IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 25 OF 2013**

BETWEEN: **QUEENSLAND NICKEL PTY LIMITED**
Plaintiff

AND: **COMMONWEALTH OF AUSTRALIA**
Defendant

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ANNOTATED SUBMISSIONS OF THE DEFENDANT

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PART I PUBLICATION

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

PART II ISSUES

2. The Special Case reserves four questions of law for determination by the Full Court.[1] Those questions are correctly summarised in the plaintiff's submissions (**PS**) at [3] - [6].

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was given by the plaintiff on 20 May 2013.[2] No further notice is necessary.

PART IV RELEVANT FACTS

4. The agreed facts are set out in the Special Case.[3] Those facts reveal several matters of particular importance.

5. *First*, Australia's deposits of nickel-bearing ores are not distributed equally among the States.[4] 96% of Australia's "economic demonstrated resources"[5] (**EDR**) of nickel are located in Western Australia.[6] Queensland retains the second largest nickel reserves with 3.8% of Australia's EDR, followed by Tasmania with 0.2%.[7]

6. *Secondly*, the physical makeup of nickel-bearing ores in Australian deposits also differs from State to State and within States. For example, the EDR of nickel in Western Australia comprises both sulphide deposits and laterite deposits.[8] The EDR of nickel in Queensland is comprised of laterite deposits only.[9]

7. *Thirdly*, at all times since the Act came into force, no nickel ore from Australian deposits has been used by the plaintiff. 100% of the nickel ore used by the

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1 Special Case Book (**SCB**) 95-96.

2 SCB 17.

3 SCB 83-95.

4 SCB 85 [17].

5 "Economic demonstrated resource" is a term used to denote the amount of naturally occurring nickel that is reliably estimated to exist in the ground and which can be economically extracted at current prices with existing technology: SCB 85 [17(a)].

6 SCB 86 [17(c)].

7 SCB 86 [17(d)].

8 SCB 86 [17(e)].

9 SCB 86 [17(e)].

plaintiff has instead been imported from overseas deposits in Indonesia, New Caledonia and the Philippines.[10] The prospect that nickel would be imported from overseas deposits was one of the principal reasons for the plaintiff's decision to locate its refinery at Yabulu, on the coast of North Queensland, rather than inland at or very close to the Greenvale nickel ore deposit.[11]

8. *Fourthly*, contrary to the tenor underpinning aspects of the plaintiff's submissions, the Special Case does not demonstrate that the production processes adopted by the plaintiff to produce nickel products are "necessarily" different to those used by other nickel producers.[12]

9. The choice of nickel refining process to be used by the plaintiff was a business decision made in the early 1970s in response to a range of factors, including not only the nickel mineralisation and chemistry of the Greenvale ore body, but also technological developments in the production of nickel and cobalt products at that time, and the then expected cost of energy inputs under available production processes.[13] At least three different production processes were considered by the plaintiff.[14] While the Caron ammonia leach process (**Caron process**) was considered by the plaintiff at the time to be the most economically feasible,[15] it does not follow that the other processes were non viable or that those processes do not remain available.

10. *Fifthly*, the production process chosen by the plaintiff emits the greatest amount of carbon dioxide into the atmosphere, per unit of production, of any of the production processes used by nickel producers identified in the Special Case.[16] This is because, *inter alia*, only the process utilised by the plaintiff involves the roasting of all or nearly all of the mined nickel ore at very high temperatures (in excess of 700 degrees).[17] In addition, only the process used by the plaintiff fails to generate energy via the oxidation of sulphur during the course of the refining process, thereby requiring the plaintiff to generate a larger amount of energy from carbon fuels than the processes used by other nickel producers.[18]

11. These features, which may be described as environmental inefficiencies embodied in the Caron process, have the effect that the plaintiff, per unit of production, bears the highest liability to unit shortfall charge of the nickel producers identified in the Special Case prior to the surrender of available carbon units under the Clean Energy regime.[19]

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10 SCB 93 [46].

11 SCB 92 [42].

12 Cf for example PS [24], [48]; see also PS [46].

13 SCB 90 [34(iv)], 92-93 [43]. See also SCB 116-119.

14 SCB 93 [43] (Caron ammonia leaching, pressurised acid leaching and ferronickel smelting).

15 SCB 92-93 [43].

16 SCB 90 [33(b)].

17 SCB 89 [32(a)].

18 SCB 90 [32(b)], [33(a)].

19 SCB 92 [40].

12. *Sixthly*, the differences that exist between the production processes used by the nickel producers identified in the Special Case do not mean that the nickel and cobalt products resulting from those processes are denied identity or similarity to each other. The nickel compacts produced by the plaintiff and London Metal Exchange (**LME**) grade nickel briquettes produced by Nickel West and Murrin Murrin are each categorised as "Primary nickel products – class I" by the International Nickel Study Group and are each substitutable for the other in the production of stainless steel products (which is the primary use for nickel compacts and briquettes). In addition, the plaintiff's nickel compacts sell at very near the price of LME grade nickel briquettes sold on the London Metal Exchange.[20]

PART V LEGISLATIVE PROVISIONS

13. The plaintiff's statement of applicable constitutional provisions, statutes and regulations is accurate.

PART VI ARGUMENT

The Commonwealth's argument in summary

14. These proceedings represent a narrow challenge to the constitutional validity of a discrete part of the *Clean Energy Act 2011* (Cth) (**Act**) and *Clean Energy Regulations 2011* (Cth) (**Regulations**). The plaintiff does not impugn the core architecture of the legislative regime. It takes no issue with Parliament's ability to impose a *tax* liability on certain emitters of greenhouse gases, nor with Parliament's ability to provide *transitional assistance* to emitters (including itself) that participate in certain emissions-intensive trade-exposed activities (**EITE activities**).

15. The plaintiff instead contends that Parliament was constitutionally required to provide it with comparatively *more* transitional assistance per unit of nickel production than that provided to other nickel producers (although, the primary relief it seeks will unwind the assistance which it has already received).

16. The plaintiff's case amounts to no more than an attack on a matter of policy and design falling squarely within the remit of the legislature. While the plaintiff attempts to ground its complaint in s 99 of the Constitution, that section is not offended. Neither the Act nor Regulations discriminate between States or parts of States, let alone between persons or entities resident or operating in different States or parts of States. Nor do the Act or Regulations confer any tangible revenue advantage on States or parts of States, or upon entities resident or operating in those States or parts thereof.

17. Any difference in the amount of tax ultimately payable by the plaintiff under the Act arises not due to any discrimination between States or parts thereof but as

[20] SCB 94-95 [51], [52], [56]-[57].

a result of business decisions that the plaintiff has taken, and continues to take, as to the way in which it produces nickel in Australia; decisions made in response to a variety of variables, of which location is only one.

The Act and Regulations

The legislative scheme in overview

18. The plaintiff does not attack the overall architecture of the Act and Regulations, nor the ability of Parliament to ameliorate the consequences of the legislative scheme as it would otherwise apply to certain industries or activities. In those circumstances, it is appropriate to commence the analysis with a review of the legislative scheme in overview.[21] If the scheme viewed as a whole is constitutionally permissible, that conclusion and the reasons underpinning it will inform the approach to whether the impugned part suffers its own fatal vice.

19. At its simplest, the Act puts a price on greenhouse gas emissions in Australia by imposing a tax liability on certain emitters of greenhouse gases who fail to surrender "eligible emissions units" that equate to the number of tonnes of greenhouse gases which they have produced in a particular period.[22]

20. The two main integers in determining an entity's tax liability are: (a) its "emissions numbers"; and (b) the number of eligible emissions units surrendered by it in the applicable period. Each is considered in turn below.

Calculation of emissions numbers

21. The Act relevantly applies to entities that operate facilities in Australia that produce "covered emissions" (including greenhouse gases such as carbon dioxide) above a specified threshold in a financial year.[23] Operators of these facilities are described as "liable entities" in the Act.[24]

22. Pursuant to the Act and earlier legislation (*National Greenhouse and Energy Reporting Act 2007* (Cth)) (**NGER Act**), the number of tonnes of covered emissions produced from the operation of a facility is calculated by reference to a unit of measurement known as "carbon dioxide equivalence".[25] This calculation results in the identification of a "provisional emissions number".[26] An

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21 While the Act has been repealed with effect from 1 July 2014, the transitional provisions in the repealing statute preserve the liability of the plaintiff (and other liable entities) in respect of unit shortfall charge levied in the 2012 and 2013 financial years: *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth), items 323(1) and 324(3) of Sch 1, Pt 3. It remains convenient to refer to the legislative provisions in the present tense.

22 Act, s 4. It is not in dispute that a law with respect to taxation under s 51(ii) of the Constitution may have as its primary objective the encouragement or discouragement of particular behaviour: see for example *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555 at 569-570 (Mason CJ, Deane, Toohey and Gaudron JJ) and the authorities cited therein.

23 Act, ss 20 and 30.

24 See for example s 20(3) of the Act.

25 The "carbon dioxide equivalence" of an amount of greenhouse gas is the amount of the gas multiplied by a value specified by regulation in relation to that kind of greenhouse gas: NGER Act, s 7. Carbon dioxide has a value of "1": see *National Greenhouse and Energy Reporting Regulations 2008* (Cth), reg 2.02.

26 Act, s 117.

"interim emissions number" will generally be calculated by reference to 75% of the corresponding provisional emissions number.[27]

Eligible emissions units

23. An "eligible emissions unit" is defined in the Act to mean a "carbon unit", an "eligible international emissions unit" or an "eligible Australian carbon credit unit".[28] For present purposes, only "carbon units" are relevant.

24. Carbon units are issued by the Clean Energy Regulator (**Regulator**) on behalf of the Commonwealth.[29] Each unit has a unique identification number and a "vintage year".[30] A carbon unit is personal property and, subject to certain restrictions, is transferable.[31]

25. Carbon units may be issued by the Regulator in several circumstances, including on application for a fixed price (during the financial years 2012-2013 and 2013-2014),[32] through an auction conducted by the Regulator (in later years) or for free under the Jobs and Competitiveness Program (**JCP**) that is at the heart of these proceedings.[33]

26. Eligible emissions units, including carbon units, may be "surrendered" by notice to the Regulator during an eligible financial year.[34] A number of restrictions are imposed on the number, and type, of eligible carbon units that may be surrendered. For example, a carbon unit issued in accordance with the JCP may not be surrendered in relation to an eligible financial year unless that financial year is the vintage year of the unit.[35]

Unit shortfall and unit shortfall charge

27. The amount of tax that a liable entity is required to pay depends, in large part, upon its "unit shortfall" (if any) in a financial year.[36]

28. In a fixed charge year,[37] a "provisional unit shortfall" is first calculated. The shortfall is determined by subtracting the number of eligible emission units that a person had surrendered by 15 June in the applicable financial year from the total interim emissions numbers of the person in that financial year.[38] If the result of that calculation is a positive number, a provisional unit shortfall will exist.

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27 Act, s 126.
28 Act, s 5.
29 Act, s 94.
30 Act, s 96.
31 Act, s 103.
32 The price for units issued in the 2012 vintage year was $23: s 100(1), read with ss 100(10)-(12).
33 Act, s 99.
34 Act, ss 121, 122.
35 Act, s 122(7).
36 See Act, Pt 6, Div 3.
37 Each of the years in which the Act was in operation was a "fixed charge year".
38 Act, s 125(5).

29. Separate legislation imposes a "unit shortfall charge" on a liable entity with a provisional unit shortfall.[39] The unit shortfall charge is calculated by multiplying the number of units in the unit shortfall by a prescribed amount.[40] In the two fixed charge years in which the Act operated, the prescribed amount was 130% of the per unit charge applicable under s 100 of the Act for the issue of a carbon unit with a vintage of the relevant fixed charge year.

30. The process of calculating a liable entity's unit shortfall, and unit shortfall charge, is repeated on a final basis as at 1 February in the following year.[41]

The JCP in outline

31. The Act recognises that the legislative scheme may have a material impact on persons who participate in activities that are both emissions-intensive and trade-exposed.[42] This is because international competitive pressures restrict the ability of participants in those industries to pass on the cost of the unit shortfall charge to purchasers of product further along in the production chain. In the absence of transitional assistance, participants in EITE activities may also decide to relocate their activities to foreign countries that have not implemented climate change policies to the same effect as Australia[43] (a process of relocation commonly known as "carbon leakage"[44]).

32. The Act seeks to reduce the impact of unit shortfall charge on EITE activities by authorising the establishment of the JCP.[45] The details of the JCP are contained in Sch 1 to the Regulations.[46]

33. In simple terms, the JCP relevantly provides certain persons with free carbon units that can be surrendered so as to reduce the unit shortfall charge for which the entity would otherwise be liable.[47]

34. An "eligible person" is entitled to apply for free carbon units for an eligible financial year.[48] A person is an "eligible person" for the purposes of the JCP if,

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39 Act, s 134(1), read with s 8 of the *Clean Energy (Unit Shortfall Charge – General) Act 2011* (Cth), s 9 of the *Clean Energy (Charges – Excise) Act 2011* (Cth), s 9 of the *Clean Energy (Charges – Customs) Act 2011* (Cth) (together, the "**Charging Acts**").

40 See eg *Clean Energy (Unit Shortfall Charge – General) Act 2011* (Cth), s 8(3).

41 Act, ss 128, 134(2).

42 Act, s 143(1). That impact may be direct (ie through the imposition of a unit shortfall charge) or indirect (eg through increased electricity costs).

43 Act, s 143(2)(b). Revised Explanatory Memorandum to the Clean Energy Bill 2011 (Cth) (**Revised EM**) at [5.44], [5.46].

44 Revised EM at 35.

45 Act, s 145.

46 The *Clean Energy Amendment Regulation 2012 (No 1)* (Cth) amended the Regulations by inserting Schedule 1.

47 Act, ss 143-145.

48 Regulations, Sch 1, cl 701.

inter alia, the person has operational control of a facility at which an EITE activity was wholly or partly carried on.[49]

35. The JCP identifies 51 EITE activities in respect of which assistance is provided.[50] One of those activities is the "production of nickel" (Div 48).[51]

Division 48 of the JCP (Production of nickel)

36. Division 48 sets out four main matters. *First*, the division identifies the activity with which it is concerned:[52]

> The production of nickel is the chemical and physical transformation of either or both of:
>
> (a) nickel bearing inputs into intermediate nickel products, primary nickel products or cobalt products;
>
> (b) intermediate nickel products into primary nickel products or cobalt products.

37. *Secondly*, Div 48 specifies that this activity is an EITE activity.[53]

38. *Thirdly*, the division classifies the activity as moderately emissions-intensive.[54] The result of this classification is that eligible persons engaged in the production of nickel are entitled to assistance at a lower rate than persons engaged in activities that are highly emissions-intensive (such as, for example, integrated iron and steel manufacturing[55]).

39. *Fourthly*, the division identifies the basis for the issue of free carbon units in respect of the activity.[56] For the production of nickel, the basis for the issue of free carbon units is measured on a dry weight basis by tonne of:

> (a) 100% equivalent nickel, contained in: (i) primary nickel products produced from nickel bearing inputs; (ii) intermediate nickel products produced from nickel bearing inputs that are not subsequently transformed into primary nickel products at the same facility; or (iii) primary nickel products produced from intermediate nickel products that have not been produced at the same facility; or
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> (b) 100% equivalent cobalt, contained in cobalt products.[57]

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49 Regulations, Sch 1, cll 503, 504. Section 5 of the Act provides that "operational control" has the same meaning as in the NGER Act. The term "operational control" is defined in that Act in ss 7 and 11-11C.

50 Regulations, Sch 1, Pt 3, Divs 2-52.

51 Regulations, Sch 1, Pt 3, Div 48. The *Clean Energy Amendment Regulations 2012 (No 7)* (Cth) amended Schedule 1 to the Regulations by inserting Division 48 in Part 3.

52 Regulations, Sch 1, cl 348(1).

53 Regulations, Sch 1, cl 348(2).

54 Regulations, Sch 1, cl 348(3).

55 Regulations, Sch 1, cl 320(5).

56 Regulations, Sch 1, cl 348(4).

57 The product must also be produced by carrying on the emissions-intensive trade-exposed activity and be of saleable quality.

Number of free carbon units to which an eligible person is entitled

40. The number of free carbon units to which an eligible person undertaking an EITE activity is entitled is calculated by applying a statutory formula.[58]

41. The formula includes as integers three "allocative baselines". The allocative baselines are comprised of: (a) the baseline level of direct emissions per unit for the production of the relevant product, including emissions associated with the use of steam;[59] (b) the baseline level of electricity consumed per unit for the production of the relevant product;[60] and (c) the baseline level of natural gas (or its components) feedstock used per unit for the production of the relevant product.[61]

42. The allocative baselines are fixed numbers for each EITE activity and, where applicable, various sub-categories of those activities.[62] The fixed numbers have been calculated by reference to *industry average levels* during the period 2006 – 2008 in respect of the applicable activity or sub-category of activity.[63]

43. Item 2.14 in cl 401 of Sch 1 sets out the allocative baselines for the production of nickel. The item includes sub-baselines for the various outputs in order to distinguish between different types of nickel products and also between the different stages in the production of nickel products. For example, the item recognises that a greater amount of emissions will be produced when producing nickel products from nickel bearing inputs (ie from nickel ore in its original state) than will be produced when producing nickel products from intermediate nickel products (ie nickel that has already been subjected to some form of refining). The allocative baselines applicable to the former are therefore significantly higher than apply to the latter.

44. The formula includes as a further integer the adjusted production of the eligible person, being the volume or amount of the relevant product, adjusted in accordance with cl 803, to be the volume or amount used to issue carbon units for a given financial year.[64] The adjusted production integer is the only integer in the formula specific to the individual circumstances of the relevant eligible person.

45. The incorporation in the formula of a fixed allocative baseline for direct emissions has the effect that each participant in a particular EITE activity, or sub-category of that activity, is entitled to the same number of free carbon units per unit of production, irrespective of the amount of carbon pollution that they

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58 The formula is set out in cl 906 of Sch 1 to the Regulations.

59 Clause 907(5).

60 Clause 907(8).

61 Clause 907(11). This allocative baseline is not relevant to the production of nickel: see item 2.14 of the table following cl 401(1) of Sch 1 to the Regulations.

62 The individual baseline levels of direct emissions are listed in the table following cl 401(1) of Sch 1 to the Regulations.

63 Explanatory Statement to the *Clean Energy Amendment Regulation 2012 (No 1)* (Cth) at 106-107.

64 Regulations, Sch 1, cl 907(6).

produce. For example, if nickel producers A and B each produce 100 tonnes of 100% equivalent nickel contained in primary nickel products of saleable quality produced from nickel bearing inputs in a specified period, they will each be entitled to the same number of free carbon units in that period, even if nickel producer A produces twice the number of tonnes of covered emissions than nickel producer B and is therefore *prima facie* liable to a higher unit shortfall charge prior to the surrender of eligible emissions units. This outcome is one example of the way in which the JCP seeks to ensure that liable entities have an incentive to continue to reduce their emissions notwithstanding the existence of transitional assistance.[65]

Conclusions to be drawn from the Act and Regulations

46. Five matters may be noted, to which it will be necessary to return.

47. *First*, the entities potentially liable to unit shortfall charge are identified in the Act in a manner that is geographically neutral. An entity is a "liable entity" under s 20 of the Act irrespective of where the entity, or the relevant facility, is located within Australia.

48. *Secondly*, the amount of covered emissions produced by facilities operated by a liable entity is determined in the same way irrespective of where the entity, or relevant facility, is located.

49. *Thirdly*, the ability of a liable entity under the Act to surrender eligible emissions units in order to avoid a unit shortfall is not governed by geographic considerations.

50. *Fourthly*, the JCP does not differentiate between EITE activities on the basis of geography. This matter is considered in further detail in relation to Div 48 at [63] ff below.

51. *Fifthly*, the amount of free carbon units to which persons carrying out a prescribed EITE activity, or sub-activity, are entitled are the same, per unit of production, as each other person carrying out the same activity or sub-activity and are in no way dependent upon the location of the entity or of the facility over which the entity has operational control.

52. These five matters present immediate, and, it is submitted, insuperable, difficulties for the plaintiff's contention that Div 48 constitutes an invalid preference under s 99 of the Constitution.

Section 99

Relevant principles

53. Section 99 of the Constitution provides:

> The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

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65 See further at [83] ff below.

54. The object of the provision was to "prevent federal favouritism and partiality in commercial and other kindred regulations".[66] As it applies to laws of revenue, s 99 largely mirrors the prohibition on discrimination between States or parts of States in s 51(ii).[67] Both provisions form part of a constitutional scheme designed to protect the "formal equality" of the States *inter se* and their people within the Federation and the "economic union" which came into existence upon the creation of the Commonwealth.[68] Other provisions within the constitutional scheme include ss 51(iii), 88, 90 and 92. These sections:[69]

> operate independently, but they overlap to some extent. Laws of taxation, including laws with respect to customs duties, fall under sec 51(ii) and as laws of revenue they fall under sec 99. Laws with respect to bounties on the export of goods fall under sec 51(iii) and also, as laws of trade or commerce, under sec 99. A preference in relation to any of these subjects which infringed sec 99 would also be a prohibited discrimination or a prohibited lack of uniformity under one of the other sections.

55. Consistently with this analysis, it is common ground that a preference, for the purposes of s 99, necessarily involves discrimination or lack of uniformity (although discrimination or lack of uniformity does not necessarily involve a preference).[70]

56. In the present context, the concepts of discrimination and lack of uniformity are directed at the terms and operation of *the law* in question. Discrimination will not arise where the impugned law does not itself draw a distinction between States or parts of States, but instead has general operation throughout the Commonwealth.[71] This is so even if, by reason of circumstances existing in one or more of the States, the Commonwealth law may not operate uniformly or may give rise to different economic or other consequences in different States.[72] Put shortly, s 99 requires uniformity in law, not uniformity in effect.[73]

57. This approach reflects long-standing recognition that the Constitution is not a mechanism for ensuring equality in the incidence, or practical effect, of revenue

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66 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) (***Quick and Garran***) at 877.

67 *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 (***Fortescue***) at 575 [29] (French CJ).

68 *Fortescue* at 561-562 [3] (French CJ). See also *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585 (Mason CJ, Brennan, Deane and McHugh JJ).

69 *Elliott v Commonwealth* (1936) 54 CLR 657 (***Elliott***) at 668 (Latham CJ).

70 PS [43]. *Elliott* at 668 (Latham CJ); 683 (Dixon J): "[t]o give preference to one State over another State discrimination or differentiation is necessary. Without discrimination between States or parts of respective States, it is difficult to see how one could be given preference over the other. But I agree that it does not follow that every discrimination between States is a preference of one over the other." See also *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 271 (Webb J); *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Victoria)* (2004) 220 CLR 388 (***Permanent Trustee***) at 423 [88] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Fortescue* at 575-576 [30], 607 [124]-[125], 623 [176], 636 [227].

71 *Fortescue* at 585 [49], 594 [83], 601-602 [105], 604 [113]; *Austin v Commonwealth* (2003) 215 CLR 185 (***Austin***) at 247 [117] (Gaudron, Gummow and Hayne JJ).

72 *Austin* at 247 [117] (Gaudron, Gummow and Hayne JJ); *Fortescue* at 602-603 [108]-[109], 605 [117] (Hayne, Bell and Keane JJ), 617-618 [155] (Crennan J).

73 *Fortescue* at 576-577 [32] (French CJ).

measures. This is particularly so in relation to natural resources within the "vast area of the Commonwealth, extending over 32 parallels of latitude and 40 degrees of longtitude".[74] In *WR Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)*,[75] the Judicial Committee stated:

> The Commonwealth is very rich in minerals of many kinds, but they are, of course, unequally distributed between the States. Moreover, the climactic and soil conditions and the state of development are very different in these various areas. Uniform taxes on selected metals or, for example, on the coal produced in the States may impose a heavy burden on some States whilst leaving other States wholly untouched or only slightly affected ... . This was and is obvious, and it would be a mistake to regard the restrictions contained in sec 51(ii) and (iii) as providing for equality of burden as regards taxation or equality of benefit as regards bounties...As Isaacs J observed in *R v Barger*... . 'the pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular state. It does not include differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities; and there is nothing, in my opinion, to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States.'

58. These remarks echo earlier observations that "nature has already discriminated",[76] with the result that a law does not infringe the Constitution "merely because it operates unequally in the different States – not from anything done by the law-making authority, but on account of the inequality of conditions obtaining in the respective States."[77]

59. In *Fortescue*, the plurality summarised the effect of authorities including those just cited as being that: "discrimination has been found only where the relevant Act provided for the application of different rules according to locality."[78] Similarly, French CJ said:[79]

> [T]he constraints imposed by ss 51(ii) and 99 of the *Constitution* serve a federal purpose – the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people. Those high purposes are not defeated by uniform Commonwealth laws with respect to taxation or laws of trade, commerce or revenue which have different effects between one State and another because of their application to different circumstances or their interactions with different State legal regimes.

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74 *R v Barger* (1908) 6 CLR 41 (***Barger***) at 70 (Griffith CJ, Barton and O'Connor JJ).

75 (1940) 63 CLR 338 at 347-348.

76 *Barger* at 70 (Griffith CJ, Barton and O'Connor JJ).

77 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 (***Cameron***) at 79 (Starke J); see also *Colonial Sugar Refining Co Ltd v Irving* [1903] St R Qd 261 at 276-277; *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367; *Conroy v Carter* (1968) 118 CLR 90 at 101 (Taylor J).

78 At 594 [83].

79 At 585 [49]; see also 561-563 [3]-[5].

60. The reasons of Crennan J and Kiefel J were to like effect.[80] It therefore remains the position that no violation of s 99 occurs where the rule "laid down by the Act is a general one, applicable to all the States alike."[81]

61. If discrimination or a lack of uniformity can be identified, it is then necessary to consider whether the impugned legislation gives "preference" to one State or part thereof over another State or part thereof, within the meaning of s 99.

62. It may be accepted that the concept of a "preference" is necessarily indefinite.[82] However, a claimant alleging a contravention of s 99 must be able to identify, at least with reasonable precision, the actual preference alleged. And it is only when it has been determined that a definable preference is given by challenged legislation that the Court is able to consider whether that preference is given to one State or part thereof over another State or part thereof.[83] Such a preference is one that confers some tangible advantage on a State or part of a State, or on residents or persons operating in a State or part thereof.[84]

No discrimination

63. **Terms and legal operation**. The focus of the plaintiff's claim is Div 48 of Pt 3 of Sch 1 to the Regulations (**Div 48**), which sets out the activity definition for the "production of nickel".

64. Div 48 does not discriminate between States or parts of States, or between residents of States or parts of States. The definition of "production of nickel" has general operation throughout Australia. Clause 348(1) does not distinguish, on the grounds of geography, between liable entities, their facilities, or the nickel-bearing inputs used by them to produce nickel or cobalt products.[85] The definition applies equally to a liable entity producing nickel in Queensland as it does to a liable entity producing nickel in Western Australia. No other clause in the Division treats entities differently because they or their property is in one locality rather than another.[86]

65. While the plaintiff submits to the contrary,[87] it identifies no clauses in Div 48 which incorporate geographic considerations as criteria for the operation of the Division or which otherwise result in the Division not having uniform operation throughout the Commonwealth.

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80 At 617-618 [155] (Crennan J); 629-630 [202], 635 [222] (Kiefel J).

81 *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367.

82 *Elliott* at 682 (Dixon J); *Permanent Trustee* at 423 [87] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

83 *Elliott* at 665 (Latham CJ).

84 cf *Crowe v Commonwealth* (1935) 54 CLR 69 (**Crowe**) at 92 (Dixon J); see also 83, 86; *Elliott* at 669, 670 (Latham CJ); 683 (Dixon J).

85 Contra PS [46].

86 *Barger* at 110: "Discrimination in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality" (Isaacs J).

87 PS [47]-[49].

66. Although not expressly impugned by the plaintiff, the balance of the Act and Regulations also omit any relevant geographic discrimination of the type prohibited by s 99 of the Constitution. The unit shortfall of an entity engaged in the production of nickel is required to be calculated in precisely the same manner irrespective of where in Australia the entity or its facility is located. Similarly, the circumstances in which, and the rate at which, unit shortfall charge is imposed on liable entities are uniform and place no weight on matters of geography.

67. **No relevant differential effect in practice**. As already noted, the mere fact that a piece of Commonwealth legislation may have a differential impact upon entities falling within its scope by reason of natural or business circumstances pertaining to a particular State or part thereof does not render the legislation discriminatory in any relevant sense.

68. While it is not to the point to descend into the "location" enquiry urged by the plaintiff, if one does in the present case, the extent of any differential impact resulting from geographic considerations is tangential, or but the reflection of one of many variables, at best.

69. *First*, the plaintiff obtains 100% of its nickel ore requirements from overseas. It is therefore unable to demonstrate a *present* link between any differential impact suffered by it and a State or part thereof. Rather, the plaintiff contends that choices made by the plaintiff in the 1970s concerning the design of its Yabulu refinery were referable to the geological makeup of a nickel deposit at Greenvale, North Queensland, being the ore body closest in physical proximity to the refinery.[88] The unstated premise in this contention seems to be that the plaintiff's current activities should be viewed, constitutionally, as controlled by geographic circumstances pertaining in North Queensland.

70. However, the Special Case makes clear that the geological makeup of the Greenvale deposit was only one of a "range of relevant factors" considered by the plaintiff in making what the parties agree was a "business decision" as to the nickel refining process that ought be adopted at Yabulu.[89] Those factors included[90] technological developments at the time and the then expected cost of energy inputs under available production processes (noting that the decision to use oil as the refinery's primary fuel source was made prior to the 1974 oil shock[91]).

71. Nor would it be correct to assume that the design of the Yabulu refinery has remained static since the 1970s. Prompted by a four-fold increase in oil prices in the late 1970s, the design of the refinery was changed in a number of respects.[92] As one would expect, the design of the refinery has been kept under regular review and, as circumstances have changed, "process changes

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88 PS [19].

89 SCB 92-93 [43].

90 SCB 92-93 [43].

91 SCB 153.10-153.20.

92 SCB 153.

and improvements" have been progressively implemented since the late 1980s.[93]

72. *Secondly*, it is also common ground that the differences in the activities undertaken by the nickel producers identified in the Special Case are the consequence of a number of matters, only one of which is the respective geographical locations at which each company conducts its smelting and refining operations.[94] Those matters include the current commercial circumstances of each company, the economic circumstances affecting the production of nickel and a range of business decisions made in the past and present concerning the manner in which nickel products should be produced by that company.[95] This is unsurprising and provides one explanation for why the Constitution does not require Commonwealth trade, commerce and revenue laws to operate in a manner that is *substantively* uniform as between the residents of each State or part thereof.

73. **The plaintiff's critique**. According to the plaintiff, the main vice in Div 48 is that it *fails* to differentiate between activities that are "inherently and necessarily different according to the location at which they are carried out".[96] That critique suffers from several difficulties.

74. *First*, the critique is not supported by the Special Case. As just noted, the plaintiff has not demonstrated that the differences between the circumstances now faced by the plaintiff and those faced by other nickel producers are "inherently or necessarily different" due to Australian geographic factors (even if it be relevant to have regard to those matters). The critique fails on this ground alone.

75. *Secondly*, and in any event, the logical consequence of the plaintiff's submission seems to be that Div 48 should be replaced by activity definitions that differentiate between the production of nickel as it occurs in Queensland and as it occurs elsewhere in Australia.[97] However, legislation cast in those terms would raise the very problem to which s 99 was directed – namely, the risk that economic unity would be negated by revenue measures drafted to reflect the particular geographic conditions in individual States or parts thereof.[98]

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93 SCB 157.30; see further at 159 - 169.

94 SCB 90 [34].

95 SCB 90 – 91 [34].

96 PS [48] (emphasis added); see also PS [24]; PS [56]: "[Div 48] makes no attempt to take account of differences in local conditions. On the contrary, the constitutional defect lies in the failure of the Regulations to take any account of the distinct character of the nickel production activities necessarily undertaken in different States."

97 See for example PS [48], where the plaintiff points to the "distinct activities undertaken by the Western Australian producers" in contrast to those undertaken by the plaintiff.

98 See for example *Cameron*, where the prescribed fair average value of livestock in Table III of the *Income Tax Regulations 1917* (Cth) differed from State to State "simply because the subject of taxation finds itself in one State or the other" (at 77 (Isaacs J)).

76. While, expressed generally, it is often appropriate to characterise the equal treatment of unequals as discriminatory, that reasoning has no permissible operation under s 99 where, as here, the asserted inequality arises from natural conditions pertaining to different States or parts thereof.[99] This is because a corollary of a requirement of formal economic union is that Parliament has no general permission, let alone duty, to seek to fashion revenue laws which take as their central object the negation of differences that exist by reason of the varying conditions of climate and locality in Australia.[100] The alleged mischief upon which the plaintiff focuses in the present case is therefore no more than a reflection of Parliament's inability to draft laws of revenue in terms that utilise as a relevant criterion for their operation the location of an entity or its property in a State or part thereof.

77. *Thirdly*, the difficulties in the plaintiff's critique are not resolved by recourse to the language of "classification".[101] The plaintiff's complaint that Div 48 classifies various activities within the one category of "production of nickel" is no more than a complaint that the Parliament should have introduced into its classification of EITE activities an even further level of differentiation. However, provided that the classifications adopted by the Commonwealth do not distinguish between States or parts thereof, it was for Parliament to determine whether and, if so, how, EITE activities should be classified, and the point at which the descent into even further levels of sub-division would cease to cohere with the scheme and purposes of the Act.

78. **Reasonably appropriate and adapted**. The plaintiff misstates the effect of references in *Austin*[102] and *Permanent Trustee*[103] to the concept of a distinction being appropriate and adapted to a proper objective.[104] Those observations do not operate as some form of judicial exception to the prohibition in ss 51(ii) and s 99 that applies whenever Parliament is shown to have some beneficial purpose. Rather, they give content to the concept of discrimination itself and recognise that mere differential treatment is not thereby discriminatory.[105]

79. As the plurality in *Fortescue* recognised, consideration of the "relevance" or "appropriateness" of differentiation may be of particular importance in cases where a "preference" or "advantage" is said to be conferred.[106] That recognition echoes the observations of Quick and Garran that the concept of a "preference" in s 99 connotes a distinction or differentiation that is arbitrary, undue or unreasonable.[107] Conversely, if "the difference of treatment is the reasonable

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99 Contra PS [46].

100 *Barger* at 70 (Griffith CJ, Barton and O'Connor JJ).

101 Contra PS [48]-[50].

102 At 247 [118] (Gaudron, Gummow and Hayne JJ).

103 At 424 [89] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

104 Cf PS [61]-[68].

105 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 510 (Brennan J), 572 (Gaudron J); *Fortescue* at 563 [5], 576 [31], 585 [49] (French CJ).

106 *Fortescue* at 603 [112] (Hayne, Bell and Keane JJ), quoting *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 at 629-630 [40].

107 Quick and Garran at 878; *Fortescue* at 576 [31] (French CJ).

result of the dissimilarity of circumstances – or if it is based on recognized and reasonable principles of administration – it is no preference".[108]

80. Read in this way, no difficulty arises in the application of the reasoning in *Austin* and *Permanent Trustee* as it relates to s 99 and the plaintiff's application to overrule the decisions should be refused. To the extent that the plurality in *Fortescue* identified potential difficulties in the application of the reasoning in *Austin* and *Permanent Trustee* to s 51(ii),[109] those difficulties do not arise for further consideration in the present case given that the plaintiff does not contend that the Act and Regulations offend s 51(ii).

10 81. For the reasons set out above,[110] Div 48 does not provide for any differential treatment. But, even if it did, it would be necessary for the plaintiff to demonstrate that the differential treatment was properly characterised as discriminatory. It is at that stage in the analysis that it becomes relevant to consider the extent to which the differential treatment is the product of a distinction that is appropriate and adapted to the attainment of a proper objective.

82. In the Commonwealth's submission, any differential treatment that exists in the present case (which is denied) was appropriate and adapted to a proper objective and is therefore not to be characterised as discriminatory in nature.

20 83. The objects of the JCP include: (a) enabling the identification of activities as EITE activities; (b) providing transitional assistance in respect of such activities if carried on in Australia; and (c) providing such assistance in a manner that is economically and environmentally efficient.[111] In furtherance of these objectives (and, in particular, the need for assistance to be economically and environmentally efficient) the JCP was designed to preserve the incentives for persons conducting EITE activities to reduce their carbon emissions.[112] This was achieved by, *inter alia*: (a) providing assistance on the same basis to all persons, new and existing, conducting a given eligible activity; and (b) providing assistance on the basis of industry averages using historical information on the
30 emissions from these activities.[113] In this way, the most energy efficient person within a particular EITE activity is not penalised for that conduct by receiving a lower number of free carbon units, per unit of production, than its less efficient competitors.

84. The desire for an economically and environmentally efficient method of providing transitional assistance also impacted on the way in which eligible EITE activities were identified. In defining eligible EITE activities, a decision

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108 Quick and Garran at 878.

109 *Fortescue* at 604 [114]-[115] (Hayne, Bell and Keane JJ).

110 At [63]-[66].

111 Act, ss 143(2)(a), (c) and (d).

112 Revised EM at 15: "The Jobs and Competitiveness Program will ensure that businesses that produce a lot of pollution and compete in international markets remain competitive, while still retaining strong incentives to reduce carbon pollution".

113 Revised EM at [5.6].

was taken not to differentiate between activities by reference to the technology employed, fuel used, the age of the plant or the quality and types of feedstock used in the course of the activity.[114] This approach ensures that participants in an EITE activity have the flexibility to take steps to reduce their level of emissions (by, eg, using a better quality feedstock or more efficient production processes) without falling outside the activity definition and without any reduction in the number of free carbon units to which the entity would otherwise be entitled.[115]

85. The definition of "production of nickel" in Div 48 accords with these objectives. The definition is silent as to the technology, fuel, feedstock or plant employed in order to produce nickel. As a result, and consistently with the objectives of the JCP, a number of nickel producers fall within the Division notwithstanding that they go about the task of producing nickel in a variety of ways and with varying levels of carbon emissions.

86. Nor could it be suggested (and the plaintiff does not suggest) that the definition of "production of nickel" is drafted in such a way as to arbitrarily capture activities that bear no rational or reasonable relationship to each other.[116] It is common ground that each nickel producer identified in the Special Case engages in similar business activities in that they:[117]

(a) engage in an activity which sees nickel bearing inputs being subjected to a chemical and/or physical transformation so as to produce an output which is either a nickel product, a cobalt product or a mixed nickel and cobalt product;

(b) engage in the activity for purposes that include competing with other nickel and cobalt producers worldwide.

In addition, it is common ground that the nickel compacts produced by the plaintiff are substitutable for the LME grade nickel briquettes produced by Nickel West and Murrin Murrin, and sell at very near their price.[118]

87. Ultimately, the JCP constitutes a transitional mechanism for reducing the impost which particular entities would otherwise have to bear under the Act. It may well have been theoretically open to Parliament to have adopted a methodology for specifying EITE activities that drew different or further distinctions. But it would have been equally open to Parliament to have identified a single EITE activity at a higher level of generality (eg the "production of ore-based products") that would include a large number of existing EITE activities (eg the production of smelting zinc (Div 8), aluminium

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114 *Assessment of Activities for the purposes of the Jobs and Competitiveness Program: Guidance Paper* (Department of Climate Change and Energy Efficiency, September 2011) (**Guidance Paper**) at [3.1], an earlier version of which was referred to in the Revised EM at [5.13].

115 Guidance Paper at [3.1].

116 Cf *Fortescue* at 576 [31] (French CJ).

117 SCB 87 [24].

118 See [12] above.

metal (Div 10), alumina (Div 11), magnesia (Div 13), copper (Div 30), iron ore pellets (Div 35) and so on). It would also have been open to Parliament to have concluded that the production of nickel should not be identified as an EITE activity to which the JCP applied, with the result that nickel producers received no entitlement to free carbon units.[119] These choices were for Parliament alone to make, provided always that any EITE activity identified did not include a geographic location within Australia as a criterion for its operation. As the Court recognised in *Bayside City Council v Telstra Corporation Ltd*:[120]

> [I]t is in the nature of taxing statutes that not all taxpayers are treated with absolute equality, and the fact that some taxpayers enjoy exemptions that are not available to others does not necessarily involve discrimination. It may involve nothing more than differentiation based upon criteria within its constitutional power which it is well open to the legislature to regard as appropriate.

88. In the present case, Parliament concluded that the most appropriate method of providing assistance to reduce the risk of "carbon leakage" was that adopted in the JCP. That conclusion was open and did not offend any constitutional prohibition.

89. In these circumstances, it proves nothing for the plaintiff to posit a hypothetical alternative approach to identifying EITE activities in which the production of LME nickel briquettes and lower grade nickel compacts are the subject of separate activity definitions.[121] The Court will not take upon itself the task of determining whether a different approach to providing transitional assistance might have better reflected the scheme underlying the Act. Even if the Court did proceed to consider the plaintiff's hypothetical alternative, it is apparent that the approach advocated by the plaintiff would be inconsistent with the objectives identified above. It is common ground[122] that the creation of two activity definitions would have:

(a) reduced the number of free carbon units to which one or more of Nickel West, First Quantum and Murrin Murrin (being the more environmentally efficient nickel producers) would have been entitled; and

(b) increased the number of free carbon units to which the plaintiff (the most environmentally inefficient nickel producer) would have been entitled.

90. That outcome would confer a benefit upon the plaintiff at the expense of its more environmentally efficient competitors. It would fail to reward steps taken by more efficient nickel producers prior to or after the introduction of the clean energy regime to minimise their emissions. It would reduce the incentive which the plaintiff itself had to reduce its carbon emissions. It would breach the otherwise consistent practice under the JCP of not identifying EITE activities by

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119 For example, coal mining was not defined as an EITE activity and was instead provided with a separate program of transitional assistance: Revised EM at [5.59].

120 (2004) 216 CLR 595 at 630 [41] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

121 cf PS [72] ff.

122 PS [72]; SCB 76-77 [27(g)], particularly [27(g)(ii)].

reference to the technology and feedstock used by entities undertaking a particular activity (noting that the primary reasons why the plaintiff produces lower grade nickel compacts are the production process and nickel ore which it chooses to utilise). And it would be inconsistent with the central premise of the Act that those who emit more, pay more; and would require an enquiry into how far differential emission levels are explained by geography, an enquiry about which the Act and the JCP as a whole is silent (and properly so).

No preference

91. The plaintiff has made no submissions as to why, even if discrimination is shown, Div 48 gives "preference" to one State or any part thereof over another State or any part thereof.

92. In the Commonwealth's submission, no preference exists. No tangible advantage is given to a State or part of a State by reason of the Act and Regulations.[123] The Act and Regulations neither contemplate nor provide for: (a) any transfer of funds from the Commonwealth to a State or States; (b) the payment by liable entities of any amount to States, let alone at differing rates; (c) the conferral of free carbon units on liable entities in different amounts depending on the State in which the entity or its facility is located; or (d) the payment of unit shortfall charge in different amounts depending on the State in which the entity or facility is located.

Reading down

93. If the Court accepts the Commonwealth's submissions concerning s 99, this question is not reached.

94. If the question is reached, the plaintiff's submissions should be rejected.[124] The plaintiff contends that, as an alternative to declaring *Div 48* invalid, the Court should read down *the Act* and *Charging Acts* so that they do not apply to, and do not impose liability for, unit shortfall charge in respect of the production of nickel.

95. The plaintiff's contention is not explicable. The plaintiff makes no challenge to the ability of Parliament to establish a carbon pricing scheme or to impose unit shortfall charge on liable entities in accordance with that scheme. Rather, the focus of its complaint is Div 48. That Division forms part of a temporary mechanism (the JCP) whereby certain entities are provided with free carbon units that they can use to reduce their liability to unit shortfall charge. That mechanism is contained in a legislative instrument, not the Act itself, and was only authorised by the Act in so far as it was a valid regulation.

96. The Court does not "read down" a legislative scheme that is valid (the Act and Charging Acts) because part of a separate legislative instrument is invalid (Div 48). That course is not authorised by s 15A of the *Acts Interpretation Act*

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123 cf *Crowe* at 92 (Dixon J); see also 83 (Rich J), 86 (Starke J); *Elliott* at 669 (Latham CJ), 683 (Dixon J).

124 cf PS [76].

1901 (Cth),[125] which does not contemplate the reading down of an enactment other than the one that would otherwise be invalid. Nor could it be concluded that the Act was premised on the existence of the JCP such that Parliament did not intend to impose a liability for unit shortfall charge on nickel (or any other) producers in circumstances where the relevant part of a transitional assistance package turned out to be invalid.

97. The appropriate course in the present case, if the plaintiff's submissions on validity be otherwise accepted, is simply for the Court to declare Div 48 invalid, thereby leaving the remaining architecture of the carbon pricing scheme in both the Act and Regulations intact.[126]

PART VII QUESTIONS OF LAW STATED FOR THE OPINION OF THE FULL COURT

98. The questions of law should be answered as follows:

Question 1: No.

Question 2: No.

Question 3: Yes.[127]

Question 4: The plaintiff.

PART VIII LENGTH OF ORAL ARGUMENT

99. It is estimated that 2.5 hours will be required for the presentation of the oral argument of the Commonwealth.

Dated: 29 October 2014

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125 As read with s 13(1)(a) of the *Legislative Instruments Act 2003* (Cth).

126 The appropriate course where an Act is valid but Regulations made under it are found to infringe s 99 is to strike down the Regulations: see eg *James v Commonwealth* (1928) 41 CLR 442 at 462 (Higgins J): "the preference, if it is a preference, is created not by the Act but by the Regulations. The Act is, in this respect, perfectly valid; for it may be obeyed without violating sec 99 as to preference between States. But I do not see how reg 4...can be obeyed without preference"; see also at 457 (Knox CJ and Powers J) and 464-5 (Starke J).

127 It is not necessary to decide whether the law is valid as (a) an excise, (b) a customs duty, or (c) otherwise a tax. The law is clearly valid as one of those three.