HIGH COURT OF AUSTRALIA

8 April 2015

QUEENSLAND NICKEL PTY LIMITED v THE COMMONWEALTH OF AUSTRALIA

[2015] HCA 12

Today the High Court unanimously upheld the validity of provisions of the Clean Energy Regulations 2011 (Cth) that provided for the free issue of carbon "units" to entities engaged in the production of nickel.

The *Clean Energy Act* 2011 (Cth), *Clean Energy (Charges – Excise) Act* 2011 (Cth), *Clean Energy (Charges – Customs) Act* 2011 (Cth) and *Clean Energy (Unit Shortfall Charge – General) Act* 2011 (Cth) established and imposed a tax on liable entities for certain greenhouse gas emissions in excess of a specified threshold volume. Entities could reduce their tax liability by surrendering "units" that were set-off against emissions in excess of the threshold. Schedule 1 to the Clean Energy Regulations 2011 (Cth), titled the "Jobs and Competitiveness Program" ("JCP"), provided for the issue of free units to entities engaged in "emissions-intensive trade-exposed" activities.

One such activity was the "production of nickel", which was defined in Div 48 of Pt 3 of the JCP ("Div 48"). The number of free units issued to nickel producers was calculated by reference to the volume of nickel produced and industry averages for greenhouse gas emissions per unit volume of nickel production.

The plaintiff, Queensland Nickel Pty Limited, carried out the production of nickel at a refinery in Queensland. Its major competitors carried out the production of nickel in Western Australia. Due to differences in the kinds of ore processed, the production processes employed and the types of nickel products produced, the plaintiff's refinery emitted more greenhouse gases per unit volume of nickel than its Western Australian competitors. The issue of free units under the JCP therefore effected a proportionately smaller reduction in the plaintiff's overall tax liability than it did for the plaintiff's competitors.

Section 99 of the Constitution prohibits the Commonwealth, by any law or regulation of trade, commerce, or revenue, giving preference to one State or any part thereof over another State or any part thereof. The plaintiff commenced proceedings in the High Court, claiming that Div 48 contravened s 99 because it made no allowance for the differences in inputs, production processes and outputs between the plaintiff and the Western Australian nickel producers. The plaintiff argued those differences were caused, at least to some extent, by differences in natural, business or other circumstances between Queensland and Western Australia.

The Court found that the differences between the plaintiff's and the Western Australian producers' inputs, production processes and outputs were not due to differences between Queensland and Western Australia in natural, business or other circumstances. As a matter of fact, therefore, the Court held that Div 48 did not give a preference to one State over other States and did not contravene s 99 of the Constitution.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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