

2016 MULSS Mooting Competition

Grand Final



KING & WOOD
MALLESONS

Electra Pty Ltd
Plaintiff

-and-

The State of Victoria
Defendant

MELBOURNE LSS GRAND FINAL MOOT PROBLEM

SPECIAL CASE

Pursuant to Rule 27.08 of the High Court Rules 2004, the parties state the following special case and questions of law:

1. Electricity is produced in Victoria by two companies — Electra and PowerfulCo. Each is a “transmission company” within the meaning of the *Electricity Industry Act 2000* (Vic). Each produces electricity by various means at various places around the state.
2. Electricity is made up of a substance (electrons) that has mass. Electricity is generated when electrons are in a particular state.
3. An electron is a negatively charged particle. It is one of the three basic types of particles which make up matter at the sub-atomic level: protons, neutrons and electrons.
4. Electricity is not normally visible. Its presence is detected by devices such as meters which detect/measure voltages and measure currents, which identify a number or flow of electrons (current), the voltage and other parameters (eg frequency) of that flow.
5. Electrical energy is generated by the following process:
 - (a) Some form of energy/force is applied to separate negatively charged electrons from the positively charged nuclei of atoms. When electrons are

separated from the nucleus and held apart in a higher energy state, an electric field is produced.

- (b) Allowing the negative charges to move towards a positive charge (and to a lower energy state) releases electrical energy. Allowing the charge to move through an appropriate device allows work to be done.
6. Electricity is capable of being quantified. It is quantified at the point at which it passes through a meter. Electricity can be stored.
7. Electricity is consumed, in that it is transformed or dissipated by its use by the end user.
8. Electricity is generated for commercial purposes by converting an energy source into electrical energy. For example, brown coal or natural gas may be burnt to produce electricity. In Victoria, electricity is commonly generated at voltages of between 11kV and 24kV.
9. After the electricity has been generated it needs to be transmitted to the areas in which it will be used. The transmission system uses wires (lines) strung between transmission pylons to transmit electricity.
10. Transmission occurs at high voltages through the transmission system, composed of electricity lines and transmission substations. In Victoria, electricity is transmitted at 220kV, 330kV and 500kV. Before it is transmitted it is transformed from the voltage at which it is initially produced to a higher voltage.
11. The transmission substations serve two main purposes:
 - (a) they interconnect various electricity lines; and
 - (b) they transform the electricity by changing the voltage at which the electricity is transmitted.
12. Some transmission substations also act as connection points to the distribution system, at which the voltage of the electricity is reduced to 66kV (generally) and then delivered to the distribution system.

13. The distribution system (which is different from the transmission system) typically consists of:
 - (1) 66kV lines,
 - (2) substations that further transform the electricity from 66kV to 22kV,
 - (3) 22kV lines,
 - (4) distribution substations that further transform the voltage from 22kV to 240V;
and
 - (5) branch lines that connect the 240V lines to the property of the distributor's customer (ie the end-user or consumer of electricity).
14. Transmission system pylons are placed on various pieces of land in Victoria. Some of this land is held by private owners and some is Crown land. Electra and PowerCo do not own the land on which their pylons are placed — access to and use of the land is obtained through special transmission easements held by each of the companies.
15. Most of the private land over which the transmission pylons run is subject to general land tax under Division 1 of Part 2 of the *Land Tax Act 2005* (Vic).¹ Some of the private land and all of the Crown land is not subject to general land tax.
16. Transmission easements are the subject of a special form of “land tax” imposed on transmission easements by Division 4 of Part 2 of the *Land Tax Act* (subject to an exemption under s 87 — but no such exemption has been granted).
17. The transmission easement land tax is not in the same form as, and does not operate in the same way as, the general land tax. In particular:
 - (1) The transmission easement land tax is calculated by reference to a valuation of the easement made under section 5B of the *Valuation of Land Act 1960* (Vic),² by reference to the decreased value of the land resulting from

¹ This is a real Act.

² Also a real Act.

the presence of the transmission easement. In contrast, general land tax is calculated by reference to a valuation made under section 5A of the *Valuation of Land Act*.

- (2) If unpaid the transmission easement land tax does not generate a charge over the land in question, unlike the general land tax (see s 96 of the *Land Tax Act*).
18. The transmission easement tax is not calculated by reference to the amount of electricity passing through the pylons on the easement.
 19. The transmission easement tax need not be paid before the transmission company can lawfully use its easements; it simply generates a debt to the state.
 20. The transmission easement land tax raises revenue of approximately \$45 million dollars per year from each of Electra Pty Ltd and PowerCo (\$90 million in total).
 21. The cost of this tax is passed on to consumers of electricity, resulting in consumers paying approximately 5% more for their electricity than they otherwise would.
 22. In the second reading speech for the Land Tax Amendment Bill 2004, which first introduced the transmission easement land tax,³ the Treasurer, Mr Brumby, said this:⁴

On 24 March 2004, the government also announced its intention to cease the collection of the smelter reduction amount (SRA), which has been in place since 1997, from 30 June 2004. The SRA is the subject of litigation in the High Court and, whilst the government does not admit any liability in this matter, it has decided to end the levy in order to minimise any uncertainty for the electricity industry and for consumers. Since 1997, the SRA has been used to fund the State Electricity Commission of Victoria's contractual obligations, which relate to two electricity supply agreements with the Point Henry and Portland smelters. These obligations will be met after this date from government contributions from consolidated revenue.

The funding shortfall caused by this decision has consequences for the general financial health of the state. Under these conditions the changes to

³ As initially drafted the Land Tax Amendment Bill 2004 (Vic) amended the *Land Tax Act 1958* (Vic) (the **1958 Act**). The Bill was later amended so that it repealed the 1958 Act and replaced it with the *Land Tax Act 2004*.

⁴ Victoria, Legislative Assembly, *Hansard*, 1 April 2004 at 544 (Mr Brumby) (this is a real extract from a real second reading speech).

the *Land Tax Act 1958* made in this bill are a fiscally responsible move by this government, which provide an appropriate and equitable source of revenue.

Existing land tax payers and other easement holders will not be affected by these new arrangements as it is expected the arrangements will only affect a small number of specialised commercial enterprises.

23. Assume that the smelter reduction amount (**SRA**) was a levy previously imposed on electricity producers by reference to how many megawatts of electricity they produced each month.⁵ Assume that Electra had challenged the validity of the SRA in the High Court on the basis that it imposed a duty of excise; but the matter was settled because the legislation imposing the SRA was repealed. The *Land Tax Act* was then amended so as to impose the transmission easement land tax.
24. In addition to its electricity distribution business, Electra also transmits pay television content through various cables it owns. That involves the transmission of electromagnetic waves and light through the cables to a household that has a receiving device.
25. Sound and images are converted into data at the transmitting end, and then that data is converted into an electromagnetic wave in the form of a variation in its amplitude or frequency (analogue) or continuity (digital). The variation is understood by the receiving device, which “reads” the variation and creates sound or images at the receiving end.
26. Pursuant to the *Pay TV Tax Act 2017 (Vic)*,⁶ a tax is imposed on Electra for every TV program transmitted through its cables, by reference to the number of customers that download or watch the content.
27. The parties agree that if the pay TV content is properly regarded as “goods” then the *Pay TV Tax Act* is invalid by reason of s 90, because it involves a tax on the distribution of the pay TV content. However, the parties do not agree as to whether

⁵ There was a real SRA, but you do not need to know the details of it or how it was calculated, beyond what is stated in this Special Case.

⁶ A hypothetical Act.

the pay TV content is properly regarded as “goods” for the purposes of s 90 of the Constitution.

- (1) The plaintiff says the content and the electromagnetic waves that transmits the content are things that are articles of trade or commerce.
- (2) In contrast, the defendant says that information passed along a cable using electromagnetic waves constitute services, not goods.

28. Electra has instituted proceedings in the High Court seeking:

- (1) a declaration that Division 4 of Part 2 of the *Land Tax Act* is invalid by reason of s 90 of the Constitution; and
- (2) a declaration that the *Pay TV Act* is invalid by reason of s 90 of the Constitution.

29. A single justice directed that the following questions of law be determined by the Full Court:

- (1) Is the transmission easement land tax imposed by Division 4 of Part 2 of the *Land Tax Act 2004 (Vic)* valid?
- (2) Is the *Pay TV Tax Act* valid?