CASE NOTE: PALMER'S ORE: QUEENSLAND NICKEL PTY LTD v COMMONWEALTH

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I INTRODUCTION

The *Australian Constitution*[1] has express prohibitions on Commonwealth discrimination against the States and it makes an attempt to divide various aspects of fiscal power between the Commonwealth and the States. As set out in section 99 of the *Australian Constitution*, the Commonwealth may not give preference to States or parts of Sates in any revenue law.[2] This case[3] was a Constitutional matter heard in the High Court of Australia, examining whether the effect of intensive greenhouse gas emission activities of entities that have been taxed under the *Clean Energy legislation*[4] was to give preference to one State over another contrary to section 99 of the *Australian Constitution*. It is worth noting that the *Clean Energy Act 2011* (Cth) in its whole was repealed with effect from 1 July 2014.[5] However, despite that repeal, the operation of the *Clean Energy legislation* was preserved insofar as it related to the liability of entities to pay the greenhouse gas emissions tax for the years beginning 1 July 2012 and 1 July 2013 ('the relevant years').

This case note will examine the High Court's decision in relation to section 99 of the *Australian Constitution* and its impact on the *Clean Energy legislation*. This case note will also examine the High Court's decision in this case as a follow-on from the principles highlighted in *Fortescue Metals Group Ltd v Commonwealth*.[6]

II QUEENSLAND NICKEL PTY LTD v COMMONWEALTH

A *The Taxing Legislation*

The *Clean Energy legislation* established and imposed a tax on liable entities for certain greenhouse gas emissions in excess of a specified threshold volume.[7] 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.[8] The JCP was designed to reduce the tax

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[1] *Commonwealth of Australia Constitution Act 1900* (Imp) ('*Australian Constitution*').

[2] Ibid s 99: 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.

[3] *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451.

[4] The *Clean Energy legislation* includes the *Clean Energy Act 2011* (Cth), the *Clean Energy Regulations 2011* (Cth), the *Clean Energy (Charges – Excise) Act 2011* (Cth), the *Clean Energy (Charges – Customs) Act 2011* (Cth) and the *Clean Energy (Unit Shortfall Charges – General) Act 2011* (Cth).

[5] *Clean Energy Legislation (Carbon Tax Repeal) Act 2014* (Cth).

[6] (2013) 250 CLR 548.

[7] *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [9].

[8] Ibid [10].

payable under the *Clean Energy legislation* on businesses that were exposed to international competition and which produced relatively high amounts of greenhouse gas emissions.[9] One such activity under the JCP[10] was the production of nickel.[11] 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.[12] Significantly, issuing the free 'units' did not take into account the location of the entity producing the nickel, the nature of the iron ore used to produce the nickel, the process used in the production of the nickel, or the amount of carbon emissions emitted per unit volume of nickel produced.[13] Therefore, the more environmentally inefficient the entity's production (that is, the greater the number of tonnes of carbon emissions emitted from the entity) the greater the tax the entity had to pay.[14]

B *The Production of Nickel*

Although there are significant nickel bearing iron ore deposits distributed throughout Australia, the bulk are comprised in a small number of iron ore bodies in Queensland and Western Australia.[15] During the relevant years, there were a number of entities in Australia producing nickel products as defined by the *Clean Energy legislation*[16]. Queensland Nickel Pty Ltd ('the Plaintiff') carried out the production of nickel at its Yabulu refinery near Townsville in Queensland. Its major competitors BHP Billiton Nickel West Pty Limited ('Nickel West'), FQM Australia Nickel Pty Ltd ('First Quantum') and Murrin Murrin Operations Pty Limited ('Murrin Murrin') carried out the production of nickel in Western Australia.[17]

Due to differences in the geographic location of the entities, the kinds of ore processed, the production processes employed and the types of nickel products produced (all of which will be discussed in more detail below), the Plaintiff's refinery emitted more greenhouse gas per unit volume of nickel than its Western Australian competitors.[18] 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 Western Australian competitors.

C *The Plaintiff's Contentions*

The Plaintiff firstly contended that, because the issue of free 'units' were calculated with reference to industry averages and therefore resulted in the same number of free 'units' per volume of production, regardless of differences between producers' inputs, production process and producers' outputs, the JCP contravened s 99 of the *Australian Constitution*.[19]

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9 Ibid [40].

10 *Clean Energy Regulations 2011* (Cth) sc 1, pt 3, div 48 of the JCP specified 51 emissions-intensive trade-exposed activities, of which the production of nickel was one.

11 *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [41].

12 Ibid [48].

13 Ibid.

14 Ibid 49.

15 Ibid [13].

16 See especially *Clean Energy Regulations 2011* (Cth) sch 1, cl 348(5).

17 *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [15].

18 Ibid [16] – [32].

19 Ibid [50].

Secondly, the Plaintiff contended that, as between the Plaintiff and its Western Australian competitors there were differences in inputs, production processes and outputs and that those differences were (at least to some extent) caused by differences in *natural, business or other circumstances* as between the locations, and thus the States in which each of the entities carried on its processing operations.[20] Therefore, the JCP did not make any allowance for these differences and treated activities similar, which were not similar and thereby mandated a different unequal taxation for nickel producers according to whether their processing operations were located in Queensland or in Western Australia. This was said to result in a preference being given to Western Australia within the meaning of s 99 of the *Australian Constitution*.[21]

D *The Decision of Nettle J*

With regard to the Plaintiff's first contention Nettle J (with whom French CJ, Hayne J, Kiefel J, Bell J, Gageler J and Keane J agreed) pointed out that with regard to preference and discrimination for the purposes of s 99 of the *Australian Constitution,* the Commonwealth does not give a preference by law or regulation to one State over another unless the law or regulation discriminates between those States.[22] Nettle J stated that in earlier judgments of the High Court[23] this discrimination was determined solely by reference to the legal form of the law or regulation, or whether the law or regulation had a discriminatory purpose, or whether the law or regulation drew a formal legal distinction.[24] Later cases[25] also took into account the practical effect of the law and regulation.[26] Nonetheless, the view consistently taken in relation to taxation laws has been that it is not enough, in order to demonstrate discrimination, to show *only* that a taxation law may have different effects in different States because of differences between circumstances in those States.[27] In addressing this issue Nettle J held that it is apparent that the JCP did not discriminate in its legal effect between States, it applied equally to entities producing nickel regardless of the State of production. In terms of the practical effect of the law or regulation, the Plaintiff did not suggest that the differences in inputs, production processes and outputs were due to anything other than the differences in natural, business and other circumstances as between the States of production.[28]

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20 Ibid [51].

21 Ibid.

22 Ibid [52]; *Elliot v Commonwealth* (1936) 54 CLR 657, 668 (Latham CJ); *Fortescue Metals Group Ltd v Commonwealth* (2103) 250 CLR 548, 575 (French CJ).

23 *R v Barger* (1908) 6 CLR 465, 106 (Isaacs J); *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68, 72 (Knox CJ); *James v Commonwealth* (1928) 41 CLR 442, 455-6 (Knox CJ); *Elliot v Commonwealth* (1936) 54 CLR 657, 688 (Evatt J); *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338, 348 (Viscount Maugham); *Commissioner of Taxation v Clyne* (1958) 100 CLR 246, 272 (Webb J).

24 *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [53].

25 *Ha v New South Wales* (1997) 189 CLR 465, 498 (Brennan CJ); *Fortescue Metals Group Ltd v Commonwealth* (2103) 250 CLR 548, 605 (Hayne, Bell and Keane JJ).

26 *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [53].

27 Ibid.

28 Ibid [56].

With regard to the Plaintiff's second contention, Nettle J pointed out that the High Court in *Fortescue Metals Group Ltd v Commonwealth*[29] dealt with the situation where a Commonwealth taxing Act produced different consequences in different States due to differences between States' *legislation*. However, their Honours should be taken to have left open for consideration the kind of situation which arises where a Commonwealth law results in different consequences in different States due to differences between States in *natural, business or other circumstances*.[30]

Turning his attention to the Plaintiff's inputs, Nettle J said that from 1974 to 1992 the Plaintiff processed dry laterite ore sourced from its Greenvale ore source and after the Greenvale source was exhausted, it brought in small quantities of dry laterite ore from its Brolga mine.[31] However, during the relevant years to which the JCP applied, it only used wet laterite ore imported from Asia.[32] However, at no time was the Plaintiff precluded by naturally occurring circumstances from obtaining dry laterite ore from its mine at Brolga or even Western Australia.[33] The Plaintiff's Caron process was capable of extracting higher volumes of nickel from wet laterite ore imported from Asia than from dry laterite ore or sulphite ore available in Australia and it can therefore be concluded that the Plaintiff's choice of wet laterite ore was based on economic circumstances, which had nothing to do with the State in which it conducted its processing operations.[34]

With regard to the production processes, Nettle J said that in the 1970's the Plaintiff chose to use the Caron process and that (at the time) it was the most economically feasible system, taking into account geographic considerations to process the Greenvale dry laterite ore.[35] In the 1990s Murrin Murrin and First Quantum also used dry laterite ore. However, both chose a form of acid leaching system to process the dry laterite ore.[36] Consequently, it appears that (in terms of geographic considerations), the Plaintiff and its competitors were essentially in the same position when they made their decisions to employ the Caron process or the acid leaching process respectively.[37] Assuming that each entity's decision was economically rational, it follows that the differences between the individual selections of processing systems where the consequences of considerations other than any differences between the ore bodies each of them had in contemplation at the time of selection.[38] Nettle J also pointed out that over the last 40 years energy prices have altered significantly and the technical efficiency and environmental safety of production processes have increased and it might be that if the Plaintiff's 1970's decision had been delayed until the 1990's, it would have chosen an acid leaching process similar to its competitors.[39] However, the Plaintiff's technological disadvantage and thus its fiscal disadvantage under the JCP were due to the Plaintiff making its choice when the available technology was not as advanced

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29 (2013) 250 CLR 548; see also *Austin v Commonwealth* (2003) 215 CLR 185, 247 (Gaudron, Gummow and Hayne JJ).

30 *Queensland Nickel Pty Ltd v Commonwealth* (2015) 89 ALJR 451, [57].

31 Ibid [17].

32 Ibid.

33 Ibid [59].

34 Ibid [60].

35 Ibid [61].

36 Ibid.

37 Ibid [62].

38 Ibid.

39 Ibid [63].

and it does not imply that any such difference in technology was caused by differences between States in natural, business or other circumstances.[40]

In addressing the issue of the entities' outputs, Nettle J pointed out that there were some differences between the outputs produced by the Plaintiff in Queensland and the outputs produced by Murrin Murrin and First Quantum in Western Australia. However, it is not possible to say whether the difference in output was solely due to each entity's liability to pay the greenhouse gas emission tax under the JCP.[41] Turning his attention to the market for nickel products, Nettle J noted that both Nickel West and Murrin Murrin produced London Metal Exchange ('LME') grade nickel products. [42] The Plaintiff produced non-LME grade nickel products. However, although the nickel products were not of LME quality, they were still categorised as Primary Nickel Products – Class 1 and were suitable for the same use (mostly stainless steel products) and sold for similar prices as the LME grade nickel products sold by Nickel West and Murrin Murrin.[43] More importantly, even if there were significant differences in the output, they were the necessary consequences of the differences between the inputs and production processes of the entities.[44] Since the difference between inputs and production processes were not shown to have been caused by differences between circumstances in different States, it could not be inferred that the differences in outputs were caused by differences in circumstances between States.[45]

III CONCLUSION

As expected by Constitutional lawyers, the High Court unanimously found for the Commonwealth and held that the differences between the Plaintiff's and its Western Australian competitors' inputs, production processes and outputs were not due to differences between Queensland and Western Australia in natural, business or other circumstances. Therefore, the High Court held that the JCP did not give a preference to one State over other States and did not contravene s 99 of the *Australian Constitution*. The Plaintiff was therefore liable to pay the greenhouse gas emissions tax as established by the *Clean Energy legislation* for the relevant years. Although the *Clean Energy legislation* has been repealed in its entirety, this case remains relevant in demonstrating the High Court's reasoning when considering s 99 of the *Australian Constitution*, as well as discussing the principles following on from *Fortescue Metals Group Ltd v Commonwealth*.

Nettle J gave his first judgment in this case and it is the latest in a tradition of sorts, where the High Court periodically forgoes its usual practice of presenting judgments where multiple Judges agree (and have nothing further to add) as jointly authored by all of them, in favour of one Judge presenting the judgment and the rest giving individual pro forma concurrences. Although seemingly never officially acknowledged, the practice appears to be a way for the High Court's Judges to mark the arrival of a new Judge on the bench. The practice has been criticised that it potentially creates the impression that the High Court's

40 Ibid [64].
41 Ibid [65].
42 Ibid [28].
43 Ibid [31] – [32].
44 Ibid [66].
45 Ibid.

Judges perform their role differently in cases where the tradition is followed and simply because it included Nettle J's first judgment, readers of this decision (including, perhaps, the Plaintiff) may well consider whether the concurrences of six Judges truly signal their agreement with Nettle J's views on the law, or just their broader respect for their new colleague and the High Court's traditions.[46]

[46] Jeremy Gans, 'Opinions on High' on University of Melbourne, *High Court Blog* (8 April 2015) < http://blogs.unimelb.edu.au/opinionsonhigh/2015/04/08/news-nettle-js-first-judgment/>.