JUD/*2019*FCAFC131 -

FEDERAL COURT OF AUSTRALIA

Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia [2019] FCAFC 131

Appeal from:	*Linfox Australia Pty Ltd and Commissioner of Taxation* [2019] AATA 222
File number:	NSD 464 of 2019
Judges:	**ROBERTSON, KERR AND STEWARD JJ**
Date of judgment:	21 August 2019
Catchwords:	**TAXATION** – appeal on a question of law from the Administrative Appeals Tribunal – fuel tax – excise or customs duty that is payable on fuel – whether taxpayer acquired taxable fuel to use, in a vehicle, for travelling on a public road – whether, as a consequence, the amount of the taxpayer's fuel tax credit for the fuel was reduced by the amount of the road user charge for the fuel – whether error of law in the conclusion of the Tribunal that certain toll roads operated by a private operator to make a profit and required to be maintained by that operator at its cost were each a "public road" within the meaning of s 43-10(3) of the *Fuel Tax Act 2006* (Cth) **TAXATION** – appeal on a question of law from the Administrative Appeals Tribunal – fuel tax – whether, if the taxpayer was entitled to a fuel tax credit, it ceased to be entitled to such credit "to the extent that it has not been taken into account, in an assessment of a net fuel amount" of the taxpayer, during the period of four years after the day on which the taxpayer was required to give to the Commissioner a return for the period, within the meaning of s 47-5(1) of the *Fuel Tax Act*
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AB *Fuel Tax Act 2006* (Cth) ss 2-1, 41-10, 41-20, 41-25, 43-8, 43-10, 47-5, 60-5, 110-5 *Income Tax Assessment Act 1997* (Cth) s 995-1 *Taxation Administration Act 1953* (Cth) Sch 1, s 155-5(2)
Cases cited:	*Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 *Cavric v Willoughby City Council* [2015] NSWCA 182; 89 NSWLR 461

	Commissioner of Taxation v Futuris Corp Ltd [2008] HCA 32; 237 CLR 146 *Commissioner of Taxation v Murray* (1990) 21 FCR 436 *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514
Date of hearing:	8 August 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Taxation
Category:	Catchwords
Number of paragraphs:	135
Counsel for the Applicant:	Mr JO Hmelnitsky SC with Ms TL Phillips
Solicitor for the Applicant:	MinterEllison
Counsel for the Respondent:	Mr S Lloyd SC with Ms K Deards SC and Mr M Cosgrove
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 464 of 2019

BETWEEN:	**LINFOX AUSTRALIA PTY LTD** Applicant
AND:	**COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA** Respondent
JUDGES:	**ROBERTSON, KERR AND STEWARD JJ**
DATE OF ORDER:	**21 AUGUST 2019**

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. Subject to order 3, the applicant pay 75 percent of the respondent's costs of the appeal, as agreed or assessed.
3. If either party wishes to contend for a different costs order, that party is to notify the other party and the associate to Robertson J within seven days of the date of this order. In that event each party is to file and serve, within a further seven days, written submissions, limited to 3 pages, in support of the costs order for which that party contends, and the issue of costs will then be determined by the Court on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 Two issues arise on this appeal on questions of law from the decision of the Administrative Appeals Tribunal, constituted by a judge of this Court sitting as a Deputy President. Although the Tribunal decided in favour of the applicant on the second issue, it decided against the applicant on the first issue and therefore affirmed the objection decision.

2 The first issue, which arises on the applicant's appeal, is whether the road user charge in s 43-10(3) of the *Fuel Tax Act 2006* (Cth) applies to fuel acquired by it as a business for use in a vehicle for travelling on certain toll roads, being the M2 Motorway, the Go Between Bridge, Eastlink, and the Sydney Harbour Tunnel. The question of construction is whether the applicant acquired taxable fuel to use, in a vehicle, for travelling on a public road. The question of law as framed by the applicant in its amended notice of appeal is whether a toll road operated by a private operator for the purpose of making a profit and which is required to be maintained by that operator at its cost is a "public road" within the meaning of s 43-10(3).

3 The tax periods subject to these proceedings are 1 July 2012 to 30 June 2016. As at July 2012, s 43-10(3) said, so far as relevant:

> To the extent that you acquire... taxable fuel to use, in a vehicle, for travelling on a public road, the *amount of your fuel tax credit for the fuel is reduced by the amount of the road user charge for the fuel.

4 There is no definition of "public road" in the *Fuel Tax Act.*

5 The applicant's vehicles in question, in which the diesel fuel was acquired to be used, each has a gross vehicle mass of more than 4.5 tonnes. This is significant because, by s 41-20, a person is not entitled to a fuel tax credit for taxable fuel to the extent that the person acquires the fuel for use in a vehicle with a gross vehicle mass of 4.5 tonnes or less travelling on a public road.

6 The system is one of taxing and crediting. Fuel tax, which was defined in s 110-5 to mean duty that is payable on fuel under various other Acts, is not levied under the *Fuel Tax Act.* It may not necessarily be paid by a person in the position of the applicant who acquires, but does not import or manufacturer, fuel. Recognising, however, that such a person may nevertheless bear the economic burden of fuel tax, the *Fuel Tax Act* provides them with a credit, in certain circumstances, in order to reduce the incidence of fuel tax on fuel acquired by them for various

uses: see s 40-5(2)(a). The effect in this case, in general terms, of the provisions in question is that, for fuel acquired to use in the vehicles in question, fuel tax is collected from the manufacturer or importer of the fuel and is retained up to the amount of (to the extent of) the road user charge, while the rest is refunded to the applicant by a fuel tax credit. Put differently, the applicant receives a (partial) fuel tax credit which equals the fuel tax rate minus a road user charge. The road user charge is set by the Transport **Minister**, being the Minister who administers the *Motor Vehicle Standards Act 1989* (Cth).

7 For illustrative purposes, assume the price of the fuel is $2 per litre and the tax (generally paid by the manufacturer or importer) is $1 per litre. An entity carrying on a business could claim the tax as a fuel tax credit. But assume the road user charge is $0.60 per litre. The fuel tax credit is reduced to $0.40 per litre, being the fuel tax credit reduced by $0.60 per litre, the amount of the road user charge for the fuel.

8 The second issue, which arises on the respondent Commissioner's notice of contention, is whether, as a result of the operation of s 47-5 of the *Fuel Tax Act*, the applicant has ceased to be entitled to certain fuel tax credits. Fuel tax credits are claimable by a business by means of a business activity statement (**BAS**). The question of law as framed by the respondent in its notice of contention is whether the inclusion of part of a fuel tax credit in an assessment of a net fuel amount results in the whole fuel tax credit being "taken into account, in an *assessment of a *net fuel amount of yours" for the purposes of s 47-5.

9 Section 47-5(1) said:

> You cease to be entitled to a fuel tax credit to the extent that it has not been taken into account, in an *assessment of a *net fuel amount of yours, during the period of 4 years after the day on which you were required to give to the Commissioner a return for the tax period or fuel tax return period to which the fuel tax credit would be attributable under subsection 65-5(1), (2) or (3).

10 The primary facts were not in dispute before the Tribunal.

The Tribunal's reasons

First issue

11 In relation to the first issue, the Tribunal found the following facts, at [19], in relation to these toll roads:

> 1) the object of the existence of the toll roads is for the public to use them;
>
> 2) because the construction and/or operation of the toll roads involved some form

of "public-private partnership", this object is achieved through contractual arrangements by which the road is to be kept open for use by the public;

3) by this means, the public is generally entitled as of right to use the toll roads;

4) by the same contractual arrangements and other arrangements which vary between toll roads, persons using the roads become subject to an obligation to pay a toll to the operator of the toll road, the obligation being enforceable by various means;

5) the toll road operator's purpose in operating the toll roads is to make a profit; and

6) by the contractual arrangements, the operator of the toll road is responsible for the costs of maintaining the roads for the duration of the operator's right of operation (generally commensurate with the term of the leasehold and/or other legal interests in the land on which the road is located vested in the operator), following which the roads revert to be the responsibility of one or more government entities.

12 At [33], the Tribunal found that in the case of these toll roads there was no question that they were generally accessible to the public. The Tribunal found they were fully integrated into the overall public road system in order to ensure public accessibility, albeit subject to the obligation or condition of paying the toll.

13 Turning to questions of the construction of the statutory provision, at [23] the Tribunal said that nothing in the *Fuel Tax Act* suggested that common law notions of a road dedicated to the public had any role to play in the construction of the phrase "public road" in the *Fuel Tax Act*. The same conclusion applied to the many different statutes which contained definitions of "public road". Those definitions operated for the purpose of the specific statute. Neither party in this Court contended otherwise.

14 It followed, the Tribunal said at [24], that the orthodox approach of construing the term "public road" in the context of the *Fuel Tax Act* as a whole should be adopted. The term appeared in a number of provisions, including ss 41-10(4)(a), 41-20, 41-25(2)(c), former s 43-8(4)(c), and s 43-10(4).

15 At [27], the Tribunal said that the process of construction must be in the context of the legislation as a whole and the circumstances in which it operated, but the text cannot be ignored or some other text substituted.

16 The Tribunal noted that the road user charge was to be as determined by the Minister and, if not so determined, was the rate specified: s 43-10(7). The rate was to be determined by legislative instrument: s 43-10(8). While there were some procedural and substantive

constraints on the Minister, the Tribunal said, the power was not confined to the determination of a charge to recover the costs of road construction and maintenance. No doubt, the Tribunal said, the power was not unconfined, but nothing in the text of the provision or the *Fuel Tax Act* as a whole suggested that the power was available for governments (be they the Commonwealth, State, Territory or local) to recover only the costs to them of the construction and maintenance of roads.

17 The Tribunal said it may be accepted that this object, for governments to recover the cost of construction and maintenance of roads, lay at the centre of the determination making power. But the applicant's approach involved assuming that this object, in effect, exhausted the entire scope of the power. It was this confining of the power which the Tribunal said it was unable to accept.

18 Nothing suggested that recouping the cost to government of road construction and maintenance exhausted the scope of the power, the Tribunal said. Once that was accepted, there was no sound reason for concluding that the exclusionary indicia on which the applicant relied (the road being operated for private profit and the private operator being responsible for maintenance costs during the term of the operator's rights) were decisive.

19 The Tribunal said, at [28], that it was unsurprising that the extrinsic material on which the applicant relied should focus on current practices and the fact that recoupment of road construction and maintenance costs had been central to those practices. The Tribunal said it may also be accepted that it was anticipated that the road user charge under the *Fuel Tax Act* would be set in accordance with the National Transport Commission's determination process. These, however, were all policy statements. They were not irrelevant, the Tribunal said, but they could not be substituted for the text of the *Fuel Tax Act*, which made no reference to the National Transport Commission's determination process and vested in the Minister a broad power to determine a road user charge. That power, the Tribunal said, should not be confined in the way the applicant's case would require, to a power to permit nothing more than government recouping the cost to it of constructing and maintaining roads. This was because nothing in the text or context supported such a constraint on the scope of the power. The Tribunal said the power permitted more than this; what that more may be was confined only by the express provisions of the statute (s 43-10(9)-(12)) and by necessary implication from the scope, purpose and objects of the *Fuel Tax Act* as a whole.

20 So construed, the Tribunal said, a broader meaning of "public road" was to be preferred. The Tribunal said, at [30], that there was insufficient justification from the statutory text, construed in context, to understand "public road" to mean a road for which government is responsible for construction and maintenance costs or a road which is not operated with the object of yielding profit to a private entity.

21 The Tribunal also said, at [30], that, first, the meaning should reflect the breadth of the determination making power of the Minister, and, second, the meaning should operate sensibly for all provisions. The Tribunal gave ss 43-10(3) and (4) as an example. If a public road excluded privately operated toll roads such as the four examples in the present case, then the exclusion in s 43-10(4) became fraught, the Tribunal said. The "public road" travel required to be incidental to the vehicle's main use would exclude travel on private toll roads. Section 41-20 was another example, the Tribunal said. This was intended to be a disentitling provision for vehicles under (sic) 4.5 tonnes. Yet if "public road" did not include a privately operated toll road, then travel by such a vehicle on such a road would not be subject to the disentitlement. To put it another way, a vehicle under (sic) 4.5 tonnes travelling on a private toll road would be entitled to a fuel tax credit for such travel when, by s 2-1(b), it was apparent that fuel tax was to be applied to "fuel used on-road in light vehicles for business purposes". Contrary to the applicant's arguments, this reference (and others) to "on-road" indicated that "public road" took a meaning consistent with the respondent's proposed construction, of roads generally accessible as of right to the public.

22 The meaning the Tribunal preferred, it said at [31], also accorded with the breadth of the power of the Minister to make a determination of a road user charge. That is, the road user charge was deducted from fuel tax credits relating to travelling on a public road. The criterion which the respondent proposed, that a public road was one on which members of the public were generally entitled as of right to travel, accorded with the breadth of the power of the Minister, enabled the provisions of the *Fuel Tax Act* as a whole to operate harmoniously, and involved no manifest absurdity or unreasonableness.

23 The respondent's construction also made practical commercial sense, the Tribunal said at [32]. On the applicant's approach, the Tribunal said, the heavy vehicle driver must obtain copies of and delve into the interstices of enormously complex contractual documents to ascertain the details of the public-private partnership by which the road was constructed, was operated and

was maintained. The Tribunal said that a construction which avoided this impracticality was to be preferred.

Second issue

24 In relation to the second issue, at [43] the Tribunal said that the parties' competing submissions involved an issue of both construction and fact. One of the construction issues was what did a "fuel tax credit" which had "not been taken into account in an assessment of a net fuel amount of yours" mean? The respondent contended that, having regard to the terms of ss 47-5 and 60-5, this meant the net fuel amount had not been quantified in an assessment. In the scheme of the *Fuel Tax Act* as a whole, which permitted adjustments (Div 44) and attributions to tax periods (Div 65), the Tribunal found this prospect unlikely. The Tribunal said it may be accepted that in its returns the applicant applied the whole of the road user charge to its fuel tax credits (excluding the fuel used to refrigerate trailers which was then in issue), but the Tribunal did not see how this meant the fuel tax credit for the net fuel amount was not "taken into account" in the deemed assessments. It was taken into account as a relevant integer. And it was against that taking into account which the applicant objected.

25 On this basis, the Tribunal said, the applicant's construction was to be preferred. Provided the historical acquisition of fuel and a claimed associated fuel tax credit was taken into account in the assessment, whether or not the net fuel amount was itself quantified in the assessment, s 47-5(1) was not engaged. An acquisition may be "taken into account" in a variety of ways, the Tribunal said. The way the applicant in the present case took the claimed associated fuel tax credit into account was to deduct from it the road user charge. The assessment nevertheless took into account the fuel tax credits, the Tribunal said, enabling the applicant to adopt the path it did, which was to lodge an objection to the assessment.

The parties' submissions

First issue

26 The applicant submitted that the Tribunal's decision was affected by error as follows.

27 First, the applicant submitted that the Tribunal did not resolve the constructional choice presented by the language of "public road" by evaluating the "relative coherence of the alternatives with identified statutory objects or policies", referring to: *Taylor v Owners – Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at 557 [66]; *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 92 ALJR 1064 at 1071 [20]. Rather, the applicant submitted,

the Tribunal's construction of "public road" – which term was used in the statutory scheme to delimit the *incidence* of the road user charge imposed by s 43-10(3) – was predicated on the Tribunal's construction of the Minister's power to determine the *rate* of that charge. On such an approach, the applicant submitted, the Tribunal found it necessary (at [27]) to "exhaust the scope of the power" to determine the *rate* of the road user charge under ss 43-10(7) and (8) before attributing meaning to the term "public road". The applicant submitted that such an approach was inapposite given that the considerations that might be available when setting the *rate* of the road user charge could not be logically conclusive of whether the charge arose in the first place.

28 The applicant submitted it was necessary to have regard to orthodox considerations of text, context and purpose, whereby context was regarded at the first stage, and in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means, one may discern the statute was intended to remedy, referring to *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at 408; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14].

29 The applicant referred to the text, the context and the statutory purpose. In relation to the latter, the applicant submitted the overall object of the *Fuel Tax Act* was to reduce or remove the incidence of fuel tax on fuel used in heavy vehicles for business purposes, referring to s 2-1. As to the purpose of the road user charge in s 43-10(3), the applicant submitted the Tribunal correctly found (at [26]) that this was to "reimburse the public purse for road expenditure occasioned by the damage caused by heavy vehicles to roads not already financed through tolls". In this respect, the applicant submitted that the **Revised Explanatory Memorandum** to the Fuel Tax Bill 2006 (Cth) made clear (at [1.2], [2.2], [4.3]) that the introduction of the proposed new fuel tax credit system was the first of "a number of fuel tax measures announced in the Government's June 2004 white paper, *'Securing Australia's Energy Future'*". That **White Paper** had in turn stated, at page 100:

> The transport sector has long argued that the current excise arrangements for heavy vehicles, defined as those with a gross vehicle mass of 4.5 tonnes or more, are inefficient and need reform. The government has listened and will introduce reforms to remove inefficiencies and ensure the excise system plays a more positive role in supporting Australia's transport task.
>
> The existing partial excise applying to fuel used in heavy vehicles will be formally recognised and set as a non-hypothecated road user charge from 1 July 2006. The value of the charge will be set in accordance with the National Transport Commission's heavy vehicle charging determination process. This cooperative federal-state process

assesses the impact of heavy vehicles on road costs, and is used by the states and territories to set and adjust registration charges for these vehicles.

The applicant also referred to that White Paper at pages 14 and 93, as follows:

REDUCING THE BURDEN OF TAXATION—

FUEL EXCISE REFORM

Starting on 1 July 2006 and concluding on 1 July 2015, the fuel excise system will be modernised and simplified. About $1.5 billion in excise liability will be removed during the period to 2012–13 benefiting many thousands of businesses and households. The government will limit the effective application of excise to the business use of fuel in on-road applications in vehicles with a gross vehicle mass of less than 4.5 tonnes, and private use of fuel in on-road vehicles and certain off-road applications. All fuels used off road for all business purposes will become effectively excise free.

Excise on burner fuels will be removed, benefiting up to 90 000 households, mainly in regional areas, that currently pay excise on the fuel they use for heating. The current partial excise on fuels used in heavy vehicles will be converted to a road user charge and the existing urban-rural boundaries will be abolished. The excise arrangements for heavy vehicles will apply to all fuels, not just diesel. This will provide partial excise relief for around 54 000 heavy petrol vehicles for the first time [ABS 2003]. These changes build on the 2003–04 Budget decision that excise rates for all fuels will be based on energy content. Alternative fuels that effectively enter the excise net from 1 July 2011 will receive a 50 percent discount on energy content based excise rates.

...

FUEL EXCISE REFORM

Key Points

The current excise arrangements are no longer consistent with the principles of good taxation.

The Australian Government will implement a major programme of reform to modernise and simplify the fuel excise system, commencing on 1 July 2006 and concluding on 1 July 2015. The changes will lower compliance costs, reduce tax on business and remove the burden of excise from thousands of individual businesses and households.

The government will limit the effective application of excise to:

- business use of fuel in on-road applications in vehicles with a gross vehicle mass of less than 4.5 tonnes
- private use of fuel in vehicles and certain off-road applications

All fuels used off-road for all business purposes will become excise-free over time.

Excise rates for all fuels will be based on energy content, with alternative fuels receiving a 50 per cent discount on energy content excise rates.

The current complex system of grants and rebates will be replaced by a single business credit system. Excise credits will be claimable through the Business Activity Statement from 1 July 2006.

Partial excise credits will apply to all fuels, including petrol, used for all business

purposes on-road in vehicles with a gross vehicle mass of at least 4.5 tonnes.

The net excise paid on fuels used on-road for business purposes in heavy vehicles (those with a gross vehicle mass of 4.5 tonnes or more) will be converted into a road user charge, and the urban-regional boundaries that govern eligibility for excise credits for heavy vehicles will be removed. New requirements will be introduced to address heavy polluters.

...

30 The applicant also referred to the National Transport Commission's January 2006 Regulatory Impact Statement, and October 2005 Technical Report, in relation to the Third Heavy Vehicle Road Pricing Determination.

31 As to the former, the Regulatory Impact Statement, described as setting out the National Transport Commission's proposals for a Third Heavy Vehicle Road Pricing Determination, the following was said, at pages 4 and 9-10:

> Costs of providing and maintaining roads for use by light vehicles are not subject to a national cost-recovery charging system. Taxes and charges applying to light vehicles are the province of individual State and Territory governments. Expenditure that does not relate to road construction and maintenance is not recovered by the charges, nor is expenditure on toll roads.
>
> ...
>
> ... The Pricing Principles are:
>
> *"National heavy vehicle road use prices should promote optimal use of infrastructure, vehicles and transport modes.*
>
> *This is subject to the following:*
>
> - *full recovery of allocated infrastructure costs while minimising both the over and under recovery from any class of vehicle*
> - *cost effectiveness of pricing instruments*
> - *transparency*
> - *the need to balance administrative simplicity, efficiency and equity (eg impact on regional and remote communities/access)*
> - *the need to have regard to other pricing applications such as light vehicle charges, tolling and congestion.*
>
> *Note: These principles allow for the inclusion of variable mass distance charges and externality charges relating to noise and air emissions where:*
>
> - *there are clear net economic gains;*
> - *the extent of effort is recognised; and*
> - *transparency and more accurate pricing within the road mode are ensured".*

32 As to the latter, the Technical Report, the applicant referred to [1.2] which in turn referred to the August 2004 Road Use Pricing Principles approved by the Australian Transport Council. Later, at [3.3] under the heading unallocated road expenditure, it was said that certain costs were excluded from the cost allocation process because either they were recovered by other fees or they did not reflect the costs of providing and maintaining roads for motorised road users. It was said that expenditure on roads being financed through tolls was not included in the expenditure reported, and should be excluded from the national heavy vehicle charges calculations in order to avoid double counting.

33 The applicant submitted that, in face of the Tribunal's acceptance of the statutory purpose of the road user charge, whereby toll roads would be excluded from the expenditure calculation by the National Transport Commission to avoid double counting in accounting for heavy vehicles paying their fair share of road construction and maintenance costs, the reasons the Tribunal gave for adopting a broader meaning of public road did not withstand scrutiny. The meaning of "public road" that the Tribunal adopted did not reflect the logical connection, referred to by the Tribunal at [27], between heavy vehicle use and recouping the cost to government of road construction and maintenance.

34 The applicant submitted that its case as to the meaning of a "public road" in s 43-10(3), being a term which, as used in that provision, demarcated the fuel base that was subject to the road user charge, did not depend on the breadth of the ministerial power to set the rate of that charge. To hold, as the Tribunal did, that before working out the meaning of a "public road" in s 43-10(3) one had to exhaust the scope of the determination power in s 43-10(8) collapsed the distinction drawn between these provisions, the applicant submitted. Even if the scope of the rate determination power were as wide as the Tribunal found at [28], the scope of that power did not delineate the base in relation to which the charge could be raised. The applicant submitted that it was not a question of exhausting the scope of the power but of finding the centre of gravity of the power, which was the recoupment of maintenance and construction costs where those costs were borne by the public.

35 The applicant submitted that the use of the undefined term "on-road" in the objects provisions of the *Fuel Tax Act* did not, as the Tribunal found, provide any indication as to the meaning of the term "public road". Given that the only "road" referred to in the substantive provisions of the *Fuel Tax Act* is a "public road", the *Fuel Tax Act* can be seen to use the term "on-road" in the objects provisions in ss 2-1 and 40-5 as a shorthand for the phrase "travelling on a public

road" in s 41-20. The word "public", appearing in that phrase, must be given work to do. The language of "on-road" simply begged the question of what was comprised by "travelling on a public road" for the purposes of the *Fuel Tax Act*, the applicant submitted.

36 The applicant submitted that the construction of "public road" for which it contended enabled each of the provisions of the *Fuel Tax Act* in which that term appeared (being ss 41-10(4)(a), 41-20, 41-25(2)(c), 43-8(c), 43-10(3), 43-10(4)) to operate sensibly. If each of these toll roads was not a "public road", the exclusion in s 43-10(4) did not, as the Tribunal considered, become "fraught". Rather, in that event, the road user charge in s 43-10(3) did not apply to fuel used for travelling on the toll road, so that the exception to that charge in s 43-10(4) simply was not engaged. Further, where there was a potential for s 43-10(4) to exclude the road user charge from being applied to fuel used for travelling on what was admittedly a public road under s 43-10(3), a characterisation exercise must be undertaken to identify a vehicle's "main use" and whether its travel on a public road was "incidental" thereto. The nature of this enquiry was not materially affected by whether or not the toll road was a public road. Further, the applicant submitted, its construction of "public road" would not give any unintended operation to s 41-20. The Tribunal considered that s 41-20 was "intended to be a disentitling provision for vehicles under (sic) 4.5 tonnes" and, on that premise, that the applicant's construction of "public road" would mean that certain travel by light vehicles "would not be subject to the disentitlement". Yet, the Tribunal's identification of the purpose underlying s 41-20 assumed the very proposition that was in issue, namely, that fuel used "on-road" as referred to in s 2-1 of the *Fuel Tax Act* (and fuel used in a light vehicle "travelling on a public road" as referred to in s 41-20) included fuel used for travel on the toll roads. The extrinsic material did not support that assumption: see the Revised Explanatory Memorandum at [2.10], [2.47], [2.50], [2.51]. Whether or not one of the toll roads was a public road within the meaning of the *Fuel Tax Act*, fuel used in light vehicles on a public road will be subject to fuel tax, which was the result for which s 41-20 provided, the applicant submitted.

37 The purported "practical common sense" considerations relied upon at [32] of the Tribunal's reasons did not justify the construction of "public road" adopted by the Tribunal, the applicant submitted. The fuel tax credits scheme under the *Fuel Tax Act* was predicated on self-assessing taxpayers conducting an apportionment exercise to calculate their entitlements thereunder, involving differentiation between acquisitions and uses of fuel: (i) for business and non-business purposes (s 41-5(1)); (ii) for transport and other purposes such as domestic heating (s 41-10(1)); (iii) in heavy vehicles and in light vehicles (s 41-20); (iv) for travelling on a public

road and for other purposes (s 41-10(3)); and (v) for "incidental" and non-incidental travel on a public road (s 41-10(4)). Given the detailed analysis of fuel acquisition and usage (pursuant to Div 44) that must be undertaken by taxpayers to accurately claim fuel tax credit entitlements, there was little relative "impracticality" in taxpayers differentiating between fuel used for travelling on the toll roads and fuel used for other purposes.

38 The Tribunal's assumption that, if the respondent Commissioner's construction of "public road" was accepted, "no further inquiry will need to be made", ignored the myriad distinctions that would remain to be considered when working out fuel tax credit entitlements. These included, for instance, whether the road was a private access mining road, forestry road, or port road, etc. The alleged simplicity of the Commissioner's construction of "public road" was thus illusory, the applicant submitted.

39 The applicant submitted that the Court should prefer a construction of "public road" that complemented the notion of a "road user charge", with which that term was statutorily aligned, and which was manifestly concerned with raising a levy which responded to road use by heavy vehicles.

40 The applicant submitted the question was not whether the public had access to these roads. The cost-setting process, the raising of a road user charge, was not concerned with what the public could and could not access. It was concerned with how heavy vehicles use roads and the public costs of maintenance and, indeed, other costs, such as environmental and health costs, associated with heavy vehicle use.

41 The respondent Commissioner submitted that a public road in the *Fuel Tax Act* was any road which the public may generally access as of right, in the sense that the road operators bear a corresponding obligation to ensure the toll roads and bridges were generally open and available to use by the public. To the extent it was necessary to go beyond that consideration, the respondent submitted, it would be sufficient that the public bear some risk, responsibility or cost in relation to the road, in order for that road to be considered a "public road" for the purposes of s 43-10(3).

42 The respondent submitted that the statutory context revealed that the object of the legislation was to simplify the pre-existing fuel tax, excise and rebate measures, and thus to reduce the administrative burden. The respondent referred in this respect to s 2-1 and to the Revised Explanatory Memorandum at [1.2]-[1.3].

43 The respondent submitted that the context necessarily included the Minister's power to *set* the rate of the road user charge, that power being in the same provision as that which reduced a taxpayer's credit. The only express constraints on the Minister's power were in ss 43-10(9)-(12).

44 The respondent submitted the legislation was drafted in a way that gave the Minister significant latitude in determining the rate of the road user charge. The consequence of this was that the Minister may have regard to a range of matters, such as costs, risks or responsibilities borne by the public in setting the rate. The key point was that there was no restriction in the legislation that would prevent the Minister from taking into account public costs associated with tolled roads. Whether the Minister did so (or not) was irrelevant. The statutory architecture was broad enough to permit it, and this gave an indication as to the purpose in using the expression "public road" in the same provision, the respondent submitted.

45 The Minister's power may involve the setting of a rate to deal with externalities to road costs, examples of which included the possibility of dealing with environmental costs or risks, the respondent submitted.

46 The respondent submitted that the Go Between Bridge was built at the cost of the Brisbane City Council, and each of the M2 Motorway, Eastlink and the Sydney Harbour Tunnel involved the use of land acquired or held by the public and/or some other public contribution (such as an interest free loan). The respondent referred to the Appendix to the reasons of the Tribunal at [217]-[225], [267]-[269], [286]-[289] and [317]. These were significant public costs or contributions that the Minister could take into account in setting the charge. Given that context, it would make no sense to construe "public roads" in a manner that excluded those toll roads. The statutory purpose of the road user charge – construed by reference to the words Parliament chose to include in s 43-10 rather than by reference to other materials – was to recover any public cost that the Minister could take into account in setting the road user charge. The expression "public road" was to be construed accordingly, the respondent submitted. The power conferred on the Minister in another subparagraph of the provision in question was part of the statutory context that indicated what was intended by the expression "public road".

47 The respondent submitted that the meaning that the word "public" had been given in different statutory contexts was of no assistance at all in this case.

48 There was no controversy, the respondent submitted, that there must be some apportionment exercise for fuel used in travelling on roads that were not public roads.

49 The respondent submitted that the impracticality which his and the Tribunal's construction avoided, and which the applicant's construction could not avoid, was the necessity of enquiring into the contractual requirements in relation to particular toll roads, to ascertain whether and to what extent the public or private interests were to earn a profit, or were to bear costs or responsibility of maintenance. The Sydney Harbour Bridge, which the public paid a toll to access, was a public road on the applicant's test but other cases were much less clear. The Tribunal also extracted facts which were not disputed in a lengthy Appendix, which indicated the complexity of the identified toll road arrangements. Similar difficulties may arise in other contexts, such as on airport or port roads, the respondent submitted.

50 The respondent submitted his construction was practical, in that it could be assessed as a matter of common sense whether a road was public, by dint of a taxpayer's ability to make use of a toll road that was integrated into the overall public road system. Toll roads were necessarily accessible to the public generally; in fact, the profitability of such a road depended upon the public taking up that opportunity. Few members of the public would have access to the numerous, lengthy and complex agreements which were necessary to consider in order to work out the extent to which the "government is responsible for construction and maintenance costs". The respondent referred, for example, to the M2 Project Deed, under which the Roads and Traffic Authority was required to "design and construct" works relevant to the Motorway: cl 2.17(a), and also to cll 1.2(c)(i) and (ii) of Exhibit K to the Project Deed. The construction adopted by the Tribunal meant that such an enquiry into the various contractual documents was unnecessary. The respondent also submitted that, even if those documents could be obtained, the applicant's construction involved the impracticality that, in effect, the extent to which a government or private operator bore the cost of construction and maintenance was a question of degree, without a binary answer.

51 In its written reply, the applicant submitted that neither of the two central matters of statutory context relied on by the respondent provided sufficient reason for preferring the respondent's construction of "public road". Section 2-1 of the *Fuel Tax Act* made clear that the legislation was principally targeted at reducing or removing the incidence of fuel tax levied on taxable fuels used for business purposes. That section, and the paragraphs from the Revised Explanatory Memorandum extracted by the respondent, demonstrated an object not only to

reduce the "administrative burden" or "compliance burden" of the former schemes, but to provide actual "excise relief" from the "burden of fuel tax", referring also to the White Paper at 97-102. In this context, the respondent's reliance on the asserted "object of simplification" as supporting what was claimed to be a less "complex" construction of "public road" than that advanced by the applicant was misplaced, the applicant submitted. The applicant referred to *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5], in a passage recently cited in *Australian Mines and Metals Association Inc v Construction, Forestry, Maritime, Mining and Energy Union* [2018] FCAFC 223; 363 ALR 343 at [80], for the proposition that the general rule that legislation ought to be construed purposively "may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act". The respondent's construction, the applicant submitted, created a broader base for the collection of the road user charge and thus increased the excise burden, contrary to what may be considered to be the overarching legislative purpose.

52 The applicant submitted the respondent's reliance on the scope of the Ministerial power to set the rate of the road user charge as signifying the breadth of the expression "public road" was also problematic. The respondent's observation that the Minister had "significant latitude" in determining the rate of the road user charge in circumstances where it applied did not answer the question of whether it applied in the first place and, thus, the meaning of "public road".

53 The applicant submitted the respondent's argument that the statutory purpose of the road user charge was "to recover any public cost that the Minister could take into account in setting the road user charge" was therefore circular. It disregarded the "not controversial" fact that the sphere of operation of the road user charge was tethered, by the language used by the legislature, to the concepts of road use, travelling on a road and "public road". Whatever factors the Minister may take into account when setting the rate of the road user charge – be they environmental costs, road maintenance costs or other externalities – the Minister's power did not extend to determining the fuel base that was subject to charge, the applicant submitted.

54 The applicant's argument was that, as accepted by the Tribunal at [27], the costs to government of the construction and maintenance of roads lay at the centre of the determination-making power. The Tribunal should have found that those same considerations also lay at the centre of the meaning of "public road". Further, the extrinsic materials which reflected an expectation

as to how the road user charge would be calculated and how it had in fact been calculated at the time of the various amendments to s 43-10 of the *Fuel Tax Act* – that is, by reference to public expenditure on the maintenance of non-tolled roads – were relied upon by the applicant, not as matters said to constrain the Ministerial power per se, but to illuminate the historical context in which Parliament used the expression "public road" to delimit *whether* that charge would arise.

55 The applicant submitted that the respondent's alternative construction of a "public road" as one in respect of which "the public bear some risk, responsibility or cost" was an unsatisfactory statement of the scope of the expression. The statutory scheme acknowledged that the public at large bore risks, responsibilities and costs in respect of all road travel (eg, environmental risks/costs, per s 41-25). The applicant submitted that adoption of this construction would thus make every road a "public road", giving the word "public" no work to do. This alternative construction should be rejected by reference to the same considerations of legislative purpose, the applicant submitted. The central considerations identified by the Tribunal were a reason to conclude that a "public road" was one in relation to which construction and maintenance costs were principally borne by the public, the applicant submitted, not any road in relation to which the public bears any cost.

Second issue

56 It appears to be common ground that in its BASs for the relevant periods, the applicant claimed fuel tax credits in relation to its acquisitions of diesel fuel. In those returns, which became deemed assessments of its net fuel amount, the amount of those fuel tax credits was reduced by the amount of the road user charge (as determined from time to time under s 43-10 of the *Fuel Tax Act*), except in relation to fuel used to refrigerate trailers. The applicant objected to its assessments of net fuel amount, including on the ground that, for fuel acquired or used for travelling on the toll roads, its fuel tax credits ought not to have been so reduced: see the Tribunal's reasons at [53]. The Commissioner disallowed those objections by a reviewable objection decision dated 7 July 2017 and the applicant sought review of that objection decision before the Tribunal.

57 The respondent submitted that the Tribunal incorrectly construed s 47-5 of the *Fuel Tax Act*, in particular, how a credit is "taken into account", with the result that it incorrectly held that the portion of the applicant's fuel tax credits which related to the road user charge had been taken into account.

58 There was no dispute, the respondent submitted, that the applicant claimed credits in its BASs which did not include amounts referable to the road user charge, as the applicant proceeded on the basis that s 43-10 had reduced its entitlement to those credits. The respondent contended that the amounts not included in a BAS, which was a deemed assessment, were not "taken into account" for the purposes of s 47-5.

59 Section 47-5 causes an entity to cease to be entitled to a credit after a specified period. In the absence of s 47-5, an entity's entitlement would not cease and could be called upon at any time, subject to the limitations on objecting to or amending assessments, the respondent submitted.

60 The respondent's submission was that a credit was taken into account for the purposes of s 47-5 where the particular amount of the credit had been included in the integers of the assessment of the taxpayer's net fuel amount in relation to a tax period.

61 First, the respondent submitted that the section recognised that a taxpayer may cease to be entitled to part of a credit. It used words of apportionment: "to the extent that". As such, it was necessary to work out how much of a credit had been "taken into account". As a result, a particular amount of a credit was not taken into account merely by taking some account of a credit entitlement generally, or in the abstract. It was not taken into account by exclusion.

62 Secondly, the respondent submitted it was also not sufficient that the amount of the credit be "taken into account" generally, such as by way of worksheet calculations that sat behind an assessment or by way of some thought process, whereby a taxpayer consciously considered the credit amount. Rather, the credit must be taken into account "in an *assessment of a *net fuel amount". The preposition "in" prescribed how a credit was taken into account, the respondent submitted.

63 Thirdly, the respondent submitted that an "assessment" meant the "assessment ... of an *assessable amount", referring to s 110-5 of the *Fuel Tax Act* and s 995-1 of the *Income Tax Assessment Act 1997* (Cth). An "assessable amount" meant a "net fuel amount", the respondent submitted, referring to s 995-1 of the 1997 Act and s 155-5(2) of Sch 1 to the *Taxation Administration Act 1953* (Cth). The respondent submitted that the "net fuel amount" was defined in the formula in s 60-5.

64 The respondent submitted that working out the integer of that formula termed "Total fuel tax credits" required the identification of the amount of each credit to which the taxpayer was entitled. The total was the "sum" of all those credits. Where a taxpayer's entitlement to a

credit was *reduced* by s 43-10(3), the respondent submitted that the amount of that reduction was not an amount of a fuel tax credit to which a taxpayer was entitled that was included in the sum. It was not included "in" the "net fuel amount", the respondent submitted.

65 It followed, the respondent submitted, that part of a credit was not "taken into account" in the necessary manner, that was "in an *assessment" of the "net fuel amount", unless it had been included in the sum of the fuel tax credits claimed and, therefore, the assessed "net fuel amount".

66 The respondent submitted that the construction preferred by the Tribunal did not require the credit to be included in the fuel tax credits captured by an assessment, but rather it was sufficient that the amount was part of the process of calculation, referring to the Tribunal's reasons at [23]. This construction was at odds with the statutory text, the respondent submitted, and was impractical in its application.

67 The respondent submitted that the applicant did not include the parts of the fuel tax credits it sought in its sums of fuel tax credits or net fuel amounts. As such, the Commissioner must succeed so far as the 4 year period in s 47-5 had expired as at the date of the Tribunal's decision.

68 The applicant submitted that the "entitlement" to a fuel tax credit that was to lapse after four years was the entitlement to claim a fuel tax credit in a self-assessment of net fuel amount. That is, the applicant submitted, the section required taxpayers to take into account any fuel tax credit by claiming it in the relevant time period or else forego their ability to do so. The section said nothing about the taxpayer's "net fuel amount", or their ability to challenge such amount or obtain refunds of fuel tax should their challenge be successful. In this respect the applicant referred also to the Explanatory Memorandum (**2009 Explanatory Memorandum**) to the Tax Laws Amendment (2009 GST Administration Measures) Bill 2009 at [1.17]. These matters were the province of the objection process in Pt IVC of the *Taxation Administration Act*, from which s 47-5 of the *Fuel Tax Act* did not derogate.

69 The applicant submitted that s 47-5 extinguished only the capacity to claim an entitlement to a fuel tax credit and did not affect the resolution of an existing dispute about the quantum of a claimed fuel tax credit. The applicant adopted what the Tribunal said at [44] as follows: "Provided the historical acquisition of fuel and a claimed associated fuel tax credit is taken into account in the assessment, whether or not the net fuel amount is itself [correctly] quantified in the assessment, s 47-5(1) is not engaged".

70 First, the applicant submitted, s 47-5 operated against a background in which, but for the introduction of the section, a taxpayer could arguably claim an entitlement to a fuel tax credit for any historical acquisition of fuel indefinitely. The section therefore was not concerned with the correct quantification in a return of the amount of any credit claimed, the applicant submitted, but the taking into account of any entitlement to a credit within the time limit specified.

71 Second, the applicant submitted, read in the context of the tax law as a whole, including Pt IVC of the *Taxation Administration Act*, it was apparent that s 47-5 was not concerned with the quantification of fuel tax credits which had been taken into account in an assessment of a net fuel amount. If it were otherwise, the applicant submitted, the substantive entitlement might be extinguished before an objection or appeal as to quantum had been determined. There was no justification for such an interpretation of the provision, which the applicant submitted provided finality in respect of claiming fuel tax credits for historical acquisitions of fuel, not finality by extinguishing an entitlement in respect of a credit which had been claimed.

72 Third, the applicant submitted, there was nothing in the text, context or purpose of s 47-5 of the *Fuel Tax Act* to suggest that, where a taxpayer had validly engaged their rights under Pt IVC to challenge an assessment of net fuel amount, the section operated so as to deprive a taxpayer of those rights and to override the important protection accorded by Pt IVC, including the provisions in ss 14ZZL and 14ZZQ of the *Taxation Administration Act*. Indeed, it would lead to incongruous results if s 47-5 of the *Fuel Tax Act* operated to deny a taxpayer any relief in the nature of a refund after a four year period had elapsed, notwithstanding valid Pt IVC proceedings being on foot, and ultimately being determined in the taxpayer's favour.

73 In reply, the respondent submitted the applicant's submission that s 47-5 was concerned with "the entitlement to claim a fuel tax credit in a self-assessment of net fuel amount" ceasing, rather than the amount of any credit or part thereof, was inconsistent with the statutory context. The respondent submitted that the applicant's construction gave no work to do in relation to the words "to the extent that" – what, on the applicant's case, was to be apportioned if s 47-5 was concerned with the abstract claim to an entitlement to a credit, not to an amount?

74 Further, the respondent submitted, prior to 1 July 2012 there was a relevant exception to s 47-5 contained in s 47-10. That exception, he submitted, was engaged where a taxpayer had given him a notice under former s 105-55 of Sch 1 to the *Taxation Administration Act*. The contents necessary for such a notice were not onerous, and in many respects it involved little more than

making a claim to the credit entitlement generally; the identification of an amount was not required. The respondent referred in this respect to *Re North Sydney Developments Pty Ltd and Federal Commissioner of Taxation* [2014] AATA 363; 92 ATR 740 at 745-6 [13]; 748 [24]-[25]. In 2012, s 105-55 was amended so the exception had no application to tax periods starting after 30 June 2012. The applicant's construction was an attempt to reinstate the low threshold in s 105-55, the respondent submitted.

75 Finally, the respondent submitted, the applicant attempted no reconciliation of how it said s 47-5 interacted with provisions concerning objections or appeals under Pt IVC. No such reconciliation could be made. Yet a taxpayer, by its own action, could prevent the expiration of its fuel tax credits. It could include credits which had not been claimed in BASs for later fuel tax periods (which was entirely within its control), relying on s 65-5(4) or the *Fuel Tax: Correcting Fuel Tax Errors Determination 2013* (Cth). Similarly, a taxpayer could also take steps well in advance of the expiration of the four year period specified in s 47-5, thus avoiding the difficulty in issue.

76 In response to the respondent's reply, the applicant submitted that s 47-5 of the *Fuel Tax Act* was inserted for the purpose of "creating a consistent four-year period for claiming input tax credits and fuel tax credits", referring to the 2009 Explanatory Memorandum at [1.6]-[1.7].

77 In the applicant's submission, the respondent contended that the language in s 47-5 – providing that a taxpayer ceases to be entitled to a fuel tax credit "to the extent that it has not been taken into account" in an assessment or return – had the consequence that:

> a. where a taxpayer included a fuel tax credit as part of a net fuel amount in its return, in an amount reduced by the road user charge, the credit was not taken into account to the "extent" of that reduction; and, accordingly,
>
> b. unless the taxpayer included the road user charge component of the reduced credit in a subsequent return within the relevant 4-year period, its ability to recover such amount lapsed.

78 The applicant submitted that such a contention did not accord with s 65-5 of the *Fuel Tax Act*, which contemplated that "a fuel tax credit" (which was, by definition, "an entitlement") could only be attributed to a single tax period. Once a taxpayer had taken into account a fuel tax credit (albeit as reduced by the road user charge) in its return, it could not defer attribution of the credit (or an amount thereof equal to the road user charge) to a later return under s 65-5(4). That being so, the Court would be slow to conclude that the language of apportionment in s 47-5 limited recovery of such a reduced amount.

79 The question asked by the respondent's submission as to the work that was to be done by the words "to the extent that" in s 47-5 on the applicant's construction, although stated rhetorically, may be readily answered, the applicant submitted. Under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) s 29-10(2)(b) (**GST Act**) and the *Fuel Tax Act*, for a taxpayer who accounted on a cash basis, the applicant submitted that an input tax credit and thus a fuel tax credit for an acquisition of fuel was attributable to the period in which the taxpayer provided consideration for the acquisition; but, if a taxpayer provided only *part* of the consideration for the acquisition in a tax period, the credit was attributable to that period only to the extent that the taxpayer provided consideration in that period: see s 29-10(2)(b) of the GST Act, s 65-5(1)(a) of the *Fuel Tax Act*. An input tax credit and fuel tax credit for a given acquisition may therefore be attributed to (and returned in) two periods, the applicant submitted, reflecting the time at which parts of the consideration were provided. In turn, the applicant submitted, the limitation period in s 47-5 of the *Fuel Tax Act*, for a given fuel tax credit arising from a given acquisition of fuel, will only bite where a portion of the consideration was not provided within the relevant four-year period. That was the "apportionment" with which the language "to the extent that" in s 47-5 was concerned, the applicant submitted. The 2009 Explanatory Memorandum confirmed this, the applicant submitted, referring to [1.15], [1.16] and Example 1.8.

80 The applicant submitted that the respondent claimed that the applicant did not identify how s 47-5 of the *Fuel Tax Act* interacted with Pt IVC of the *Taxation Administration Act,* yet this vice underlay the respondent's submissions. The applicant submitted that the respondent's construction of s 47-5, if accepted, would have the effect of rendering Pt IVC proceedings in a Tribunal or Court nugatory if not finally determined within four years of a return. The respondent suggested that, to avoid the awkward result arising from his construction of s 47-5 "[t]he Tribunal can determine that, as at the date of its decision, credits within the four year period have not expired, and the Commissioner will be obliged to give effect to that decision under s 14ZZL of the [*Taxation Administration Act*], including to allow the taxpayer the benefit of credits that otherwise would have expired after the decision". The source of the asserted power was simply not explained, the applicant submitted, and its existence may be doubted.

81 The applicant submitted the better way to "reconcile" s 47-5 of the *Fuel Tax Act* with Pt IVC of the *Taxation Administration Act* was by recognising that these provisions had a different operation in relation to taxpayers' fuel tax credit entitlements. Section 47-5, where applicable, imposed a time limit on claiming an entitlement to a fuel tax credit. Pt IVC and s 155-60 of

Sch 1 to the *Taxation Administration Act* provided for the amending of an assessment to give effect to an objection decision or decision of a Court or Tribunal. Accordingly, where a taxpayer objected to an assessed net fuel amount within the period contemplated by Pt IVC, and the objection was determined by the Commissioner – or the Tribunal or Court on review or appeal – in the taxpayer's favour, the Commissioner would be bound to implement such decision, regardless of the time when that final decision is made or the basis upon which the taxpayer prepared its returns. The applicant submitted that the respondent's contention to the contrary should be rejected.

82 The applicant submitted that the removal of the "stop-the-clock" provision in s 105-55 of the *Taxation Administration Act* (which, prior to the "self-assessment regime for indirect taxes, served to extend the four year period after which a taxpayer was no longer entitled to any unpaid fuel tax entitlements) and of the consequential exception to s 47-5 appearing in s 47-10(2) was effected upon the introduction of the self-assessment regime for indirect taxes in 2012. This subsequent development could not affect what it meant for a credit to be "taken into account" for the purposes of s 47-5, a concept which appeared in that section prior to the 2012 amendments. The applicant referred in this respect to *Ajinomoto Company Inc v NutraSweet Australia Pty Ltd* [2008] FCAFC 34; 166 FCR 530 at [92]-[99] and to the Explanatory Memorandum (**2012 Explanatory Memorandum**) to the Indirect Tax Laws Amendment (Assessment) Bill 2012 (Cth), Example 1.16.

Consideration

First issue

83 The principal legislation is a tax act. We agree with the Tribunal that the issue is therefore not to be approached by reference to, for example, the *Roads Act 1993* (NSW) and the questions of dedication at common law or in accordance with statute, considered by the New South Wales Court of Appeal in *Cavric v Willoughby City Council* [2015] NSWCA 182; 89 NSWLR 461. Indeed, this was common ground.

84 Next, it was not submitted that the additional tax revenue retained by reason of the reduction by the road user charge of fuel credits conferred by the *Fuel Tax Act* was hypothecated or earmarked in law for road construction or maintenance. Compare, in the context of grants to the States, s 7 of the *Commonwealth Aid Roads Act 1959* (Cth), and s 3(3) of the earlier *Federal Aid Roads Act 1926* (Cth) under which there was payable out of the Consolidated Revenue

Fund into the Federal Aid Roads Trust Account such amount as was necessary for the purposes of the agreement in the form in the Schedule to that Act.

85 We start with the statutory scheme.

86 "Fuel tax" was defined in s 110-5 (and is now defined in s 43-6) to mean duty that is payable on fuel under various acts, in effect as a duty of excise or a duty of customs, subject to a presently irrelevant exception. As we have said this duty is generally paid by an importer or manufacturer of fuel, rather than by an entity such as the taxpayer that acquires fuel for use in its business. Then, a fuel tax credit is provided, for the relevant object as outlined in s 40-5(2)(a) of reducing the incidence of fuel tax applied to "fuel used in carrying on your enterprise (other than fuel used on-road in light vehicles)", by s 41-5:

> (1) You are entitled to a fuel tax credit for taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in *carrying on your *enterprise.
>
> Note 1: Other provisions can affect your entitlement to the credit. (For example, see Subdivision 41-B.)
>
> Note 2: Fuel is taken to have been used if it is blended as specified in a determination made under section 95-5.
>
> ...

87 A fuel tax credit is not generally available for fuel supplied for domestic use, but see s 41-10, for example, in relation to certain fuels supplied for domestic heating.

88 Division 43, which contains s 43-10, the provision to be construed, does not itself deal with a disentitlement rule for fuel tax credits, one such rule being that a person is not entitled to a fuel tax credit for taxable fuel to the extent the person acquires the fuel for use in a vehicle with a gross vehicle mass of 4.5 tonnes or less travelling on a public road, per s 41-20. Rather, Div 43 is concerned with the amount of a person's credit for taxable fuel. Section 43-10, where it applies, reduces the amount of a person's fuel tax credit for fuel. Section 43-10(3) requires such a reduction, by the amount of the "road user charge", to the extent the fuel is acquired, manufactured or imported to use, in a vehicle, for travelling on a public road.

89 The note to s 43-10(3) states that only certain motor vehicles whose gross vehicle mass is more than 4.5 tonnes are entitled to any credit: this stems relevantly from s 41-20. Each of the applicant's motor vehicles under consideration answers that description, that is, their gross vehicle mass is more than 4.5 tonnes.

90 The immediate context, therefore, is working out the amount of the applicant's fuel tax credit and whether it is to be reduced by the amount of the road user charge for the fuel. Thus, the credit is reduced and the amount of the reduction is worked out by reference to the rate of fuel tax or road user charge in force at the beginning of the tax period to which the credit is attributable: see s 43-10(6). The amount of road user charge for taxable fuel was, in the compilation of the *Fuel Tax Act* prepared on 9 July 2012, $0.21 for each litre of the fuel or, where a rate had been determined by the Minister, the rate so determined by legislative instrument.

91 The amount of a person's fuel tax credit is not reduced by the amount of the road user charge for the fuel if the vehicle's travel on a public road is incidental to the vehicle's main use: see s 43-10(4). Examples would be farm machinery or mining machinery moved for relatively short distances on a public road but where the vehicle's main use would be on a farm, or in mining, not on a public road.

92 Thus, fuel tax credits may be claimed for fuel used in a vehicle of over 4.5 tonnes for travelling on a public road by a person in carrying on their enterprise, but the amount of that credit is reduced by the amount of the road user charge.

93 It appears therefore that, leaving aside aviation fuels, the effective incidence of fuel tax was to fall, broadly: on fuel for private use of motor vehicles; on business use of fuel on public roads in motor vehicles with a gross vehicle mass of 4.5 tonnes or less; and on business use of fuel in travelling on public roads in motor vehicles with a gross vehicle mass of more than 4.5 tonnes but only to the extent of the road user charge for the fuel.

94 The paragraphs of the Revised Explanatory Memorandum to which the applicant referred in support of its construction were as follows:

> 2.10 The object of the fuel tax credit system is to establish a single system of fuel tax credits to reduce or remove the incidence of fuel tax on business inputs and the household use of fuel in electricity generation and heating. The intention is that fuel tax is effectively only applied to the private use of fuel in motor vehicles and other equipment powered by internal combustion engines and the business use of fuel used on-road in light vehicles. ***[Section 40-5]***
>
> ...
>
> 2.47 If a taxpayer acquires or manufactures in, or imports fuel into, Australia to use in a vehicle with a gross vehicle mass of 4.5 tonnes or less on a public road, they will not be entitled to a fuel tax credit, subject to the transitional rule governing vehicles with a gross vehicle mass of 4.5 tonnes mentioned in paragraph 1.35. ***[Section 41-20]***

...

2.50 A road is a ***public road*** if it is:

- opened, declared or dedicated as a public road under a statute;
- vested in a government authority having statutory responsibility for the control and management of public road infrastructure; or
- dedicated as a public road at common law.

2.51 A road is not a public road if it is a:

- road constructed or maintained under a statutory regime by a public authority that is not an authority responsible for the provision of road transport infrastructure, in circumstances where the statutory regime provides that public use of, or access to, the road is subordinate to the primary objects of the statutory regime;
- forestry road;
- private access road for use in a mining operation; or
- road that has not been dedicated as a public road over privately owned land.

95 As to [2.50]-[2.51], neither party contended that those paragraphs of the Revised Explanatory Memorandum answered the present question. Toll roads are not mentioned. It appears that what is said there was not intended to be exhaustive. In any event what is said in an explanatory memorandum cannot control the meaning of the language used by the legislature: *Re Bolton; Ex parte Beane* [1987] HCA 12; 162 CLR 514. Identifying the purpose, or mischief, may be another matter.

96 Further, the emphasis of the Revised Explanatory Memorandum is on off-road (as opposed to on-road) applications for business purposes becoming tax-free, as explained at page 3 as follows:

> Under the fuel tax credit system, all taxable fuel acquired or manufactured in, or imported into, Australia for use in off-road applications for business purposes will become tax-free over time. This will, for the first time, provide fuel tax relief to businesses involved in a range of activities. For example, businesses involved in manufacturing, quarrying and construction will become entitled to fuel tax relief. ...
>
> Fuel tax relief will be expanded under the fuel tax credit system for fuel used in road transport by allowing a partial fuel tax credit for all taxable fuels, including petrol, acquired or manufactured in, or imported into, Australia for use on-road for all business purposes in registered vehicles with a gross vehicle mass of more than 4.5 tonnes. The partial credit will be equal to the effective fuel tax rate *minus* a road-user charge.

97 There is nothing in the ordinary meaning of "fuel to use, in a vehicle, travelling on a public road" which suggests that the capacity or entitlement of the public to use the road is not the

central concept. There is a broad correspondence between off-road and non-public roads and on-road and roads which the public uses.

98 The language does not readily bring to mind issues of liability to maintain the road. The effective incidence of fuel tax, as explained in [93] above, does not suggest those issues. Instead, it appears that wider purposes are sought to be effected.

99 The term "private road" is not used in the *Fuel Tax Act*. During the relevant period, apart from s 43-10 in subsections (3) and (4), the term "public road" was also used in s 41-10(4), s 41-20, s 41-25, s 43-8(4) and s 44-5.

100 The first of these, s 41-10(4), uses the expression in the context of a motor vehicle designed merely to move goods with a forklift and is for use primarily off public roads. It does not support the notion that the liability for maintenance of a road was intended by the legislature to be the, or a, relevant distinction or criterion in the conception of a public road. The language of "public road" is not there linked to a road user charge.

101 The second of these, s 41-20, concerns a "disentitlement rule" whereby a person is not entitled to a fuel tax credit for taxable fuel to the extent that the person acquires the fuel for use in a vehicle with a gross vehicle mass of 4.5 tonnes or less travelling on a public road. Again, the language of "public road" is not there linked to a road user charge.

102 According to the Revised Explanatory Memorandum at [2.48], this "break point" of 4.5 tonnes or less:

> ... aligns eligibility for a fuel tax credit with the additional licensing conditions that must be met in all Australian jurisdictions to drive a vehicle of this mass or greater and the *Australian Design Rules* for heavy vehicles. In addition, the *Heavy Vehicle Charges Determination* that establishes the road-user charges for heavy vehicles applies to vehicles over 4.5 tonnes.

That provision provides some, although limited, support for a connection between the mass of a vehicle and the concept of liability for maintenance as relevant to what is a public road. It is limited because the determination of the rate of road user charge under s 43-10 is not confined to issues of maintenance.

103 The support is also limited because the lack of an entitlement to a fuel tax credit means that the effective incidence of fuel tax in relation to fuel acquired for use in travelling on public roads is higher for businesses using lighter vehicles (ie 4.5 tonnes or less) than for businesses using heavier vehicles (who may get a credit and thus reduce the incidence of fuel tax, even if that

credit is reduced by the road user charge). If road damage and maintenance were key considerations, it would be odd for heavy vehicles, that presumably do more damage to roads, to pay less per litre than lighter vehicles.

104 An answer to this may be to say the road user charge does not apply to lighter vehicles. But that would seem to ignore that the charge only operates to reduce credits, which are not available in any event to lighter vehicles travelling on a public road.

105 The third of the provisions we have listed at [99] above, s 41-25, is another "disentitlement rule". By that provision a person is not entitled to a fuel tax credit for taxable fuel to the extent that they acquire the fuel for use in a motor vehicle unless the motor vehicle meets environmental criteria. There is an exception for a motor vehicle that is not used on a public road. Again, in our opinion, this provision does not support the notion that the liability for maintenance of a road was intended by the legislature to be the, or a, relevant distinction or criterion in the conception of a public road. The language of "public road" is not there linked to a road user charge. In this case, the legislature is concerned with environmental considerations where, relevantly, the vehicle is used on a public road.

106 The fourth of the provisions, former s 43-8(4), was concerned with working out the amount of carbon reduction that applied to a particular quantity of taxable fuel that a person acquired. The amount of carbon reduction that applied to the fuel was nil to the extent that, relevantly, the person acquired the fuel for use in a vehicle with a gross vehicle mass of more than 4.5 tonnes travelling on a public road. Again, the concern of the legislature was environmental.

107 The fifth and last of the provisions we have listed at [99] above, s 44-5, concerns increasing and decreasing fuel tax adjustments for a change of circumstances.

108 Even within the section which contains the provision to be construed, s 43-10, the use of the term "on a public road" in s 43-10(4) is referable not to questions of road maintenance but to a different policy, being that where a vehicle's travel on a public road is incidental to the vehicle's main use, such as farm machinery and vehicles used in mining enterprises, the fuel tax credit is not reduced by the road user charge.

109 The term "on-road" is also used, in the overview in s 2-1, the objects described in s 40-5, and in the guide to Div 41 contained in s 41-1. Each of these uses concerns fuel used "on-road" in light vehicles for business purposes, to which fuel tax is effectively applied and fuel tax credits

denied. The use of the term "travelling on a public road" in s 44-5(4) is in the example given and relates back to s 43-10(3).

110 We have referred above to the determination of the rate of road user charge. We see no error in the conclusion of the Tribunal, at [27], that the power is not confined to the determination of a charge to recover the costs of road construction and maintenance. The Revised Explanatory Memorandum, at [2.81], says no more than as follows:

> The road-user charge will be set in accordance with the National Transport Commission's heavy vehicle charging determination process. The fuel tax based charge will be adjusted annually in a similar fashion to the way that the States and Territories adjust registration fees for heavy vehicles. Changes to the charge will be made by varying the level of fuel tax credit paid for fuel used in heavy vehicles.

111 While the reference to a heavy vehicle shows that it is likely there will be some relationship between the rate of the road user charge, as determined, and the need for maintenance of roads surfaces, that relationship is insufficient to persuade us of the conclusion for which the applicant contends, which is that acquiring taxable fuel to use in a vehicle for travelling on a public road excludes acquiring fuel for use for travelling on these toll roads. Indeed, that the exercise of the power to set a road user charge may take into account tolls does not seem to us to assist the construction of "on a public road" for which the applicant contends. First, it tends, if anything, to support the idea that it is in the amount of the charge, rather than at the level of whether fuel is for use in a vehicle for travelling on a public road, that any double counting may be accounted for. Second, we consider the reference to tolls of itself says nothing about the liability for maintenance, or the fact of maintenance, of the road in question. As we note at [115] below, the applicant's construction focuses on whether construction and maintenance costs fall on the public, not on the mere existence of a toll.

112 In our opinion, this review of the legislative scheme and the use of the expression "on a public road" provides too weak or uncertain a connection to the concept of road maintenance, either generally or through the concept of "road user charge", to found a conclusion that the roads in issue are not public roads because, as found by the Tribunal, by the contractual arrangements, the operator of the toll road is responsible for the costs of maintaining the roads for the duration of the operator's right of operation (generally commensurate with the term of the leasehold and/or other legal interests in the land on which the road is located vested in the operator), following which the roads revert to be the responsibility of one or more government entities.

113 In our opinion, the concept more closely aligned to the intention of the legislature is the entitlement of the public to use the roads. It will be recalled that the Tribunal found the object of the existence of each toll road was for the public to use them; because the construction and/or operation of the toll roads involved some form of "public-private partnership", this object was achieved through contractual arrangements by which the road was to be kept open for use by the public; by this means, the public is generally entitled as of right to use the toll roads; and by the same contractual arrangements and other arrangements which vary between toll roads, persons using the roads become subject to an obligation to pay a toll to the operator of the toll road, the obligation being enforceable by various means. The Tribunal also found these toll roads were fully integrated into the overall public road system in order to ensure public accessibility, albeit subject to the obligation or condition of paying the toll.

114 We also note, and see no error in, the Tribunal's reference, at [32], to the practical consideration that in a self-assessment taxing regime it makes practical commercial sense that taxpayers not be obliged to obtain copies of and delve into the interstices of enormously complex contractual documents to ascertain the details of the public-private partnership by which the road was constructed and is operated and maintained. The construction which avoids that impracticality is to be preferred.

115 It was not suggested that the mere existence of a toll would mean that a road would not be a public road, within the meaning of the legislation. Senior counsel for the applicant disavowed that contention, reiterating that the applicant's construction focused on whether construction and maintenance costs fall on the public.

116 The purpose of the legislation is to deal with the incidence of fuel tax. The legislature has indicated by its language those who by their use of fuel are to bear the tax and those who are to receive credits. We do not see that that overall purpose assists in the present task of statutory construction of s 43-3.

117 As to the extrinsic material sought to be relied on by the applicant, we accept that the Revised Explanatory Memorandum is capable of assisting in the ascertainment of the meaning of the provision and we have given consideration to that material, consistently with s 15AB of the *Acts Interpretation Act 1901* (Cth), to determine the meaning of s 43-10(3) and the provisions to which we have referred. But we have not found the other material to be capable of so assisting, in part because that material would not have been before the legislature and in part because it is too remote from the language of the statute. We refer to what was said by Hill J

in *Commissioner of Taxation v Murray* (1990) 21 FCR 436 at 449, with whom Sheppard J agreed at 436:

> The ascertainment of the legislative intention, which will be derived by reference to the words used considered in their context, and by construing the statute as a whole, may be aided by extrinsic material as s.15AB makes evident. But the intention of the Commissioner in submitting a matter for consideration of a governmental committee and the deliberations of that committee will, even if proved to come from the suggested source, tell little at all of the parliamentary intention. At best such material may suggest the mischief which some person had in mind when framing a bill before it is put before Parliament. *But if the Parliament is not appraised of that mischief by the proponent of the bill in a second reading speech, by an explanatory memorandum or in debate, it will be hard to be sure that the mischief was in truth that which Parliament sought to overcome.* A surer guide in such a case will be the words of the statute themselves. Particularly will that be the case where the words to be construed are ordinary English words not attended with ambiguity.
>
> (Emphasis added.)

118 We do not find persuasive the applicant's submission that the cost-setting process, the raising of a road user charge, was not concerned with what the public can and cannot access but with how heavy vehicles use roads and the public costs of maintenance and, indeed, other costs, environmental costs and health costs, associated with heavy vehicle use. The question is the meaning of the words "on a public road" in the phrase "fuel to use, in a vehicle, for travelling on a public road", read in its statutory context, having regard to the purpose of the legislation. It is liable to distort the proper approach to the question of construction to concentrate only on the amount of the road user charge and to take that concept as one which controls the meaning of the words "on a public road". In that sense, the legislation is concerned with the incidence of fuel tax in light of what is or is not a public road and as a consequence, on what we regard as the correct construction, with the roads to which the public, as users of fuel, have access.

119 We see no error of law in the Tribunal's conclusion on this issue. It is not necessary for us to consider the respondent Commissioner's alternative submission: see [41] above.

Second issue

120 It is not strictly necessary to decide this issue, it being agitated by the respondent's notice of contention, on the assumption that the applicant succeeded on the first issue, as providing a separate basis for dismissing this "appeal". However, the matter was fully argued before us, as it was before the Tribunal, and may be of wider importance as bearing on the administration of the *Fuel Tax Act* or the indirect tax system more generally. The point also raises a question about whether the Tribunal fell into error in deciding this issue as it did. Senior counsel for each party agreed that we should decide the issue in any event.

121 The calculation of a net fuel amount is arrived at under s 60-5, being so far as relevant total fuel tax (there defined as "nil") minus total fuel tax credits. A taxpayer's total fuel tax credits are ascertained, so far as presently relevant, by the taxpayer determining their entitlement to fuel tax credits under Div 41 and working out the amount of those credits in accordance with Div 43. Relevantly, s 43-5(1) provides that the amount of a taxpayer's fuel tax credit is the amount of fuel tax payable on the taxable fuel, and as discussed previously s 43-10(3) provides that that amount is reduced by the amount of the road user charge for the fuel. The taxpayer's net fuel amount reflects how much the taxpayer or the Commissioner must pay, depending on whether the net fuel amount is positive or negative. The net fuel amount is for a tax period or a fuel tax return period.

122 In the present case the taxpayer made a self-assessment, deemed to be an assessment, under which it calculated (on this assumption incorrectly) its net fuel amount by assessing its total fuel tax credits by reducing the amount of its fuel tax credits ascertained under s 43-5(1) by the amount of the road user charge for the fuel pursuant to s 43-10(3). The taxpayer now contends that it should not have so reduced its fuel tax credits under s 43-10(3), with the result that the amount of its total fuel tax credits is increased and its net fuel amount is reduced.

123 Section 47-5 was originally introduced by the *Tax Laws Amendment (2009 GST Administration Measures) Act 2010* (Cth) and at that time provided that after four years a taxpayer ceased to be entitled to a fuel tax credit to the extent that the taxpayer had not taken it into account in working out its net fuel amount.

124 The provision was amended in 2012 to take its present form, the amendment being explained in the 2012 Explanatory Memorandum at [1.123] as being "to operate in a self-assessment environment." There is no indication in the 2012 Explanatory Memorandum that the amendment was otherwise intended materially to change the operation of the provision.

125 The respondent relies on s 47-1 which states, as a guide to Div 47, "Your entitlements to fuel tax credits cease unless they are included in your assessed net fuel amounts within a limited period (generally 4 years)."

126 The submissions on behalf of the respondent appear to have as their central proposition that a fuel tax credit is taken into account in an assessment of a net fuel amount only to the extent that the particular amount of fuel tax credit is quantified, as a positive integer, in an assessment. The respondent submitted that, in a literal sense, that part of the credit in contest here had not

been included, referring to s 47-1. That part had been excluded by the arithmetical process. So it was correct to say, in a sense, that it had been taken into account by exclusion in calculating the fuel tax credit, but that was not the statutory test, the respondent submitted.

127 The construction of the provision by the Tribunal has the result that the (higher, because reduced by the road user charge) fuel tax credit was taken into account in the assessment and that therefore s 47-5(1) does not operate as a bar to the applicant's entitlement to the credit or adopt the path it did, which was to lodge an objection to the assessment.

128 In our opinion, there is no error of law in the Tribunal's conclusion. We do not accept the submission on behalf of the respondent that the inclusion of an (on this hypothesis, erroneous) integer, being the road user charge, in the calculation of the total fuel tax credits means that a fuel tax credit has not been taken into account, to the extent of the amount of that integer, in the assessment of the net fuel amount.

129 We do not accept the respondent's submission that the non-inclusion of amounts referable to the road user charge in the taxpayer's BAS has the result that those amounts were not taken into account in an assessment, or what may be implicit in it, which is that the meaning of s 47-5 is controlled by what is in the integers of a taxpayer's BAS. Nor do we accept the respondent's submission that what is "taken into account" in an assessment of a taxpayer's net fuel amount, for the purposes of s 47-5(1), is the specific elements of the statutory formula for net fuel amount in s 60-5, relevantly here "total fuel credits", and does not encompass, as the Tribunal found, an (unreduced) fuel tax credit amount which is part of the calculation of the total fuel credits amount.

130 Section 47-5 does not proceed by reference to the headline figure of "total fuel credits" but rather operates to affect a taxpayer's entitlement to a fuel tax credit, the amount of which is worked out in accordance with Div 43, if *that* credit is not taken into account in an assessment of a net fuel amount. In working out the amount of each credit the integers are, relevantly, the amount of the taxpayer's entitlement to a credit under s 43-5(1) (which the taxpayer has not challenged) and the amount of any reduction required by s 43-10(3) on account of the road user charge (which is what the taxpayer has challenged by objection).

131 The respondent placed weight on the fact that s 47-5 speaks of credits being taken into account *in* an *assessment*, which he submitted indicated that it was not sufficient that the amount of the credit is taken into account generally, such as in worksheet calculations. However, the reason

for adopting that form of words is explained, as we have noted above, by the move to a self-assessment system. That statutory language is broad enough to encompass, and we would see no reason to exclude from its operation, credits the taxpayer has taken into account in working out its net fuel amount (which were covered by the previous statutory formulation). Further, it is relevant that "assessment" is defined in s 110-5 of the *Fuel Tax Act* by reference to the meaning given to that term in s 995-1 of the *Income Tax Assessment Act* which is, in relation to an assessable amount such as a net fuel amount, an "ascertainment" of that amount. That term, as defined, describes not an outcome or an amount or a notice of assessment (or BAS), but a *process* the completion of which has the consequence that a specific amount becomes due: see *Commissioner of Taxation v Futuris Corp Ltd* [2008] HCA 32; 237 CLR 146 at [2] and [49], referring to *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252 per Kitto J. When the term "assessment" as used in s 47-5(1) is understood in this way, there is little difficulty in describing an integer representing the taxpayer's unreduced credits as having been taken into account in an assessment by reason of it having formed part of a calculation (the process) which produced the net amount recorded in the taxpayer's BAS that created an entitlement to a refund (the consequence) by the deemed assessment mechanism.

132 Similarly, the respondent's emphasis on the appearance of words of apportionment ("to the extent that") in s 47-5 is misplaced. On our construction those words have ample operation, at least where the taxpayer makes a mistake in the ascertainment of its (unreduced) entitlement to credits under s 43-5(1).

133 Finally, contrary to the respondent's submission that the taxpayer is attempting to reinstate the former low threshold in s 47-10 (which operated by reference to former s 105-55 of Sch 1 to the *Taxation Administration Act*), the construction we prefer does not have that effect. It operates by reference to whether a taxpayer has taken into account particular amounts in self-assessing its entitlement to fuel tax credits, not to general or unspecific notices given by the taxpayer to the Commissioner.

134 In our opinion, the assessment of the net fuel amount includes the calculation of the total fuel tax credits which in turn includes the amount by which the taxpayer's fuel tax credit for the fuel is reduced by the amount of the road user charge. That the assumed error was in relation to the road user charge, and therefore affected the calculation of the total fuel tax credits, does not seem to us to have the result that the fuel tax credit has not been taken into account, to the extent of the erroneous reduction, in an assessment of the net fuel amount.

Conclusion and orders

135 The appeal should be dismissed, with costs. However, since the respondent's notice of contention fails, the applicant should not have to pay the entirety of the respondent's costs. Our provisional view is that the applicant should pay 75 percent of the respondent's costs, but if either party wishes to contend for a different costs order we will make appropriate directions to allow that to be done, and for short written submissions to be made.

I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Robertson, Kerr and Steward.

Associate:

Dated: 21 August 2019