily secondary to the right of installation and, in any event, require notification to the land-holder before being exercised (s 109).

4. Thus the *Utilities Act* does not confer a right on utilities to install network infrastructure on private leasehold land – the installation depends on the consent of the leasehold owner, or on the existence of an easement or other right in favour of the utility. Thus, the ACT (on the Respondents' argument) is charging for a right which it has not given, and which it has no power to give on its own statutory scheme.

5. Insofar as the charge is said to be a *quid pro quo*, the Respondents supplied no evidence that the amount was calculated by reference to any actual costs of or value of access for maintenance purposes, or any benefits of installing infrastructure.[1] The UNFT continues to rise: see QCC's primary submissions, [6]. Further, the UNFT is calculated on a one-dimensional measure of length. It is not calculated on a two-dimensional measure of the area of land occupied by network infrastructure.

6. At [26], ACTEW invokes *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399 to assert that the ACT's legislative powers "are sufficient to empower it to grant to persons in the position of ACTEW rights to use or occupy land held under 'private' leasehold land". Not so – the ACT legislature is, unlike the States, subject to a "just terms" guarantee: *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a).

7. The Respondents seek to make something of the land tenure in the ACT. Yet neither has disputed that such leasehold interests would, at the least, carry with them the right to quiet enjoyment: QCC's primary submissions, [27]. Rather, ACTEW says at [26]: "It matters not that [what has occurred] may involve an infringement of the owner's right of quiet possession." That argument illustrates the substance of the

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[1] Cf *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 at 467.

matter: the ACT's leasehold system is of no real significance to this argument. The Respondents say that the ACT is entitled to charge for exercising its legislative powers, so as to infringe on or give away the rights of other property-holders. To charge for that exercise cannot be characterised as anything like a fee for a service.

8. ACTEW asserts that the encroachment on private leasehold land is unlikely to be significant because the Code identifies the boundary of the network as typically 1m inside the boundary: at [8] and [27]. The Code provision refers to the boundary of the network ending at the connection point. It does not address the commonplace fact that network pipes from which the connection is taken often cross private leasehold land, by running parallel to a back-fence between two lines of properties.[2]

9. Both Respondents submit that the terms of the UNFT Act – especially "route length" – should be construed as not applying to National Land, on the basis that "the ACT has no effective control over National Land": ACTEW; [23]; also ACT, [24]. Yet the ACT need not have legislative control over such land in order to impose a tax on local networks by a criterion which encompasses some land outside its control.

10. The Respondents seek to read a limitation into the UNFT Act not supported by the text, nor required by constitutional principle. Neither Respondent mentions s 107 of the *Utilities Act*, which states that functions exercisable under that Part "are exercisable in relation to National Land only by agreement with the Commonwealth" – it was contemplated that utility networks would run over National Land.

11. The ACT argues at [24.3], in effect, that National Land cannot have been meant to be included, given that the references to a network facility "on land in the ACT" must refer to a facility "that is capable of being the subject of a lease or licence granted by the Territory in favour of the utility", implicitly referring to the exclusions in s 6(2) of the UNFT Act. However, although s 6(2)(b) does refer to "a licence *granted by the Territory*", s 6(2)(a) and (c) are not so limited.

12. The ACT asserts at [24.4] that "here there is no doubt that the UNFT is applied to a facility owned by ACTEW located on Territory, as opposed to National Land". However:

    12.1. whether National Land was included in the calculations in practice was a matter within the Respondents' knowledge, not QCC's; the matter was always in issue; it was for example addressed in opening at the trial;[3]

    12.2. QCC had sought documents relevant to this issue, which ACTEW refused to produce; and

    12.3. counsel for ACTEW said the following at trial (transcript 431):

> aside the facts – and your Honour doesn't have any facts as to how much as a percentage the national land may be within the section 6 network facility, and your Honour equally doesn't have any facts as to how much, if any, of what I have called leased Territory land is within the network facility in section 6 – but, in my submission, when one

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2 Illustrated in ACTEW's diagram at AB 1609.

3 Transcript 16-21.

> looks at the statutory rights that are conferred, one can well conclude that the Territory may charge the network facility, the owner of the network facility, for those rights or privileges, whether it is leased Territory land, unleased Territory land, or national land.

A revenue-raising purpose

13. ACTEW responds to the evidence of the ACT's revenue-raising purpose (see QCC's primary submissions, [34]) by saying that "the ambiguous material" referred to "could not be substituted for the text": ACTEW, [32]. QCC suggests no such thing. The material is not ambiguous, reveals a clear purpose, and to assert that that purpose is of "little, if any, relevance" to the characterisation of a charge as a tax is contrary to authority. There is no authority that a Court should exclude evidence of parliamentary intention when characterising a statute: cf ACTEW, [32]. The Court can have regard to extrinsic materials when analysing laws said to infringe s 90.[4]

B. THE UNFT IS AN EXCISE

A tax on an essential step in production or distribution

14. Both Respondents emphasise the fact that the UNFT is imposed on the owner, not operator, of a network facility. Here, they are the same person. The Respondents are dismissive of this point: "the owner of the network happened also to be the operator": ACT, [64]; see also ACTEW, [48]. This is no mere chance. Water networks are not the type of thing readily bought and sold and are in the nature of a natural monopoly. The substance of the matter cannot simply be dismissed.

15. ACTEW asserts at [49] that, in fact, the "day to day operation of ACTEW's water network is undertaken by a partnership" between an ACTEW subsidiary and a Jemena company. Whoever may provide the staff, it is clear that ACTEW is the operator of the network: ACTEW holds the utilities licence: as it concedes at [49]; and it supplied consumers (it was the party to QCC's supply contracts).

16. ACTEW suggests at [47] that QCC elides the distinction between ownership and use of the pipelines. However, as QCC set out at [45]-[49] of its primary submissions, the link is evident because:

    16.1. use of the pipelines is a practical necessity in both the production and distribution of potable water (at [60] the ACT claims there was no evidence for this, but it does not actually suggest to the contrary);

    16.2. the pipelines are exclusively used to those ends;

    16.3. here, the owner of the water network also operates the pipelines and produces the potable water; and

    16.4. even if there was a difference between owner and operator, the operator would need to pay the owner for use.

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[4] See, for example, *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 493); note also *Sportodds Systems Pty Ltd v NSW* (2003) 133 FCR 63 at [40]-[41].

17. ACTEW suggests at [51] that the UNFT is a form of land tax, which has not hitherto been thought to be an excise. The answer is similar to that made in relation to payroll tax: see QCC's primary submissions, [79]. ACTEW correctly accepts at [37] that issues of degree are involved. Here, the following matters indicate that the UNFT is not in the same class as a general land tax:

    17.1. The UNFT is imposed on a very limited set of persons: owners of utilities networks for water, electricity, gas, telecommunications and sewerage.

    17.2. Those networks transmit things of value (and/or, in the case of sewerage, things for which charges are levied).

    17.3. The UNFT does so by reference to a one-dimensional measurement: *length*. It is not calculated on the two-dimensional measure of *area*.

    17.4. The length is the length of the very things used in production and distribution: pipelines and associated infrastructure. The levy is not imposed on, for example, the whole of the area occupied by the utilities (for example office space, car-parks, land reserved for future or other uses, etc). Nor is it levied on the area occupied by the network infrastructure. Analogously, the levy in *Matthews* (1938) 60 CLR 263 was imposed on the area planted to chicory, not the whole farm area held by chicory producers.

18. ACTEW at [53] disputes the relevance of *Matthews*, saying that the levy there was imposed on producers of chicory, not the owners of the land. Yet the tax was imposed by reference to the area of chicory planted, and it would be surprising if the result would have been different if the tax had been imposed instead on owners of the land, where they were the same as the producers of the chicory.

A natural relationship between the tax and the value/quantity of water supplied

19. The ACT at [73] embraces the statement by Keane CJ, at [137], that "there is no relationship *at all*". In contrast, ACTEW suggests at [46] that his Honour's statement must be seen in context, and that "any such relationship" is "weak"; see also [39], [72]. Neither party engages in substance with the points that QCC made at [64].

20. At [70]-[72], ACTEW lists and emphasises the figures for water usage in the ACT in 1998-2008, but significantly fails to mention the primary reason for the variation in that period. As the ACT more candidly acknowledges at [74.6], "it is not disputed that the volume of water flowing through the network reduced by 20-40% in response to the imposition of water restrictions by the Territory". Such variation in response to seasonal/climatic variation would have been no surprise to the farmers levied in *Matthews* and *Logan Downs*. The ACT suggests, three times, that UNFT is payable even though water might not flow through the water network: ACT, [52], [74.4] and [76]. Similar arguments were made and rejected in *Matthews*, *Logan Downs* and *Hematite*: see QCC's primary submissions at [64.4].

21. Both Respondents rely on the fact that the amount/value of water distributed will depend on the diameter of the pipes: ACT, [74.3]; ACTEW, [69]. No doubt that is one factor, but it does not establish that there is not a significant relationship between the length of the network and the amount/value of what is transmitted.

The levy was intended to be and was passed on

22. ACTEW at [75] seeks to downplay the significance of this factor. However, it is not a point founded only on the reasoning of Mason J in *Hematite*. The indirect character of a tax has long been seen as one significant indicator of an excise.

23. ACTEW suggests at [74] that QCC has confused the roles of the ACT Executive with the Legislature, arguing that what either branch intended as to who would ultimately bear the cost is irrelevant. The UNFT was a budget measure, introduced to the Assembly by the ACT Government. Immediately after it was passed, executive steps were taken to enable the cost to be passed straight through to consumers: see QCC's primary submissions, [73]. The character and validity of such a measure must be assessed by reference to its legal terms and practical operation: *Ha v NSW* (1997) 189 CLR 465 at 498. In *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [119], account was taken of executive action. ACTEW effectively asks the Court to avert its eyes from the actual and intended practical effect of the measure.

Factors in *Hematite*

24. Both Respondents seek to support Keane CJ's distinguishing of *Hematite* at [136] of his judgment. As QCC has submitted, that case is not a template. But, in any event, the factors invoked by Mason J at 634, quoted by the ACT at [37], tend to support QCC's case. First, although the UNFT is not levied only on water networks, it is only levied on a small number of networks, each of which transmits things of value (or for which charges may be levied). Secondly, although the UNFT may not in form be imposed on the operator of the networks, it is in substance imposed on the operator of the water network. Thirdly, the size of the fee was relevant to indicate that it was "not a mere fee for the privilege of carrying on an activity": Mason J at 634. The same is true here. Fourthly, the fee here is payable before an essential step in production (and distribution) can take place. The ACT seeks to rely, at [55]-[57], on the fact that the UNFT is payable in arrears. This accounting point is of no substance, and appears to summon up the *Dennis Hotels* ghost of back-payments.

25. As for discrimination, there is no requirement for this in establishing an excise. It may be relevant to characterising a tax as one imposed on goods, but the core issue is always whether the levy can be characterised as imposed on a step in the production, manufacture, sale or distribution of goods. That is established here.

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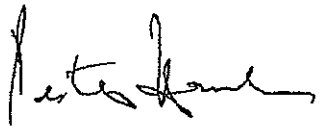

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