QUEENSLAND NICKEL PTY LIMITED v. COMMONWEALTH OF AUSTRALIA (B25/2013)

Writ of summons filed: 16 May 2013

Date special case referred to the Full Court: 28 August 2014

The plaintiff owns and operates a nickel and cobalt refinery at Yabulu, near Townsville in North Queensland. There are three other producers of nickel and cobalt in Australia, namely BHP Billiton Nickel West Pty Limited, First Quantum Minerals Limited and Murrin Murrin Operations Pty Limited which are located in Western Australia. Each of the plaintiff, Nickel West, First Quantum and Murrin Murrin 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 the *Clean Energy Act* 2011 (Cth) "the Act".

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".

The plaintiff claims that the legal and practical effect of Division 48 of Part 3 of Schedule 1 to the *Clean Energy Regulations* 2011 (Cth), as amended by the *Clean Energy Amendment Regulation* 2012 (No 7) (Cth), is to give preference to Western Australia, or alternatively to particular regions in Western 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. This is contrary to s 99.

The whole of the Act was repealed, with effect from 1 July 2014, by the *Clean Energy Legislation (Carbon Tax Repeal) Act* 2014 (Cth). However, despite that repeal, the operation of the Act and related legislation was preserved insofar as it related to the liability of liable entities to pay unit shortfall charges for the years beginning on 1 July 2012 and 1 July 2013.

The questions stated in the Special Case for the opinion of the Full Court include:

- Was Division 48 of Part 3 of Schedule 1 to the Regulations invalid in its application to the plaintiff on the ground that it gave preference to one State, or any part thereof, over another State, or any part thereof, contrary to s 99 of the Constitution?

- Should any or all of the following provisions:
  - Division 48 of Part 3 of Schedule 1 to the Regulations;
  - clauses 501 to 506, 701, 804, 901 to 913 of Schedule 1 to the Regulations;
  - sections 122 to 134, 145 and 312 of the Act; and,

- Part 3 of the *Clean Energy (Charges - Excise) Act* 2011 (Cth), Part 3 of the *Clean Energy (Charges - Customs) Act* 2011 (Cth) and the *Clean Energy (Unit Shortfall Charge - General) Act* 2011 (Cth);

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

- Who should pay the costs of the proceedings?