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

BETWEEN: **QUEENSLAND NICKEL PTY LIMITED**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Respondent

PLAINTIFF'S ANNOTATED WRITTEN SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED BY THE SPECIAL CASE

2. The questions of law stated in the special case (SCB 95) referred for the opinion of the Full Court (SCB 80), may be summarised as follows.

3. **Question 1** asks whether Div 48 of Pt 3 of Sch 1 to the *Clean Energy Regulations 2011* (Cth), as amended by the *Clean Energy Amendment Regulation 2012 (No 7)* (Cth), (collectively, "**Regulations**"), made pursuant to ss 145 and 312 of the *Clean Energy Act 2011* (Cth) ("**Act**"), is invalid in its application to the plaintiff on the ground that it gives preference to one State, or any part thereof, over another State, or any part thereof, contrary to s 99 of the *Constitution*.

4. **Question 2** asks whether any or all of the following provisions ("**relevant provisions**"):

   (i) Div 48 of Pt 3 of Sch 1 to the Regulations;

   (ii) cll 501 to 506, 701, 804 and 901 to 913 of Sch 1 to the Regulations;

   (iii) ss 122 to 134, 145 and 312 of the Act; and

   (iv) Pt 3 of the *Clean Energy (Charges - Excise) Act 2011* (Cth), Pt 3 of the *Clean Energy (Charges - Customs) Act 2011* (Cth) and the *Clean Energy (Unit Shortfall Charge - General) Act 2011* (Cth) (collectively, "**Charge Acts**");

   should be read down, in their application to the plaintiff, so as to avoid contravening s 99 of the *Constitution* and, if so, how.

5. To the extent that any or all of the relevant provisions are capable of operating consistently with s 99 of the *Constitution*, **Question 3** asks whether, on their proper construction, any or all of those provisions impose upon the plaintiff any liability for any "unit shortfall charge" in respect of the production of nickel.

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6. **Question 4** asks which party should pay the costs of the proceedings.

7. The relevant provisions have been repealed with effect from 1 July 2014.[1] However, it is common ground (SCB 85 at [10]) that the transitional provisions in the repealing statute preserve the liability of the plaintiff (and of other liable entities) in respect of the imposts in question for the 2012 and 2013 financial years.[2] It is convenient in these submissions to refer to the legislative provisions in the present tense.

8. In Part V below, the plaintiff develops the following submissions:

   a. *First*, the unequal outcome in the present case is the product of the method of classification adopted in Div 48 of Pt 3 of Sch 1 to the Regulations itself, not of any differences in the factual circumstances existing in the various States.

   b. *Secondly*, and in the alternative, the statements in the authorities concerning the ambit of s 99 of the *Constitution* where there exist differences in the natural, business or factual circumstances in the various States, properly understood, do not place the impugned provisions of Div 48 beyond the scope of the prohibition in s 99.

   c. *Thirdly*, the criterion of "appropriate and adapted to the attainment of a proper objective" should not be accepted as applicable under s 99 of the *Constitution*. The reasoning of the majority in *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)*[3] should not be followed in this respect.

   d. *Fourthly*, in the event the third submission above is not accepted, then nonetheless Div 48 does not satisfy the "appropriate and adapted" test.

PART III: NOTICES UNDER S 78B OF *THE JUDICIARY ACT 1903*

9. Notice pursuant to s. 78B of the *Judiciary Act 1903* (Cth) was given on 20 May 2013 (SCB 17). The plaintiff considers that no further notice is necessary.

PART IV: RELEVANT FACTS

10. Without seeking to repeat the agreed facts set out in the special case (SCB 83-95), the basic facts are summarised as follows.

11. Each of the plaintiff, BHP Nickel West Pty Limited ("**Nickel West**"), Murrin Murrin Operations Pty Limited ("**Murrin Murrin**") and FQM Australia Nickel Pty Ltd ("**First Quantum**") undertakes the activity of the "production of nickel" as defined in Div 48 of Pt 3 of Sch 1 to the Regulations. The plaintiff does so at its nickel and cobalt refinery located at Yabulu, near Townsville in North Queensland. The other producers do so at various locations in Western Australia (SCB 84 at [5]-[8]).

12. In the course of producing nickel and cobalt products in Australia, each of the plaintiff, Nickel West, First Quantum and Murrin Murrin operates facilities,[4] resulting

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[1] *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth), s 3 and Sch 1, Pt 1, item 1.
[2] Items 323(1) and 324(3) of Sch 1, Pt 3 to the *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth).
[3] (2004) 220 CLR 388 at 423-425 [88]-[95] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).
[4] As defined in s 9 of the *National Greenhouse and Energy Reporting Act 2007* (Cth).

directly in the release of greenhouse gases which are "covered emissions" for the purposes of s 30 of the Act (SCB 85 at [11]-[12]). Each of the plaintiff, Nickel West, First Quantum and Murrin Murrin (SCB 84-85 at [9]):

a. was a "liable entity" for the "fixed charge years" commencing on 1 July 2012 and 1 July 2013 for the purposes of s 20(3) of Act; and

b. by reason of the Jobs and Competitiveness Program in Sch 1 to the Regulations, had issued to it a number of free carbon units in respect of those two years.

13. In the financial year commencing 1 July 2012 the plaintiff, when compared with Nickel West, First Quantum and Murrin Murrin, produced the greatest number of tonnes of carbon dioxide equivalence per tonne of 100% equivalent nickel or 100% equivalent cobalt ("**unit of production**") (SCB 85 at [14]).[5]

14. There are important differences between the activities undertaken by the plaintiff and the Western Australian producers, in respect of the production of nickel products, cobalt products and mixed nickel and cobalt products. Those differences, which are described in SCB 87-90 at [25]-[33], relate to the input used, the output produced, the production processes utilised and the level of covered emissions produced by each producer.

15. The differences in the activities undertaken by each of Nickel West, Murrin Murrin, First Quantum and the plaintiff are the consequence of a variety of circumstances. Those circumstances include the respective geographical locations at which each company conducts its smelting and refining operations; and business decisions made by each company with respect to matters including the type of nickel ore to which each nickel producer is geographically proximate and the purity and other physical characteristics of the nickel ore to which each producer is geographically proximate (SCB 90-91 at [34]).

16. The geographic location of a nickel refinery affects its input costs (including in relation to ore, chemicals, energy, labour and transport); the design of its production processes; and its ability to store, treat and dispose of wastes (SCB 91 at [35]). The geographic location of a nickel refinery is typically within reasonable proximity to the nickel ore deposit(s) that the refinery was built to process. Each of Nickel West, Murrin Murrin and First Quantum operates refining or smelting facilities which are geographically close to the deposits of ore in Western Australia used by each of those producers (SCB 91 at [36]).

17. The production processes used by each of Nickel West, Murrin Murrin and First Quantum are specifically tailored to process the particular type of ore to which each refinery is physically proximate. Each producer selected the production process which was most suitable for that type of ore, following metallurgical testing conducted on samples from the ore deposits near each refinery (SCB 91 at [37]).

18. The principal reasons the plaintiff selected Yabulu as the location of its refinery included Yabulu's relative physical proximity to a deposit of nickel laterite ore at Greenvale, North Queensland; and the prospect that, in the long term, locating the

[5] The unit of production is identified in cl 348(4) of Sch 1 to the Regulations.

refinery on the coast would be advantageous when the Greenvale deposit was eventually exhausted and it would become necessary to import ore from overseas to the refinery for processing (SCB 92 at [42]). It would not be economically feasible, at any time in the reasonably foreseeable future, for the plaintiff to relocate its refinery (SCB 91 at [38]).

19. The choice of the nickel refining process to be used to extract nickel and cobalt on a commercial scale at the Yabulu refinery was made in the early 1970s as a business decision in response to a range of relevant factors, including the nickel mineralization and chemistry of the Greenvale nickel laterite ore body, being the ore body which was closest in physical proximity to the refinery (SCB 92 at [43]).

20. At all times since the coming into force of the Act, the nickel ore used by the plaintiff in its Yabulu refinery (wet laterite nickel ore) has been imported to Australia from Indonesia, New Caledonia and the Philippines (SCB 93 at [46]).

21. The mineralogy of the dry nickel laterite deposits located in Western Australia differs from the wet tropical laterite ore imported by the plaintiff. A significant difference is the presence of smectite ore lithology in the Western Australian deposits (SCB 94 at [49]).

22. The main ore lithologies present in the dry laterite ore available in Western Australia, adjacent to Murrin Murrin's refinery at Murrin Murrin, are limonite ore, smectite ore and saprolite ore. The main nickel-bearing mineral present is a smectite mineral (nontronite), which is not present in the wet tropical laterite ore sourced by the plaintiff from New Caledonia, Indonesia and the Philippines. A nickel extraction rate of less than 50% is achieved from nontronite using the modified "Caron" production process used by the plaintiff (SCB 94 at [50]). By contrast, limonite ore, which the plaintiff sources from imports, is best suited to the production process used by the plaintiff, resulting in a typical rate of nickel recovery

Introduction

23. Section 99 of the *Constitution* provides that 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.[6]

24. Div 48 of Pt 3 of Sch 1 to the Regulations contravenes s 99 because it adopts a definition of the activity of the "production of nickel" in terms which treat as alike activities which are not alike. The definition fails to recognise, or to distinguish between, the material differences in the activities necessarily undertaken by the plaintiff, as a nickel producer located in North Queensland, and the activities necessarily undertaken by the other producers located in Western Australia, where those differences are a consequence, relevantly, of the geographic locations of the facilities operated by each producer.

25. The legal or practical effect of Div 48, having regard to the relevant provisions, is to give preference to Western Australia, or alternatively to particular regions in Western

[6] The Commonwealth has admitted (SCB 70 at [25]) that, in their operation upon the plaintiff and the Western Australian producers, the relevant provisions are laws or regulations of revenue, within the meaning of s 99.

Australia, over Queensland, or alternatively North Queensland, by imposing upon the plaintiff, as a nickel producer in North Queensland, a financial impost which differs from (and is greater than) that imposed upon nickel producers in Western Australia.

The legal and practical effect of the relevant provisions of the Act and the Regulations

26. The "simplified outline" of the Act in s 4 provides (relevantly) that:

> "If a person is responsible for covered emissions of greenhouse gas from the operation of a facility, the facility's annual emissions are above a threshold, and the person does not surrender one eligible emissions unit for each tonne of carbon dioxide equivalence of the gas, the person is liable to pay unit shortfall charge. ...
>
> The financial years beginning on 1 July 2012, 1 July 2013 and 1 July 2014 are ***fixed charge years***.
>
> Later financial years are ***flexible charge years***.
>
> In a fixed charge year, carbon units will be issued under this Act for a fixed charge.
>
> In a flexible charge year, carbon units will be issued under this Act as the result of an auction." (emphasis in original)

27. The Act implements that scheme as follows. The carbon dioxide equivalence of an amount of greenhouse gas[7] emitted by a liable entity from a facility is calculated. Once the liable entity's "emissions number" (s 118),[8] calculated by reference to the carbon dioxide equivalent gas emissions of its operations, is ascertained, the entity's "unit shortfall" is calculated: ss 125 to 128. That shortfall is the difference between the emissions number and the number of "eligible emissions units" held by the liable entity: s 128(2), (5). Eligible emissions units are those issued to the liable entity by the Clean Energy Regulator ("**Regulator**") on behalf of the Commonwealth: s 94.

28. Where there is a unit shortfall, the liable entity may purchase carbon units either from the Regulator for a fixed charge (s 100) or in the secondary market (ss 104 and 105). Those units may then be surrendered to meet the shortfall: s 122. Alternatively, the liable entity may pay a "unit shortfall charge": s 134. In the 2012 and 2013 fixed charge years, that charge is imposed by the Charge Acts at the rate of 130% of the equivalent fixed cost for the issue of carbon units for that year multiplied by the number of the shortfall.[9]

29. In general, a liable entity which produces a greater number of tonnes of carbon dioxide equivalence from the operation of a facility, per unit of production, will have a higher liability for unit shortfall charge, after the surrender of available free carbon units but prior to the purchase of additional eligible emissions units, than an entity

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[7] This concept is defined in s 7 of the *National Greenhouse and Energy Reporting Act* 2007 (Cth).

[8] The emissions number was required to be reported under s 22A of the *National Greenhouse and Energy Reporting Act* 2007 (Cth).

[9] Section 9 of the *Clean Energy (Charges - Excise) Act 2011* (Cth), s 9 of the *Clean Energy (Charges - Customs) Act 2011* (Cth) and s 8 of the *Clean Energy (Unit Shortfall Charge - General) Act 2011* (Cth).

that produces a lower number of tonnes of carbon dioxide equivalence, per unit of production.

30. Part 7 (ss 143 to 158) of the Act, which is entitled "Jobs and Competiveness Program", provides for the creation, by regulation, of a program for transitional assistance by way of free carbon units to entities which engage in certain "emissions-intensive trade-exposed activities". The "aim" of Pt 7 is (s 143(1)):

> "to recognise issues relating to the impact of this Act and the associated provisions on the international competitiveness of activities that are:
>
> (a) identified as emissions-intensive trade-exposed activities; and
>
> (b) carried on in Australia."

31. The "objects" of Pt 7 include the reduction of the incentives for an emissions-intensive trade-exposed activity to be relocated to foreign countries as a result of different climate change policies applying in Australia compared to foreign countries; and the provision of transitional assistance in respect of such activities carried on in Australia, until such assistance is no longer warranted having regard, *inter alia*, to whether foreign countries that are responsible for the substantial majority of the world's emissions have implemented measures to reduce those emissions that have an impact that is comparable to the impact of Australian emissions reduction measures (including the impact of associated assistance): sub-ss 143(2)(b), (c) and (f) of the Act.

32. Section 145(1) provides:

> "The regulations[10] may formulate a program (to be known as the ***Jobs and Competitiveness Program***) for the issue of free carbon units in respect of activities that:
>
> (a) under the program, are taken to be emissions-intensive trade-exposed activities; and
>
> (b) are, or are to be, carried on in Australia during an eligible financial year specified in the program." (emphasis in original)

33. The explanatory memorandum accompanying the Bill for the Act described the purpose of the Jobs and Competitiveness Program as follows:[11]

> "As Australia moves towards a clean energy future, a carbon price may impact on the international competitiveness of its industries which undertake activities that are both emissions-intensive and trade-exposed. The Program provides significant support for jobs and protects the competitiveness of these emissions-intensive trade-exposed industries from risks for emissions-intensive trade-exposed activities to be located in, or relocated to, foreign countries as a result of different climate change policies applying in Australia compared to foreign countries."

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[10] The general regulation-making power is conferred by s 312 of the Act.
[11] *Clean Energy Bill 2011: Explanatory Memorandum*, p 159.

34. Div 48 of Pt 3 of Sch 1 to the Regulations defines "the production of nickel" as follows:

> "(1) 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."

Sub-section (5) defines "nickel bearing inputs", "intermediate nickel products", "primary nickel products" and "cobalt products" in terms such that the defined activity of "the production of nickel" applies to the activity carried on by each of the plaintiff, Nickel West, Murrin Murrin and First Quantum (SCB 84 at [5]-[8]).

35. Under the Jobs and Competitiveness Program, an eligible person may apply for free carbon units for an eligible financial year: cl 701 of Sch 1 to the Regulations. Eligibility turns upon satisfaction of the applicable requirements set out in Pt 5 of Sch 1: cl 501.

36. The formula for ascertaining the total number of free carbon units to be issued to an applicant in respect of an emissions-intensive trade-exposed activity carried on in Australia is set out in cl 906(1) ("**formula**"). The formula includes as integers: the baseline level of direct emissions per unit for the production of the relevant product, including emissions associated with the use of steam (cl 907(5)); the baseline level of electricity per unit for the production of the relevant product (cl 907(8)); and the baseline level of natural gas (or its component) feedstock per unit for the production of the relevant product (cl 907(11)) (collectively, "**allocative baselines**").[12] The formula includes as a further integer the adjusted production of the applicant, 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 financial year: cl 907(6).

37. A consequence of the formula is that a highly emissions-intensive activity attracts a higher rate of assistance (initially 94.5%) than a moderately emissions-intensive activity (initially 66%): cl 907(4). The provision of assistance at two different rates is described in the explanatory memorandum as "reflecting the need to provide relatively more assistance to relatively more emissions-intensive activities in order to reduce the likelihood of carbon leakage."[13] The risk of "carbon leakage" is described as follows in the explanatory memorandum:[14]

> "Without appropriate assistance arrangements, applying constraints on carbon pollution in Australia before other countries could risk 'carbon leakage' — activities could be relocated from Australia to countries where those activities may not be subject to comparable carbon constraints. Carbon leakage is not in Australia's interests — either from an environmental or an economic point of

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[12] The allocative baselines for the production of nickel are set out in item 2.14 of cl 401.
[13] *Clean Energy Bill 2011: Explanatory Memorandum*, p 162.
[14] *Clean Energy Bill 2011: Explanatory Memorandum*, p 35.

view. The Jobs and Competitiveness Program ... is designed to reduce this risk."

38. Pursuant to cll 501 to 506 and 701 of Sch 1 to the Regulations, each of the plaintiff, Nickel West, First Quantum and Murrin Murrin was eligible to apply to the Regulator for the issue of free carbon units for the 2012 and 2013 fixed charge years. Pursuant to cl 804(1), the Regulator was obliged to approve such application upon satisfaction of the criteria in cl 804(3), and thereafter was obliged to issue to each company under cl 902(1) a specified number of free carbon units calculated in accordance with cll 901 to 913.

10 39. By reason of the activity definition of the production of nickel contained in Div 48, each of the plaintiff, Nickel West, First Quantum and Murrin Murrin received free carbon units in the 2012 and 2013 fixed charge years. The number of free carbon units issued to each company, in respect of the production of nickel, was as follows (SCB 91-92 at [39]):

	Free carbon units issued with respect to the fixed charge year commencing on 1 July 2012	**Free carbon units issued with respect to the fixed charge year commencing on 1 July 2013**
Nickel West	1,216,628	1,252,994
Murrin Murrin	496,692	784,363
Plaintiff	554,791	454,205
First Quantum	290,212	303,845

40. The plaintiff had, in the fixed charge year commencing on 1 July 2012 and per unit of production, a higher liability for unit shortfall charge, after the surrender of available free carbon units issued to it but prior to any purchase by it of additional eligible emissions units, than Nickel West, First Quantum or Murrin Murrin (SCB 92 at [40]).

41. The number of free carbon units issued to each company, and the size of the liability
20 of each company for unit shortfall charge, were a consequence, in part, of the classification of the plaintiff's conduct as falling within the same activity definition as that which applies to the conduct of Nickel West, First Quantum and Murrin Murrin, namely the activity definition contained in Div 48 (SCB 92 at [41]).

42. The effect of the relevant provisions, and in particular the operation of the formula upon the activity definition for the production of nickel stipulated in Div 48, is thus to impose liability for unit shortfall charge in a greater amount upon nickel producers located in North Queensland than nickel producers located in Western Australia.

Div 48 of Pt 3 of Sch 1 to the Regulations contravenes s 99 of the *Constitution*

43. "Preference" in s 99 of the *Constitution* is a narrower concept than "discrimination";
30 while preference necessarily involves discrimination or lack or uniformity, the latter

does not necessarily involve the former.[15] Discrimination includes the equal treatment of those who are not equals.[16]

44. The challenge to the minerals resource rent tax legislation in *Fortescue Metals Group Ltd v Commonwealth* failed because the Court held that any discrimination or inequality between miners was not effected or created by the Commonwealth legislation, but by the operation of State laws.[17] That may be contrasted with the present case, where the unequal outcome is effected or created by the activity definition for the production of nickel contained in the Regulations. It does not depend in any way upon the operation of State laws.

10 45. The plaintiff accepts that there are statements in the authorities to the effect that, in general, s 99 will not be breached if the differential treatment is caused by differences in the natural, business, legislative or factual circumstances existing in the various States upon which a Commonwealth law of general application operates.[18] Statements to similar effect appear in the authorities concerning s 51(ii) of the *Constitution*.[19] Many of the statements may be traced to the observation made by the Privy Council in *Colonial Sugar Refining Co Ltd v Irving* that:[20]

> "The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed
20 by the States themselves."

No uniform operation throughout the Commonwealth

46. Div 48 of Pt 3 of Sch 1 to the Regulations itself adopts an activity definition for the production of nickel which treats as alike activities that are not alike. Div 48 selects, as the criterion for the operation of the taxing provisions in the Act and the Charge Acts, a classification of an activity which, of its nature, must be and is undertaken differently in different parts of Australia. By failing to distinguish between those different activities, and by imposing a classification in undifferentiated terms, Div 48 mandates a different or unequal taxation outcome for nickel producers located in different parts of the nation.

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[15] *Elliott v The Commonwealth* (1936) 54 CLR 657 at 668 (Latham CJ), 683 (Dixon J); *Permanent Trustee* (2004) 220 CLR 388 at 423 [88] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [30] (French CJ), [124]-[125] (Hayne, Bell and Keane JJ), [176] (Crennan J), [227] (Kiefel J).

[16] *Permanent Trustee* (2004) 220 CLR 388 at 424 [89]; *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118]; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 240; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 480; *Cameron v The Queen* (2002) 209 CLR 339 at 344 [15].

[17] (2013) 87 ALJR 935, [2013] HCA 34 at [107], [117]-[121] (Hayne, Bell and Keane JJ), [172]-[174] (Crennan J), [202], [225] (Kiefel J).

[18] *Colonial Sugar Refining Co Ltd v Irving* [1906] AC 360 at 367; *R v Barger* (1908) 6 CLR 41 at 108, 110-111 (Issacs J), 131 (Higgins J); *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 79 (Starke J); *James v The Commonwealth* (1928) 41 CLR 442 at 462 (Higgins J); *Permanent Trustee* (2004) 220 CLR 388 at 434 [128] (McHugh J); *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [5], [49] (French CJ), [83], [109] (Hayne, Bell and Keane JJ), [155], [162], [176] (Crennan J), [201]-[202], [216] (Kiefel J).

[19] *R v Barger* (1908) 6 CLR 41 at 70 (Griffith CJ, Barton and O'Connor JJ concurring); *W R Moran Pty Ltd v DFCT* (1940) 63 CLR 338 at 347-348; *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 271 (Webb J); *Conroy v Carter* (1968) 118 CLR 90 at 101 (Taylor J, Kitto and Windeyer JJ concurring); *Austin* (2003) 215 CLR 185 at 247 [117] (Gaudron, Gummow and Hayne JJ).

[20] [1906] AC 360 at 367.

47. The definition of the production of nickel chosen by the Regulations is not a rule of uniform application throughout the Commonwealth; it does not impose a liability, requirement or standard which operates irrespective of the location of the facilities at which liable entities undertake the activity. The provisions of general application which impose rules of uniform operation are the relevant provisions in the Act and the Charge Acts. However, as is evident from the relief claimed (SCB 54 at [31]), and the terms of Question 1 (SCB 95 at [59]), the plaintiff makes no challenge to the validity of those provisions. The claim of invalidity is confined to Div 48 itself, which is of a different character.

48. Div 48 is a method of classification which, in its terms, falsely assimilates activities that are inherently and necessarily different according to the location at which they are carried out. That classification is then an integer of decisive importance in the calculation of the financial impost. By adopting this method of classification, the Regulations require that the relevant provisions of the Act and the Charge Acts operate so as to favour and disfavour, respectively, the distinct activities undertaken by the Western Australian producers and the plaintiff. The result is a higher liability for unit shortfall charge for those who undertake the production of nickel, as classified, in North Queensland, when compared to Western Australia. The source of the different outcome is the classification.

49. This is not a case in which the unit shortfall charge happens to be payable by liable entities in different amounts because of "local circumstances". Rather, the activity which attracts taxation, the production of nickel, is itself defined in Commonwealth law in terms which require differential treatment of producers in Queensland and Western Australia.

50. It is the method of classification adopted by Div 48, and not the different circumstances existing in one or more of the States, which effects or creates the unequal liability for unit shortfall charge in different parts of Australia. It cannot be said that the unequal outcome "arises not from anything done by the Parliament"[21]; or that it arises "not from anything done by the law-making authority, but on account of the inequality of conditions obtaining in the respective States".[22] The unequal result is fixed by the Commonwealth law itself, in the form of the classification of activity contained in Div 48, and not by reason of the different conditions obtaining in the respective States.

The product of differences in factual circumstances in different parts of Australia?

51. In any event, some caution is required in seeking to apply, in the present case, the statements in the authorities concerning the creation of an unequal outcome by reason of differences in the factual circumstances existing in the various States.

52. First, as the majority observed in *Permanent Trustee*, in the application in a given case of the critical phrase in s 99, "give preference ... over", much will depend upon the level of abstraction at which debate enters upon the particular issue.[23] The level

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[21] *Colonial Sugar Refining Co* [1906] AC 360 at 367.
[22] *Cameron v DFCT* (1923) 32 CLR 68 at 79 (Starke J).
[23] (2004) 220 CLR 388 at 423 [87]. See also *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [124] (Hayne, Bell and Keane JJ).

of abstraction or generality ought to be selected having regard to the federal purposes of s 99.[24] Those purposes may be summarised as including the protection of the economic unity of the Commonwealth and the formal equality in the Federation of the States *inter se* and their people;[25] and the protection of taxpayers in the same circumstances in the various States from discrimination by a federal law with respect to taxation, imposed differentially or unequally between States.[26] Those purposes are hindered, not advanced, by any absolute limit upon the ambit of s 99 expressed in terms of differences in the natural, business or other factual circumstances between the States or parts thereof.

53. Secondly, it is now firmly established that, for the purpose of analysing whether a law is with respect to a head of power,[27] or infringes a constitutional limitation on power,[28] the Court must examine not only the formal or legal operation of the law, but also its practical effect or practical operation, namely "the effect of the law in and upon the facts and circumstances to which it relates".[29] This applies to the prohibition on disability or discrimination on the ground of State residence under s 117 of the *Constitution*,[30] which Mason CJ described as being a counterpart to other provisions, including s 99, which prohibit discrimination between the States in matters of taxation, trade and finance.[31] In *Fortescue*, five members of the Court expressly accepted that characterising a law for the purpose of applying ss 51(ii) and 99 requires consideration not only of the legal form, but also the practical effect or practical operation, of the law.[32] Thus, attention must be directed to the "real substance and effect" of the law.[33]

54. Thirdly, that s 99 looks to the practical effect of the impugned law and that a "preference" may involve the giving of similar treatment to dissimilar circumstances, were matters that were well understood from the earliest days of the Federation. In 1901, in their commentary on the phrase "give preference" in s 99, Quick and Garran said:[34]

> "Where the circumstances are dissimilar, a preference may arise either because the dissimilarity of treatment is excessive, or because the similarity of treatment is excessive. With regard to taxation, perhaps no serious difficulty is likely to arise; but with regard to charges for services, equal charges for

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[24] See, eg, *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [22] (French CJ).
[25] *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [5], [49] (French CJ).
[26] *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [163] (Crennan J).
[27] See, eg, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[28] See, eg, *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 232 [49] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ) (s 51(xxxi)); *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 169 [44], 198-199 [138] (s 51(xxxi)); *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 583 (Mason CJ, Brennan, Deane and McHugh JJ) (s 90); *Cole v Whitfield* (1988) 165 CLR 360 at 382, 399, 401, 408 (the Court) (s 92). See also Gummow, "Form or Substance?" (2008) 30 *Aust Bar Rev* 229 at 239.
[29] *Ha v New South Wales* (1997) 189 CLR 465 at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).
[30] *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487-488, 525, 545, 559, 569, 581-583; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362 at 408 [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
[31] *Street* (1989) 168 CLR 461 at 485.
[32] (2013) 87 ALJR 935, [2013] HCA 34 at [117] (Hayne, Bell and Keane JJ), [156] (Crennan J), [202] (Kiefel J).
[33] *W R Moran Pty Ltd* v *DFCT* (1940) 63 CLR 338 at 346, [1940] AC 838 at 854.
[34] Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 877-878.

> different services may cause as great inequality as unequal charges for similar services. ...
>
> The intention and the effect must both be looked to in order to decide whether a preference exists ..."

55. Fourthly, the decisions in the Court do not yield any "single, simply expressed and exhaustive explanations and definitions of the limitations on legislative power imposed by" s 99.[35] The expression of a constitutional limitation in past cases may, and often does, vary with the form of the particular legislation then under consideration.[36] Propositions ought not be permitted, by further judicial exegesis, to take on a life of their own which is removed from the constitutional fundamentals which must sustain them.[37] The expressions used in earlier cases ought not be substituted for the constitutional language. Nor should they be treated as having a direct normative effect which controls the outcome of future cases upon different statutory schemes.

56. Fifthly, the statements in the authorities concerning differences in local conditions, as in *Fortescue*[38] itself, frequently appear in circumstances where the impugned law had sought, in some way, to take account of variations in local conditions. The cases illustrate that the *Constitution* preserves a measure of flexibility to the Commonwealth to ensure that its imposts are levied with fairness across the federation. Quite different considerations arise here. Div 48 of Pt 3 of Sch 1 to the Regulations 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. The failure to do so creates, rather than obviates, unfairness in outcomes between the States.

57. Sixthly, any *a priori* rule which treats as fatal to the application of s 99 the characterisation, or possible characterisation, of differential treatment as a product of different factual circumstances, would be apt to denude s 99 of practical operation.

58. The statements in the authorities concerning natural, business or other factual circumstances should not be understood as imposing or recognising any absolute prohibition upon consideration of the practical effect of a law, for the purpose of determining whether it "give[s] preference ... over", within the meaning of s 99. Nor should they be understood as substituting for the enquiry presented by the terms of s 99 a different enquiry directed to ascertaining whether the unequal outcome is, or should be, characterised as the product of factual differences existing in the States.

59. None of the authorities in this Court dealing with s 99 of the *Constitution* have involved the validity of a Commonwealth law which, for the purpose of calculating an amount of tax, classifies within a single definition activities which, of necessity, are carried out differently in different parts of the federation. The statements identified in paragraph 45 above do not control the outcome of the present litigation.

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[35] *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [16] (French CJ).
[36] See, eg, *Austin* (2003) 215 CLR 185 at 249 [124] (Gaudron, Gummow and Hayne JJ).
[37] See, eg, *Austin* (2003) 215 CLR 185 at 258-259 [145] (Gaudron, Gummow and Hayne JJ).
[38] *Fortescue* (2013) 87 ALJR 935, [2013] HCA 34 at [74].

60. If (contrary to the submissions made at paragraphs 46 to 50 above), the Court concludes that Div 48 is relevantly expressed so as to operate uniformly throughout the Commonwealth, nonetheless, looked at as a matter of substance, the activity definition gives a preference to Western Australia over Queensland in a manner which offends s 99.

Section 99 does not import any test of "appropriate and adapted to a proper objective"

61. In its Defence at [27](g) (SCB 76), the Commonwealth pleads that any differential treatment "was reasonably appropriate and adapted to the attainment of the objectives of the legislative scheme, which objectives are proper objectives". The Court should reject the attempt to invoke this criterion under s 99 of the *Constitution.*

62. The majority in *Permanent Trustee* adopted and applied, for the purpose of s 99, the following conception of discrimination:[39]

> "The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals[40], where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.[41]"

The majority concluded that there was no infringement of s 99 in that case because the different treatment and unequal outcome produced by the impugned legislation[42] was the product of distinctions that were appropriate and adapted to a proper objective, namely to assimilate the taxation laws applying in Commonwealth places with those laws in the surrounding State.[43] The differences in revenue outcomes between States thus mirrored the differences that existed between the different taxation regimes from State to State.[44]

63. In *Fortescue*, only French CJ accepted that a criterion for determining whether a Commonwealth law discriminates or gives a preference in the sense used in ss 51(ii) and 99 of the *Constitution* was whether the distinctions it makes are appropriate and adapted to a proper objective.[45] Hayne, Bell and Keane JJ concluded that it was not necessary to explore whether, or how, this criterion was to be applied to a law with respect to taxation, because their Honours held that the relevant legislation did not discriminate between States and had no different application between States.[46] Their Honours nonetheless identified sound reasons why s 51(ii) of the *Constitution* should

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[39] (2004) 220 CLR 388 at 424 [89], quoting *Austin v The Commonwealth* (2003) 215 CLR 185 at 247 [118] (Gaudron, Gummow and Hayne JJ).
[40] *Queensland Electricity Commission* (1985) 159 CLR 192 at 240; *Castlemaine Tooheys* (1990) 169 CLR 436 at 480; *Cameron v The Queen* (2002) 209 CLR 339 at [15].
[41] *Street* (1989) 168 CLR 461 at 510-511, 548, 571-573, 582; *Cameron v The Queen* (2002) 209 CLR 339 at 344 [15].
[42] *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth).
[43] (2004) 220 CLR 388 at 424-425 [91]-[95].
[44] (2004) 220 CLR 388 at 425 [91].
[45] (2013) 87 ALJR 935, [2013] HCA 34 at [5], [31], [49].
[46] (2013) 87 ALJR 935, [2013] HCA 34 at [116]. Neither Crennan J (see at [175]) nor Kiefel J found it necessary to address this question.

not be understood as involving such a criterion. Those reasons, which are equally applicable to s 99, were:[47]

> "[T]he prohibition which the qualifying words of s 51(ii) provide is cast in absolute terms. The power to make a law with respect to taxation may not be exercised so as to discriminate. By contrast, as noted earlier, s 102 gives power to the Parliament, by any law with respect to trade or commerce, to forbid, as to railways, "any preference or discrimination by any State, or by any authority constituted under a State, *if* such preference or *discrimination is undue and unreasonable, or unjust* to any State" (emphasis added), when "due regard" is had to certain matters. Section 51(ii) uses no qualifying words like "undue", "unreasonable" or "unjust". It erects a rule expressed simply as "so as *not* to discriminate" (emphasis added).
>
> In its terms, then, s 51(ii) may be read as assuming that there are no differences between States (or parts of States) which could warrant a law with respect to taxation distinguishing between them. An assumption of that kind would fit comfortably with the limiting words of s 51(ii) fulfilling a fundamental federal purpose: that laws with respect to taxation enacted by the federal Parliament treat all States and parts of States alike. If this is the assumption that underpins s 51(ii), it would follow that, if a law with respect to taxation does discriminate between States (or parts of States), no further question could arise about whether the distinction that the law created or drew might none the less be explained or justified in a way that would take the challenged law outside the qualifying words of the provision. And if no further question of that kind need be answered, there would be no occasion to identify or consider the relationship that the law may have with some object or end which is identified as "proper" or "legitimate", because there could be no object or end that could constitute or reflect some difference between States (or parts of States) which would justify distinguishing between them."

64. The actual result in *Permanent Trustee* may be defensible on the basis that the mirror taxes legislation did not give *preference* to any State by merely replicating the *then* existing State position in each State, as opposed to imposing a *new* Commonwealth tax burden non-uniformly.[48] However, the reasoning of the majority, to the extent it was justified on the basis that there is no preference if such differentiation is the product of a distinction which is "appropriate and adapted to the attainment of a proper objective", should not, with respect, be followed.

65. It is useful to summarise the majority's reasoning in *Permanent Trustee* to demonstrate why some of that reasoning should not be followed. The majority reasoned as follows:

    a. The critical phrase in s 99 is "give preference .... over". Preference involves more than making a distinction or differentiation: at 423 [87].

    b. Preference involves discrimination but even if there is discrimination there is not necessarily a preference: at 423 [88].

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[47] (2013) 87 ALJR 935, [2013] HCA 34 at [114]-[115].

[48] The actual decision may also be defensible on the basis that to make laws imposing taxation operating in Commonwealth places in States could not amount to giving preference to one State over another.

c. Both in *Street* and in *Austin,* it was suggested that the notion of discrimination includes the view that there is no such discrimination if a differentiation in treatment is justified as appropriate to meet a proper objective: at 423-4 [88]-[89].

d. This was in part anticipated in *Elliott,* where the majority held that the imposition of a licensing system at particular ports in only some States did not give preference, when the decision to impose the licensing system was based on a view as to the necessary executive action at these ports: at 424 [90].

e. There is no discrimination between States effected by the mirror taxes legislation, even though there is a differential and unequal outcome as between States on the imposition of Commonwealth tax (replicating State tax in Commonwealth places) because the differentiation meets a proper objective: at 424-5 [91].

f. The proper objective appears to have been the desirability that there be no benefit in a Commonwealth place compared to other parts of the State where the Commonwealth place is located: at 425 [91], [94].

g. *Cameron v DFCT* did not require a different conclusion. Even if there was a difference in the treatment of different Commonwealth places in different States, the differential treatment was justified as being appropriate and adapted to the objective of replicating relevant State taxes in Commonwealth places located in the relevant State: at 425 [92]-[94].

66. There are a number of reasons why the above reasoning should not be followed:

a. First, the phrase "give preference ... over" does not permit the Court to ignore the differential treatment of a tax measure in different States on the basis that the differential treatment has a proper objective. Such a concept puts a gloss on the phrase, "give preference ... over". To adopt such an approach means that, notwithstanding the terms of s 99, a law of revenue *may* give preference to one State over another if there is a good enough reason for so doing. That is not permitted by the words of s 99. It is the antithesis of them. The phrase "give preference ... over" does not import the concept of appropriate and adapted differentiation.

b. Secondly, *Elliott* was decided on the basis that no State was given preference, in the sense of being favoured. It was not decided on the basis that a differential treatment is justified if founded on a proper objective. The majority in *Permanent Trustee* erred in equating the giving of preference (i.e. favourable treatment) with a separate notion that a law does not prefer if it meets a proper objective.

c. Thirdly, the primary objective of the mirror taxes legislation was to impose Commonwealth tax in Commonwealth places in the same way as State tax was imposed in the State where the Commonwealth place was located. To suggest that this is a proper objective, namely the objective of assimilation or replication, is to permit a Commonwealth tax to be imposed differentially as between States on the footing that such assimilation or replication (by differentiation) is self-justificatory. It is not a valid "proper objective".

d. Fourthly, the majority did not sufficiently address and explain why a *Commonwealth* tax did not give preference to one State over another when it made different State tax rates applicable in different States. Replicating the difference, whilst the difference is permissible under State law, is not permissible pursuant to a Commonwealth law. This is because when it is imposed, it operates unequally and non-uniformly in the States, thereby giving a preference.

e. Fifthly, the uncertainties inherent in the "appropriate and adapted" standard militate against its expansion into new areas of constitutional doctrine. As Crennan, Kiefel and Bell JJ observed in *Monis v The Queen*, the formulation "provides no guidance as to its intended application and tends to obscure the process" of analysis and "[i]ts use may encourage statements of conclusion absent reasoning".[49]

67. The factors relevant to the overruling of an earlier decision in this Court[50] support the conclusion that *Permanent Trustee* should not be followed or should be overruled:

a. *Permanent Trustee* was not the result of a line of cases carefully working out the meaning and effect of s 99. Indeed, it put a gloss on s 99 that was not articulated before, and was not previously treated as informing the notion of "give preference". This is apparent from the strong dissenting judgments of McHugh J and Kirby J setting out the history of decisions on s 99[51] and discussing its meaning.[52]

b. Although the error in the majority's reasoning has not become explicit in authorities after *Permanent Trustee,* the case dealt with a peculiar circumstance. The only subsequent authority on s 99 - *Fortescue* - did not provide any support for the tests of "appropriate and adapted" and "proper objective", except, with respect, in the reasons of a single Justice (French CJ). *Permanent Trustee* is not part of a definite stream of authorities. Subject to the exception just noted, it has not been followed. It can be overruled or not followed without affecting an established line of cases.

c. *Permanent Trustee* is an isolated application of the appropriate and adapted criterion to s 99. Although *Permanent Trustee* can be confined to its peculiar facts, the majority's reasoning potentially affects s 99 generally.

d. *Permanent Trustee* deals with an issue of constitutional importance with potentially far-reaching implications. The reasoning on s 99 cannot be supported and the Court in this case should indicate that it will not follow that reasoning.

68. To the extent that leave may be necessary to make the above submission, leave should be granted.

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[49] (2013) 249 CLR 92 at 213 [345].
[50] *Queensland v Commonwealth* (1977) 139 CLR 585 at 620-631; *Commonwealth v The Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 55-58; *John v Commissioner of Taxation of Commonwealth* (1989) 166 CLR 417 at 438-440; *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 350-353 [65]-[71].
[51] (2004) 220 CLR 388 at 433 [126]-[155], 459 [204]-[209], 463 [217]-[226].
[52] (2004) 220 CLR 388 at 446 [155]-[158], 461 [211]-[233].

The unequal outcome is not appropriate and adapted to a proper objective

69. If (contrary to the submissions made in paragraphs 61 to 68 above), the Court concludes that the "appropriate and adapted" criterion is applicable under s 99 of the *Constitution*, Div 48 of Pt 3 of Sch 1 to the Regulations does not satisfy that test.

70. The plaintiff competes with laterite and non-laterite ore based refineries and smelters located worldwide, including in China, New Caledonia, Indonesia, Cuba, Brazil and the Philippines (SCB 94-95 at [54]). None of those countries has implemented measures to reduce carbon dioxide emissions that have an impact that is comparable to the impact of Australian emissions reduction measures, including the impact of the Act on nickel producers in Australia (SCB 95 at [58]).

71. The activity definition in Div 48 results in low assistance, and the highest liability, for the producer (the plaintiff) with the highest emissions intensity and the greatest risk of relocating to a foreign country without comparable climate change policies. The activity definition operates to over-compensate those traders with lower emissions intensity. The definition undermines, rather than promotes, the objects of Pt 7 of the Act. In particular, the definition would increase, rather than reduce, the incentives for a body in the position of the plaintiff to relocate production to foreign countries as a result of different climate change policies (s 143(2)(b)) and fails to provide assistance in a manner that is economically efficient (s 143(2)(d)).

72. If two separate "activity definitions" had been adopted for (i) the production of London Metal Exchange nickel briquettes ("**first definition**"); and (ii) the production of lower grade nickel compacts and other customised nickel and cobalt products ("**second definition**"), then this would have:[53]

    a. reduced the number of free carbon units to which one or more of Nickel West, First Quantum or Murrin Murrin would have been entitled under the formula; and

    b. increased the number of free carbon units to which the plaintiff would have been entitled under the formula.

73. The outcome identified in paragraph 72(a) above would have occurred because:

    a. the nickel products produced by the plaintiff would not fall within the first definition;

    b. the baseline for direct emissions per unit of production would be calculated by reference to industry averages during the historic assessment period that exclude the tonnes of carbon dioxide equivalence produced by the plaintiff;

    c. as the plaintiff produces the greatest number of tonnes of carbon dioxide equivalence per unit of production, the baseline for direct emissions would fall; and

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[53] The matters stated in paragraphs 72 to 74 are common ground: see the Commonwealth's Defence at [27](g), particular (ii), at SCB 76-77.

d. given the inclusion of allocative baselines in the formula, the nickel producers falling within the first definition would receive a lower number of free carbon units than they receive by reason of the operation of Div 48 as presently framed.

74. The outcome identified in paragraph 72(b) above would have occurred because:

a. only the plaintiff produces products falling within the second definition;

b. the baseline for direct emissions per unit of production would be calculated by reference to the direct emissions, per unit of production, during the historic assessment period, of the plaintiff alone;

c. as Nickel West, Murrin Murrin and First Quantum produce fewer tonnes of carbon dioxide equivalence per unit of production than the plaintiff, the baseline for direct emissions would increase; and

d. given the inclusion of allocative baselines in the formula, the plaintiff would receive a higher number of free carbon units than it receives by reason of the operation of Div 48 as presently framed.

75. The activity definition in Div 48 fails to meet the objectives of Pt 7 of the Act. It causes disproportionate economic harm in circumstances where there exists a reasonable alternative, in the form of separate activity definitions. Separate activity definitions would meet the objectives of Pt 7, by ensuring that the greatest assistance is provided to the producer with the highest emissions intensity and the greatest risk of relocating to a foreign country without comparable climate change policies. The differential treatment resulting from Div 48 is not reasonably appropriate and adapted to the attainment of the objectives of Pt 7 of the Act.

The relevant provisions should be read down so as to be within power

76. As an alternative to a declaration of invalidity regarding Div 48, the relevant provisions of the Act and the Charge Acts should be read down, in accordance with s 15A of the *Acts Interpretation Act 1901* (Cth), so as to avoid inconsistency with s 99 of the *Constitution*. That is best achieved by construing those provisions so they do not apply to, and hence do not impose liability for unit shortfall charges in respect of, the production of nickel. When so construed, the relevant provisions have an independent and severable operation upon the subjects within power, which is unaffected by the process of reading down to avoid the excess of power.[54]

PART VI: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

77. See Annexure "A".

PART VII: ORDERS SOUGHT BY THE PLAINTIFF

78. The plaintiff respectfully submits that the questions of law stated for the opinion of the Full Court in the special case should be answered as follows:

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[54] See *Victoria v Commonwealth* (1996) 187 CLR 416 at 502-503 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

Question 1: "Yes."

Question 2: "Unnecessary to answer." Alternatively: "Yes. On their proper construction, the provisions identified in sub-paragraphs (ii) to (iv) of Question 2 do not apply to the production of nickel."

Question 3: "Unnecessary to answer." Alternatively: "No."

Question 4: "The defendant."

PART VIII: ORAL ARGUMENT

79. The plaintiff estimates that approximately 2 to 3 hours will be required for the presentation of the plaintiff's oral argument, including submissions in reply.

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Dated: 24 September 2014

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