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

BETWEEN: **QUEENSLAND NICKEL PTY LIMITED**
Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Defendant

PLAINTIFF'S ANNOTATED SUBMISSIONS IN REPLY

PART I: PUBLICATION ON THE INTERNET

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

PART II: CONCISE REPLY TO THE ARGUMENT OF THE DEFENDANT

2. *Re Defendant's Submissions paragraphs 8 and 74 ("DS [8] and [74]").* The Special Case does demonstrate that the activity of the production of nickel undertaken in North Queensland is necessarily different from the activity undertaken in Western Australia. In particular:

   (a) the differences between the activities undertaken by the plaintiff and the Western Australian producers, 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;

   (b) those differences are the consequence of circumstances which include the respective geographical locations at which each nickel producer conducts its smelting and refining operations; and business decisions made by each producer with respect to matters including the type of nickel ore to which each 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];

   (c) 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];

   (d) 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: SCB 91 at [36];

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(e) each of the Western Australian producers operates refining or smelting facilities which are geographically close to the deposits of ore in Western Australia used by each of them: SCB 91 at [36];

(f) the production processes used by each of the Western Australian producers are specifically tailored to process, and were selected as the most suitable for processing, the particular type of ore to which each refinery is physically proximate: SCB 91 at [37];

(g) the particular production process used by the plaintiff, if applied to the dry laterite ore available in Western Australia, would achieve a nickel extraction rate of less than 50%: SCB 94 at [49]-[50]; and

(h) by contrast, the limonite ore imported by the plaintiff results in a typical rate of nickel recovery of approximately 85%: SCB 93 at [47].

3. *Re DS [47]-[52].* The plaintiff does not dispute, as an accurate description of the operation of the Act and the Regulations when considered without reference to Div 48, the five matters identified by the defendant. However, none of those five matters presents any insuperable obstacle to the conclusion that Div 48 adopts a method of classification of the activity of the production of nickel which offends s 99 of the *Constitution.*

4. The operation of the Act and Regulations, including the calculation of unit shortfall charge and the issue to liable entities of free carbon units which are then available to reduce that liability, insofar as applicable to entities engaged in the production of nickel, depends upon the means selected in Div 48 to define that activity. The differential treatment which results from the terms of the definition in Div 48 is not denied or diminished by the operation which the Act and the Regulations have upon other activities, or the operation which they would have in the absence of Div 48.

5. *Re DS [56]-[60] and [76].* The plaintiff relies upon its submissions at PS [51]-[59], none of which is the subject of any specific challenge in the defendant's submissions.

6. *Re DS [64]-[65].* The clause in Div 48 which results in the Division not having uniform operation throughout the Commonwealth is sub-cl 348(1). That sub-clause defines "[t]he production of nickel" in terms which fails to distinguish between activities which, of their nature, are undertaken differently in North Queensland and Western Australia. For the reasons given at PS [46]-[50], Div 48 imposes a method of classification which effects or creates unequal liability for unit shortfall charge as between nickel producers located or operating in North Queensland and Western Australia.

7. That constitutes differential treatment of a nickel producer because of the locality at which production occurs, as compared with a nickel producer in another locality in a different State.

8. *Re DS [17], [68], [70] and [72].* The extent of the differential treatment resulting from geographical considerations (see SCB 90 at [34]) is sufficient to engage s 99 of the *Constitution*, notwithstanding the contribution or effect of other variables. A law or regulation of revenue may "give preference" within the meaning of s 99

notwithstanding that the advantage conferred is not solely referable to geography and includes other contributing factors.

9. Were it otherwise, the Parliament could readily circumvent s 99 by designing a revenue measure which selects location in one State, or any part thereof, as one of several criteria for the imposition or calculation of the tax. An interpretation of s 99 which permitted such a course would defeat the purposes of the prohibition, 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;[1] 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.[2]

10. *Re DS [69].* It is immaterial that the plaintiff obtains 100% of its nickel ore requirements from overseas. The *present* link between the differential impact and the geographic location of the plaintiff's nickel production activities is supplied by the circumstance that the production methods used by the plaintiff are determined, at least to a substantial degree, by that location and the sources of imported ore to which the plaintiff's refinery are geographically proximate (see SCB 90 at [34], 92-94 at [42]-[50]). The fact that the plaintiff now sources nickel ore from countries which are located close to North Queensland, and are a great distance from Western Australia, reinforces, rather than denies, the continuing existence of the link between unequal treatment and geography.

11. *Re DS [75]-[76].* The adoption of two separate activity definitions for the production of nickel, of the kind propounded at PS [72], could readily be achieved in terms which do not select, as a criterion for the operation of the definition, geographic location. As the terms of the separate activity definitions at PS [72] demonstrate, the activities would be defined by reference to the production processes and their outputs, rather than the location at which they occur. This would not involve any conflict with the principles identified by Isaacs J in *Cameron*.[3]

12. *Re DS [78]-[80].* The error in the reasoning of the majority in *Permanent Trustee*[4] was the application, under s 99, of the criterion of appropriate and adapted differentiation. The reasoning was erroneous for the reasons given at PS [63]-[66]. The error is not cured by characterising the application of the criterion as "giv[ing] content to the concept of discrimination itself" (DS [78]). The observations by Quick and Garran[5] relied upon by the defendant find no support in the words used in s 99 or its federal purpose. The doubts expressed by the plurality in *Fortescue*[6] concerning the test of "reasonably appropriate and adapted", although addressed to s 51(ii) of the *Constitution*, apply with equal force to s 99.

13. *Re DS [84],[85] and [90].* A guidance paper issued by the relevant Commonwealth department[7] for the purpose of administering the Act cannot be relied upon as

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1 *Fortescue* (2013) 250 CLR 548 at [5], [49] (French CJ).
2 *Fortescue* (2013) 250 CLR 548 at [163] (Crennan J).
3 *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 at 76-77 (Isa.
4 (2004) 220 CLR 388 at [87]-[94].
5 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 878.
6 (2013) 250 CLR 548 at [114]-[115].
7 *Assessment of Activities for the purposes of the Jobs and Competitiveness Program: Guidance Paper* (Department of Climate Change and Energy Efficiency, September 2011) at [3.1].

demonstrating that the means selected by Div 48 for defining the activity of the production of nickel are reasonably appropriate and adapted to any proper objective.

14. *Re DS [87]-[90].* Div 48 is not a reasonably appropriate and adapted means of achieving the objective of reducing the risk of "carbon leakage". Div 48 results in the least assistance being provided to the nickel producer which is at the greatest risk of relocating to overseas jurisdictions with different climate change policies (see PS [70]-[75]). That state of affairs increases, rather than reduces, the risk of "carbon leakage".

15. The availability of an alternative, reasonably practicable and less drastic legislative measure - here, a method of classification involving two separate activity definitions of the kind identified in PS [72] - is a conventional way of testing whether or not the measure selected by the Parliament is reasonably appropriate and adapted to a proper objective.[8]

16. *Re DS [62], [91] and [92].* The legal or practical effect of the method of classification adopted by Div 48 is to confer a tangible advantage upon nickel producers in Western Australia over those in Queensland or North Queensland. The tangible advantage is conferred by the interaction between Div 48, which defines the activity of the production of nickel, and the provisions of the Act (ss 122 to 134, 145 and 312), the Regulations (cll 501 to 506, 701, 804 and 901 to 913 of Sch 1) and the Charge Acts (ss 8 and/or 9, as applicable), which operate by reference to that activity definition for the purpose of imposing liability for unit shortfall charge and providing for the issue of free carbon units.

17. The advantage conferred on the Western Australian producers in each of the 2012 and 2013 fixed charge years was:

    (a) (with one exception) a higher number of free carbon units (SCB 91-92 at [39]); and

    (b) a lower liability for unit shortfall charge, after the surrender of available free carbon units but prior to any purchase of additional eligible emissions units (SCB 92 at [40]).

    This is sufficient to constitute a "tangible commercial advantage" in the relevant sense.[9]

18. *Re DS [95]-[96].* As an alternative to a declaration of invalidity of Div 48, s 15A of the *Acts Interpretation Act 1901* (Cth) would authorise the reading down of the relevant provisions of the Act and the Charge Acts so as to ensure that they do not impose liability for unit shortfall charge by reference to the method of classification

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[8] See, eg, *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318 at [110]-[113] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Monis v The Queen* (2013) 249 CLR 92 at [347] (Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2013) 88 ALJR 227, 304 ALR 266 at [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Tajjour v New South Wales* (2014) 313 ALR 221, [2014] HCA 35 at [36] (French CJ), [113]-[114] (Crennan, Kiefel and Bell JJ), [152] (Gageler J).

[9] See *Elliott v Commonwealth* (1936) 54 CLR 657 at 669-670 (Latham CJ); see also at 683 (Dixon J); *Crowe v Commonwealth* (1935) 54 CLR 69 at 83 (Rich J), 86 (Starke J), 92 (Dixon J), 96-97 (Evatt and McTiernan JJ).

in Div 48, in the event the Court concludes that the imposition of such liability by reference to Div 48 breaches s 99 of the *Constitution*.

19. That is so because, but for s 15A, those provisions, to that extent, would have been in excess of power, by reason that they conferred a preference contrary to s 99. Section 15A preserves the validity of those provisions, to the extent they are not in excess of power. This is achieved by construing those provisions so as not to impose liability for unit shortfall charge upon liable entities which engage in the production of nickel.

Dated: 12 November 2014

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