IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No C2 of 2011

BETWEEN:

QUEANBEYAN CITY COUNCIL

Appellant

ACTEW CORPORATION LIMITED

First Respondent

THE AUSTRALIAN CAPITAL TERRITORY (DEPARTMENT OF TREASURY)

Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

(Re the Water Abstraction Charge)

Filed on behalf of the Commonwealth Attorney-General by:

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PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Respondents.

3. Section 90 of the Constitution prohibits States or Territories from (amongst other things) imposing a tax on the production, manufacture, sale or distribution of goods, including water.

4. Water in the Australian Capital Territory (**ACT**) is a finite natural resource. ACT legislation vests certain rights in 'water of the Territory' in the ACT. The ACT legislature has largely prohibited the taking of water without a licence and made payment of a Water Abstraction Charge (**WAC**) a condition of a licence. On 1 July 2006, the ACT increased the WAC from 25c/kilolitre to 55c/kilolitre. The first issue in these appeals is whether that increase was unconstitutional.

5. Following the approach adopted by the parties, the Commonwealth makes submissions on the WAC in proceeding C2 of 2011 and submissions on the Utilities (Network Facilities Tax) (**UNFT**) in proceeding C3 of 2011.

6. In summary, in relation to the WAC, the Commonwealth submits that:

   (1) The WAC has the positive characteristics of a tax.

   (2) In deciding whether, nonetheless, it is a special exaction that is not a tax, it is necessary to consider a range of factors relevant to the characterisation of the charge. The most relevant factors are:

      (a) the WAC is a charge for the acquisition or use of property or for a privilege, being the right to take a finite natural resource under long-standing public stewardship, which charge Is similar to a royalty;

      (b) although there may exist a significant degree of practical compulsion, ACTEW Corporation Limited (**ACTEW**) has some choice about acquiring or using the property or privilege to which the charge relates; and

      (c) there is a sufficient relationship between the size of the WAC and the value of the property or privilege acquired;

   which together indicate that the WAC is a special exaction that is not a tax.

PART III: Not applicable.

PART IV: RELEVANT CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

7. The Commonwealth accepts the Queanbeyan City Council's (**QCC**'s) statement of the applicable constitutional and legislative provisions.

Part V: ARGUMENT

A. Duties of excise

8. Section 90 of the Constitution provides:

> On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

9. Section 90 is located within Chapter IV, governing "Finance and Trade". It was intended to give the Commonwealth Parliament "a real control of the taxation of commodities",[1] because without that control the imposition of differential State taxes upon goods would impair free trade throughout the Commonwealth,[2] thereby undermining a paramount purpose of Federation.[3] It was recognition of the substantive purpose of s 90 within Chapter IV which led the Court in *Ha v New South Wales* (***Ha***) to reject differential treatment of local and interstate or foreign manufacture as a necessary feature of an excise,[4] thereby putting to rest a controversy that had previously dogged s 90.[5] After *Ha*, the term "duties of customs and of excise" in s 90 "must be construed as exhausting the categories of taxes on goods".[6]

10. The effect of s 90 is that only the Commonwealth can impose taxes on goods. As a result, taxes on goods are subject to several constitutional limitations that are relevant to the objective of creating a free trade area.[7] Taxes imposed under s 51(ii) of the Constitution must not discriminate, or give preference (s 99) and must not impose any tax on property belonging to a State (s 114). Any law of trade or commerce will be subject to ss 92, 99 and 100. These constitutional requirements help to ensure that taxes on goods do not create distortions within the national economy.

11. Bearing the key role of s 90 in mind, any principles that confine the operation of s 90 should be carefully scrutinised. As the line of authorities considered[8] in *Ha* demonstrate, it is possible for legitimate principles to be exploited so as to attempt to confine the operation of s 90. But the operation of constitutional constraints is not to

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1 *Parton v Milk Board (Vict)* (1949) 80 CLR 229 at 260.3 (Dixon J), affirmed in *Ha v New South Wales* (1997) 189 CLR 465 at 495.3 (Brennan CJ, McHugh, Gummow and Kirby JJ); cf 507.8-512 (Dawson, Toohey and Gaudron JJ).

2 *Ha v NSW* (1997) 189 CLR 465 at 497.6 (Brennan CJ, McHugh, Gummow and Kirby JJ); *Capital Duplicators [No 2]* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

3 *Ha v NSW* (1997) 189 CLR 465 at 492.5 (Brennan CJ, McHugh, Gummow and Kirby JJ). See also *Betfair Pty Ltd v Western Australia* (2008) 418 CLR 452-453 at [12]-[18] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

4 *Ha v NSW* (1997) 189 CLR 465 at 497.7 (Brennan CJ, McHugh, Gummow and Kirby JJ). For the history of that minority view see 512.8-514 (Dawson, Toohey and Gaudron JJ).

5 That controversy does not, in any event, have any bearing on the present case.

6 *Ha v NSW* (1997) 189 CLR 465 at 488.9 (Brennan CJ, McHugh, Gummow and Kirby JJ).

7 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 276.4 (Brennan, Deane and Toohey JJ); *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1992) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

8 Note that *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 and *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 were expressly not overruled by the Court, but were said to 'stand as authorities for the validity of the imposts therein considered': *Ha v NSW* (1997) 189 CLR 465 at 504.

be circumvented by the use of "circuitous devices"[9] or "drafting devices".[10] As a result, this Court must scrutinise fees levied by the States or Territories to ensure that those fees are not duties of excise, even if they appear to be fees for services, fees for the acquisition or use of property or fees for a privilege. It is necessary to look "beyond matters of legal form and to the practical effect of the law in question".[11]

12. An excise is a tax on a step in the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin.[12] While that formulation identifies an excise as a tax "on goods", s 90 does not use the word "goods" and that word is not used in the authorities in a narrow sense. Section 90 applies to taxes on "commodities",[13] "articles of commerce",[14] "manufactured or produced articles",[15] or things the subject of "trading or commercial transactions".[16]

13. Despite the fact that there is no "property" in flowing water prior to its abstraction,[17] there is property in water once it is taken into possession or control (including by abstraction).[18] Once water is abstracted for the purpose of treatment and distribution, it is a "commodity", "article of commerce" or thing the subject of "trading or

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9 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 349.5 (Dixon J); *O Gilpin Ltd v Commissioner for Road Transport and Tramways (NSW)* (1935) 52 CLR 189 at 211–12 (Dixon J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [136] (Hayne, Kiefel and Bell JJ) and [192] (Heydon J). In *Caltex Oil (Australia) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523, Mason CJ, Gaudron and McHugh JJ said: "The principle that it is not permissible to do indirectly what is prohibited directly, which is expressed in the maxim quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud, is a more traditional general statement of the same proposition. It has been acknowledged that, in conformity with this principle, the adoption of a circuitous device with a view to avoiding the need to comply with a constitutional requirement will be of no avail: *Bank of New South Wales v Commonwealth* [(1948) 76 CLR 1 at 349–50]".

10 *Ha v NSW* (1997) 189 CLR 465 at 498.9 (Brennan CJ, McHugh, Gummow and Kirby JJ).

11 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at 169 [44] (French CJ, Gummow and Crennan JJ).

12 *Ha v NSW* (1997) 189 CLR 465 at 490.5 and 499.9 (Brennan CJ, McHugh, Gummow and Kirby JJ); cf 506.2 (Dawson, Toohey and Gaudron JJ); *Hematite Petroleum v Victoria* (1983) 151 CLR 599 at 615 and 619 (Gibbs CJ), 634 (Mason J), 657-658 (Brennan J), 665 (Deane J) (***Hematite***); *Capital Duplicators Pty Ltd v Australian Capital Territory [No 2]* (1992) 178 CLR 561 at 587 (Mason CJ, Brenna, Deane and McHugh JJ). This Court has not yet determined whether a tax on consumption amounts to an excise, and it is not necessary to determine that issue in this case.

13 *Mutual Pools & Staff Pty Ltd v Commissioner of Taxation* (1992) 173 CLR 450 at 454 (Mason CJ, Brennan and McHugh JJ) (***Mutual Pools***). See also *Peterswald v Bartley* (1904) 1 CLR 497 at 508 (Griffith CJ); *Browns Transport Pty Ltd v Kropp* (1958) 100 CLR 117 at 129 (Dixon CJ, McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ).

14 *Mutual Pools* (1992) 173 CLR 450 at 467.5 (Dawson, Toohey and Gaudron JJ); *WA v Hammersley Iron Pty Ltd* (1969) 120 CLR 42 at 63.3 (Kitto J); *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263 at 287-304 (Dixon J); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59 at 67.5 (Gibbs J) and 69 (Stephen J).

15 *Mutual Pools* (1992) 173 CLR 450 at 454.2 (Mason CJ, Brennan and McHugh JJ); *Hematite* (1983) 151 CLR 599 at 663 (Deane J).

16 *Mutual Pools* (1992) 173 CLR 450 at 467.7 (Dawson, Toohey and Gaudron JJ).

17 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 173 [55] (French CJ, Gummow and Crennan JJ), 188-189 [109], 190-191 [112]-[113] and 200 [145] (Hayne, Kiefel and Bell JJ).

18 *Ashworth v Victoria* [2003] VSC 194 at [73]-[84] (Gillard J); *Akiba v Queensland (No 2)* (2010) 270 ALR 564 at 739 [759] (Finn J); *Embrey v Owen* (1851) 6 Ex 353 at 369-372; 155 ER 579 at 585-587; *Mason v Hill* (1833) 110 ER 692, 701 (Denman CJ, Littledale and Parke JJ), stating "no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream and of which he had the possession; and during the time of such possession only".

commercial transactions". As a result, a charge on the abstraction of that water will be an excise if:

(a) that charge is a "tax"; and

(b) that tax is "on" the production or distribution of the water.

14. Buchanan J was correct to proceed on that basis.[19] Perram J's doubts in that regard were not well founded,[20] because his Honour's approach turned solely on concepts of "property" and did not consider the application of s 90 to "articles of commerce" or "commodities", and failed to give sufficient effect to the policy underlying s 90 and its role in the scheme of Chapter IV of the Constitution. His Honour's view also turned on the absence of property in water prior to its abstraction, and failed to find that a different position applies once water is taken into possession and control.

The characteristics of a tax

15. The characteristics of a "tax" have been extensively considered by this Court in the context of ss 51(ii), 55 and 90 of the Constitution.[21] In all those contexts, the starting point is the formulation advanced by Latham CJ in *Matthews v Chicory Marketing Board* (***Matthews***), who observed that the State levy then before the Court was a tax because it exhibited the following characteristics:[22]

> a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered.

16. That formulation is regularly applied by this Court.[23] It was further explained in *Air Caledonie International v Commonwealth*[24] (***Air Caledonie***), where the Court considered limits to the concept of a tax relevant to the disposition of these appeals:[25]

> [T]he negative attribute — "not a payment for services rendered" — should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham CJ are all present. Thus, a charge for the acquisition or use of property, a fee for a privilege and a fine or

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19 *Queanbeyan City Council v ACTEW & Anor* (2009) 178 FCR 510 (**Decision at first instance**) at 535 [118] and 543 [162].

20 *Australian Capital Territory v Queanbeyan City Council & Anor* (2010) 188 FCR 541 (**Full Court Appeal**) at 589 [199].

21 In the context of Commonwealth taxes, the application of the relevant criteria will be affected by ss 81 and 83 of the Constitution, which ensure that moneys raised by Commonwealth taxation have a public purpose. See the Commonwealth's argument in *Roy Morgan Research Pty Ltd v Commissioner of Taxation*, in which this Court has reserved judgment.

22 (1938) 60 CLR 263 at 276.3. See also 290.7 (Dixon J).

23 See, e.g., *Luton v Lessels* (2002) 210 CLR 333 at 342 [10] (Gleeson CJ), 352 [49] (Gaudron and Hayne JJ) and 365 [94] (Kirby J); *Airservices Australia v Canadian Airlines* (1999) 202 CLR 133, 189-190 [132] (Gaudron J) (***Airservices***); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 500.7 (Mason CJ, Brennan, Deane and Gaudron JJ) and 521.5 (Dawson and Toohey JJ) (***Tape Manufacturers***).

24 (1988) 165 CLR 462.

25 (1988) 165 CLR 462 at 467.5 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). That passage was approved in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 567 (Mason CJ, Deane, Toohey and Gaudron JJ); *Luton v Lessels* (2002) 210 CLR 333 at 352 [50] (Gaudron and Hayne JJ), 382-383 [176] (Callinan J); *Tape Manufacturers* (1993) 176 CLR 480 at 501.1 and 504 (Mason CJ, Brennan, Deane and Gaudron JJ), cf 521.7 and 522.8 (Dawson and Toohey JJ) and 529.3 (McHugh J).

penalty imposed for criminal conduct or breach of statutory obligation are other examples of special types of exactions of money which are unlikely to be properly characterized as a tax notwithstanding that they exhibit those positive attributes. (Emphasis added)

17. The categories of special exaction identified in that passage are derived, in part, from s 53 of the Constitution.[26] For each category, the question is whether a charge has some feature or combination of features that mean it is not properly characterised as a tax.[27]

10 18. In light of these statements by the Court, the issues raised by these appeals can be analysed by considering whether each charge:

(a) has the positive characteristics of a tax; and

(b) if so, is nonetheless to be characterised as a special exaction that is not a tax; and

(c) if not a special exaction but a tax, is a duty of excise.

19. Ultimately, however, in respect of each charge the only question for the Court is whether it meets the constitutional description of a "duty of excise", having regard to all relevant factors.

B. The Water Abstraction Charge

20 20. The key features of the legislative regime that bear on the characterisation of the WAC are as follows:

(a) "The right to the use, flow and control of all water of the Territory" is vested in the ACT.[28] Statutory provisions of that kind divest pre-existing common law

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26 *Air Caledonie* (1988) 165 CLR 462 at 468 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 561 (Gibbs J).

27 *Air Caledonie* (1988) 165 CLR 462 at 468.8 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). As to the distinction between a tax and a penalty, see *R v Barger* (1908) 6 CLR 41 at 99 (Isaacs J); *Re Dymond* (1959) 101 CLR 11 at 22 (Fullagar J).

28 *Water Resources Act 1998* (ACT) (the **1998 Act)** s 13 (now repealed); *Water Act 2007* (ACT) (**2007 Act**) s 7. The term "water of the Territory" is not defined in either Act. Note that, in relation to Lake Burley Griffin, '[t]he right to the use and flow and to the control of the water in [so much of Lake Burley Griffin as is National Land] is ... vested in the Commonwealth and no right to the use and flow and to the control of the water in [that] lake ... shall be acquired by a person except as provided by or under this Ordinance or any other law in force in the Territory' (see s 11(1) of the *Lakes Ordinance 1976* as applied to Lake Burley Griffin by s 5(5) of the *National Land Ordinance 1989*). (The Lakes Ordinance generally became the *Lakes Act 1989* (ACT) on 11 May 1989 by force of s 34(4) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), except insofar as it was applied to Lake Burley Griffin by the National Land Ordinance by reason of s 34(5) and Sch 5 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).) In that regard, pursuant to ss 27 and 28 of the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) (the PALM Act), "land" in the ACT (which is defined to include water) may be either "National land" or "Territory land":. The ACT Executive, on behalf of the Commonwealth, has responsibility for managing Territory Land, and the ACT Legislative Assembly has power to make laws to regulate the exercise of this management role (s 29 of the PALM Act and s 22(2) of the Self-Government Act respectively). Generally speaking, the National Capital Authority has responsibility for managing National Land (s 4 of the National Land Ordinance and s 6(g) of the PALM Act). No part of the Cotter Catchment has been declared to be National Land and thus no issue arises in the present appeals as to the application of the

riparian rights.[29] In respect of water in the area that now comprises the ACT, those rights were divested in 1896.[30]

(b) ACT law imposes a general prohibition on the taking of water without a licence,[31] and empowers an authority to grant a licence to take water.[32] Accordingly, irrespective of the position that would otherwise have prevailed at common law, unless they hold a licence, members of the public have no general right to take water in the ACT.[33]

(c) The Minister has been empowered to impose fees under the relevant legislation (expressly including "a fee that is a tax" under the 1998 Act).[34] Non-payment of that fee entitles the ACT Environment Protection Authority to suspend or cancel ACTEW's licence to take water.[35]

(d) In the exercise of that power, the WAC is, and has been, levied by a series of determinations issued by the relevant Ministers. The amount of the WAC has varied over time, having been introduced at 10c/kl on 1 January 2000, but then increased to 20c/kl on 1 January 2004, 25c/kl on 16 August 2005, 55c/kl on 1 July 2006, and then reduced to 51c/kl on 1 July 2008 (corresponding with a change in the calculation method).

(e) Initially, the WAC was levied on the volume of water delivered to users. However, from 1 July 2001, the WAC was levied on the volume of water charged to users. Since 1 July 2008, the WAC has been levied on the basis of the volume of water abstracted.

21. The ACT controls two water catchment areas, the Cotter Catchment and the Googong Dam Area.[36] The Googong Dam is on the Queanbeyan River, which is located in NSW. The Commonwealth acquired the Googong Dam Area from NSW in 1973 for the purpose of providing facilities for the storage and supply of water for use in the ACT. After acquiring the Googong Dam Area, the Commonwealth enacted the *Canberra Water Supply (Googong Dam) Act 1974* (Cth). While that Act vested the rights to use and dispose of waters in the Googong Dam Area in Australia,[37] those

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1998 or 2007 Acts to the abstraction of water from National Land. Finally, the ACT Executive is also expressly responsible for governing the ACT with respect to 'water resources' (s 37 of the Self-Government Act).

29 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 172 [53]-[54] (French CJ, Gummow and Crennan JJ), 192-193 [120] (Hayne, Kiefel and Bell JJ).

30 By the *Water Rights Act 1896* (NSW) s 1. That Act was replaced by the *Water Rights Act 1902* (NSW) s 4, which likewise vested the right to the use, flow and control of water in the Crown. That provision was given "effect in the Territory as if it were a law of the Territory" by s 6(1) of the *Seat of Government Acceptance Act 1909* (Cth) and s 4 of the *Seat of Government (Administration) Act 1910* (Cth) until other provision was made. Such provision was made, at the latest, on the enactment of the *Law Reform (Miscellaneous Provisions) Act 1999* (ACT) s 4 and Sch 1.

31 1998 Act s 33; 2007 Act s 28(1). Note there are limited exceptions to the prohibition against unlicensed taking of water in s 33 of the 1998 Act and s 28 of the 2007 Act.

32 1998 Act s 35; 2007 Act ss 30, 31.

33 *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 172-173 [54] (French CJ, Gummow and Crennan JJ).

34 1998 Act s 78; 2007 Act s 107.

35 1998 Act s 72; 2007 Act s 106.

36 Decision at first instance at 514 [11].

37 *Canberra Water Supply (Googong Dam) Act 1974* (Cth) s 11(1). In this context Australia means the Commonwealth: *Acts Interpretation Act 1901* (Cth) s 17(a).

rights are exercisable by the ACT Executive on behalf of the Commonwealth.[38] Having regard to the above provisions, Buchanan J approached the case on the basis that all the water that ACTEW is authorised by licence to take lies or flows in areas under the direct control of the ACT.[39]

22. The WAC was imposed without regard for the source of the water taken by ACTEW under its licences and supplied by it to customers including QCC. The case has not been run below on the basis that any distinction needed to be drawn between water taken by ACTEW from the Googong Dam Area and water taken within the geographical limits of the ACT.[40] QCC sought a declaration that the WAC, as imposed by the determinations made under the 1998 and 2007 Acts, is a duty of excise.[41] Further, Buchanan J found that "the ACT has full authority to grant licences and control the taking of water from both the Cotter Dam and the Googong Dam"[42] and that finding was not challenged on appeal.

23. Given the way the claim for relief was framed and the arguments advanced by the parties, it is not necessary for the Court to consider the validity of the WAC as it relates to water from the Googong Dam Area separately from water abstracted from within the ACT because the characterisation of the WAC as a fee for the acquisition or use of property, or as a fee for a privilege, is not affected by the fact that the underlying statutory foundation for the ACT's rights in relation to the water differs depending on the place from which water is abstracted:[43]

(a) if the WAC is invalid in its application to water abstracted from within the ACT, it is invalid in its entirety;

(b) if the WAC does not infringe s 90 in its application to water abstracted from within the ACT, the appeal should be dismissed because QCC has not advanced any argument that the WAC is invalid in its application to water from the Googong Dam Area if it is valid in relation to water abstracted in the ACT.

Positive characteristics – The WAC is a compulsory exaction

24. A positive criterion of a tax is that it is a "compulsory" exaction. It follows that, unless the WAC is "compulsory" it will not be a tax. That would make it unnecessary to consider whether the WAC is one of the special types of exaction that are not taxes despite the fact that they have all the positive characteristics referred to in *Matthews*.

25. At first instance, Buchanan J found (in the course of analysing the positive characteristics of a tax) that ACTEW was required, as a matter of "practice and commercial reality", to take water under the control of the ACT in quantities determined by the consumption of those to whom it supplies water.[44] He also found that "water should be regarded as so basic in Australian society that consumers have no real choice but to use it in some form or other, even if they have some control

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38 *Canberra Water Supply (Googong Dam) Act 1974* (Cth) s 11(2).
39 Decision at first instance at 514 [11]. See also 530 [94].
40 Decision at first instance at 530 [94]. See also at 532 [100].
41 Amended Application dated 2 February 2009 at [1].
42 Decision at first instance at 530 [94].
43 Irrespective of the place from which water is abstracted, the ACT's rights are more direct than those of Tasmania considered in *Harper*: Decision at first instance at 532 [100].
44 Decision at first instance at 533 [110].

over their consumption".[45] His Honour therefore considered that this positive criterion was satisfied.

26. Perram J (dissenting in relation to the WAC) took a similar approach, rejecting the submission that only legal compulsion would suffice and observing that "[p]ractically speaking, the possibility of the Supplier [ACTEW] obtaining its water other than under its licence is exiguous and remote."[46]

27. If a government imposes a charge as a precondition to engaging in a field of endeavour or enterprise, that charge may be a "compulsory exaction" within the *Matthews* formulation despite the fact that there is no compulsion to enter that field or engage in that enterprise. There are many cases that recognise that a licence fee may be a tax if there is legal compulsion to pay that fee if a person carries on business in a particular field even though, in a broader sense, the person paying the fee may choose not to carry on business in the relevant field. If the making of a choice to engage in the activity that required a licence was sufficient to prevent a licence fee from being a "compulsory exaction", then the licence fees at issue in the *Dennis Hotels*[47] line of authority should not have been characterised as taxes at all, in the absence of any compulsion to sell cigarettes, liquor or petrol. Yet none of those cases were analysed in that way.[48]

28. Similarly, in *Attorney-General for New South Wales v Homebush Flour Mills Ltd*,[49] the theoretical availability of alternatives that would have avoided the miller making the payment did not prevent the characterisation of the charge (imposed under the statutory scheme) as a compulsory exaction.[50] Nor, in *General Practitioners Society v Commonwealth*,[51] did the absence of compulsion to become a pathologist mean there was not relevantly compulsion to pay the statutory application fee. In that case Gibbs J assumed, without deciding, that practical rather than legal compulsion did not prevent characterisation as a tax.[52]

29. It follows that a charge may be a "compulsory exaction" for the purposes of the *Matthews* formulation if there is legal compulsion to pay that charge if water is abstracted from areas controlled by the ACT, even if a person engages in that activity through choice. Whether or not ACTEW is compelled to obtain water from the ACT to supply water in the ACT, once it takes water from areas controlled by the ACT, it is required by law to pay the WAC.[53] That imposition of the charge by law is sufficient to make the WAC a compulsory exaction.[54]

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45 Decision at first instance at 535 [117].

46 See Full Court Appeal at 587 [192].

47 *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529.

48 E.g. the licence fee on the wholesale and retail sale of tobacco in *Ha v NSW* (1997) 189 CLR 465 at 510.1; the victualler's licence in *Dennis Hotels* (1960) 104 CLR 529.

49 (1937) 56 CLR 390.

50 (1937) 56 CLR 390 at 399-400 (Latham CJ) and 413-414 (Dixon J).

51 (1937) 56 CLR 390.

52 *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 561.7. See also at 568 (Aickin J).

53 See, e.g., 2007 Act ss 28 (prohibition on taking water without a licence), 77A (offence to take water without a licence), 106 (licence may be suspended or cancelled for non-payment of a fee).

54 ACTEW's reference to the 'Efficiency Dividend' applicable to Commonwealth agencies is inapposite (ACTEW's submissions on the WAC (C2 of 2011) at [52]). Application of the Efficiency Dividend simply results in an annual reduction of funds appropriated *to* agencies (see e.g. "Commonwealth of Australia, Department of Finance and Deregulation, Review of the

30. The WAC also meets the other positive characteristics of a tax: it exacts money, the exaction is by a public authority (the ACT), [55] for public purposes, and is enforceable by law.

Special exaction – The WAC is a fee for the acquisition or use of property or for a privilege

31. It is necessary therefore to consider whether the WAC is special type of exaction which is not a tax, even though the positive characteristics of a tax are all present.

32. Water is a finite and fluctuating natural resource that has long been managed in the public interest.[56] The WAC is the price (exacted by the public) for the right to take this scarce resource. If the WAC is properly characterised as "a charge for the acquisition or use of property" or "a fee for a privilege", those being two of the special types of exactions identified in *Air Caledonie*, then it is unlikely it is a tax, even if the positive characteristics identified in *Matthews* are present.[57]

33. But it is important to note that the formulation in *Air Caledonie*[58] provided examples of various special types of exaction that may not be taxes. These examples assist in applying the prohibition in s 90. But in each case, the Court should examine State and Territory charges as a matter of substance to ensure that these charges are not a circuitous or drafting device to avoid the operation of s 90 of the Constitution. Such scrutiny should reflect that a paramount purpose of Federation was free trade throughout the Commonwealth, and the importance of s 90 to this purpose.

34. The question whether a charge, having the positive characteristics of a tax, should nevertheless be characterised as a special exaction that is not a tax requires consideration of all of the relevant factors, including:

(a) the historical characterisation of charges of a similar kind as not imposing taxation (such as, for example, royalties) and the nature of the property or privilege to which the charge relates, such that if something is received in exchange for the charge, this suggests it is not a tax;

(b) the extent to which the recipient has a choice about acquiring the property or privilege to which the charge relates (including whether there are alternative providers), because the greater the level of choice the less likely a charge is to be a tax;

(c) the extent to which there is a relationship between the amount of the charge and the value of the property or privilege acquired, as such a relationship suggests that a charge is a fee for what is acquired and therefore that it is not a tax;

Measures of Agency Efficiency report"; March 2011 at p 20.) More relevantly, where a legislature creates a statutory corporation and expressly requires that corporation to pay amounts to the executive by way, for example, of dividends, the obligation to pay will not generally amount to taxation (cf ss 11 and 32, and item 6, Part 3.1 of Schedule 3 to the *Territory-Owned Corporations Act 1990* (ACT)). That is less likely to be the case, however, in respect of a law of general application that applies to private persons and statutory corporations alike.

55 Noting that the requirement for a public authority and a public purpose may be superfluous, see *Tape Manufacturers* (1993) 176 CLR 480 at 501 (Mason CJ, Brennan, Deane and Gaudron JJ).

56 *ICM Agriculture* (2009) 240 CLR 140 at 171 [50] (French CJ, Gummow and Crennan JJ).

57 See paragraph 16 above.

58 (1988) 165 CLR 462 at 467.5.

(d) the purpose of the charge (the purpose of revenue raising suggesting a tax); and

(e) the consequences of a failure to pay the charge and/or a failure to receive the property or privilege to which the charge relates.

(a) Charge for property

35. The best established example of a fee for the acquisition or use of property that is not a tax is a royalty. It is well settled that, if a charge is properly characterised as a royalty, it is not a tax.[59]

36. Royalties include "mineral royalties, patent and copyright royalties and royalties in respect of rights to cut and remove timber".[60] "[I]t is of the essence of [such] a royalty that the payments should be made in respect of the exercise of a right granted and should be calculated in respect of the quantity or value of things taken, produced or copied or the occasions upon which the right is exercised."[61] A "royalty may be a fee for a licence."[62]

37. Mineral royalties are a fee imposed for the right to take property that has traditionally been owned and controlled by the State. Such royalties: invariably relate to property of a kind that is traditionally subject to public ownership (factor (a) above); involve a relationship between the fee and the quantity or the value of what is taken (factor (c)); involve something of value being received in exchange for the payment of the royalty (factor (a)); involve a person who takes minerals invariably doing so as a consequence of a substantially unfettered choice (factor (b)). If the State simply "sold" minerals that it owns that clearly would not be a tax, and the fact that the "selling" occurs pursuant to legislation does not change the analysis. Taken together, the circumstances attending traditional royalties demonstrate that they are special exactions not properly characterised as taxes.

38. Fees to acquire property that do not constitute traditional royalties may be analysed in the same way, although care is required to ensure that s 90 is not avoided by the use of circuitous devices. The point is illustrated by *Yanner v Eaton*,[63] where the Court considered legislation that provided that certain "fauna" was the property of the Crown. The legislation was analogous to that at issue in this appeal, as it prohibited the taking of fauna by unlicensed persons, and provided that a fee was payable to obtain a licence. Gleeson CJ, Gaudron, Kirby and Hayne JJ observed that the drafter of the legislation may have perceived a need to vest property in fauna in the Crown so as "to differentiate the levy imposed ... from an excise" and to do so by making it as similar as possible to "traditional royalties recognised in Australia and imposed by a proprietor for taking minerals or timber from land, but also to some other rights

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59 Brennan J (for the Court) stated in *Harper* that "A royalty ... is not a tax and, not being a tax, cannot be a duty of excise": (1989) 168 CLR 314 at 333.7.

60 *Tape Manufacturers* (1993) 176 CLR 480 at 497 (Mason CJ, Brennan, Deane and Gaudron JJ).

61 *Tape Manufacturers* (1993) 176 CLR 480 at 497, citing *Stanton v Federal Commissioner of Taxation* (1955) 92 CLR 630 at 642, where the Court explained the "essential notion" of things being taken from the land is that the payment is "made in respect of the taking of something which otherwise might be considered to belong to the owner of the land by virtue of his ownership". See also *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235 at 243 per Rich J: "In its secondary sense [royalty] ... denotes a consideration paid for permission to exercise a beneficial privilege, usually made payable as and when the privilege is exercised".

62 *Tape Manufacturers* (1993) 176 CLR 480 at 520 (Dawson and Toohey JJ). See also *McCauley v Federal Commissioner of Taxation* (1944) 69 CLR 235 at 243 (Rich J).

63 (1999) 201 CLR 351.

(such as warren and piscary) which never made the journey from England to Australia".[64] Their Honours described a royalty as "a fee exacted by someone having property in a resource from someone who exploits that resource".[65]

39. *Yanner v Eaton* did not involve a challenge to the validity of the fee for the right to take fauna, and the Court did not need to determine whether that fee was in fact a "royalty" or a fee for the acquisition of property that was akin to a royalty. The Court did, however, recognise that the statutory vesting of property in fauna in the Crown was nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource".[66] For resources of that kind, the fact that a State has property in a resource only by virtue of its own legislation does not necessarily prevent a fee for the right to exploit the resource from being characterised as a fee for the acquisition of property. However, whenever a State vests property in itself, and then purports to charge for the right to access that property, the substance of the scheme established must be examined, as it is possible that such an arrangement will properly be characterised as a tax rather than a fee for the acquisition or use of property.[67]

40. If the ACT "owns" or has "property"[68] in the water abstracted by ACTEW,[69] the charge imposed by the ACT for the right to take that water may fall within the concept of a royalty: it would be a fee exacted by someone having property in a resource from someone who exploits that resource, charged by reference to the quantity of the resource taken.

41. Ultimately, however, "ownership" is an unstable criterion for determining whether the WAC is a fee for the acquisition of property (whether it be a royalty or fee akin to a royalty) because "ownership" refers to a "bundle of rights" the contents of which are not fixed.[70] The rights that ordinarily form part of the bundle were identified by Professor Honoré, in an analysis that has been cited with approval,[71] as follows: [72]

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution and the incident of residuarity ...

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64 (1999) 201 CLR 351 at 369.5 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

65 (1999) 201 CLR 351 at 369 [27].

66 (1999) 201 CLR 351 at 369 [28], quoting *Toomer v Witsell* (1948) 334 US 385 at 402.

67 See, e.g., *Homebush Flour Mills* (1937) 56 CLR 390

68 This Court has recognised that "property" is a difficult and in some respects imprecise term: *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 375 [47] (McHugh J), 388-389 (Gummow J) and 404 [137] (Callinan J).

69 See footnote 17 above; Full Court Appeal at 581-582 [169]-[170] (Stone J), 589 [200] (Perram J).

70 See, e.g., *Telstra v Commonwealth* (2008) 234 CLR 210 at 230 [44], 233 [52]; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 634-635; *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17], 368 [25].

71 *Booth v Commissioner of Taxation* (1987) 164 CLR 159, 165 (Mason CJ); *Hepples v Commissioner of Taxation* (1990) 22 FCR 1, 24-25 (Gummow J).

72 AM Honore, 'Ownership', *Oxford Essays in Jurisprudence* (A.G. Guest ed, 1961) at 107, 113. *Halsbury's Laws of England* lists a similar bundle of rights attaching to ownership, being "the rights of exclusive enjoyment, of destruction, alteration and alienation, and of maintaining and recovering possession of the property from all other persons": see *Halsbury's Laws of England* (4th edn) vol 35, paras 1227 and 1228.

42. The ACT undoubtedly enjoys a statutory right to the "use, flow and control" of the water of the Territory.[73] It therefore has the most important rights in the bundle. Further, those rights have been vested in a body politic to be managed for the public since 1896. The long history of public stewardship of water in Australia means that there cannot be any suggestion that rights in water have been vested in the ACT as a circuitous device to avoid the operation of s 90.

43. Where a charge is imposed as the price for the right to take and exploit a natural resource in public stewardship, the charge will not ordinarily be a tax. Such a charge is akin to the price paid for property. It is not a tax, because taxation does not entail an exchange for value or the conferral of a direct benefit on the person who is taxed.[74] Charges of that kind stand apart from fees paid for a "privilege" where the privilege is merely a licence to do something which is prohibited without a licence (such as licences to sell tobacco or alcohol).[75] Payment of such a charge does not result in the receipt of pre-existing property and is thus more readily characterised as a tax.

44. In *Harper v Minister for Sea Fisheries*[76] (***Harper***), this Court considered whether a fee for a licence to take abalone (the taking of which was prohibited without a licence) was a tax. The fee varied depending on the amount of abalone the licence holder was authorised to take. Prior to and including 1987, the fee was a fixed amount ($360) per tonne. For 1988, the fee was calculated as a percentage of the average value per tonne of abalone taken in State waters in the previous 12 months.[77] For 1989, the fee was a fixed amount of $28,200 where the quantity of abalone authorised to be taken did not exceed 15 tonnes, and $40,000 where it did exceed that threshold. To obtain his licences in 1987, 1988 and 1989, the Plaintiff paid $9,576, $18,079 and $18,076 respectively (the $40,000 payable under the regulations in force in 1989 being adjusted when the fee paid in the previous year was credited against that amount).[78] In the three year period between 1987 and 1989, the price for abalone increased from $13.12 per kilogram to $17 per kilogram.[79]

45. In considering whether the licence fees were taxes, the entire Court proceeded on the footing that a central consideration was the fact that abalone was a limited natural resource in public stewardship. The leading judgment was given by Brennan J, with whom all the other members of the Court agreed.[80] However, additional observations were made in two joint judgments, one delivered by Mason CJ, Deane and Gaudron JJ, and the other by Dawson, Toohey and McHugh JJ.

46. Brennan J found that rights to take a limited natural resource not otherwise available to the public[81] conferred on the licensees "a privilege analogous to a profit à

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73 1998 Act s 13; 2007 Act s 7. See further footnote 28 above.

74 *Elder's Trustee & Executor Co Ltd v Register of Probates (SA)* (1917) 23 CLR 169 at 173; *Air Caledonie* (1988) 165 CLR 462 at 469-470; *Airservices* (1999) 202 CLR 133 at 240 (McHugh J).

75 *Harper* (1989) 168 CLR 314 at 335.5; Full Court Appeal at 583 [176].

76 (1989) 168 CLR 314.

77 The regulations setting the fee are set out at *Harper* (1989) 168 CLR 314 at 326-328.

78 *Harper* (1989) 168 CLR 314 at 318.3. See also Full Court Appeal at 561 [72], where Keane CJ pointed out that under the 1989 fee regime the fee for the first tonne of abalone taken above the 15,000 tonne limit was $11,800.

79 *Harper* (1989) 168 CLR 314 at 317.8

80 *Harper* (1989) 168 CLR 314 at 325.1 (Mason CJ, Deane and Gaudron JJ) and 336.6 (Dawson, Toohey and McHugh JJ).

81 The legislature having abrogated the public right that otherwise existed at common law: see *Harper* (1989) 168 CLR 314 at 332.4 (Brennan J).

prendre", with the fee paid for that licence being "analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property".[82] Brennan J considered the analogy with a profit à prendre valid on the basis that:[83]

> A limited natural resource which is otherwise available for exploitation by the public can be said truly to be public property whether or not the Crown has the radical or freehold title to the resource. A fee paid to obtain such a privilege is analogous to the price of a profit à prendre; it is a charge for the acquisition of a right akin to property. Such a fee 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 resource to which a right of access is obtained by payment of the fee.

47. Mason CJ, Deane and Gaudron JJ likewise emphasised the character of abalone as a limited natural resource.[84] Their Honours did not consider it necessary to find that the rights conferred by a licence were analogous to a profit à prendre because, while accepting that comparison, their Honours considered that the licence was in truth "an entitlement of a new kind created as part of a system for preserving a limited public natural resource".[85] The amounts payable to obtain the licence were "of the same character as a charge for the acquisition of property", with the result that the licence fee was not a tax under the statement of principle in *Matthews* as explained in *Air Caledonie*.[86] The charge was the "quid pro quo for the property which may lawfully be taken pursuant to the statutory right or privilege which a commercial licence confers upon its holder" and for that reason was not a tax.[87]

48. Dawson, Toohey and McHugh JJ agreed with Brennan J, but their Honours emphasised that their conclusion that the licence fee was not a tax flowed from "all the circumstances of the case".[88] It was significant to their Honours' decision "that abalone constitute a finite but renewable resource which cannot be subjected to unrestricted commercial exploitation without endangering its continued existence".[89] However, their Honours emphasised, correctly, that:[90]

> Clearly the line between a price paid for the right to appropriate a public natural resource and a tax upon the activity of appropriating it may often be difficult to draw. But what is otherwise a tax is not converted into something else merely because it serves the purpose of conserving a natural resource.

49. Despite hearing substantial argument on the question, the Court found it unnecessary to decide whether Tasmania owned the abalone the subject of the charge,[91] because whether or not Tasmania owned the abalone its rights were sufficiently analogous to property rights so that the licence fee was properly characterised as a special exaction that was not a tax. It was a fee of the same

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82 *Harper* (1989) 168 CLR 314 at 335.4.
83 *Harper* (1989) 168 CLR 314 at 335.4 (emphasis added).
84 *Harper* (1989) 168 CLR 314 at 325.5.
85 *Harper* (1989) 168 CLR 314 at 325.5.
86 *Harper* (1989) 168 CLR 314 at 335.9-336.5.
87 *Harper* (1989) 168 CLR 314 at 325.7.
88 *Harper* (1989) 168 CLR 314 at 336.7.
89 *Harper* (1989) 168 CLR 314 at 336.9.
90 *Harper* (1989) 168 CLR 314 at 337.3.
91 *Harper* (1989) 168 CLR 314 at 334.5 (Brennan J). See also at 335.4 (Brennan J) (a limited natural resource is "public property whether or not the Crown has the radical or freehold title to the resource").

character as a fee for the acquisition of property.[92] *Harper* therefore illustrates that to focus on the question whether the ACT has "property" in the water the subject of the WAC is to ask the wrong question.

50. The relevant fact is that the WAC is a fee imposed as the price to take a finite resource in public stewardship since 1896. If viewed as a charge for the water that is taken, it is a fee for the acquisition or use of property.[93] If viewed as a charge for the right to take water, it is a fee for a privilege.[94] In either case, the WAC is not a tax.

(b) Choice to acquire property

51. In *Harper*, Mason CJ, Deane and Gaudron JJ said that the licence fee was not a tax because it was "properly to be seen as the price exacted by the public, through its laws, for the appropriation of a limited public natural resource to the commercial exploitation of those who, by their own choice, acquire or retain commercial licences".[95] The existence of "choice" was regarded as relevant to whether the licence fee was a "special exaction" of one of the kinds identified in *Air Caledonie*, because *Harper* was decided on the basis that the licence fee was a special exaction (which would have been unnecessary if the "choice" to take abalone had the consequence that the fee was not a "compulsory exaction" and therefore did not have the positive characteristics of a tax).[96] Necessarily, therefore, there is a difference between the positive characteristic of compulsory exaction, and the factor of choice as indicating a special exaction.

52. Keane CJ treated *Harper* as supporting "the proposition that, generally speaking, a voluntary payment of money in order to acquire rights in the nature of property is not to be characterised as a tax."[97] His Honour said:

(a) while the ACT is under a political obligation to provide an urban water supply, it is under no legal obligation to do so and is entitled to charge for the water it provides;[98]

(b) ACTEW is under no legal obligation to take water from the ACT, but in exercising a choice to do so, it becomes obliged to pay the WAC;[99]

(c) to say that ACTEW is practically obliged to take its water from the ACT is "to say no more than that, as a government owned corporation, it chooses to take ACT water in conformity with the wishes of its controlling shareholder";[100]

(d) to say that ACTEW was practically compelled to acquire water from the ACT because it would be uneconomic to acquire water from elsewhere only goes to show that the WAC is not so high that consumers would make a rational choice and obtain their water from other suppliers;[101] and

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92 *Harper* (1989) 168 CLR 314 at 336.4. See also 325.7.
93 Full Court Appeal at 558 [65] and 564 [81] (Keane CJ).
94 Full Court Appeal at 581 [168] and 583 [176] (Stone J).
95 *Harper* (1989) 168 CLR 314 at 325.6 (emphasis added).
96 *Harper* (1989) 168 CLR 314 at 332.7 (Brennan J).
97 Full Court Appeal at 561 [73] (emphasis added).
98 Full Court Appeal at 558 [65] (emphasis added).
99 Full Court Appeal at 558 [65] (emphasis added).
100 Full Court Appeal at 561 [75] (emphasis added).
101 Full Court Appeal at 561 [76] (emphasis added).

(e) the WAC was not a tax because it was a "payment exacted as the quid pro quo in a voluntary transaction to acquire a right to an asset from public resources".[102]

53. The above reasoning attributes too much significance to "choice" and the "voluntary" nature of the taking of water. In *Harper*, the Court did not analyse the extent to which abalone divers had alternatives other than to pay the licence fee (such as moving interstate or changing industry). The existence of alternatives was assumed in the statement that the fee was paid by "choice". But in truth, in the absence of legal compulsion to engage in a particular activity, there is no strict dichotomy between situations involving choice and those involving "no choice" or "compulsion". Instead, there is a continuum between voluntariness and compulsion, and along that continuum choices become progressively more encumbered. For that reason, in the absence of legal compulsion it is more apt to examine the "degree of choice" than to characterise an activity as voluntary or compulsory.

54. The degree of "choice" as to whether to enter a field that attracts an obligation to pay a charge, but that results in an acquisition of property or a privilege, is one factor that is relevant to whether a charge is a "tax" or a "special exaction". But it is not by itself determinative. In the large majority of cases where a charge is imposed as the price of access to a public resource, the fact that a person chooses to enter the field and to pay the charge in order to acquire the resource will strongly suggest that the charge is properly characterised as a fee "for" the resource. The choice to pay will demonstrate the existence of a relationship between the amount of the charge and the value of the property that is acquired.

55. The position is different where a person has very little choice but to engage in the activity that attracts the charge, even if, having paid the charge, the person acquires property, because in that situation the fact that the charge is paid does not demonstrate that there is any relationship between the amount of the charge and the value of the property.

56. By focusing on the fact that ACTEW was not under any legal compulsion to acquire water from the ACT, Keane CJ gave insufficient weight to the fact that ACTEW had no real practical alternative but to acquire water from the ACT. That fact made it more important to examine other factors that bear on the characterisation of a charge as a tax or a special exaction. In particular, it made it more important to consider whether the amount of the WAC has a discernible relationship to the value of the water acquired by ACTEW. That inquiry becomes progressively more important the less choice there is as to whether to engage in the activity that attracts a charge, because as the degree of choice decreases the relationship between the decision to pay the charge and the value of the property acquired becomes less self-evident.

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[102] Full Court Appeal at 564 [81] (emphasis added).

(c) Discernible relationship

57. In *Air Caledonie*, the unanimous Court observed that: [103]

> [I]f the person required to pay the exaction is given no choice about whether or not he acquires the services and the amount of the exaction has no discernible relationship with the value of what is acquired, the circumstances may be such that the exaction is, at least to the extent that it exceeds that value, properly seen as a tax. (emphasis added)

58. This Court has generally refused to countenance any rigid approach in identifying whether a compulsory charge has the features of a tax.[104] Consistently with that refusal, the above passage suggests that the existence of a discernible relationship with value is one factor to be considered in determining whether a charge should be characterised as a "special exaction" or a tax.[105] The lack of a discernible relationship does not necessarily indicate that a charge is a tax, but it is a factor that supports that conclusion.[106] That is the correct approach.

59. In *Harper*, Dawson, Toohey and McHugh JJ considered that the most important circumstance that supported their conclusion that the licence fee was not a tax was "the fact that it is possible to discern a relationship between the amount paid and the value of the privilege conferred by the licence".[107] But it is important to examine the way their Honours applied that requirement, because in discerning a relationship between the licence fee and the value of the abalone that was acquired, their Honours:

(a) accepted that it was "significant that abalone constitute a finite but renewable resource";[108]

(b) did not draw any distinction between the three different licence fees that were in issue, despite the fact that the 1987 licence fee was set at a fixed rate per tonne of abalone taken, the 1988 licence fee related to "value" only insofar as it incorporated within it the commercial value of abalone (which it may be expected would have incorporated the very licence fees in question), and the 1989 licence fee was one of two fixed fees depending on whether the amount taken exceeded 15 tonnes. It seems that their Honours considered that each of these methods of calculation had a discernible relationship with the value of the abalone taken, even though a diver who took one tonne of abalone would have paid $360 under the 1987 fee, but $28,200 under the 1989 fee;

(c) did not attribute any significance to the fact that the amount paid by Mr Harper for his licence in 1988 and 1989 was double the amount paid in 1987, while there was only a small increase in the price of abalone over that time.

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103 *Air Caledonie* (1988) 165 CLR 462 at 467.9.

104 *Air Caledonie* (1988) 165 CLR 462 at 467.3. See also *Luton v Lessels* (2002) 210 CLR 333 at 352 [49] (Gaudron and Hayne JJ).

105 The discernible relationship criterion was similarly treated as one relevant factor (albeit an important one) in *Harper* (1989) 168 CLR 314 at 336.7 (Dawson, Toohey and McHugh JJ); *Airservices* (1999) 202 CLR 133 at 234 [298] and 239 [310], 240 [314] (McHugh J). At first instance, at [83], Buchanan J referred to the absence of a discernible relationship as rendering a charge "vulnerable" to characterisation as a tax.

106 *Airservices* (1999) 202 CLR 133 at 240 [314] (McHugh J). See also 286 [457] (Gummow J).

107 (1989) 168 CLR 314 at 336.7.

108 (1989) 168 CLR 314 at 336.7.

60. The approach adopted by Dawson, Toohey and McHugh JJ suggests that, while some relationship between the amount of a charge and the value of any property that is obtained is necessary, a loose relationship will be sufficient (at least in the case of a regime designed to manage a finite but renewable public resource).

61. The majority in the Full Court was correct in holding that, if the discernible relationship requirement applies to fees for the acquisition or use of property, it is not demanding. The question is whether there is "no discernible relationship". As Keane CJ observed, the relationship need not be "fair" or "equitable" or "reasonable" – it need merely be "discernible".[109] Similarly, Stone J noted that a "discernible" relationship is a very low threshold and "does not posit that the fee should represent good value for the return under the licence".[110] The exercise of monopoly power to charge what the market will bear does not mean that the price charged ceases to have a discernible relationship to the value of what is supplied.[111]

62. QCC's argument that the WAC does not have a discernible relationship to the value of water acquired by ACTEW focuses on monopoly pricing and the contention that an "objective value" for water can be calculated as the sum of "reasonable costs, plus a reasonable rate of return".[112]

63. In the context of compulsory services, if the existence of a monopoly supplier makes it difficult to determine the value of a service, the cost of providing that service may provide a reasonable proxy for the "value" of the service.[113] If a fee has no discernible relationship to the cost of providing the relevant service, that may support an inference that the fee is a revenue raising measure, which may in turn support characterisation of the fee as a tax.[114]

64. By contrast, a government may incur no or minimal costs in granting the right to access a resource in public stewardship. While there will inevitably be costs associated with accessing the resource, those costs may be borne entirely by the person granted the right of access. In those circumstances, it would be inappropriate to value the right of access by reference to the "cost" of providing that right. To do so would deny governments capacity to realise the value of the resources that they own, and in so doing to manage access to resources to protect them for the benefit of the public generally. Accordingly, references to "cost" are of no assistance in deciding whether a fee has a discernible relationship with the value of any property acquired in return for the payment of that fee.

65. The WAC in issue has not been shown not to have a discernible relationship to the water acquired by ACTEW. It is fixed at a set rate per kilolitre, meaning the amount of the WAC has a direct relationship to the amount of water that is taken. The fact that water is a finite resource strengthens the conclusion that the WAC has a discernible relationship to the value of the water taken, because the ACT has a degree of latitude in setting the price to take water in circumstances where a government may

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109 Full Court Appeal at 565 [87]. See also *Airservices* (1999) 202 CLR 133 at 220 [245] (McHugh J).

110 Full Court Appeal at 583 [174].

111 Full Court Appeal at 565 [87].

112 QCC's submission on the WAC (C2 of 2011) at [74].

113 *Airservices* (1999) 202 CLR 133 at 234 [298] (McHugh J). As Gummow J recognised at 282-283 [445]-[447], it may be necessary to have regard to "non-market values" in considering this characteristic.

114 *Airservices* (1999) 202 CLR 133 at 239 [311] (McHugh J); also at 191 [136] (Gaudron J). See also *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 538.4 (Barwick CJ), 562.9 (Gibbs J) and 570.8-571.1 (Aickin J).

legitimately choose to seek to conserve a scarce natural resource that has social and environmental value.[115] It is conceivable that the WAC could be set at such a rate that it would bear no discernible relationship with the value of the water acquired (as ACTEW concedes[116]), but that has not been shown to be the case in relation to the WAC in issue in the present appeals.

(d) The purpose of the charge

66. Revenue raising is not a universal determinant of taxation.[117] A charge may be a tax even if it is imposed to encourage persons to modify their behaviour so as to avoid the charge entirely.[118]

67. That is not to deny that the objective of raising revenue may be relevant in characterising a charge as a tax.[119] But the fact that a charge is imposed to raise revenue does not establish that the charge is a tax. That is particularly true where a charge is imposed as a fee for the acquisition or use of public property. The raising of revenue will be the inevitable consequence of requiring people who seek to profit from access to a limited resource to pay for that access, in that way providing some compensation to the public for the loss of that resource[120] and permitting the State to realise the economic value of the resource. If the fact that a payment raised revenue meant a charge was a tax, that would deny content to the Court's recognition in *Air Caledonie* that a "charge for the acquisition or use of property" should not be characterised in that way.

(e) The consequences of failure to pay the charge

68. If ACTEW fails to pay the WAC within 30 days of the day it is payable, its licence to take water may be either cancelled or suspended until the WAC is paid.[121] In either event, it would be an offence for ACTEW to take any water within the ACT.[122] The fact that ACTEW's ongoing entitlement to take water is dependent upon payment of the WAC demonstrates that there is a close connection between the payment of the WAC and the continued use of property or the right to take property. That supports the conclusion that the WAC is a fee "for" the acquisition or use of property or a privilege.

Summary

69. In summary, therefore, whilst the WAC has the positive characteristics of a tax, an analysis of the relevant factors indicates it is a special exaction that should not be so characterised. The key factors are that it is a fee for the acquisition or use of property

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115 See ACTEW's submissions on the WAC (C2 of 2011) at [33] to [36]. See also *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 182 [90] (Hayne, Kiefel and Bell JJ).

116 See ACTEW's submissions on the WAC (C2 of 2011) at [36]. Cf the ACT's submissions on the WAC (C2 of 2011) at [49].

117 *Airservices* (1999) 202 CLR 133 at 178 [91] (Gleeson CJ and Kirby J), 261 [374] (Gummow J).

118 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 569.5 (Mason CJ, Deane, Tohhey and Gaudron JJ). To the same effect see 589.1 (Dawson J). See also *Radio Corporation Pty Ltd v Commonwealth* (1938) 59 CLR 170 at 179-180 (Latham CJ); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 13.5 (Kitto J), 18.7 (Windeyer J).

119 *Airservices* (1999) 202 CLR 133 at 178 [91] (Gleeson CJ and Kirby J), 239 [311] (McHugh J); see also *Luton v Lessels* (2002) 210 CLR 333 at 343 [13] (Gleeson CJ).

120 *Harper* (1989) 168 CLR 314 at 332.5 (Brennan J).

121 1998 Act s 72; 2007 Act s 106.

122 1998 Act s 33(1); 2007 Act ss 28, 77A.

or a fee for a privilege, being the right to take a finite natural resource under long-standing public stewardship, similar to a royalty. The recipient, ACTEW, has some degree of choice about acquiring the property or privilege, though with a significant degree of practical compulsion, but there is some relationship between the amount of the charge and the value of the property or privilege acquired.

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