IN THE SUPREME COURT OF NEW ZEALAND SC 6/2012

[2013] NZSC Trans 16

**BETWEEN** **TERMINALS (NZ) LIMITED**

Appellant

**AND** **COMPTROLLER OF CUSTOMS**

Respondent

Hearing: 5 August 2013

Court: Elias CJ
McGrath J
William Young J
Glazebrook J
Gault J

Appearances: R E Harrison QC and A Sorrell for the Appellant
M S R Palmer and S Kinsler for the Respondent

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**CIVIL APPEAL**

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**MR HARRISON QC:**

If your Honours please, I appear for the appellant with my learned friend, Mr Sorrell.

**ELIAS CJ:**

Thank you Mr Harrison, Mr Sorrell.

**MR PALMER:**

Tena koutou katoa, may it please the Court, I appear for the Comptroller of Customs and with me is Mr Kinsler.

**ELIAS CJ:**

Thank you, tena koe Mr Palmer, Mr Kinsler. Yes Mr Harrison?

**MR HARRISON QC:**

May it please your Honours, I came down with a head cold over the weekend so I trust the sound isn't too muffled and my throat lasts.

**ELIAS CJ:**

I hope the ears weren't too bad, I've just been going through that landing.

**MR HARRISON QC:**

Yes. Now, what I would like to do is just to start with the photographs of the complex that my client operates at Mt Maunganui which – those photographs are found in volume 4 of the case on appeal at tab 36. I thought perhaps I'd just try and acquaint your Honours with the general site and how things work in the broad context. If we go to photograph 1, which is an aerial photograph taken some time ago in the early stages of the complex, which means that some of the tanks and so on that now are shown, are now on the premises are not shown here. We're looking from the Mt Maunganui side of the Tauranga Harbour, in other words south, from the south looking north and the way things operate, obviously we have the facility in the bottom left, the boundary is as appears. It is a dedicated and quite sophisticated operation serving storage facilities not only for this one for Gull and BP but also other major fuel operators and what happens is that the – there is a dedicated tanker berth which is sort of towards the top right of the picture you see to – you see the harbour and two sort of towers sticking up, the berth is in around that area.

**WILLIAM YOUNG J:**

Where the ship is or on the other side?

**MR HARRISON QC:**

We're on this side, yes, on the lower – the lower or southern side.

**WILLIAM YOUNG J:**

So where the ship is?

**MR HARRISON QC:**

I don't think there's a ship there but back –

**GLAZEBROOK J:**

Across the –

**WILLIAM YOUNG J:**

Opposite the ship.

**MR HARRISON QC:**

To the, the berth is to the left of that but in that vicinity and there is a, there is a facility there where large 12-inch pump pipe, pipeline and pumps on the ship connect to the various facilities, this one included, and the pipeline, the 12-inch pipeline for my client's facility runs along the top from right to left along parallel to the harbour and then cuts down along that green sward in the left of the photograph all the way along there and comes in where you can see a pipeline coming in between the line of pipes, it comes in off the sward there and into the large storage tanks. Where you see the first little leg off to the first major tank on the left is where the flow of motor spirit or diesel is diverted to its particular tank. Unloading from the tanker, the pumps on the tanker ship are powerful enough to push the motor spirit or diesel all the way to the tanks. The particular product is kept separate from, say, diesel from motor spirit by what is called the pig, which is inserted at the tanker ship. The pig is pushed along, keeps the two fuels separate and then when the tanker stops pumping whatever it is, diesel or motor spirit, regular or premium is left in the pipeline. Then when it comes in it is diverted to its storage tank and then awaits the delivery operation. If we can go from –

**ELIAS CJ:**

Can you just tell us where you're taking us with these? What's the point that you're asking us to take from this?

**MR HARRISON QC:**

I want, if I may, to ensure that it's understood that this is an entire storage delivery operation rather than just focusing on the single point in time when the butane and the motor spirit are pumped into the tanker. It's a complete operation and it's a high-tech operation requiring a good deal of security and safety measures.

**ELIAS CJ:**

It's a complete storage operation –

**MR HARRISON QC:**

Yes it is.

**ELIAS CJ:**

– is that, that's the point?

**MR HARRISON QC:**

It's a complete storage operation with fuel stored, of various kinds, delivered in various combinations and in this instance two fuel owners, Gull largely, and BP.

**ELIAS CJ:**

Yes, thank you.

**MR HARRISON QC:**

But the photographs show the different stages of the process in, if we go to photographs 20 to 22, to page 481. These photographs show the collection of pipes coming in towards the gantry where the fuel is dispatched into the tanker. Then at – if we go to photograph 15, which is page 476, that grey building is the gantry which is where the fuel trucks come in and there's a computerised delivery. The pipes that have come in at 12 inch reduced to eight or 10 inch within the facility, and as well four inch pipes carry the additives such as butane. The butane with which we're concerned is stored in the underground facility which is in the foreground of photograph 15 with the concrete blocks around it.

Then if we go to photograph 19, and then to photograph 5, we can see the operation that, five and six, the operation with the conglomeration of pipes that is the, this is the point where the different fuels are linked to each other at the point where they are pumped into the fuel tank. And the fuel truck has different compartments in it so that it can take different combinations of all blends of fuel.

The evidence about this is dealt with by Mr Bodger in his affidavit at volume 2, tab 14. He deals with the reception and storage operation at paragraphs 9 to 22 and at paragraphs 23 and following he deals with the delivery aspect of the operation. If I can just take your Honours to that. This is at page 157 of the case on appeal. The point really here is that what we're talking about is a total operation which involves delivering fuels, either motor spirit or diesel, in a variety of combinations, not just a combination which Customs alleges gives rise to an excise duty liability. For

example diesel is blended with biodiesel. Motor spirit in either regular or premium versions is blended with ethanol or blended with butane or blended with a combination of ethanol and butane. So these are all ways in which the owner of the product, the retailer, seeks to have the product delivered and the driver of the tanker truck is the one who implements the ordering system in the gantry and this whole operation, we submit, is not remotely to be characterised as manufacturing if one looks at it in its proper operational perspective.

**GLAZEBROOK J:**
Mr Harrison, I assume you'll deal with the issue of the manufacturing permit for the ethanol mix at some stage?

**MR HARRISON QC:**
Yes, yes, I will. So the evidence around what the delivery of butane along with motor spirit into the tanker involves chemically is dealt with in Mr Bodger's affidavit at paragraph 33, that's page 160 of the case. His evidence is that butane occurs naturally in motor spirit but is also a by-product of the process in refining petroleum. Its addition back into base product premium or regular motor spirit does not affect any change in the essential nature of the motor spirit in question.

**GAULT J:**
Why do they do it?

**MR HARRISON QC:**
How do they?

**GAULT J:**
Why do they do it?

**MR HARRISON QC:**
Why do they do it?

**GAULT J:**
If it effects no change?

**MR HARRISON QC:**

They do it because it is, the butane is cheaper than the motor spirit. They are using a locally produced product and combining the two, and obviously watching the specifications, still results in compliant motor spirit. They can then be more price competitive because they are using ingredients when combined which are cheaper than purchasing motor spirit outright.

**GAULT J:**
It just makes it go further?

**MR HARRISON QC:**
It makes it go further and the ingredients overall have a lower purchase price point when you put them together. So having produced –

**WILLIAM YOUNG J:**
How significant is the excise disparity in that end result?

**MR HARRISON QC:**
Sorry how –

**WILLIAM YOUNG J:**
How significant is the different rates of excise duty on butane and motor spirits?

**ELIAS CJ:**
10 cents is –

**MR HARRISON QC:**
Well –

**WILLIAM YOUNG J:**
No, no, how significant is it in the cheapness in the economy.

**MR HARRISON QC:**
Oh –

**WILLIAM YOUNG J:**
I know it's 10 cents a litre for duty and 48 cents a litre for –

**MR HARRISON QC:**

It's, I can't actually tell you what the price of a litre of motor spirit as against a litre of butane is but there's a saving, if you like, the primary saving is on the lower purchase price of the butane.

**WILLIAM YOUNG J:**

But is that because it's not so heavily taxed?

**MR HARRISON QC:**

No it's because it's cheaper. It's a cheaper product to buy than motor spirit.

**ELIAS CJ:**

This paragraph 33 is referring only to the legal definition of motor spirit isn't it? There's nothing more in it than that? It qualifies as a motor spirit.

**MR HARRISON QC:**

It – the motor spirit to which the butane is added is motor spirit in terms of the Customs and Excise legislation. It's motor spirit in terms of the various regulations governing quality –

**ELIAS CJ:**

Yes.

**MR HARRISON QC:**

– and specification and after the butane is added it is similarly so qualifies in both respects. In addition it is sold as motor spirit, marketed as motor spirit and –

**ELIAS CJ:**

I suppose the question really is, so what?

**MR HARRISON QC:**

So what.

**ELIAS CJ:**

So what do you take from that? From the fact that it's within the quality parameters?

**MR HARRISON QC:**

What I will be describing is the case law definition of "manufacturing" and production is expressed in various ways but if – what you have to come up with at the end of your process or operation under the case law definition is something essentially different from what you started with. So if –

**ELIAS CJ:**

That's really my question. You're referring us here to simply the regulatory specifications of motor spirits. Is it accurate to say it is no different simply because that is the specification that the law uses for some purposes?

**MR HARRISON QC:**

No I, I haven't said that it is no different. I submit that it is essentially the same. It hasn't changed in its character or nature. I was about to come to Mr Koutsaenko's evidence, which is the other evidence on its foot, but my point – fundamentally, my point is this: if the case law definition of "manufacturing" is the definition that ought to be applied here, then these changes, which are merely negligible, but they are changes by way of the introduction of butane, do not satisfy the case law test in my submission. So that there is no change in the – there's a price advantage from doing it. There's no change in the specification, the legality of selling and describing it as motor spirit and commercially it's sold as motor spirit. The only difference is that it can be sold at a cheaper price.

**WILLIAM YOUNG J:**

Motor spirits are produced in New Zealand I take it?

**MR HARRISON QC:**

Motor spirits are produced at Marsden Point Refinery but a lot of motor spirit and my client's motor spirit, Gull's motor spirit, is imported.

**WILLIAM YOUNG J:**

So if motor spirits produced at – a quantity of motor spirit was produced at Marsden Point that had exactly the same composition as the material that you sell –

**MR HARRISON QC:**

Yes.

**WILLIAM YOUNG J:**

It would be rated to excise duty, or whatever the right term is, on the basis of a total volume?

**MR HARRISON QC:**

Yes it would be, if it's all manufactured in New Zealand, then it is rated at the motor spirit rate of 48 cents a litre.

**WILLIAM YOUNG J:**

But what if they bought, whoever operates the Marsden Point Refinery, bought some butane separately and mixed it in?

**MR HARRISON QC:**

If they do that as part of their manufacturing process, part of their overall manufacturing process, then that would carry the duty.

**GLAZEBROOK J:**

What do you say about the argument that's made on behalf of Customs that motor spirit is essentially just a mixture in any event and so, as I understand the argument, effectively if just mixing things together is not manufacture then most spirits are not able to be manufactured because they're just effectively a mixture?

**MR HARRISON QC:**

Well that statement has no foundation in the evidence and it's not accepted.

**GLAZEBROOK J:**

All right.

**MR HARRISON QC:**

In fact if – obviously motor spirit is produced as Mr Bodger says at para 33 as a process of refined petroleum. It starts with crude oil. Various products are refined out along the way, first motor spirit, then diesel and on down the chain. It is incorrect to characterise the original manufacturing process for motor spirit as simply blending. It's a notorious fact that crude oil is used, refined, to create motor spirit and a whole lot of other products as well. But that – I did want to go to Mr Koutsaenko because this is an aspect of the discussion. He's at tab 32 and we can see at paragraph 5, page 272, that he is commenting only on the basic differences between butane and

motor spirit, or petrol as he calls it, and the effect on the two substances where they are blended with each other. He's not commenting on the manufacturing of motor spirit and indeed he's careful to restrict himself. What he says at paragraph 8 is, "Petrol comprises many ingredients being primarily a mix of many, a dozen or more, liquid hydrocarbons." So at this point he doesn't refer to it as a blend but rather as a mix. "Butane is one of the ingredients of petrol. No one specific formula because it is a mix of several of hydrocarbons."

And then he goes on to say, I omit a sentence, "Petrol is a blend or mix of a number of chemicals." Then he goes on to deal with butane noting that, "It's a gas which is produced usually as a product of, or at least in conjunction with, or in natural gas production." And then at 11 he says, "Petrol is not butane." He says, "If three litres of butane is added to 100 litres of petrol the result is approximately 103 litres of petrol. Butane is still separately identifiable in the petrol if the petrol is analysed but the three litres of butane become part of the petrol so there is approximately three litres more of petrol than before the addition."

**GAULT J:**
So in effect butane becomes petrol?

**MR HARRISON QC:**
The butane is subsumed within the petrol or motor spirit, if I may call it that.

**GAULT J:**
It becomes motor spirit.

**MR HARRISON QC:**
Motor spirit, that's because that's what, the term that the CE Act uses, your Honour. Yes and over the page, paragraph 12, "Similarly the 100 litres of petrol to which the three litres of butane has been added is not the same." And he lists various changes. But the point – and I'm not – we accept that adding 5 per cent or less of butane to motor spirit that's stored at the facility results in motor spirit because effectively the butane, being much the lesser, loses its separate butaneness, if you like, and becomes motor spirit compliant with all of the tests that are applied both legal and qualitative to classify motor spirit. The issue is whether that, in itself, falls within any known or appropriate definition of "manufacturing" to which I am now – I will now come.

**McGRATH J:**

Just before you do, Mr Harrison, in paragraph 12 does the concept of percentage volume evaporated, and the change to that, that may occur, has that got particular significance for this case? Does it have any relation to the Court of Appeal's approach which seems to have turned on changing volume?

**MR HARRISON QC:**

I'm not aware of a connection between that and the change in volume. I read the Court of Appeal judgment as simply saying, as he says, you add three litres to 100 litres you end up with roughly 103 litres. I mean motor spirit is constantly evaporating in fact and there are quite substantial losses during a storage process. So the – I summarise in the submissions the reasoning in the High Court and Court of Appeal judgments.

I have dealt with the factual background and I'd like now to just go to page 7 of my written submissions and the issue of interpreting revenue legislation. I do this with the greatest of respect because it seems to me that there is quite a fundamental divergence of approach between my learned friends and me in the way they are urging the Court to approach the interpretative task and while often these differences in approach do not – are not significant I have, with respect, a perception that it maybe significant here. Now of course we've got section 5 of the Interpretation Act. We have also the recent pronouncement in the *Stiassny and others v Commissioner of Inland Revenue* [2012] NZSC 106 judgment of this Court. At page 8 I have set it out in full. That judgment was delivered after the close of argument in this case in the Court of Appeal and the Court of Appeal did not refer to it and I stress, of course, as I have in paragraph 22, the what I call, "The *Stiassny* principle, that the Court should insist that before a taxing provision 'is effectual to make the tax payer amenable to the tax, it uses words which, on a fair construction, must be taken to impose that tax in the circumstances of the case.'"

And I note those in Carter saying, after the passage that was cited in *Stiassny*, "None of what's been said means there's no longer any place for the old presumptions. In cases of genuine doubt as to the meaning and purpose of a provision, the accused," the accused, I don't know where that came in, "and the taxpayer are still likely to get the benefit of the doubt." And just while I'm dealing with the authorities I'd just like to refer and hand up also an extract from a House of Lords decision, *W T Ramsay Ltd v*

*Inland Revenue Commissioners* [1982] AC 300 and in the judgment of Lord Wilberforce, which I've highlighted at page 323, some familiar principles were stated the first of which, "A subject is only to be taxed upon clear words, not upon 'intendment' or upon the 'equity' of an act. Any taxing act of Parliament is to be construed in accordance with this principle. What are 'clear words' is to be ascertained upon normal principles: these do not confine the Courts to literal interpretation."

Now I'm going to obviously spend a little time going through our interpretation arguments but in a nutshell we argue that what I've called the case law definition of "manufacture and production", the legislative history of the definition in question, an examination of the language of the three sub-paragraphs of the definition of "manufacture", and other factors as well, indicate on conventional interpretation principles that the case law definition is applicable rather than any definition along the lines of the Court of Appeal judgment. The respondent argues that to adopt an approach which has recourse to legislative history distinguishing between provisions within the one definition, exclusion unius if you like, is a regressive approach to interpretation and we no longer do that. My submission is that the *Stiassny* principle does recognise that there is something of a special situation in relation to taxing statutes which do not contain an anti-avoidance provision. Where there's an anti-avoidance provision the application of that provision quite likely presents a different ball game but here, as in the GST legislation, there's no anti-avoidance provision.

The commercial operation, which I have attempted to describe in opening, is a perfectly legitimate and proper, indeed necessary way to deliver stored petroleum products and additives to the end user. It's high-tech, it ensures accuracy and it ensures safety of storage and my submission is that a fair construction approach, relying on some of these old but good tools, produces that outcome. So as I argue at paragraph –

**McGRATH J:**
Do you read that as saying a fair construction on ordinary principles of interpretation including contextual, reading the provision in its context of that?

**MR HARRISON QC:**
Yes, yes and I'll come – my submission is that there is a very important contextual indicator that favours my argument and I'll come to that. I also argue at para 34 and

following that rather than an expansive approach to any key threshold concept such of manufacture, because that is the absolute trigger concept, there should not be an expansive approach, there should be a non-expansive approach by contrast with the Court of Appeal which was happy to treat production as intended to be a word of wide import.

**WILLIAM YOUNG J:**

Can I just pause? This part of the definition of "manufacture" applies only to fuels?

**MR HARRISON QC:**

Yes.

**WILLIAM YOUNG J:**

Which obviously includes motor spirits, what else, diesel? Do you know what else is included? The word "fuel" isn't actually defined in –

**MR HARRISON QC:**

Well it is in the Duties Table. A whole lot of fuels are listed –

**WILLIAM YOUNG J:**

Are they, right. The Duties Table isn't that accessible actually.

**MR HARRISON QC:**

No, I fear it's wrapped one's head in a towel stuff –

**WILLIAM YOUNG J:**

Well what's the best one –

**MR HARRISON QC:**

– but I'm going to have to take –

**WILLIAM YOUNG J:**

– to look at?

**MR HARRISON QC:**

– your Honours to it.

**WILLIAM YOUNG J:**

The best one is to look at the one that was in force until repealed in January 2010, is that the best one?

**MR HARRISON QC:**

The best one will be the one that's in my volume of materials.

**WILLIAM YOUNG J:**

Thank you.

**ELIAS CJ:**

Is that the last one? Is that the applicable one?

**MR HARRISON QC:**

It's applicable to the time we're concerned with.

**ELIAS CJ:**

Yes, sorry, that's what I –

**MR HARRISON QC:**

It's been revised since and there've been some changes to the legislation as well. It's at tab 1 of the appellant's bundle of authorities and it's a version of January 2012. Now I'm very shortly going –

**WILLIAM YOUNG J:**

No, don't worry, I'll find it. You move on, I'll sort it out, thank you.

**MR HARRISON QC:**

Yes. So my submission is that a fair construction approach would include traditional interpretive tools such as expressio unius and I've also made the point at para 25 about the taxing statute which lacks an anti-avoidance provision. In that context I am submitting, and this is with an eye to the fact that the so-called gap where – the question that your Honour Justice Young addressed to me, which is that if the butane was added in, say, prior to import, the same amount of butane had been added in to motor spirit prior to import, the duty levy would be at motor spirit level.

**WILLIAM YOUNG J:**

And I've also asked what would happen if it happened in New Zealand at Marsden Point where –

**MR HARRISON QC:**
Yes, yes.

**WILLIAM YOUNG J:**
– and it's the same result?

**MR HARRISON QC:**
Yes, because that – what we're looking at in essence unless – I would submit in the absence of express words, in a nutshell, we have two trigger points for the tax, the duty, excise duty on most spirit. One is importation and whatever it is when it's imported, be it motor spirit or some other fuel entirely, diesel, that's the trigger point and it then gets assessed for duty at whatever rate applies to that commodity, and the other trigger point is on importation, and again whatever it is and how –

**ELIAS CJ:**
Sorry, I thought you said importation was the first trigger.

**MR HARRISON QC:**
Sorry, manufacture.

**ELIAS CJ:**
Manufacture's the first trigger or –

**MR HARRISON QC:**
Well –

**ELIAS CJ:**
These are triggers you could have, is that the point?

**MR HARRISON QC:**
There are two trigger points.

**ELIAS CJ:**
Yes.

**MR HARRISON QC:**

Yes, and let's assume precisely the same motor spirit. It's a regular motor spirit. It comes in. The amount that – the mix of it, how much butane is already in it or has been added to it will vary. It is not an absolute constant. If it's manufactured here, say at Marsden Point, at the point its manufacture is completed it is subject to duty as soon as it moves out of, outside of Marsden Point, which is the manufacture area. At the point when it's – or alternatively, if the same motor spirit is imported, as soon as it is imported, it comes off the ship effectively, again it is subject to duty as motor spirit at the motor spirit duty rate. The fact that it is then mixed with another fuel, also a dutiable product, does not create a gap. It is simply the tax payer lawfully arranging his affairs in a way that is perfectly permitted. It's not an evasion of duty. It is a use of two duty-paid commodities lawfully purchased, lawfully stored, and delivered under a contract to the rightful owner in accordance with that owner's directions. And, in my submission, it would take words that are a whole lot clearer than we have to dictate a contrary outcome.

Now I just want to, before I get into scheme and purchase, I just want to touch on the respondent's interpretation approach because I've suggested that the interpretation approach is going to be of significance to the outcome here. The appellant fundamentally disagrees with the respondent's interpretation approach which attempts to characterise excise duty as a tax on consumption or a proxy for such a tax, that is to say that leads to the argument that every last litre of motor spirit that ends up on a road in a vehicle must be taxed as to its quantum at the roadside, if you like, when purchased by the motorist. Excise duty in New Zealand has never been a tax on consumption. It has always been a tax either on the point of importation or manufacture, save for one short period in about the 1930s when it was a tax on the wholesaler, which isn't a tax on consumption in any event. GST is a tax on consumption. GST is charged on motor spirit. The consumer has to pay that tax right at the very end of the process but here, as I've argued, it is a tax on either – taxed at the point of either importation or manufacture.

Now there's no need, therefore, in this case to refer to academic treatises on what excise duty historically has been or to go back to the year dot. We only need to go – if we're going to trace the legislation back, we only need to go back as far as the Customs Amendment Act 1986, extracts from which are at tab 6 of our volume. I don't want to go to it unless I have to but it was –

**ELIAS CJ:**

Sorry, I'm just not very familiar with this area, just thinking about excise and the stress you're placing on this not being a tax on consumption. Does the nature of this tax change because it is also a tax on manufacture as well as a tax on importation?

**MR HARRISON QC:**

It could, in theory, but in practice it doesn't. That is to say the Duties Table could specify a different rate of excise duty distinguished between a locally manufactured motor spirit and an imported one. In practice, level playing field. We do not distinguish between those but we could. I'm not sure if that answers the question.

**ELIAS CJ:**

Well I'm just really wondering, if it's more than a tax on importation, it is a tax on manufacture. Whether that really is very different from a tax on consumption?

**MR HARRISON QC:**

Well –

**ELIAS CJ:**

It's either manufactured here or it's imported.

**MR HARRISON QC:**

The point is that it's either taxed on importation or on manufacture. Not sequentially because –

**ELIAS CJ:**

No I understand that.

**MR HARRISON QC:**

Yes.

**ELIAS CJ:**

I understand that but I'm just wondering what's left out of it being a tax on consumption?

**MR HARRISON QC:**

Well the answer to that is if we just take Gull's motor spirit here, which is imported, it's imported by Mobil. Mobil is actually the importer. Mobil pays the duty. Gull purchases its share of the overall import, however much it's agreed with Mobil it would get, so there's then a purchase transaction by Gull and no doubt the duty is built into that. It's then stored and then goes out from the facility where it goes to individual Gull operators, some of which are owner-operated so there's then a transaction there. There's then a transaction where Joe Public purchases it with GST added. That is what I call, that final transaction is what I would call a tax on consumption.

**McGRATH J:**

If you want to have a tax on consumption isn't one way of achieving that, however, to tax at the point of import and manufacture?

**MR HARRISON QC:**

I don't accept that such a tax is a tax on consumption, your Honour. It's a tax on volume imported but there is no obligation on the importer to do anything with it. In that sense it's – everything is – in one sense everything that's taxed, that is a product ultimately for retail, that is taxed at an earlier point, is kind of a tax on consumption but it's an unhelpful description. And the point, it seems to me, I'm trying to deal with the Comptroller's argument, the reason why it is being elevated into a tax on consumption is in order to argue that every litre that reaches the consumer ought to have been taxed at the motor spirit rate, and there's this whole edifice of submission –

**ELIAS CJ:**

What's the answer to that though?

**MR HARRISON QC:**

Well, the –

**ELIAS CJ:**

That that is not what is being provided for, is –

**MR HARRISON QC:**

Well, the – it's also – the Land Transport Management Act 2003 is also relied on as part of this argument for the Comptroller. There the argument is that excise duty on

fuel is earmarked for roads, and this somehow demonstrates that it's a tax on consumption. My submission is we are simply getting too, far too far away from the essential inquiry which is what this Act says about this particular trigger point for excise duty, which is manufacture. What happens to the excise duty on fuel under a statute that was enacted at least a year after the definition with which we are concerned is simply too remote an inquiry to identify what this definition in issue means. So all I'm submitting is that all of these are really red herrings. It's quite clear what the trigger points are in the CE Act and those trigger points need to be considered in relation to one another, not worrying about what ultimately happens to the fuel when it reaches the consumer.

Now I want to move on to looking at the Act, the CE Act, and I have addressed some of that at pages 9 to 10 of the written submissions. I want to focus on Part 7 and just spend a little bit of time on that. That takes us into the Duties Table, straight into it after that.

Now if we go to – there's a copy of the statute in the Comptroller's Bundle, Volume 1. Part 7 is at – that's its tab, tab – volume 1, tab 1, and it's at page 111 of the pagination.

Now the key provisions –

**WILLIAM YOUNG J:**
So this is imported material, B, or are we looking…

**MR HARRISON QC:**
No, part – you'll see the heading to Part 7, "Excise and Excise Equivalent –

**WILLIAM YOUNG J:**
Yes.

**MR HARRISON QC:**
– Duties". Using those expressions in the strict sense – page 111.

**WILLIAM YOUNG J:**
Sorry. I'm looking at the wrong material, sorry.

**MR HARRISON QC:**
Page 111.

**WILLIAM YOUNG J:**
Yes.

**MR HARRISON QC:**
In the strict sense, excise duty is applied to manufactured, excisable products. Excise equivalent duties are applied to imported excisable products. So Part 7 deals with both kinds and the key provisions are sections 73 and 75.

Now this is an important part of my argument around the context of the definition, your Honour Justice McGrath. The two sections, 73 and 75, need to be looked at back to back and then in relation to the Duties Table which is tab 1 of our volume. So the way it works is 73(1), "In respect of all goods that are manufactured in a manufactured area and specified in Part A of the Duties Table there must be levied, collected and paid excise duties... at the appropriate rates set out... in the Duties Table collecting."

And at 75, which is the imported goods one, "Excise duty at the appropriate rate specified in Part B of – "

**ELIAS CJ:**
What's the meaning of excise equivalent duty? Is that equivalent to the manufactured –

**WILLIAM YOUNG J:**
When it is manufactured. Excise is the imported excise equivalent of the same item as –

**ELIAS CJ:**
Excise –

**MR HARRISON QC:**
Excise – they –

**ELIAS CJ:**

Excise equivalent but the equivalence is to the excise duty on manufactured goods?

**GLAZEBROOK J:**
Yes, yes.

**WILLIAM YOUNG J:**
So which is excise, on imported or manufactured?

**MR HARRISON QC:**
Excise duty is manufactured.

**WILLIAM YOUNG J:**
I see, thank you.

**MR HARRISON QC:**
Excise equivalent is imported. So these are two completely parallel provisions. So 73(1) refers to Part A of the Duties Table and 71(1) for imported goods refers to Part B of the Duties Table. Now just to digress slightly, but it may be appropriate, until 2009 what is now the Duties Table was a schedule to the Act and when I referred to the start of the history of this legislation being the 1986 Amendment, I did so because that was the first iteration of the Customs and Excise legislation which adopted this model of having a Table with Parts A and B in it. So the model comes through but then, as we can see from the provisions at 76A and following, in 2009 instead of having a schedule to the CE Act we moved to this Duties Table creature which was able to be more readily amended administratively.

Although it is still, I hope this is not too much of a digression, if we go to 121 we can see that under 76D the Table is subject to the Regulations (Disallowance) Act and at 76G the Table may be amended and must be interpreted as if it were an enactment which is to say unusually perhaps 76G(3), "The Interpretation Act 1999 applies to the... Table as if it were an enactment." So it is a Table –

**McGRATH J:**
Is it made by a statutory regulation process or is it made as a rule administratively?

**MR HARRISON QC:**

It's certified, and I'm subject to correction here, it's certified by the Chief Executive under 76B but then may be disallowed under the Regulations (Disallowance) Act. And there's also section 78, there's a power to amend, the Governor-General in Council can amend it.

**McGRATH J:**
It's a form of subordinate legislation in a sense?

**MR HARRISON QC:**
Yes, yes. The point is this, is the scope of 73(1), to go back to it, the duty to levy excise duties on manufactured goods is linked to how those goods are specified in Part A of the Table and under 75 ditto for imported goods and Part B. Now this is important because of the way I then propose to develop my argument in relation to motor spirit and Parts A and B of the Duties Table. The point I've been making about 73 and 75 is taken up immediately at the beginning of the Duties Table, I'm referring here to tab 1 of the appellant's bundle of authorities. We see those notes at the start it's printed out as a slash-1 at the top of the pagination, slash-2. So four says, "Duties specified in Part A of this Table are duties imposed pursuant to section 73 and duties in Part B imposed for duties imposed pursuant to section 75." So Part A then says, "Goods manufactured in New Zealand". So Part A is dealing with goods manufactured in New Zealand and then when we go through, your Honours will be aware that basically when we come to excise duty we're dealing with alcoholic liquor and products, tobacco and fuels. So one way or another the series of headings will be dealing with alcohol and then there is a heading on page 4, a third of the way down, "99.75 Fuels", but I want it – just noting that that's where the fuels start, and this is I'm afraid tortuously coming to a point that your Honour Justice Glazebrook wants me to develop. If we go back to page 2, within the alcohol part, you'll see an item, 99.35, dealing with ethyl alcohol, which is the same as ethanol. So undenatured ethyl alcohol of at least 80 per cent strength and ethyl alcohol and other spirits denatured of any strength which imported would be classified and so on.

Now I don't know if I need to explain this but ethyl alcohol obviously is able to be used in alcoholic drinks. To prevent that happening when it's used as an additive to fuel, it is denatured. In practical terms what that means is at this facility when the truck containing ethanol arrives there is a large squirt of motor spirit added and it's then stored in a separate tank, and that denaturing activity has to be done in a licensed manufacturing area because naturally Customs are concerned that

undenatured alcohol is kept very secure, because if, if it is undenatured it's going to be carrying a very high rate of duty, $59 – sorry, roughly $50 a litre. If it is denatured, it then is free of duty because it's not going to be used for alcoholic consumption but as a way of extending fuels. Now –

**WILLIAM YOUNG J:**
Sorry, I'm actually missing – haven't got the page we're meant to be looking at. This is in tab 1 of your bundle, sorry, tab 1?

**MR HARRISON QC:**
Yes, on the back – page 2. Is that double-sided?

**WILLIAM YOUNG J:**
Yes, page 2, yes, okay, sorry.

**ELIAS CJ:**
99.35, is it?

**MR HARRISON QC:**
Yes.

**GLAZEBROOK J:**
Is this explained anywhere in the evidence?

**MR HARRISON QC:**
Yes, it is in –

**GLAZEBROOK J:**
Can you just refer us to where it's explained?

**MR HARRISON QC:**
Yes. So the – if we just go to, for example, to 99.35.45C, you've got ethyl alcohol denatured in accordance with a formula approved by the Chief Executive.

**WILLIAM YOUNG J:**
Sorry, it's 99.45?

**MR HARRISON QC:**

99.35.45C. About half way down that page.

**WILLIAM YOUNG J:**

Yes, yes.

**MR HARRISON QC:**

So if it's denatured in accordance with the Comptroller's formula it's free of duty, but if it is not, if you don't comply with the formula then it's back to the 49.5, $49.50-odd per litre of alcohol duty. Now this is why the ethanol is –

**ELIAS CJ:**

Sorry, where is the reference to denatured, as opposed to undenatured?

**MR HARRISON QC:**

It's within 99.35 if you continue – the first line is undenatured, second line denatured and then at 99.35.40B, just second line down, ethyl alcohol and other spirits denatured of any strength. Each classification and sub-classification has to be identified by counting the number of dashes so you've got one dash just over half way down, ethyl alcohol and other spirits denatured, and two dashes is denatured in accordance with the formula, and that's free, but if you don't do as you're told by the Chief Executive you end up in other and you're back at $50 a litre. So –

**McGRATH J:**

Can I just say I found the three for the denatured. Where do I find, which of these figures 49.5 applies to the undenatured?

**MR HARRISON QC:**

It's the other. So you've got just below, one line below 99.35.40B, you've got one dash, ethyl alcohol and other spirits denatured.

**McGRATH J:**

I see.

**MR HARRISON QC:**

Yes. Then you've got two dashes, ethyl alcohol denatured, which is the free one, and then below that, two dashes, other, it's ethyl alcohol which is denatured but not,

it's other, it's not in accordance with the formula and if you haven't followed the Chief Executive's formula you're back to per litre alcohol, per LL 49 and – now sorry this is so convoluted but this is the point that ethyl, and I have to take this up also with the tripartite current definition of "manufacture", I have to come back to this but one thing at a time, the point is from my client's perspective the reason for having a licence manufacturing area for alcohol, which you then denature and you then blend into your motor spirit, is that at this point it's required to be dealt with in this way because it's alcohol, at this point it's alcohol, until it meets the motor spirit. So that it is not a fuel at this point until it meets the motor spirit therefore it has to be dealt with as a form of manufacturing under the definition.

Actually it's probably going to be easier if I go back to the definition rather than come back to it much later. If we go to the definition in the respondent's volume, tab 1, the definition of "manufacture", page 28 of the printout. We're concerned with B in relation to the butane added to fuel and the issue is whether that is manufactured within B. But at the point when the undenatured alcohol is being dealt with, and before it ends up in the motor spirit, it is under C, I submit. That is it is at that point in time it's neither tobacco, nor a fuel, it hasn't yet become a fuel, and so the operation of adding it comes under C and there's a different concept of manufacture being the extended definition that arises under C. Now actually I've gone further into that than I wanted to.

**ELIAS CJ:**

So to be very simplistic the puff of motor spirits that's necessary in order to undenature it, is that right? Undenature?

**MR HARRISON QC:**

No, to denature.

**ELIAS CJ:**

Denature. Sorry, to denature –

**MR HARRISON QC:**

Yes.

**ELIAS CJ:**

– is a manufacturing process which turns it into motor spirits but adding the motor spirits so formed to other motor spirits is not manufacturing?

**MR HARRISON QC:**
It's not manufacturing under C.

**ELIAS CJ:**
It's not manufacturing under C, I understand that, yes.

**MR HARRISON QC:**
If it's anything it's under B but we say it isn't.

**ELIAS CJ:**
Yes, yes.

**MR HARRISON QC:**
But in other words, we say – basically we say about the – the argument from my learned friend seems to be, well, look, by having a manufacturing area for your ethanol blending into motor spirit, it's kind of an admission that equally adding the butane must likewise be manufacturing, to which we say, and this is in the evidence, "We did the ethanol that way because you told us to, Customs, and secondly there is this difference that I pointed out." Now –

**WILLIAM YOUNG J:**
Can you explain to me how a New Zealand manufacturer or motor spirits gets, as it were, the advantage of the duty free ethanol in an ethanol blend? So I'm making, I'm producing motor spirits at Marsden. I would like to bulk it up as far as I can with ethanol and get the duty advantage. How does that work? What's the mechanism by which that advantage is captured?

**MR HARRISON QC:**
Well, the – can I just – before I answer that –

**WILLIAM YOUNG J:**
Yes, sure.

**MR HARRISON QC:**

Can I just – I'll deal with this matter of the references. The ethanol aspect of the operation is dealt with in paragraph 20 of Mr Bodger's first affidavit at page 155 of volume 2 of the case. So it's fairly rudimentary. There is a whole lot of material in the Gull evidence about how they prepared for the introduction of ethanol on the market. They pioneered it, and I'm not sure to what extent other fuel companies have used it. Ethanol is a local product regarded as green and advantageous. Various – it makes use of products that were hitherto, as I understand it, not used, so it's a socially and economically beneficial thing to be not burning mineral-based fuels but burning a natural fuel such as ethanol. But it has to be blended and a whole new regime was introduced. The history of that is in our affidavit evidence. I see the whole thing as a complete side issue, with respect, because I'm only answering an argument from the other side that says, "Well, it must be manufacturing because you accepted the ethanol operation was manufacturing." I see it as a side issue but we –

**GLAZEBROOK J:**

Well, it's – for myself, it's not so much that anybody accepted anything or any of the pejorative material that's attributed to motives, et cetera, it's more if the blending of ethanol and motor spirits is not production then – or is production, then why is not the blending of butane and the other motor spirits production? And your answer to that is that ethanol and the motor spirits comes at least in the initial stages under paragraph C of the definition, which has that ancillary processes, not paragraph B. Is that – have I understood the argument?

**MR HARRISON QC:**

That's it, your Honour. So if we can go back then, if I may, to the point I'm trying to develop about the Duties Table.

**WILLIAM YOUNG J:**

Sorry, you are going to answer my question as to how the ethanol comes off, how in a local manufacturing context the manufacturer gives the advantage dutywise of mixing ethanol with motor spirits.

**MR HARRISON QC:**

The manufacturer of the ethanol –

**GLAZEBROOK J:**

They must get it back, mustn't they, in some way?

**MR HARRISON QC:**

It's, it's free of duty if it is delivered direct to a place where it will be denatured. So the –

**WILLIAM YOUNG J:**

Yes but the duty is imposed on the motor spirits when it's transferred out of their facility, isn't it?

**MR HARRISON QC:**

Yes but –

**WILLIAM YOUNG J:**

So how do they get – and that's presumably the fuel bulked up?

**MR HARRISON QC:**

Yes but if we go back, we don't manufacture ethanol.

**WILLIAM YOUNG J:**

I'm not talking about you.

**MR HARRISON QC:**

Yes.

**WILLIAM YOUNG J:**

I'm talking about someone at Marsden Point.

**MR HARRISON QC:**

The – but no it's not manufactured at Marsden Point, it's manufactured by a dairy company?

**WILLIAM YOUNG J:**

Yes, yes –

**MR HARRISON QC:**

It's manufactured by a dairy company –

**WILLIAM YOUNG J:**

– I'm talking about someone who produces motor spirits in New Zealand and is subject to excise duty. Now what's the point at which excise duty is imposed on the New Zealand manufacturer?

**MR HARRISON QC:**

If we take the – if we take a straight ethanol motor spirit blend, the motor spirit will be dutied at the motor spirit rate upon importation, that's our motor spirit –

**WILLIAM YOUNG J:**

No, I'm talking about manufacturing.

**MR HARRISON QC:**

– so that is –

**WILLIAM YOUNG J:**

I'm talking about manufacturing in New Zealand not importation, not your situation.

**MR HARRISON QC:**

Well it's – I can't answer that question and I don't believe that ethanol is added – if we take Marsden Point, I don't understand it to be the case that ethanol is added to motor spirit manufactured at Marsden Point. This is a Gull operation which –

**WILLIAM YOUNG J:**

Right, okay, so it doesn't arise.

**GLAZEBROOK J:**

The question probably is, if it were added would that be, as you've said – well would there be any mechanism if it were added for getting that back on the basis that it was a non-excise –

**MR HARRISON QC:**

It doesn't need to be got back, your Honour.

**GLAZEBROOK J:**

Well otherwise they're paying, if they did add it they would be paying excise duty on the ethanol as well at the motor spirit rate.

**MR HARRISON QC:**

No, with respect Ma'am, the ethanol that's manufactured by the dairy company is in liquid form. Maybe the dairy company sells some of it to an alcoholic drinks manufacturer, in which case it's dutied, it's got to be dutiable, but if it is destined to be denatured, say at these premises, then the manufacturer of the ethanol is not required to pay duty, so it doesn't have to come back. As long as there is a secure sealed delivery, which there is, with the ethanol sealed so it cannot be misused as an alcoholic drink, it is brought straight to the facility, immediately denatured. At that point its fate is as a zero rated commodity is sealed, and it remains zero right throughout. It never, ever –

**GLAZEBROOK J:**

Well the answer would be then if the Marsden Point people added it then it would be exactly like the butane, they would end up paying duty on it, on the blended amount at motor spirit rates. I think your friend might be trying to –

**MR HARRISON QC:**

Well I was just going to go to that. Yes, I was going to go to that. If we go to page 4 of the Duties Table, if we look at 99.75 for fuels, we can see how it works in terms of the Table. You've got, for example, 99.75 is a regular grade at the black dot there and that's one dash. Two dashes, the one ending in F –

**GLAZEBROOK J:**

Sorry, what page are we on?

**MR HARRISON QC:**

Page 4 of the Duties Table. So you can see that black dot, motor spirit with research, octane number less than 95 regular. So then the next line, dash, dash, blended with ethyl alcohol and the unit is per LMS, which means per litre motor spirit. So if you add in the ethyl alcohol denatured in accordance with the formula, you're only paying duty on the litre of motor spirit, whereas –

**GLAZEBROOK J:**

And is that the same under the manufacturing – oh, that's the manufacturing Table, isn't it?

**MR HARRISON QC:**

No we then go to – yes, it is.

**GLAZEBROOK J:**

Yes.

**MR HARRISON QC:**

And we then go below that to dash, dash other, immediately below, you've got per L, which is per litre. So, if you've got a fuel, if you've got a fuel blended with ethanol, the ethanol – you only pay – if you've got motor spirit blended with ethanol you only pay per litre of the motor spirit. You don't pay anything for the ethanol. If you've got a fuel that's other, you pay per litre motor spirit and this is the heart of the dispute, because Customs says we're under other and we say that's only true if there is a manufacturing when we conduct the dispatch activity, because it only operates in relation to a manufacturing in New Zealand.

So I wanted to – I hope we've dealt with the ethanol issue sufficiently. I just want to say Part A, "Goods Manufactured in New Zealand." That's page 1 of the Duties Table.

**ELIAS CJ:**

Mr Harrison, I'm sorry.

**GAULT J:**

In dealing with the ethanol position, I am now confused and I'm not sure I can articulate this, but it seems to me that you argued that the reason for the difference between alcohol on the one hand and butane on the other was that butane is useable as an alcohol not just as a fuel and I understand that, but then you told us that the reason why you had to get the licence in respect of the ethyl alcohol was because it could be used as potable consumption. But I understood you to say that because it was going to be used for alcohol, you didn't have to consider duty because of the intended use and the circumstances under which it was controlled. So, I don't now see how your argument runs that you can't draw the conclusion that the respondents would have us draw with reference to the ethyl alcohol comparison.

**MR HARRISON QC:**

What I intended to submit, your Honour, was that if it's not intended to be used as alcohol. If it is sold from the ethanol manufacturer to Gull, designated to be denatured in Gull's facility, that is taken on trust and it's the equivalent of the old bonded warehouse. It moves in a bonded form from the ethanol manufacturer to TNZ not intended for use as potable alcohol and as long as that transaction ending in the denaturing is honoured, it remains free of duty and thereafter it is dealt with as that item we've been looking at on page 2. Is that –

**GAULT J:**
Yes, I understood that. The reference to the need for a licence that I was having difficulty with.

**MR HARRISON QC:**
Right, well, that is because the Customs insist on it. They say that the denaturing in accordance with the formula approved by the Chief Executive, who is also the Comptroller, has to happen in a licensed manufacturing area and that is apparent in some of the documentation that is before the Court. It's probably not in dispute.

**GAULT J:**
Yes, thank you.

**MR HARRISON QC:**
Right, and it's dealt with in the affidavit of another deponent, the first affidavit of Mr Mountfort, which is at page 180 of volume 2 of the case. Paragraph 13 and following deals with the way in which Gull/TNZ –

**ELIAS CJ:**
Sorry, can you give me that reference again?

**MR HARRISON QC:**
– was required to have such a licence.

**ELIAS CJ:**
I'm sorry, can you give me that reference again?

**MR HARRISON QC:**

Yes. It's at Mountfort, first affidavit, volume 2 of the case, page 180, paragraph 13 and following.

**McGRATH J:**
And what does it deal with? You were about to complete that…

**MR HARRISON QC:**
It deals with the fact that we had to have a licensed manufacturing area when we started taking, purchasing ethanol and using it as an additive to motor spirit.

So back to the Duties Table, and I think I'm now at the point that I have been trying to get to, why this is important. You've got Part A, "Goods manufactured in New Zealand", and then you've got the section dealing with fuels at page 4. You've got Part B, which is headed, "Imported Goods", and then if you go to the fuels section of Part B at page 9, at the top there, you've got motor spirit with a regular grade which if manufactured in New Zealand would be classified with an excise number. That's got one dash, and then it divides into, as we've seen earlier in Part A, dash dash "Blended with ethyl alcohol", and then dash dash "Other", and the same is true of premium which is about a few lines below that, premium, "Which if manufactured in New Zealand".

So what we've got is, and this is already set out and summarised in paragraphs of my written submissions, at page 11, it's at 12, what we've got – and your Honours can work your way through this material as well if you want, I don't want to take any more time on it if I can help – para 36, I note the Part A, "Fuels", where you've got other motor spirit which if imported, and then the Part B we've just seen is if manufactured, so that what we've got is, what we've got here is motor spirit that undoubtedly was imported into New Zealand and it cannot come under Part A because that applies only to motor spirit manufactured here. You've got – so the motor spirit has to come under Part B and, as we've seen, that's at page 9 of the Duties Table, and the classification of such motor spirit imported is that it's either going to be blended with ethyl alcohol we're not concerned with or an other, "other" being motor spirit with however much butane it may have which hasn't been blended with ethyl alcohol or ethanol and has been imported. So there is no classification for a motor spirit falling within Part B on which when imported the requisite duty was paid per litre, that is the other, to which butane is subsequently added, duty paid butane. It comes within neither Part A or Part B, that particular transactions and that that is

not a hole or a gap as argued, it is an indication that the interrelationship between s 73 and Part A and the interrelationship between 75 and Part B seize the transaction, the trigger-point transaction of assessing duty as occurring once only. It is a strong contextual indication, in my submission, that what happened in this case is not intended to attract an assessment of excise duty on the delivered, the as delivered mix of butane and motor spirit. I know this is fairly heavy-duty stuff, but it – I can put it this way that if anything that analysis supports my argument at the very least it indicates that there's noting in the Act to support the argument for the Customs to the contrary.

Now there is also a separate analysis of chapter 27 of the Tariff, which takes us one level beyond that and that is set out in pages 13 and following of the written submissions. Basically what we've got is references in Part B. If we just go back to page 9 at the top, we've got a reference to Tariff items in the left-hand column and if we're taking the regular grade other, we find that in the left-hand side we've got Tariff items to New Zealand 2710.12.19 and others for premium. If we trace those back into the relevant portion of the Customs Tariff, which is chapter 27 at tab 3 of our volume, we find that there is a distinction between motor spirit which is imported for the purpose of manufacture, this is tab 3, page 27-4. You've got a heading at the very top, a bold heading, "27.1 Petroleum Oils and Oils Obtains," et cetera, other than crude. Then you've got below that second bullet point down, 2710.12 Light Oils and Preparations, two dashes, in goes to three dashes, motor spirit, four dashes in bulk in ship's bottoms, that is in other words a bulk importation. That is what we're dealing with and then you've got below that, one, two, three, five dashes opposite the highlighted, the sort of greyed out bullet point reference for manufacturing a licensed manufacturing area rate of duty free or you've got going down to about half way, a bullet point, five dashes other, which means not imported for manufacture and then you've got this. It's below that, that you pick up the same Tariff numbers as appear in the Duties Table to which I drew attention earlier. Those are from about half way down 2710.12.15, 2710.12.17, 2710.12.19, it's at that point that the Tariff is – there's this back reference to the Tariff, so the result is that we are looking at a category of motor spirit which is not imported for manufacture in a licensed manufacturing area which is treated, in other words, is already manufactured, having the requisite research octane, it is then back to the Table. It is then categorised in Part B which is to say it is imported and if manufactured in New Zealand would be classified. So, the whole thing fits together to create this kind of dichotomy.

**WILLIAM YOUNG J:**

So just so I understand this, if motor spirits is imported into New Zealand for the purposes of manufacture, it's duty free?

**MR HARRISON QC:**

Yes.

**WILLIAM YOUNG J:**

And the duty is imposed on the manufactured product?

**MR HARRISON QC:**

Yes, yes.

**WILLIAM YOUNG J:**

How do you – how would motor spirits imported into New Zealand be brought in for the purposes of manufacture?

**MR HARRISON QC:**

Well that – there is no evidence as to that category. It –

**WILLIAM YOUNG J:**

What would you do to – because it is an end product in itself really, isn't it?

**MR HARRISON QC:**

Yes, well, you might – if you must import, you might import some motor spirit to add with your refined – your motor spirit which has been refined as part of your overall blending process. I'm told and I don't want to give evidence from the Bar, I'm told that there are different kinds of motor spirit and some mind be used – if you ended up refining your oil, your crude oil and creating a motor spirit which is of a too low – an octane, for example, you might choose to import a higher octane motor spirit so that you can come up with one which is –

**WILLIAM YOUNG J:**

What's required for the product –

**MR HARRISON QC:**

– within specifications, but that's all part of the one process and it's all within a licensed manufacturing area, so when it emerges from there if that is the duty point. There's only one duty point. That wouldn't work incidentally for our operation because the motor spirit comes in, some of it goes out without anything added, quite a lot of it.

**WILLIAM YOUNG J:**
You don't know what's going to happen it if it arises.

**MR HARRISON QC:**
Yes, so it would be a false pretence to import the whole lot as for the purpose of manufacturing duty free when in fact significant chunks of it are not being manufactured at all, even in the Customs sense.

**WILLIAM YOUNG J:**
Yes, right.

**ELIAS CJ:**
Mr Harrison, I should mention that unfortunately we have to rise at five to, so you might pick your time.

**MR HARRISON QC:**
Yes, well, I would be very relieved if I've got through the Table in chapter 7 and can hopefully move on from that. So, the – coming to the text of the definition of manufacture, the Court of Appeal was extremely dismissive, it seems to me, with respect of any idea that anything other than B of the definition related to fuels, needed to be interpreted, but with the greatest of respect I submit that is not an appropriate approach. It's not, with respect, a usual approach. Even if we don't want to go into Duties Tables and way back in history, at the very least I submit we should be looking at the definition as it was introduced in the 1996 Act itself, I say go back further and the current definition.

Now, if we go to tab 5 of the appellant's bundle, we find the definition as in the 1996 Act when enacted and if we go to tab 6 we've got the, sorry, no, I'm wrong, sorry. It's tab 7 is the 1996 definition, tab 8 is the 2002 amendment which inserted the current definition and just quickly before we finish, just to compare those two, so that the original form of the definition manufacture is on the back of the tab 7 and it was

defined manufacture in relation to goods specified in the third schedule which is now the Table, Duties Table and it had only two components, A, in relation to tobacco and that definition originally manufacture was only defined in relation to tobacco. B, in relation to goods other than tobacco, a process of production assembly packaging or other operation or process involved in the production of the goods. So, those words "other operation or process involving the production of the goods" were in the Act in 1996, but as it related to goods other than tobacco it effectively was a definition in relation to both fuels and alcohol.

Then, for reasons I will be coming to tomorrow morning, when the Act was amended in 2002, "manufacture" separated out the three products, A for tobacco, B for fuel, C, neither tobacco nor a fuel, but in fact meaning alcoholic drinks and foods and ethanol generally of course, denatured and un-denatured. So, if we trace those through, the words for B are fuel, the words, "Any operation or process involved in the production of the goods came through," C, for alcohol, C1, the words, "Operation or process involved in the production of the goods came through, but ii was added, "Any ancillary process," and that is defined in (3) below.

So, if we're going to do a linguistic analysis of the definition, we shouldn't just focus on B, in a nutshell, we need to look at all three and I will attempt to do that tomorrow morning.

**ELIAS CJ:**
Thank you Mr Harrison. We'll take the adjournment now and resume tomorrow morning.

**COURT ADJOURNS: 3.54 PM**
**COURT RESUMES ON TUESDAY 6 AUGUST 2013 AT 9.59 AM**

**ELIAS CJ:**
Yes, Mr Harrison.

**MR HARRISON QC:**
Good morning, Ma'am. Now within the written submissions I am around about at page 15 but I can say that if this is satisfactory for your Honours I expect to be finished by the morning adjournment and basically I have four topics to cover. We are on the home straight. One is a further look at the detail of the overall definition of

"manufacture" following the 2002 amendment. The other is looking at the case law meaning of "manufacture" and in particular our own New Zealand leading authorities. The third is the legislative history of the definition and the fourth is to the extent necessary just a recapping of my critique of the reasoning of the Court of Appeal.

So when we adjourned yesterday I had drawn attention to the definition of "manufacture" by contrast with the as enacted definition. The easiest way to access those again is to go to the appellant's bundle of authorities, tab 7 and tab 8.

So just to remind your Honours, the as enacted 1996 definition had Part A for tobacco, and Part B, goods other than tobacco, namely fuels and alcohol, lumped in together with this wording, "A process of production, assembly, packaging or other operation or process involved in the production of the goods", and then if we go to tab 8 and the text of the Amendment Act itself, handier because everything is on the one page, page 4 of the printout. We've got "manufacture" meaning (a), (b) and (c) with a separate definition for each of the Act's excisable goods and, of course, subsection (3) is added two-thirds down that page to flesh out paragraph (c)(ii) by way of defining ancillary process as including one or more of the following processes: filtering the goods, diluting the goods or blending the goods with other goods whether the goods are the same as, similar to or different from the goods, and then there's packaging and labelling as well. So this for alcohol, the legislature has chosen to create a number of potential tax points and activities so that, for example, if you manufacture alcohol and then you, further down the line you manufacture these dreadful alcopop-type things where you're putting in some kind of juice or fizzy drink at each occasion, even though you're diluting the alcohol, so to speak, or blending it, it's going to come within the definition of manufacture.

Now setting the scene in that way, my submissions at page 15 invite a comparative textual analysis comparing our para (b) definition first with (a) and then in turn with (c), and I have done this at paragraph 50 of my submissions. I note I have emphasised words like "manufactured" or "partly manufactured" tobacco, "duty paid" or "non-duty paid" tobacco and I contrast that with (b) because it's an express statement of – that the enumerated dealings will constitute manufacture even if they relate to tobacco which has already been manufactured. The legislature is spelling out in (a) that even already manufactured tobacco can be further manufactured and come within the definition; likewise the fact that duty has already been paid doesn't stop the definition operating.

Now – so that's an express statement of the proposition for which Customs argues under (b), namely that it doesn't matter that it's already been manufactured once and it doesn't matter that duty has already been paid on it once. But I draw that contrast. And the paragraph (c) leg, now as extended, you have (c)(i) which parallels (b) in its use of this operation or process involved in the production of the goods. So, when the definition, the (b), the as an act of (b), that dealt with both commodities was split into two, that form of words was utilised for both (b) and (c) retained and one would think and I submit, retaining whatever meaning, whatever understood meaning it had originally when the definition was enacted in 1996. That, I submit, is fairly basic tools of trade for interpretation. So, it's only when we get to (c)(ii) and the reference to ancillary process which I took you to, that the para (c) definition widens out beyond what that received or understood as an act of meaning for both fuels and alcohol has always been and so again using an expressio unius type approach, there is a marked contrast with (b) and (c) and I've summarised that in paragraph 51.

Now perhaps the other small thing, much as you probably don't want to hear more about ethanol, we've looking at the – I've submitted that the adding of ethanol to motor spirit comes under (c) and the reason I submit that it does is that being in the Duties Table under the alcohol heading to begin with, it's best a fuel in waiting until the point at which it is blended with the motor spriit, where it moves into a specific description as we saw in the Duties Table being motor spirit with ethanol added and that was the one that was taxed at per litre motor spirit rather than per litre. So, it's at the point of (c)(ii) in my submission when – that the manufacturing in relation to the ethanol happens. It's the blending of the ethanol with the motor spirit and suddenly it shifts category. But I would argue to the extent that it matters that the ethanol operation is different from the butane operation because the former comes under (c)(ii). The latter has to be looked at in terms of the (b).

So, that's a textual analysis which the Court of Appeal was not tempted to do. The Court of Appeal preferred just to look at (b) and in essence conclude that it knew what manufacture was when it saw it and adding butane to motor spirit so you've got more motor spirit was manufacture. Don't need the textual analysis of the entire definition, don't need the legislative history, don't need the case law meanings.

Now, I can jump forward because there's quite a lot we've covered within the submissions. There was one other point though. Perhaps one other specific

provision that needs to be covered off in the Customs and Excise Act and that is at section 86. Now, if we go to the Comptroller's bundle, tab 1, no, sorry, it's section 85, page 132 of the printout. Now, this section (1) –

**GLAZEBROOK J:**
Sorry, which section?

**MR HARRISON QC:**
Section 85.

**GLAZEBROOK J:**
Yes, thank you.

**MR HARRISON QC:**
Page 132 of the printout, (1) of 85.

**GLAZEZBROOK J:**
What tab are we on?

**MR HARRISON QC:**
Tab 1 of the – with the main CE Act.

**GLAZEBROOK J:**
Okay, sorry, yes.

**MR HARRISON QC:**
Page 132. Subsection (1) provides it where the licensee holder licensed manufacturing area purchases materials or goods for use and manufacture then when the finished product is entered for home consumption a credit can be claimed in respect of the duty, excise duty or excise equivalent duty paid in respect of the materials or goods, that is to say the ingredients and subsection (3) identifies the amount that can be claimed relating to materials. So, this deals with the scenario where the licensee of the manufacturing area is purchasing the goods itself, ingredients in effect, and those ingredients happen to have duty payable on them. There's a duty credit available in that narrow scenario.

**McGRATH J:**

Where the purchase has been of duty paid goods. Is that what you're saying?

**MR HARRISON QC:**
Yes, when the purchaser –

**ELIAS CJ:**
But the manufacturer –

**MR HARRISON QC:**
Sorry, the manufacturer of something using that ingredient is –

**ELIAS CJ:**
– is using part –

**MR HARRISON QC:**
– purchasing the ingredient duty paid and again the obvious scenario is tobacco or alcohol where you may buy the bulk tobacco which has been imported and will have import duty and when you come to be liable for your own duty on the rolled cigarettes or whatever, you claim the credit for the duty that was paid originally on import.

**WILLIAM YOUNG J:**
Is your problem with this that terminals didn't purchase the imported motor spirits or did sometimes?

**MR HARRISON QC:**
That is a very practical problem. Whether that gets us anywhere in terms of our argument is another thing. What it shows is that the Act does not really contemplate the kind of custodial situation we've got here where we are simply storing the fuel and delivering it at the end of the storage. We are not purchasing the fuel. Again it comes back to the point, this is perfectly legitimate.

**ELIAS CJ:**
But that might affect who's liable if you're doing it on behalf of someone else, but why would it affect the incidence of tax?

**MR HARRISON QC:**

Well, the reason I'm mentioning it is not – I'm trying to deal with it because the Court of Appeal relied on section 85 to say, "Well, we could've arranged our affairs in a way that –

**WILLIAM YOUNG J:**

I think they really relied on it to say that it's not a double tax. The approach they favoured to what happened when butane was mixed with motor spirits, didn't involve double excise duty being charged on the material that was imported.

**MR HARRISON QC:**

Yes, they in effect say that because section 85 was here, it demonstrates that there's a way around the double tax problem so that the Act, in effect, can contemplate a double tax, a sequential tax twice over, to which I submit that in fact the paradigm, and this is in the written submissions, the paradigm that section 85 envisages is quite a narrow one. Not too much emphasis should be placed on section 85 in the context of para (b) fuels, because section 85 is much more likely to have been intended to apply to tobacco and alcohol and on page 17 in footnote 21 I note a little bit of the history of 85. It goes back quite a way but originally appeared in the version of the Customs Act which was dealing with tobacco. So, all I'm submitting is that section 85 can't carry the weight which the Court of Appeal argument sought to place on.

**GLAZEBROOK J:**

Well, would it apply to somebody who purchases motor spirits and adds ethanol?

**MR HARRISON QC:**

No, because there'd be no –

**GLAZEBROOK J:**

Because – well, one would have thought so, wouldn't you?

**MR HARRISON QC:**

Well, there's – but there's no duty paid on ethanol therefore no –

**GLAZEBROOK J:**

Well, there is a duty on motor spirits blended with ethyl alcohol.

**WILLIAM YOUNG J:**

But on the – only on the motor spirits content.

**GLAZEBROOK J:**

Well, I understand that but presumably – well, would you say if you do that you don't pay duty on the motor spirits blended with ethyl alcohol because it's just been a mixture? I'm sorry to get back to ethanol but your argument must be it must apply to ethanol as well, mustn't it? But if all you were doing was blending with ethanol then there is no duty on the motor spirits.

**MR HARRISON QC:**

Well –

**GLAZEBROOK J:**

So there isn't a double taxation or even a sequential taxation on that.

**MR HARRISON QC:**

Can I –

**GLAZEBROOK J:**

But if you accept it's manufacture then wouldn't it come within that portion of the Duties Table that says, "Motor spirits blended with ethyl alcohol"?

**MR HARRISON QC:**

Can I try and respond to that in a two-step way? First of all, if you've got motor spirit and all you're doing is adding ethanol to it, because the ethanol when denatured is free of duty you don't have any issue with the need for a duty credit. There's no duty been paid on the ethanol ingredient. If what you're asking me is what happens if someone has motor spirit with the ethanol added in and has purchased that as an ingredient for further manufacture –

**GLAZEBROOK J:**

Well, I'm just having – I'm just – because what the Duties Table says is fuels blended with ethyl alcohol.

**MR HARRISON QC:**

Yes.

**GLAZEBROOK J:**

So they're presumably assuming that as part of that manufacture Table blending with ethyl alcohol is manufacture and that you do at that stage when you've blended it pay, pay duty on it, not on the ethyl alcohol content but on the motor spirit content.

**MR HARRISON QC:**

If it's manufacture at that point then you will have no duty credit for the ethanol –

**GLAZEBROOK J:**

No, but you would have a duty –

**MR HARRISON QC:**

– and you'd have a –

**GLAZEBROOK J:**

You would have a duty credit –

**MR HARRISON QC:**

– you'd have a duty –

**GLAZEBROOK J:**

– for the motor spirits that you've purchased.

**MR HARRISON QC:**

You'd have a duty credit for the motor spirit which would equate out to the duty already paid.

**GLAZEBROOK J:**

That – well, exactly, so –

**MR HARRISON QC:**

Yes.

**GLAZEBROOK J:**

– you don't have any duty on it but –

**MR HARRISON QC:**

Yes.

**GLAZEBROOK J:**

– nevertheless it would be a sequential step if in fact blending which seems to be suggested by the fact that they're talking about blending there. They don't talk about the previous refining process, because as I understand your proposition is that if you are refining then that is manufacturing and then any ancillary process like blending is part of the manufacturing. That was the argument I understood from yesterday.

**MR HARRISON QC:**

From as far as the original manufacturing process then that is correct.

**GLAZEBROOK J:**

So, would you say that if all you are doing is mixing then you're not manufacturing except to the extent that you come within paragraph (c) for the ethanol content?

**MR HARRISON QC:**

That is the argument.

**GLAZEBROOK J:**

Right.

**MR HARRISON QC:**

And as far as the facts of our case is concerned, as it happens, just with the ethanol, the appellant is the licensee of a manufacturing area and then there is a duty credit available but for the fact that the appellant has not purchased the – either the motor spirit of the ethanol. It's Gull's motor spirit and Gull's ethanol, because of the way it's –

**GLAZEBROOK J:**

So just coming back to this blended with, where is it? I've now lost my page.

**MR HARRISON QC:**

The definition?

**GLAZEBROOK J:**

The blended – the manufacturing definition that has blended with ethyl alcohol. You would say that they don't mean that just the blending is manufacture. They mean that you have to have done something ancillary like – or something further up the chain like refining before blending as manufacture. Just so that I am absolutely clear on the argument, that's all.

**MR HARRISON QC:**

Well obviously you need to identify the operation or process and I would like to think that the entire process would be looked at. If it was up at Marsden Point then everything from the refining down to the fine tuning of the mix, shall we say, to see that it's compliant is the one operation, but we don't have that here. All we have is storage plus dispatch activity and I've conceded that because of its fairly high-tech nature it's an operation.

**McGRATH J:**

Mr Harrison, can I just ask you something that's occurred to me, section 85 which you say is a section largely written around tobacco, what would happen if the cigarettes roller, I think that's the term you used or cigarette manufacturer imported the tobacco and then proceeded to process it, making it into cigarettes. Would that qualify under section 85? In other words there was no purchase involved.

**MR HARRISON QC:**

Not literally. There are problems with section 85 and I don't think I'm telling tales out of school to say that Customs has had to think about how it has interpreted section 85 in the past. It's interpreted it more liberally to allow that kind of scenario in practice, but – and I don't mind if my learned friend says something about this, but we know that there are issues around custom and practice and allowing the duty credit under 85 and what is now, appears to be an unsatisfactory wording.

**GLAZEBROOK J:**

Well, they purchase them if they import them anyway. They purchase them offshore, presumably.

**MR HARRISON QC:**

Well, maybe.

**GLAZEBROOK J:**

Well they certainly purchase them. They don't get them for free.

**MR HARRISON QC:**

So, in any event, my submission is that section –

**GLAZEBROOK J:**

It's excise duty or excise equivalent, so they've purchased them overseas. It's clearly covered by the wording.

**MR HARRISON QC:**

Yes.

**GLAZEBROOK J:**

Because they get the excise duty or the excise equivalent duty. So, if they've purchased them, they purchase them overseas. They get their import, i.e. their excise equivalent duty back.

**MR HARRISON QC:**

Yes.

**GLAZEBROOK J:**

So the only problem is they have to have purchased them and your client's problem is that it didn't purchase them. So there is a double taxation in this case, is there?

**MR HARRISON QC:**

It's only a problem if we lose on the manufacturing issue.

**GLAZEBROOK J:**

No, I understand that, but you say there is a double taxation so that the Customs are trying to collect twice, are they or are they only collecting the excess?

**MR HARRISON QC:**

There's –

**GLAZEBROOK J:**

Only purporting?

**MR HARRISON QC:**

The question is whether – I'm not suggesting –

**GLAZEBROOK J:**

Well, are they purporting to collect the excess in this case or are they trying to collect the lot?

**MR HARRISON QC:**

I'm not suggesting that it is never possible to – for goods on which excise duty has been paid to be so treated that they are deemed to be the subject of further manufacturer caught by the definition and with a section 85 into play. That's not the argument. The argument is that the scheme of the Act in general does not contemplate, readily contemplate the levying of duty twice over. It would need clear language to do that. We have clear language in paras (a) and (c) of the definition of manufacture. In respect of fuels, we don't have that clear language and we have the scheme of the duties – sections 73 and 75 and Parts A and B of the Duties Table all suggesting that there would not, in relation to fuels, be a dutying twice over, which is why I am submitting that the Court of Appeal placed undue weight on section 85 in relation to fuels, because it's perfectly explicable in relation to other types of transaction tobacco and alcohol, in a nutshell. So, I mean, it's one part of the mix of interpretation, but in my submission it can't do the work that the collector says it does.

Now, let's continue on. I want to go to page 20 in the matter of the case law definition of "manufacture" and "production". Now, I'm not going to go through all of these cases, you'll be relieved to hear. I do want to mention the New Zealand authorities and a small selection of the other cases from Australia. You'll find that the cases are drawn from a range of scenarios, some excise duty, some country of origin, some sales tax. Some use the expression of manufacture only. Some use the expression "production" and we're particularly concerned with the expression "production". So, if I can just go through the list on page 20 of this, will assist – I'll identify the ones which production was either solely or an issue or an issue alongside manufacture. So, *International Bottling Co. Ltd v Collector of Customs* [1995] 2 NZLR 579 is production. In the Australian cases *Adams v Rau* (1931) 46 CLR 572 is production. The next case *Federal Commissioner of Taxation v Rochester* (1934) 50 CLR 255 is production. *Federal Commissioner of Taxation v Jax Tyres Pty Ltd* (1984) 58 ALR 138; 5 FCR 257 production and over the page *Cooper Bros Holdings*

*Pty Ltd trading as Triple R Waste Management v Commissioner of* Taxation [2013] AATA 99 is production.

Now, I want to spend a minute or two on the two leading New Zealand cases. The first is at tab 13 of our bundle, *Wellington City Council v Attorney-General* [1990] 2 NZLR 281. Now, this was a case in which the Wellington City Council alleged that a used road sweeper originally manufactured in the United States but renovated in Australia had by reason of the extensive renovations been partly manufactured in Australia which gave an exemption from Customs duty. The expression manufacture or rather partly manufactured in Australia was in, as we can see from page 282, the first sentence of Justice Richardson's judgment appeared in the Customs regulations at the time but there was no definition of manufacture. His Honour discusses the reasoning of the trial Judge, Justice Heron at line 30 and following of that page in, because his Honour approves Justice Heron's reasoning.

I'll just go through it a little at line 35, "Following a review of English and Australian authorities concerned with the meaning of manufacture, the Judge held the term manufacturer or manufacture is not to be construed in a narrow sense," and I rely on this. "The whole process was to be assessed and relevant features might assume more importance in one case than another. Essentially however there must be the creation of an article different from the component parts which came into the process of manufacturer. Degree of difference will vary." I omit words, "in the Judge's view", line 45, "The authorities all required a new product before the test of manufacture was met. The shooting brake case, the shooting brake was demonstrably different."

And then at page 283, line 10, "Notwithstanding Mr Mathieson's careful comprehensive argument, I'm not persuaded that the Judge erred in his approach." And then at line 31, his Honour Justice Richardson said, "In my judgment manufacture in this context necessarily involves significant change in the form or function of sheen." Then there's – often referred to Justice Lockhart and *Jax Tyres*, "The essence of manufacturing implies a change from which a new and different article must emerge having a distinctive character or use." And then Bisson J notes at page 284, line 26, "The word manufactured is not defined." Then there's a reference at line 38 to *Jax Tyres* and also Justice Dixon in another case, line 45, *Jack Zinader* and all about – I won't read all that out but at 285, line 5, his Honour said, "However, in my view, there's been no change of character in the sweeper, it remains a sweeper. A different machine has not emerged."

And then His honour relies on the shooting brake case and Lord Denning, *Coleborn (T) & Sons Ltd v Blond* and that's cited from – and then having cited that his Honour says at line 32, "That accords with my overall impression in this case, that although it is a question of factor and degree nothing altogether different has been created." And Justice Hardie Boys at page 286, notes at line 5 that Justice Heron observed that there's a, it's a good idea to have a consistency approach in the interpretation of revenue and Customs legislation between Australia and New Zealand, and Justice Heron achieved that. Then he says at line 10, "Manufacture is not a term of law or art." A dictionary meaning is given. "It involves, as has been pointed out on a number of occasions when the word has fallen for consideration by the Courts, making one thing out of another, the new being essentially different from that other." And then there's more. There's a reference to the *Jack Zinader* case at line 25, the shooting brake case at line 30, and then his Honour sums up that point.

**ELIAS CJ:**

It does come from a different world, doesn't it? Shooting brake.

**MR HARRISON QC:**

Yes, yes. Now to foreshadow the argument you'll hear from my learned friend not just with this case but with all these cases the argument is are, but this was a case on country of origin. It's distinguishable. It dealt with manufacture and production. It's this, it's that. But my submission is that when I – when one goes through all these authorities, you end up with what I call a case law meaning of both manufacture and production. A received, understood meaning that one could expect the legislature to have readily adopted when enacting the definitions we're concerned with. I'll come to it in even more striking –

**ELIAS CJ:**

Well you are going to take us to the legislative history but if it's, if that approach is contradicted by the legislative history, it couldn't possibly prevail, could it?

**MR HARRISON QC:**

Correct. It's not contradicted by the legislative history and the Court of Appeal didn't suggest it was. They just considered that the legislative history was unhelpful. I respectfully differ. But if we take the proposition, for example, this case is *Wellington City Council*, is to be distinguished because it wasn't on the excise duty liability

definition of manufacture, what we note is that the Court of Appeal doesn't take that approach. The Court of Appeal doesn't say, oh well we're wary about using the decisions from England and Australia which create the case law definition. We won't apply it here or we want to make it plain that we're only adopting that definition in a very restricted way. They've adopted the, what I call the case law definition and they do so, without qualification.

Now the next case, *International Bottling*, which is at tab 14 –

**McGRATH J:**
So the Court of Appeal really decided the case on the basis that the outcome was something different?

**MR HARRISON QC:**
The outcome was?

**McGRATH J:**
The outcome of adding butane to motor spirit was something different, as decided in the line of cases, including the *Wellington City Council* case.

**MR HARRISON QC:**
No, I don't accept, with respect, that they, in fact, did decide it that way. They decided that it was manufactured because there was an increase in volume.

**McGRATH J:**
Yes. That I understand but that was the feature of difference, wasn't it?

**MR HARRISON QC:**
Well –

**McGRATH J:**
Sorry, you may want to come to this later.

**MR HARRISON QC:**
I would prefer to come to it later. Basically they declined to take up the argument that the case law definition of "production", for example, and the overarching definition of "manufacture" applied. They considered that it didn't because production was a term

of wide import, they said that the fact that there was greater volume was the clincher and from memory they said along the lines that, although we don't have to conclude this is not – we don't think this is determinative, the evidence of Mr Koutsaenko shows that the end result motor spirit was different.

**McGRATH J:**
Yes.

**MR HARRISON QC:**
But my response to that and it was the response I made first thing yesterday is that is not the case law text. It is – the test is not are you able to chemically to detect that there has been a change between what my learned friend calls motor spirit A and motor spirit B. That is not the common law, case law test. The case law test is, is it something fundamentally different? It's no longer motor spirit, it's something, another product entirely.

**WILLIAM YOUNG J:**
Let us assume a tanker is filled up with your – with the motor spirits and the butane that's been blended into it. That motor spirit has a volume and certain characteristics of which the butane is an essential part. In other words, without that butane it would be less in volume and it wouldn't have the same characteristics.

**MR HARRISON QC:**
It depends what we mean by characteristics. It –

**WILLIAM YOUNG J:**
Or volatility.

**MR HARRISON QC:**
There are scient – and this is what Mr Koutsaenko says, there are scientifically discernible differences, but they are not differences that lead this to be not motor spirit.

**WILLIAM YOUNG J:**
No, it's still motor spirits. It's just slightly different motor spirits from what it would've otherwise been.

**MR HARRISON QC:**

It's slightly different to the point of the differences being scientifically detectable, because, I mean, let's face it almost anything is scientifically detectable these days. If I sneeze into my coffee cup a scientist will be able to tell I've done that, so that the –

**WILLIAM YOUNG J:**

I don't really want to go into that in great detail. What I really want to do is get onto the next point and that is that as I read the definition it requires us to identify the operations and processes involved in the production of what goes into the tanker.

**MR HARRISON QC:**

One certainly has to identify an operation.

**WILLIAM YOUNG J:**

And processes.

**MR HARRISON QC:**

And it – well, it can be an operation or a process.

**WILLIAM YOUNG J:**

Yes.

**MR HARRISON QC:**

And it has to be involved in the production of, which means inherent in that is that it is bringing about a production of motor spirit.

**WILLIAM YOUNG J:**

Yes, so when you say, let's just say it's a very small tanker, it's got 105 litres of motor spirit, five of which came essentially from the butane, wouldn't a Court, when trying to identify the operations and processes by which that 105 litres of motor spirit was produced, say, well that obviously includes the blending? Because if it wasn't for the blending you'd only have 100 litres or five, if you look at the butane component.

**MR HARRISON QC:**

The blending or what I call the dispatch activity, is the operation.

**WILLIAM YOUNG J:**
Yes.

**MR HARRISON QC:**
The reason is whether there has been production of the motor spirit, given that production is the key concept triggering excise duty and when we look at the trigger concept we have to ask what it is meant to catch and what I'm submitting is that it has to be something that is of a more fundamental nature by way of manufacture than simply simultaneously delivering two products through a piping system into a tanker and if the case law definition of these terms is applied. In my submission it's quite clear the minor, the miniscule changes in chemical composition do not satisfy that test.

Now there's more in terms of the line of cases but I particularly want to deal with *International Bottling*, the next case, because it has ramifications not only for the case law meaning but also the legislative history. In *International Bottling,* tab 14, a case decided under the former 1966 Act, some 26,000 litres of whiskey in raw state disappeared from a boxed storage tank and the question was whether International Bottling had to pay the duty on that. There were three arguments put forward as to why that duty was payable. The first was that what had occurred in relation to the whiskey down to the point when it disappeared was manufacturing. The second was that it was deemed manufacturing under a specific provision dealing with work on a product by a contractor and both those arguments were rejected in favour of International Bottling by Justice Tompkins. But the Collector of Customs succeeded on a third argument which moved away from manufacture to importation and concluded that International Bottling was the importer of the whiskey, liable to pay import duty rather than excise duty on manufacturing.

Now the first question then is at page 285 – sorry, 582, under the heading, "Was the missing whiskey manufactured in the LMA." And the definition, the then definition of "manufacture" includes, line 45, "In relation to any goods specified in the third schedule... any process of production, assembly, packaging, and any other operation or process involved in the production of the goods." So that definition is the same as the definition originally in the 1996 Act, our Act, except that it's stipulated as an inclusive definition, line 45, and when it got into the 1996 Act it became an exhaustive definition.

So the argument for the Collector at page 583, line 4, was that the missing whiskey had been manufactured within the definition because things had happened to it amounting to an other operation or process involved in the production of the whiskey and the things relied on are listed. Collectively they were said to amount to an operation or process. And at line 14 his Honour made a statement which is, I submit, both true and important to bear in mind. "For an operation or process to be within the phrase in the definition, it must be an operation or process that was 'involved in the production' of the whiskey." So that's, it's not merely that you have an operation or process and you have an end item that is dutiable, there has to be this connection between the operation, for example, and the product, which is by way of an activity of production of it.

**ELIAS CJ:**
Why wasn't it an assembly?

**MR HARRISON QC:**
I beg your pardon?

**ELIAS CJ:**
Why wasn't it assembled? I'm just looking at the definition and why isn't production, why doesn't it take its meaning from that association, assembly packaging and so on?

**MR HARRISON QC:**
Well, on the facts as I understanding in this case, none of those, the things that happened which were fairly minor amounted to assembly either. I'm not sure whether your Honour is quarrelling with the result or –

**ELIAS CJ:**
No, I'm just wondering why it – well, I am, I suppose. I'm querying the conclusion it's come to, but however, go on.

**MR HARRISON QC:**
Yes, so in any event, there's been a citation of *Jax Tyres* and Justice Lockhart and this is the key passage on production line 21, "Production which is included in the definition manufacture is a word of wide import, but it still involves the element of

producing something different from the materials from which it was made," not possible to formulate precise definitions, "Do not bear a restricted meaning," and then Justice Tompkins goes on to look at this *Cinzano (UK) Ltd v Customs and Excise Commissioners* [1985] 1 WLR 484 case where two different strengths of vermouth which had been imported into the UK were blended and the House of Lords held that that was not a production in terms of the definition that they were faced with there, blending was not production. And his Honour says at 35, "I'm satisfied that nothing that occurred to this whisky from when it reached the LMA in the liquitainers to when it went missing, amounted to an operation or process involved in the production of the whisky. It had already been produced at the stage when it was manufactured. All that occurred to adjourn, the relevant time was held in various containers tested for quality. Ordinary use of the English word none of these passes and amounted to production of the whisky." And then his Honour refers to the leading English case of *McNicol v Pinch* [1906] 2 KB 358, "The essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made." So, there was no manufacturing.

Now, this case was decided, judgment was delivered in March 1995 so that it had represented a statement of the law in respect of the definition of manufacture under the 1966 Act for over a year when Parliament effectively re-enacted the same form of words, changing the definition from inclusive to exhaustive. So, it's not decisive but that one of the tools I submit we regularly use is to look at what the case law said about a statutory phrase or definition prior to a re-enactment of the area and if the – if a definition is re-enacted without change then that indicates that the legislative is proceeding on that understanding of the law. Effectively that the case law definition governs the interpretation of manufacture.

Now, the Court of Appeal may effectively have said, "Well, there's no evidence that the legislature, the as enacted definition in 1996, having regard to international bottling." I would put it in a different way. It's not that we have to show that it was positively applying *International Bottling*, rather *International Bottling* is the law, the best law we had and they didn't move from that. That is a sufficient factor.

Now, from there on I get into the more of the legislative history and I will deal with that later. There's also a case at tab 26 which I'll deal with just at the moment.

**WILLIAM YOUNG J:**

Just pause. It's probably, aren't their amendments largely a reaction to the *Cinzano* case? I mean they go beyond that.

**MR HARRISON QC:**

The sequence, your Honour, is this, that we had *International Bottling* then a year later we had the 1996 Act with effectively the same definition. Then we had the 2002 Act amending to our current three step –

**WILLIAM YOUNG J:**

Yes.

**MR HARRISON QC:**

– definition and I will take your Honour to some of the first and second reading material to indicate that it appears that the introduction of blending for alcohol was a reaction to being bound by the *Cinzano* approach. But it went through two stages. One was simply, I submit, an acceptance of the validity of the *International Bottling* interpretation and then a few years later –

**GLAZEBROOK J:**

Including actually *Cinzano* since it was referred to in *International Bottling* but probably because it was pre-alcopop era.

**MR HARRISON QC:**

Yes well that comes through from that Parliamentary materials. They say well we actually are now faced with alcoholic ice blocks and suddenly we're concerned about the acceptance of *Cinzano* by *International Bottling* and in 2002 we want to change that but only for alcohol.

**WILLIAM YOUNG J:**

The problem is the steps, is that the excise duty is charged in steps with alcohol, isn't it? That was the gap that was exploited in the *Cinzano* case because –

**MR HARRISON QC:**

I quarrel with the terminology "the gap that was exploited" but until 2002 fuels and alcohols were lumped together. The definition was just the one para (b) definition, there was no (c), and so there was – if we go to the – it won't necessarily help, but we go to the tab 7 definition as at 1996, the second page, page 459, it was more than

just – as well as other operation or process involved in the production of the goods, it did deal with production assembly packaging but none of that assembly or packaging really could apply to fuels. It could apply to packaging of alcohol products but what they did was remove the first part and stick it in (c) but in essence you have the one definition inappropriately serving the two commodities. The fact it was inappropriate was pointed out when they got to the alcopops and the ice blocks. Suddenly they changed it again. But there was an interregnum where, I submit, *International Bottling* was treated by the legislature, at least by default, as applying the, what I call the common law definition to both the 1966 Act and the 1996 Act.

Now page 20 of the submissions, the decisions are identified. They're quite interesting with a read through. There is initially obviously if we went through them from the beginning we'd see that there was quite an aggressive approach when sales tax was introduced in Australia and there was an attempt to ensure, to argue that cooking fish and chips was manufacturing. There was a case involving Court stenographers' transcripts, which they argued all the way to the High Court of Australia, was manufacturing. That a stenographer coming up with a transcript of the evidence at the end of the day was liable. There are various other cases. Then there's *Jax Tyres*, which is an important case, at tab 20. That involved retreading of a tyre. The decision being that the retreaded tyre has not been manufactured or produced because it's not sufficiently different. *Commonwealth of Australia v Genex Corporation Pty Ltd* (1984) 58 ALR 138, 5 FCR 257 is obiter, but on manufacture when you have the process of developing film negatives. So, that process changing the exposed film to developed negatives ready for printing, not manufacture according to the common law meaning, but was manufactured because of a specialised definition and more recently included at tab 22, because although it's an Australian Taxation appeals division case, it's worthwhile mentioning because it's up to date and recent deals, it with production.

The facts of that case were that, if we can perhaps spending a moment on it might be worth doing. The taxpayer collected used oils drained from automotive sumps and so on, which was full of gunk and suspended solids and carbons and by a process of heating it, in one instance at least, heating it and filtration, excess moisture and all the goo and undesirable particles were removed, so you ended up with oil that was usable again and the questions for determination appear under the heading. Following para 11 where you've got the heading of the ruling. Over the page you've got the questions, question and answer, those sufficiently state the facts.

So, the question was, was all this heating, the filtration and so on, part of a manufacture or production of the end product oils and the conclusion was that it was not. The discussion of the terms such as manufactured and produced begins at paragraph 61. There's a reference to a case called *Caltex* which my learned friend has brought to the Court's attention. I don't propose to deal with that other than reply. So, there's *Jax Tyres* on production, discussion that continues on and off to – of all the cases until 79 and 79 the true question is whether the goods inherently have a different utility from that part of which they were made, citing *Caltex* and at 82 the conclusion is the fuel oil is not manufactured or produced.

So that's the case law definition and we can go to each of these cases including *Cinzano* and say, "Oh, well, there's this difference and that difference," but the case law definition simply has become a received meaning in a revenue context for these terms manufacture and production and if the issue here is an interpretation which involves a fair construction as per *Stiassny* in this Court, what is the conscientious taxpayer to do other than look to the received meaning unless the statutory language directs it in a different direction. So, again it's not conclusive, but I submit that the way this terminology has been interpreted, both here and elsewhere, cases like *Cinzano* and also page 22 of my submissions.

Interestingly this little case of *McNicol v Pinch* which is at tab 24 and that's a case where the appellant's took, as I say in 72, the appellant's previously manufactured saccharine. They subjected it to a chemical process which made it much sweeter. Demonstrably, immeasurably so but nonetheless that was held that it was not manufacture because the product was always saccharine, it was saccharine before it was treated and it was saccharine after it was treated and there's a whole lot of passages like that and we say, similarly, this was motor spirit before it had the butane added. It was motor spirit afterwards, it was always motor spirit. So –

**WILLIAM YOUNG J:**
What about the butane?

**MR HARRISON QC:**
The butane was absorbed into the motor spirit.

**WILLIAM YOUNG J:**

But the butane becomes motor spirits.

**MR HARRISON QC:**

But the enquiry is into whether we manufactured motor spirit not whether we manufactured butane. If the enquiry was have we manufactured butane with duty consequences I'd have to concede that we completely transferred the butane such that it's a different product entirely. But the enquiry is whether we manufactured motor spirit by adding 5% or less of butane with only barely measurable changes and no commercial or regulatory change. This must be critical. It's the same product, it can be sold as the same product. From a regulatory point of view it's every bit as safe and compliant as the pre-dispatch motor spirit. And my submission is that if we apply these cases then there can only – and that is the test, there can be only one answer on the facts, that we have not created a new and different product. So turning now, page –

**McGRATH J:**

Can I just ask you, would you accept at page 361 of *McNicol v Pinch*, the observation at the foot of that page, the essence of making or of manufacturing, and it's put in production, is that what is made shall be a different thing from that out of which it is made. Now that's the early cases formulation. Is that still the basic principle?

**MR HARRISON QC:**

Yes, different thing being not being in kind, a difference in kind.

**McGRATH J:**

That seems to have been what Justice Tompkins applied in *International Bottling* at page 583.

**MR HARRISON QC:**

Yes.

**McGRATH J:**

At the foot of the page, he was content in the end to come down to that, and the whiskey was no different from all of these preparatory for packaging type activities so that, in the end, I think, is why he wasn't prepared to say it was a different thing.

**MR HARRISON QC:**

Yes but it's, at the risk of repetition, I just want to be careful, it's not that it is, you can detect, scientifically detect a difference, it has to be a different thing in kind. Different in kind, a different product, that is the essence of manufacture. You take one thing and you create a different thing or product, then you've manufactured that different thing or product.

**ELIAS CJ:**

And remind me why you say that the 5 per cent butane, which has become motor spirits, is not a different thing in that sense?

**WILLIAM YOUNG J:**

You start with two things and you end up with one thing.

**MR HARRISON QC:**

It's a question of the – the nature of the enquiry, as I was saying earlier, we're accused, if you like, of manufacturing motor spirit and the answer is, using my learned friend's terminology, although I don't accept it, is motor spirit, if we're applying this test, is motor spirit A, a different thing from the motor spirit B we ended up with? The answer is, no, it is not, and that has to be inquiry because they want to levy duty at the motor spirit rate on the product we ended up with. We could conduct an inquiry as to whether our losing of the 5 per cent butane in the motor spirit comes within a definition of manufacture, so that we've manufactured the butane, but that is not the issue and won't help the Customs here.

**McGRATH J:**

Mr Harrison, can I just put this to you? If you accept that the general principle is whether there is a different thing from that of which it is made, isn't everything else in this case just a question of fact and degree? There's no more principle to be derived, that no – you can't get anywhere by further fashioning the principle. You just come down to applying it to the particular circumstances?

**MR HARRISON QC:**

Well, there is a little more to it than that, because a subset of the argument is that merely blending two duty paid substances, so you end up with an increase in volume overall, is not to be regarded as manufacture or production. Whether that's because

it's not sufficiently a different thing or whether it is just as a matter of interpretation and legislative history, the way we should treat this definition, one could debate.

**GLAZEBROOK J:**
Well, it could be a different thing, couldn't it? Although I suppose if you say merely blending, you're assuming there's not a chemical reaction that creates a different substance?

**MR HARRISON QC:**
Yes, well, I certainly would want the freedom to run the argument and the alternative both ways and it's a point I'm coming back to when I get to the legislative history, but I suppose I'm reluctant, McGrath J, to treat it as a single unitary test summed up in a single sentence, because there are various announcements including the Court of Appeal in the *Wellington City Council* case describing the test and I'm concerned there's a degree of uncertain – or a margin or uncertainty and just the different thing test because then we're getting to arguing as the Court of Appeal did that the fact that it's detectably different from a scientific point of view is sufficient.

Purposively I submit that it isn't and I've summarised the – because I've summarised the points to emerge from the cases in a whole series of propositions at the end of the submissions, page 25 at the bottom para 82 and I've formulated the tests of the case law meaning over in a series of propositions at page 26. So, there's various ways it can be expressed and I've set those out there, including as I note at the top of page 27 that to determine the issue you need to evaluate the operation or process at a whole, *Adams v Rau* and I would add in the reference to *Wellington City Council* at page 282, line 37, which is where Justice Richardson was approving the High Court Judge in that case.

So, moving on, bearing the time, I want to deal with the section concerning the legislative history which is at page 22 of the written submissions. So, I've already dealt with the points at para 74 and 75 and argued as I do in para 75 that Parliament, as there was no change to the relevant wording, we can treat Parliament as having adopted the *International Bottling* approach. But then when we come to the 2002 amendment, which of course we've been through, we have – what we end up with is that the original definition of manufacturing in relation to fuel and alcohol as interpreted in *International Bottling* stays in after the 2002 amendment being repeated in para (b) that we're concerned with, and also stays in, being repeated in

paragraph (c)(i). If we just go back to the 2002 amendment at tab 8, page 4. So the same words, "Operation or process involved in the production of the goods," are reaffirmed, the same words as were interpreted in *International Bottling.* They're kept unamended in respect of fuel but in respect of alcohol (i) they are kept unamended but then they're expanded out in (ii) to include various activities including blending the goods with other goods whether the same, similar or different from the goods.

Now if we go to the commentary, this is referred to in the middle of paragraph 77 of the submissions, that's at tab 10. It's pretty brief but at the bottom of page – the page is numbered 184-1, there's a note about the substitution of the new definition of "manufacture" and over the page, "The term manufacture is used in the principal Act in a number of contexts." So they're noting that it's used for various things. Then a few lines down, "The current definition of the term distinguishes between the manufacture of tobacco and the manufacture of the two other classes of goods specified in the third schedule, fuels and alcoholic beverages. The new definition distinguishes between all three. "In order to extend the element relating to alcoholic beverages so that it includes ancillary processes." So they were content to keep the established already interpreted definition, save in relation to alcoholic beverages where they extended an element of the definition.

If we go to the first and second reading Ministerial speeches, which are at tab 11, in fact both speeches are at tab 11. If we go to page, the right-hand page 14469, down the bottom the Honourable Jim Anderton, who's introducing the first reading, he says, "This amendment follows the arrival on the New Zealand market of ice blocks containing alcohol. They were not available to me when I bought ice blocks. This legislation will ensure that excise and excise equivalent duties are charged on these products with alcohol content."

**WILLIAM YOUNG J:**
So were they imported as ice blocks?

**MR HARRISON QC:**
I'm not sure whether they were imported as ice blocks or made here. It just says on the New Zealand market not at import.

**WILLIAM YOUNG J:**

I don't quite understand why it's necessary. Wouldn't the duty be payable on the alcohol component anyway?

**MR HARRISON QC:**
I would suspect they'd probably been made locally but I wouldn't – been made locally then the issue arises. But in any –

**WILLIAM YOUNG J:**
Sorry, it may not matter but why would the duty just not be charged on the production of the alcohol that goes into the ice blocks?

**MR HARRISON QC:**
Well they want the increase in value if the –

**WILLIAM YOUNG J:**
Was the duty on these ad valorem? Don't worry about it.

**MR HARRISON QC:**
Yes, I don't know that the – if you dilute the alcohol you're probably, you're still, because of the (ii) definition you're getting greater duty, I think.

So, he says, "This legislation also makes changes to clarify the law in relation to the alcohol industry in New Zealand. The term manufacture is amended by clause 3 to overcome a difficulty that has arisen relating to the blending, dilution, bottling and labelling of wine and spirit beverages subsequent to their production. Although excluded from the current definition, those ancillary processes have been accepted in the past as being part of the manufacturing process. The new definition includes these processes."

And then, just for completeness, the second reading is two pages on. The Honourable Rick Barker at this point, but he makes the same statement at page 403, word for word as far as I can tell, the second paragraph, "This legislation also makes changes to clarify the law." So the same statement is made each time. Now the –

**McGRATH J:**

But doesn't that rather indicate they're taking a precautionary approach? Although it was seen as covered by the term "manufacture", they're a bit concerned it might not cover it and so they're exerting this further definition ancillary.

**MR HARRISON QC:**

With respect, what the Minister says is, "Although excluded from the current definition." They've been accepted in the past as part of manufacture.

**McGRATH J:**

Yes, and just looking at what the law in respect previously was. They're excluded from the current definition but he's not saying that there is a gap in the law. He's saying there's uncertainty in the law.

**MR HARRISON QC:**

It's common ground with my learned friends that this amendment was in response to the *International Bottling* case. We both agree, although it's not referred to, that this is a response to the *International Bottling* approach to the blending issue.

**McGRATH J:**

Yes.

**MR HARRISON QC:**

And what is said here is although excluded from the current definition which must, in my submission, be annulled in the direction of *International Bottling* as being the current ruling interpretation. They then say, "We are amending the former single para (b) definition to deal specifically with this blending issue in relation to alcohol while we don't do so in relation to fuels." But it's with the greatest respect to the Court of Appeal it cannot properly be said, this cannot be dismissed by a statement that Parliament wasn't really concerned with what is now para (b) relating to fuels. They quite plainly were because if we go back to the definition in the Amendment Act at tab 8, they amended (b). They changed the former (b) by removing the references to packaging et cetera, as inapt in relation to fuels. They used the same formula in (b) and (c)(i), a tacit admission that that received meaning was to operate as the primary definition for both fuels and alcohol and then tact on the ancillary process. I submit you could not get a clearer instance of legislative history showing that Parliament has chosen to distinguish between different excisable products and in

particular chosen not to cover off blending in respect of motor spirits. So, we're back to applying the case law definition.

Now that's all I want to say about the legislative history unless there's anything else. That takes me finally to the matter of the Court of Appeal judgment and the way that was reasoned and that means that we need to have both my submissions open at around page 28 and the Court of Appeal judgment, volume 1 of the case, tab 12 in front of us. Now if we take the passage at paragraph 90 of the Court of Appeal judgment, which is at the heart of their reasoning. Along the way to pronouncing, in terms of para 90, the Court of Appeal has focused on para (b) and completely ignored any interpretation arguments that spring from a comparison of (b) with (a) and (c) of the definition. Has rejected or, in any event, failed to take up as potentially applicable and intended by Parliament the case law definition and has rejected the legislative history as unclear and unhelpful. Now I've argued strongly that they were wrong in doing so but what did the Court of Appeal put in place of all those normal aids to interpretation.

Paragraph 90 they say that, "Parliament must have intended... production... to mean something different... from manufacture. Otherwise, the definition would be tautologous." And I, at paragraph 90 of my submissions I critique that because it fails, as I say there, to contemplate that Parliament simply intended production to have its received meaning as per the case law. But I also critique the, criticise the ready assumption that the definition would be tautologous and submit that in fact, and this is the top of page 29, para 91 really, it's a resort to synonym rather than tautology. Manufacture means production qualified by certain other attributes.

**WILLIAM YOUNG J:**
Well it's not an orthodox use of the word "manufacture" because it's been applied to organic material in all items, isn't it?

**MR HARRISON QC:**
Yes. Yes.

**WILLIAM YOUNG J:**
Which would normally be treated as processing rather than manufacture in the sense of making a car.

**MR HARRISON QC:**
It applies to processing in relation to the tobacco for example.

**WILLIAM YOUNG J:**
Yes.

**MR HARRISON QC:**
Yes but my point is that it, in my submission, it's a fallacious approach to say that using production as part of your definition in manufacture is per se tautologous such that you've got to give production a meaning which is different from the received meaning of manufacture. Received meaning being the case law meaning of something different in kind. It simply doesn't follow the – and then the conclusion is that production is intended to be a word of wide import. It has the connotation of making or bringing into being of goods by some operation or process. That is as close as it gets, as far as it gets to any kind of formulation of this key definition, which can trigger as we've seen here, liabilities of millions of dollars and indeed can expose the alleged manufacturer to criminal penalties.

So, why would we adopt the – a definition of that vagueness with respect when we have a perfectly good case law definition which has been applied under the previous legislation and was implicitly improved by the legislature. My submission is that is not reasoning which this Court should uphold and then the conclusion is that production sufficiently wide to include adding and mixing of ingredients where that process has the effect of increasing the overall volume of the resulting goods beyond the level properly regarded as de minimis. I'm not sure where that leaves the fuel company practice of adding so-called performance enhancing additive to motor spirit.

**WILLIAM YOUNG J:**
That's all right isn't it? Well...

**MR HARRISON QC:**
Well, but the –

**WILLIAM YOUNG J:**
Sorry.

**MR HARRISON QC:**

I mean, I don't have any evidence on this, but if you've got performance enhancing additives, one assumes that they, unless it's a false pretence, they are sufficiently distinctive in nature to be detectable in the end motor spirit. So, you've changed it's chemical composition.

**WILLIAM YOUNG J:**
But isn't that just – don't you pay duty on that anyway? Isn't that just on the per litre basis?

**MR HARRISON QC:**
No, it's not paid, duty is not paid on the combination of the two all over again.

**WILLIAM YOUNG J:**
I see.

**MR HARRISON QC:**
It's duty paid motor spirit to which an additive is paid. Mr Bodger says we do this for BP. There's two quotes, sizeable tanks, I can show you in the foreground of the photos. We don't know what it is, because BP says it's commercially sensitive, it's their secret recipe, fair enough.

**WILLIAM YOUNG J:**
What are the volumes?

**MR HARRISON QC:**
I don't think there's evidence as to the volume. It's – basically it's something that is – the mix is commanded up by the BP tanker driver who arrives to uplift the BP fuel. At the end of the day, we have – if we take the total dispatch activity, look at it for what it is from beginning to end, a storage of imported motor spirit and other products, on behalf of the owner, and then a delivery in accordance with the owner's requirements of two, here two duty paid products but a high tech mechanical process. We're a long way away, in my submission, from any traditional or even common sense concept of manufacture, such as should be a trigger point. Not for initial excise duty imposition, but a second lot of imposition of duty all over again and really on that note I don't think I can take it much further unless your Honours have questions for me.

**ELIAS CJ:**

Thank you Mr Harrison. We're bang on the adjournment time so we'll take the adjournment now, thank you.

**COURT ADJOURNS: 11.29 AM**
**COURT RESUMES: 11.51 AM**

**MR HARRISON QC:**
As your Honours please, my learned friend has graciously allowed me just to mention one thing alone. Mr Sorrell is concerned that I may have not expressed clearly the answer to the, what happened to the butane question and in essence it is there in chapter and verse in the affidavit of Mr Koutsaenko at tab 32, paragraph 11. It is a passage I read out before. The butane is still separately identifiable in the petrol, if the petrol is analysed, but the three litres of butane became part of the petrol.

**ELIAS CJ:**
But that's chemically, isn't it?

**MR HARRISON QC:**
Yes.

**ELIAS CJ:**
I mean legally it becomes motor spirits, doesn't it?

**MR HARRISON QC:**
Yes, and that's my point, and it's whether the operation or process by which it has ended up as the 103 litres or –

**ELIAS CJ:**
Yes, the three litres.

**MR HARRISON QC:**
The three, yes, the three plus, whether that is within the definition.

**ELIAS CJ:**
Yes, thank you.

**MR PALMER:**

Thank you Ma'am. The hearing of this was originally scheduled in May and I just wanted to record the Crown's sympathies for the death of Justice Chambers which occasioned this hearing to be deferred.

**ELIAS CJ:**
Thank you.

**MR PALMER:**
Your Honours, I have prepared a road map which is simply three pages that takes you through the points that I think that are key that I propose to make and with your permission I'll ask the registrar to distribute that.

**ELIAS CJ:**
Yes, thank you.

**MR PALMER:**
And you'll see from this that there are essentially four sets of points that I propose to make. Firstly, about the law of excise; secondly, about the facts; thirdly, applying the law to the facts; and then fourthly, some rebuttal, if it is necessary, of Terminals' arguments. So the first point about the law of excise really relates to interpretive method. My friend has made some bold claims, I think, about interpretive method and has suggested that there maybe a fundamental divergence of approach between us on this. I must admit I'm unclear about whether that is so. In response to your Honour Justice McGrath, my friend seemed to accept that arguing for a fair construction should be undertaken with reference to context and if that is so, that I am unclear about the difference between that and ordinary principles of purposive interpretation. However, also at times orally and at some points in the submissions, my friend says that taxing statutes, at least taxing statutes without an anti-avoidance provision, are in something of a special position and that he favours a non-expansive approach being applied to them. If that is what his argument is, then there is a fundamental divergence of approach. The comptroller says that the whole point of the *Stiassny* case of this Court was to say that the approach in interpreting revenue statutes is "much the same" as for other statutes.

It points out that in relation to tax statutes, often the only clue as to purpose is text, but the essential point here is that it's the same approach, a purposive interpretation. So, if that is an argument that my friend is making, I just wanted to set out the

comptroller's approach to it and this is reflected as you'll see in 1.1 in the comptroller's submissions at paragraphs 26 to 28.

The second point and I'm afraid I'm going to spend some time on this, is what the Act does. Excise duty is levied on all excisable goods consumed in New Zealand either manufactured here or imported and it's quite important to the proper resolution of this case that the Customs and Excise Act is properly understood. My friends when they filed their bundle did not even include the Act which I thought was surprising, so the comptroller's bundle includes it and I would like to take your Honours through significant aspects of the legislative framework. This goes to the regime, the scheme and purpose if you like of the Customs and Excise regime.

So, if I could ask you to turn to the comptroller's bundle of authorities, volume 1, tab 1. On page 1 we see, just looking through the headings of the parts, we see Part 2 is about Customs places and Customs controlled areas. Part 3 is about arrival and departure of goods. 3(a), use of information. Part 4 is an important part. This deals with entry and accounting for goods. Parts 5 and 6 are less important, 6 when it says duties, that's import duties which is not what we're talking about here. Part 7 is important, excise and Excise-equivalent Duties as is Part 8, assessment and recovery of duty and it might be worth just noting a couple of aspects in Part 9 and 10 as well. Rulings, there is a rulings regime here as there is with the income tax regime and Part 10, penalties.

So, if we can then turn to, we've already seen the definition of manufacture. I don't particularly want to take your Honours back to that. So, we can turn over that and turn instead to section 10 on page 38. So, it's important to the excise regime that there are such things as Customs controlled areas and if we see from section 10 that no area shall be used for (a), the manufacture of goods specified in Part A, or if you turn down to (d), the disembarkation or processing of persons. (e), the processing of craft and other activities (b) and (c), unless that area is licensed as a Customs controlled area. So you have to have a licence in order to manufacture things or (b), to keep them or secure imported or excisable goods you have to have a licence. So this Customs controlled area is really created as a neutral zone into which imported goods arrive and in which manufactured goods are manufactured.

I should just note, but I won't take you there, that 10(f) says, "Any other prescribed purpose," and regulation 6 do prescribe a couple of other purposes in relation to this.

**ELIAS CJ:**

Sorry, you're referring to regulations?

**MR PALMER:**

Yes, they are in another part of the bundle.

**ELIAS CJ:**

Yes, and you don't need to take us there?

**MR PALMER:**

No, I just wanted to give you the reference.

**ELIAS CJ:**

Yes, thank you.

**MR PALMER:**

So section 11, an application for an area to be licensed may be made, shall contain such particulars as prescribed. These are also prescribed by regulations and they are prescribed by regulations which specify explicitly what activities the licensee undertakes in the licensed area. Those are also in the regulations. And that's in volume 2 at tab 6. And of course the interesting aspect of that is that what is specified as activities the licensee undertakes informs the conditions put on the scope of the licence which is granted in section 6 – sorry, section 12. Section 12 is about the grant of a licence and subsection (2), a licence maybe granted subject to terms and conditions. And you'll see in subsection (3), the licence shall specify the area in respect of which it's granted, the applicant, the purpose or purposes for which the area is licensed. So if you're licensing it for manufacture, you need to say that. We can then skip forward a bit to section 20.

**ELIAS CJ:**

Are you going to – I mean is it a matter you're going to come to, to tell us how this is licensed?

**MR PALMER:**

Well the problem here, your Honour, is that this is not licensed.

**ELIAS CJ:**

I see.

**MR PALMER:**

Not licensed for manufacture.

**ELIAS CJ:**

Yes.

**MR PALMER:**

There is a license for the denaturing of ethanol and there is a license for the addition, or the blending, of ethanol with motor spirit, but, and this is really the problem here in this case, there is no license for the manufacturing of motor spirit by the addition of butane to it.

**ELIAS CJ:**

Sorry, it's licensed for blending with ethanol?

**MR PALMER:**

Yes.

**ELIAS CJ:**

Yes.

**MR PALMER:**

But it's not licensed for blending of butane.

**WILLIAM YOUNG J:**

Is the license in the material?

**MR PALMER:**

I believe it is Your Honour and my learned junior will find that reference for you. Part 3 deals with arrival departures of goods persons and craft and section 20 sets up each part by making clear that once goods are imported they are subject to the control of Customs from the time of importation until they time they're lawfully removed for home consumption or exportation.

**ELIAS CJ:**

Sorry, what are you referring to?

**MR PALMER:**

21(a) Your Honour. So goods are subject to the control of Customs where the goods have been imported from the time of importation until the time the goods are lawfully removed for home consumption, and that's a concept that we'll come to several times in this Act.

**McGRATH J:**

Is it defined?

**MR PALMER:**

It's not defined. I should just check that.

**WILLIAM YOUNG J:**

It's not in section 2 anyway.

**MR PALMER:**

It's not defined. It is however a relatively constant element of the excise regime throughout New Zealand's history and before that and the idea is that when you think about imported goods, they're imported into the Customs controlled area. They are then removed for home consumption. It's at that point that they're removed for home consumption the excise bites. So –

**GLAZEBROOK J:**

And that presumably includes removed for home consumption including manufacture, because you have that section 85 that you pay excise duty at the time it comes out, it then goes into manufacture then you pay excise duty again but with a credit or is that not right?

**MR PALMER:**

No, and I'll explain that. In essence what – you can remove it either for home consumption or for further manufacture or for export. So, - but we'll come to that.

**GLAZEBROOK J:**
Well, you probably do, because then you need to explain what section 85 is.

**MR PALMER:**
So goods are subject to the control of Customs when they've been imported until the time they're removed for home consumption or exported and then if you turn over to other aspects of this, but the relevant one for our purpose is over the page at E, paragraph E, so goods are subject to the control of Customs where the goods are manufactured in a Customs controlled area, from the time of manufacture until they're lawfully removed for home consumption.

**WILLIAM YOUNG J:**
Home means New Zealand?

**MR PALMER:**
Yes.

**GLAZEBROOK J:**
And it means other than in a Customs controlled area, so other than manufactured and I think actually the answer to my question is if you're removing it just for manufacture you probably don't pay duty, but if you're removing it for some home consumption and some other, then you pay duty and then get your –

**MR PALMER:**
Yes, yes, Ma'am, and if you look at subsection (2) on the facing page, we see that goods that are removed from one Customs controlled area to another are not removed for home consumption. So, if you're engaging and manufacturing something in several different places around New Zealand you can, as long as each one of them is licensed, as a Customs controlled area, you can move them from to another and they don't, the excise regime doesn't start to bite.

**ELIAS CJ:**
So you don't actually need a definition of home consumption because all of the provisions of section 20, the context makes it quite clear that it is in use in New Zealand as opposed to export or manufacture?

**MR PALMER:**
Yes, yes.

**McGRATH J:**
Does the bonded warehouse concept come into that too? I note it's a term that's perhaps out of date now.

**MR PALMER:**
I suspect it is, Your Honour. I will just confirm that during the lunch adjournment, but my understanding is that now it's really the Customs controlled area that takes that place, the bonded warehouse.

And really with subsection (2) and the movement between Customs controlled areas, we see that that really moves the tax collection point. So, it's not until you're removing a good for home consumption that the tax collection point actually starts, which makes sense, because that is when you have a good that you're able to sell as the manufacturer and that's the point of which you might be able to earn money for selling it and when you do that then you'll be able to pay the excise.

So, over the page, the next subparts of this part deal with arrival of craft into New Zealand and arrival of persons and departure of persons, departure of craft. We don't need to spend too long on them although just perhaps noting section 24, craft to arrive at nominated Customs places only and Customs places defined, so when you're bringing things in on your ship, you're only allowed to arrive at a nominated Customs place. So, this is all consistent with the control that Customs has over imported goods and over manufactured excisable goods.

We can then flip forward to section 39, which is further on than you think because of the other subsections, it's page 79. I'm sorry, 80. Part 4 deals with the entry and accounting for goods and the first part deals with importation. So section 39 is about the entry of imported goods. Goods that are imported or are to be imported must be entered by the importer. So this is the concept of entry. The importer enters the goods for the purposes of excise duty. And the importer, if it's an importer, can enter the goods for home consumption or for removal to a manufacturing area. And I'll just ask you note this reference, we'll come to it later, but if you note here, section 86(3), that makes clear that those two things can occur.

Now section 40 enables the Governor-General in Council to make regulations prescribing when an entry is deemed to be made for the purposes of the Act. I am reluctant to inform you that regulations have been made, reluctant only because it's a lot of paperwork. Unfortunately they didn't make it into the material, into the bundle, so I do –

**ELIAS CJ:**
What is relevant in them?

**MR PALMER:**
Not a lot Your Honour and I can just give you the reference. Regulation 21 simply specifies the time at which entry must be made for imported goods, 20 working days after importation. So it just makes, it's more detailed, it's more explicit about when these things have to be done by.

**WILLIAM YOUNG J:**
So in the motor spirits example, when is the entry made?

**MR PALMER:**
Under regulation 21 it would be within 20 days of importation.

**WILLIAM YOUNG J:**
Which is when it's unloaded from the ship?

**MR PALMER:**
Yes Sir. The other regulation to note is regulation 24 and this says that entry is deemed to be passed by Customs, so the importer makes the entry and then Customs passes the entry. The entry is deemed to be passed when a certain thing happens in Customs computer system, if it's for home consumption, and when a particular order is made, if it's for further manufacture. So it's regulation 21 and 24 are the key ones. I can hand them up if you want it but you –

**ELIAS CJ:**
Well perhaps we should have them. I hope we don't have to look at them but we might need to. Are those the only two regulations –

**MR PALMER:**
That I'm going to refer to, yes.

**ELIAS CJ:**
Yes. How thick are the regulations?

**MR PALMER:**
Thick enough.

**ELIAS CJ:**
Yes. That's all right, yes, we'll take those in, thank you.

**MR PALMER:**
If I could perhaps ask you to turn forward to section 41 and this is an important section. It relates to imported goods still. "Goods in respect of which entry has been made," so the importer makes the entry, "and passed," so passed by Customs, "Goods in respect of which entry has been made and passed must forthwith be dealt with in accordance with the entry and with the provisions of the Act." So this is an important clue as to Parliament's intent about what happens when you make an entry as an importer. If you enter them for home consumption, you should be sending them off for home consumption, for consumption within New Zealand. If you enter them for further manufacture, then you should be sending them to a Customs controlled area for further manufacture. And I'll just suggest to you to make a note next to this section that the equivalent section for domestically manufactured goods is section 70(3).

So if we turn over the page to section 46 we see that no goods subject to the control of Customs shall be placed in a craft or other conveyance for transportation until entry has been made. So, this reinforces the need to make an entry, otherwise you can't do anything with them and section 47, goods that are subject to the control of Customs must not be delivered or removed from a Customs controlled area except as provided by the Act.

And then I'm going to suggest that we flip forward to page 103. Page 103 is where Part 6 starts, duties, remember this is import duties, so not what we're concerned with, but the reason I'm mentioning it is to then ask you to go to section 65 at

page 109. So section 65 empowers the making of regulations prescribing goods that area deemed to be the produce or manufacture of any country and prescribing the conditions to be fulfilled before goods are deemed to be the produce or manufacture of any country. What this means is that with respect to import duties and with respect particularly to country of origin issues, the definition of manufacturing is as defined in regulations and the regulations include some examples that are very close to the definition that my friend is arguing for. So perhaps it's just worth turning to it –

**ELIAS CJ:**
Sorry, so what do you take from that for the purposes of this case?

**MR PALMER:**
I take from that that different definitions are available.

**ELIAS CJ:**
Yes.

**MR PALMER:**
They have been employed directly for the reason that –

**ELIAS CJ:**
But in regulations?

**MR PALMER:**
– my friend argues for.

**ELIAS CJ:**
Yes.

**MR PALMER:**
In a different context.

**ELIAS CJ:**
Yes.

**MR PALMER:**

This definition, the definition of manufacture in the Act is not that definition and perhaps just to illustrate that.

**ELIAS CJ:**
Yes.

**MR PALMER:**
If we go to volume 2 of the Comptroller's materials at tab 6, we have the regulations and at page 40 we have the definition of manufacture. Manufacture means the creation of an article essentially different from the matters or substances that go into the article. Now, if that was a definition that Parliament had wanted to use, it could've used it. It's pretty easy to word. That's the definition that my friend is arguing for.

I should point out that that is just the definition that applies to Australia and there are other definitions of the manufacturing later in the regulations that refer to – that apply for other countries, when you're determining country of origin.

**ELIAS CJ:**
I'm sorry, I've lost the place here. Tell me again, where is it?

**MR PALMER:**
I'm sorry. So, tab 6, page 40.

**ELIAS CJ:**
I see, yes, thank you.

**MR PALMER:**
So we'll move quickly on from import duties. Over the page to Part 7, excise and Excise-equivalent Duties. At section 68 we have no person –

**ELIAS CJ:**
Sorry, can I just understand –

**MR PALMER:**
Yes.

**ELIAS CJ:**

– so the legislation in respect of these duties, empowers the definition to be set by regulations?

**MR PALMER:**

That's correct.

**ELIAS CJ:**

Under Part 6?

**MR PALMER:**

Under Part 6.

**ELIAS CJ:**

But there isn't an equivalent.

**MR PALMER:**

No.

**ELIAS CJ:**

Is that what you're going to say in Part 7?

**MR PALMER:**

There's no equivalent in other parts –

**ELIAS CJ:**

Regulation making, yes.

**MR PALMER:**

– in order to set the definition of manufacture. There's no equivalent.

**ELIAS CJ:**

Yes.

**MR PALMER:**

But I guess my point would more generally, is that if Parliament had meant the definition of "manufacture" in the Act relevant here, to be what my friend contends it is, it could've said so very explicitly and there is an example of where it has been said by regulation.

**ELIAS CJ:**
But in subordinate legislation?

**MR PALMER:**
Yes, absolutely.

**McGRATH J:**
It is a statutory stipulation of the definition for the purposes of excised duty but for other concepts it may be made under subordinate legislation.

**MR PALMER:**
I think it's probably slightly different. I think I would say that for the purpose of import duty, there is a specific power to make specific definitions for the rest of the Act is a definition of section 2.

**ELIAS CJ:**
And what's the policy behind that. That's comity with different trading partners, is it that flexibility?

**MR PALMER:**
Yes, and when you're negotiating agreements with other countries –

**ELIAS CJ:**
Yes.

**MR PALMER:**
– you negotiate definitions and so you would want to have definitions for each country, which are specified in regulations. You don't want to go back and amend the Act every time.

**ELIAS CJ:**
Yes.

**MR PALMER:**
But it does indicate that the country of origin import duty context is different from the excise context.

**ELIAS CJ:**
Yes, I understand.

**MR PALMER:**
So section 68, no person may manufacture goods specified in Part A of the Table, the horrible Table that we were taken to yesterday, except in a manufacturing area that is licensed under this Act. So, this is – it supports section 10, if you like. You cannot manufacture goods unless you're doing it in a license manufacture area. Where at section 10 was saying no area shall be used for manufacture unless it's licensed, so it's supporting that.

You then have in 68(a)(b) and (c), some exemptions of different excisable goods for personal use and then 69, a section which deems goods to have been manufactured in certain circumstances. Interestingly there are reference to bio-fuel blends here. I'd have to say that those references were inserted in 2012, so a little after the period that we're talking about or most of the period that we're talking about, but clearly in the amendments Parliament was anticipating that blending would be covered.

Section 70 is important, so this is the equivalent section for entry of excisable goods. So, we've seen the requirement to enter in section 39 we've seen the requirement to enter imported goods. Section 70 is the requirement to enter domestically-manufactured goods, excisable goods.

**ELIAS CJ:**
I'm sorry to go back again, but is the submission –

**MR PALMER:**
Yes.

**ELIAS CJ:**
– you make, do you make a submission that it is permissible to interpret the provision as it stood at the relevant time, by reference to this 2012 amendment?

**MR PALMER:**

No.

**ELIAS CJ:**

No.

**MR PALMER:**

No, I'm not going that far, no.

**ELIAS CJ:**

All right, thank you.

**MR PALMER:**

It's an interesting context.

**ELIAS CJ:**

Yes, just a bit of colour.

**MR PALMER:**

Continuation of Parliamentary content. So, section 70 is the requirement to enter excisable goods, the analogue to section 39. All goods that are specified in Part A of the Table must on removal from the Customs controlled area be entered and 1(a), goods required to be entered must be entered by the licensee of the Customs controlled area or in certain circumstances by the owner of the goods. Remember we haven't got a licensee so this is what should've applied but not what did apply.

**ELIAS CJ:**

Well, it's licensed for some purposes but not for manufacture?

**MR PALMER:**

That's correct.

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

Do you rely on the fact in Part A of the Duties Table motor spirit mixed with ethanol is specifically indicated as a good, therefore one assumes under section 68 you have to have a licensed manufacturing area in respect of it and it also assumes that blending itself is, at least with ethanol, and I think you probably do say well what's the difference with butane –

**MR PALMER:**
We do.

**GLAZEBROOK J:**
It's not explicitly mentioned because, in fact, butane is part of motor spirits anyway so it's not a totally new substance like ethanol is.

**MR PALMER:**
That's correct. Yes, we do say that.

**GLAZEBROOK J:**
Is that the argument?

**MR PALMER:**
Yes, Your Honour, we do. If I can ask you then to turn over the page to section 70(3), "Goods in respect of which entry has been made and passed," so made by the manufacturer and passed by Customs, "must forthwith be dealt with in accordance with the entry and with the provisions of this Act," so this is the analogue to the section we looked at before.

**GLAZEBROOK J:**
Section 39, is that right, from memory?

**MR PALMER:**
Yes, I think that's correct. Yes. Sorry, section 41.

**GLAZEBROOK J:**
Thank you.

**MR PALMER:**

And there's an equivalent regulation making power in terms of regulations for excisable goods here as well. I won't take you to those regulations. Section 72, "For the purposes of this Act *[sic]*, goods are deemed to be removed for home consumption when the goods are physically removed from a Customs controlled area otherwise," then certain circumstances. So when you physically remove something from a Customs controlled area, you are deemed to have removed it for home consumption unless 72(a), you've moved it to another Customs controlled area or you have temporarily removed it or you removed it for export.

Section 73, "In respect of all goods that are manufactured in a manufacturing area and that are specified in Part A of the... Table, there must be levied, collected and paid excise duties," so this is the imposition of excise duty. This is the taxing provision. The Comptroller's job under this is to collect it.

Over the page to section 74, "Subject to subsection (2)," which we're not concerned with, "where goods specified in Part A... are manufactured in an area that is not licensed... the provisions of this Part –"

**GLAZEBROOK J:**
I've lost you.

**MR PALMER:**
Sorry, section 74(1), so where you've manufactured something in an area that's not licensed, this Part applies as if it was. So you don't escape the excise regime just because you don't get the license that you should've got.

Section 75, so remember section 73 imposed excise duty on goods, on manufactured goods. Section 75 imposes Excise-equivalent duty on imported goods. "Excise-equivalent duty at the appropriate rate specified in Part B of the... Table must be levied, collected and paid on all goods specified."

Now I was debating with myself whether to take Your Honours back to the Table and I think actually I should, just briefly, to make it a little clearer. So this is Terminal's bundle of authorities, at tab 1. I think it is easier to understand this Table in the context that we've just been through of the Act. The Table is divided into Part A for goods manufactured in New Zealand, B, imported goods. If we turn to fuels on page 4, Part A, if we see in the left-hand side, further the way down, 99.75, fuels, the

first one is regular motor spirit, so motor spirit with a research octane less than 95, so regular grade fuel. Underneath that there are two sorts of that sort of fuel you can have. You can have regular fuel blended with ethanol or you can have everything else.

**ELIAS CJ:**
Which might be not blended?

**MR PALMER:**
Which would not be blended with ethanol, but it could be blended with butane, for example.

**ELIAS CJ:**
And it mightn't be blended?

**MR PALMER:**
It might not be, it might be. If it is motor spirit with a research octane of less than 95 and it's not blended with ethanol, then it's other.

**ELIAS CJ:**
Yes.

**MR PALMER:**
And then –

**ELIAS CJ:**
But isn't it important to your argument that it's both unblended other than with ethanol and not blended? Yes.

**MR PALMER:**
I'm not sure whether it's important to the argument, but it's certainly part of it, yes, and we see in the unit column that the excise duty is levied on a different basis for those two goods for other, so for most motor spirit it's levied on a per litre basis and the rate of duty at this time was 48.5 cents a litre. For motor spirit blended with ethanol, per litre of motor spirit, so this is what makes the ethanol part of that blend duty free.

It is not, there is no third definition that splits motor spirit blended with butane, into something which is – on which excises duty is levied per litre of motor spirit, because that would make no sense. I just note on the next page, at the top of the next page, page 5, fuels are continued. We have liquefied petroleum gas, this is butane and we see that excise duty is levied on butane per litre at the rate of 10.4 cents. Then the imported equivalent goods are treated in the same way. So, in Part B on page 9 we have motor spirit at the top of that page, motor spirit with a research octane less than 95 regular grade blended with ethanol or other, the same rates of duty.

Now, in the written submission Terminals has argued that there are two regimes in place here. That there is the imported regime and the manufactured regime, so Part A and Part B and as a matter of form that is correct, but as a matter of substance they mirror each other and the intent is clearly that whether you manufacture or you import an excisable good, it is subject to excise duty at the tax collection point. There is no third option.

Now, I just want to deal briefly with what happens when you import something for further manufacture and if I could ask you to turn to tab 3, my friend did take you to this as well.

**GLAZEBROOK J:**
Tab 3 of yours?

**MR PALMER:**
Tab 3 of the same volume. So this is the tariff and you have numbers on the left-hand side. These numbers are picked up as references in the Table, in Parts A and B, but here we have motor spirit imported in bulk for manufacture in a licensed manufacturing area, so this is next to –

**GLAZEBROOK J:**
What number sorry?

**MR PALMER:**
Next to number 2710.12.10, so the shaded thing on page 4.

**McGRATH J:**
There's no page numbers are there?

**MR PALMER:**

Page numbers are at the top left-hand corner, chapter 27/4.

**GLAZEBROOK J:**

Right, yes.

**MR PALMER:**

So 27/4 and then we go down the left-hand column 2710.12.10, shaded, and opposite that we have motor spirit imported in bulk for manufacture in a licensed manufacturing area, and you look across to tariff, free of duty, and that's because when you're going to do something more with something, with motor spirit, when you're going to further manufacture it, you import it into a Customs controlled area, you don't pay duty, or you don't have to pay duty then. You pay duty when it leaves the Customs controlled area, once it's been domestically manufactured. So that's all I think we need to do with those Tables for the moment.

We're back at section 75 of the Act and we see at subsection – we've got there because of section 75(1). Section 75(3), "Excise-equivalent duty becomes payable (a) when entry for home consumption is passed," so that's passed by Customs or, "If become entry for home consumption the goods are dealt with in breach of the Act." So this entry for home consumption is an important element, it's a trigger point for payment of excise.

We then have the status of excise duty at section 76 on the next page. "Excise duty is a debt due to the Crown and is recoverable by action at the suit of the Chief Executive... in relation to goods specified in Part A... immediately on removal of the goods for home consumption." So it's payable and it becomes a debt immediately on removal for home consumption, 76(1)(a). I'll just suggest that you make a reference here, the equivalent to this section for Excise-equivalent duty on imported goods is section 86.

**WILLIAM YOUNG J:**

Just looking at 76(2)(b), that could provide a mechanism by which section 85 could be invoked I take it? If it is the case that Terminals can't fit itself within the provisions of section 85 presumably Gull can?

**MR PALMER:**

I think there is an argument to that effect. I wouldn't want to commit the Comptroller to a position on that at the moment.

**GLAZEBROOK J:**

Can you just answer the question that I asked, Mr Harrison I don't think I got an answer, is there effectively double taxation in this particular case or is the Comptroller only getting the difference between the butane and the motor spirit rate.

**MR PALMER:**

I will cover that. The answer is that the Comptroller is only making assessment on the value of the butane.

**GLAZEBROOK J:**

So it's the excess over the butane rate that's already been paid.

**MR PALMER:**

Yes.

**GLAZEBROOK J:**

Is that, that's the answer?

**MR PALMER:**

Yes.

**GLAZEBROOK J:**

Which is what I thought.

**MR PALMER:**

Yes.

**ELIAS CJ:**

So it's double –

**GLAZEBROOK J:**

So they're essentially –

**ELIAS CJ:**

– double excess. The excess that is the butane and the difference between the duty paid on the butane –

**MR PALMER:**

Yes.

**ELIAS CJ:**

– and the motor spirits.

**WILLIAM YOUNG J:**

So it's 38 cents a litre of butane.

**MR PALMER:**

That's correct, yes, and this is partly because the records were difficult to work through retrospectively and so Terminal suggested that if we're going to do this, we actually do it on the basis of how much butane was added in, so, yes. I will take you to that.

**ELIAS CJ:**

You'll take us to that?

**MR PALMER:**

Yes.

**ELIAS CJ:**

Because that's not the way the legislation sets it up.

**MR PALMER:**

No.

**ELIAS CJ:**

Are you saying that was an easier way to do it?

**MR PALMER:**

Yes.

**ELIAS CJ:**

And it amounts to the same thing?

**MR PALMER:**

Yes.

**ELIAS CJ:**

Yes.

**MR PALMER:**

But it is worth noting section 76(2) as to who the excise duty is owed by and noting also (3), the liability is joint and several and (4), it must be paid within the time required under the Act and there's a regulation about that. Then we have a number of provisions relating to the dreaded Table, which I think we can skip over except perhaps pausing on section 76E on page 121. Judicial notice must be taken of the Table, unfortunately.

**ELIAS CJ:**

It's those dashes that get me. What's the significance of 2, 3 or 4? But actually Justice Glazebrook has explained that it's a primitive form of setting out.

**MR PALMER:**

I would agree with that, Your Honour. If we could probably move forward to section 79A just noting that there is a power to alter, rates at excise duty, under that section and it's –

**ELIAS CJ:**

I'm sorry, just thinking about that, judicial notice, that's a very strange provision. Maybe it's common in this area, what do you say it means?

**MR PALMER:**

Well, I think what it means is that is the Table used to be a schedule to the Act.

**ELIAS CJ:**

It doesn't need to be approved. Yes, yes.

**MR PALMER:**

And now they're putting it, effectively subsidiary or subordinate legislation as wanting the Courts to treating that as the law.

**GLAZEBROOK J:**

And why wouldn't you if it was subordinate legislation.

**MR PALMER:**

Yes.

**ELIAS CJ:**

Although judicial notice doesn't necessarily entail acceptance, does it?

**MR PALMER:**

No.

**ELIAS CJ:**

It's a way of getting something before the Court. Anyway, no doubt it's not important. We're certainly not going to re-write it.

**MR PALMER:**

No. Your Honour, section 79A, the other thing I'll just note about this is the little note at the bottom of it.

**ELIAS CJ:**

79A.

**MR PALMER:**

So 79A on page 127.

**GLAZEBROOK J:**

I'm just trying to find it. Okay, AA, I see, all right.

**ELIAS CJ:**

AA comes before A.

**GLAZEBROOK J:**
Okay.

**MR PALMER:**
Yes, I don't know why.

**GLAZEBROOK J:**
No, thank you.

**MR PALMER:**
So page 127, how to alter excise duty and we just note that this is inserted in 2008 by the Land Transport Management Amendment Act and that is because there is a direct linkage between this Act and the Land Transport Management Amendment Act which has not had any airtime in the Court so far, but which will have a little later on.

Section 82 over the page, duty is payable on goods consumed before removal as if the goods had been removed. So, if they disappear in the Customs controlled area, duties payable and another miscellaneous section, subsection (2) over the page, so this is the top of page 130. No liability for duty arises when excisable goods manufactured within a manufacturing area are used in the manufacturing process carried on, so you can use it as an input –

**ELIAS CJ:**
Sorry, where is this?

**MR PALMER:**
Top of page 130, subsection (2), right at the top.

**ELIAS CJ:**
Yes.

**MR PALMER:**
So you can use an excisable good in the process of manufacturing another excisable good. You don't pay duty twice. You pay duty on a finished good. Section 85 is the duty credit section. My learned friend is arguing that this section, somehow you need to read this section differently in respect to fuel and other excisable goods. There's

simply no foundation for that submission in my submission. This is the provision which allows you to claim credits. If you haven't done that transferring of goods around different Customs controlled areas then you can use this mechanism to claim credits.

**McGRATH J:**
If you incur the excise duty.

**MR PALMER:**
If you incur excise duty.

**GLAZEBROOK J:**
Do you have to have incurred the excise duty or is it just like a GST excise duty –

**MR PALMER:**
Yes I think, I was just about to say that, I think you're right Your Honour. So if you purchase the goods, that is excise duty, the price will be expected to include excise duty, you can then ask for a credit for that because you've effectively borne the cost of the duty. Part 8, assessment and recovery of duty and remember Part 8 deals with all sorts of duty so, and you get that from section 2, the definition of "duty". So this deals with excise duty, it deals with Excise-equivalent duty, it deals with other duties as well, import duty. The first one deals with imported goods. So Excise-equivalent duty on all goods imported constitutes debt to the Crown, this is the equivalent to section 76, owed by the importer and if more than one jointly and severally becomes due and payable when they've been entered and passed for home consumption or entered for removal to a manufacturing area. "(4) Such debt is recoverable by action at the suit of the Chief Executive," so the same provision as earlier. "The right to recover duty... is not affected by the fact that no proper assessment of duty has been made," this is (5)(c).

And interestingly (5)(c), so it's 86(5)(c), it's not exactly the same but it is similar to the Tax Administration Act section, section 114 of the Tax Administration Act, which provides such strength against the judicial review as this Court has found in *Tannadyce* in a tax context. I'm not making the argument that applies here but it is

getting towards that through this subsection and through another section which I'll come to later.

Section 87, additional duty. So where any duty is unpaid then in the same way as under the tax legislation, there is penalties, additional duties, 5% and then 2% per month and there's a discretion to remit or refund. Section 87, section 88, "An entry for goods... is deemed to be an assessment by the importer or licensee...of the duty." So it sets up the challenge procedure under the Customs Appeal Authority in the same way the Taxation Appeals Authority, you'd have an assessment. That is then, you then have potential action by the Chief Executive –

**WILLIAM YOUNG J:**
So there's been no assessment here, has there?

**MR PALMER:**
There's been no assessment here for the reason that the judicial review proceeding –

**WILLIAM YOUNG J:**
Yes, yes.

**MR PALMER:**
– was issued before the assessment was going to be made so there was, you'll see in the chronology, a significant time between the audit report which was published in draft which flagged the intention to assess and then the issuing of proceedings which occurred at the same point that that audit report was finalised.

**WILLIAM YOUNG J:**
There's no time limit, or is there a time limit?

**MR PALMER:**
On?

**WILLIAM YOUNG J:**
On going back because, I mean, this goes back to 2003 now.

**MR PALMER:**

There's no time limit in this context, no.

**McGRATH J:**

In this Act, as in income tax legislation?

**MR PALMER:**

No, there is, so if we look at section 88(2), because of peculiar circumstances of this case, what's happening here is under section 88(2), the Chief Executive has reasonable cause to suspect that duty payable has not, on goods, by a person who has not made an entry in respect to the goods. The Chief Executive may assess at such amount as the Chief Executive thinks proper. So, there is no assessment. If there had been previous assessments, then I think you would have time bar issues, but there are no previous assessments here, so you have 88(2).

**GLAZEBROOK J:**

So where's the time bar?

**MR PALMER:**

Good question. I will come back to that. Section 91 over the page, so this is the section 91 and 92 remind us of section 109 of the Tax Administration Act, so we have in 91, every assessment made by the Chief Executive should be taken to be correct and duty should be payable accordingly unless on appeal a different amount is determined. So, that's similar to section 109B of the Tax Administration Act and then in section 92 we have the obligation to pay and right to receive and recover duty and not suspended by any appeal or proceedings, 92(1) and if the appellant is successful and that's properly paid. So, this is similar to section 109A of the Tax Administration Act. Again I'm not arguing that judicial review is as unavailable as it is with respect to the Tax Administration Act but I would suggest that the sections move us in that direction.

**GLAZEBROOK J:**

But that's not really before us though, is it?

**MR PALMER:**

It's not.

**GLAZEBROOK J:**
Everybody has accepted judicial review and it would be insane at this stage to say, sorry, we're not deciding anything you've got to go back and access and then go to the Customs Appeal Authority.

**MR PALMER:**
Well I'll leave the judgments of sanity to the Court but I agree with you.

**GLAZEBROOK J:**
Well, no, you're not even putting that before us really are you?

**MR PALMER:**
I'm just mentioning it on the way through in case there's any comments along these lines.

The next section we can move forward to is section 119 on page 160. This is Part 9 the rulings regime and we have the ability for a person to make an application for a Customs ruling and section 119 which then has an effect on section 122 of being conclusive evidence that goods have a particular excise classification, that's section 112(1)(b).

**ELIAS CJ:**
So remind me, what was judicially reviewed here, was it...

**WILLIAM YOUNG J:**
The intention to assess.

**ELIAS CJ:**
The intention to assess.

**MR PALMER:**
Yes, there was an interim injunction granted against the assessment.

**GLAZEBROOK J:**

Right, when did the rulings material come into this section? It looks as though it's been there some time, doesn't it? Was it around the same time that it was introduced for income tax I'm assuming or was it earlier?

**MR PALMER:**

My understanding is that it was in the – well this is the 1996, I can't give you the answer to it right now but I'll come back to that. I can tell you that the time limits that someone was asking about before are in section 94, which we've just skipped over, so someone was asking about the time bar section –

**WILLIAM YOUNG J:**

Sorry, what section?

**MR PALMER:**

Section 94. So, we do have a rulings regime. If there was uncertainty about something a ruling could be applied for and then there's no liability when that has been relied on in section 127.

**GLAZEBROOK J:**

Because they say compare the 1966 Act so it might've been much earlier than income tax rulings and it makes some sense, I suppose, in this context.

**MR PALMER:**

It would.

**GLAZEBROOK J:**

Wanting to know where you are and if you're importing something.

**MR PALMER:**

Yes, I suppose, I would've thought it would make sense in the tax context as well.

**GLAZEBROOK J:**

It's just more complicated there and you needed it more –

**ELIAS CJ:**

There doesn't seem to be an appeal provision in respect of rulings, is that right?

**MR PALMER:**

Section 126?

**ELIAS CJ:**

Yes, thank you.

**MR PALMER:**

And thankfully that completes our tour of the Customs and Excise Act.

**ELIAS CJ:**

All right, well that's probably a convenient place to take the adjournment. What are you wanting to do after the adjournment, Mr Palmer?

**MR PALMER:**

Everything after 1.2 on my outline.

**ELIAS CJ:**

Yes, thank you.

**MR PALMER:**

This is one of the reasons I gave you a reasonably detailed outline in case I don't get through it.

**ELIAS CJ:**

Yes, although I imagine going through the Act probably took longer than one would imagine the rest would take. All right, thank you we'll take the adjournment now.

**COURT ADJOURNS: 12.56 PM**

**COURT RESUMES: 2.15 PM**

**MR PALMER:**

Thank you Ma'am. I wonder whether I might just ask a question about time. I expect that I will be able to finish in order for my friend to have a right of reply but that rather does depend slightly on how much interaction there is with the Court.

**ELIAS CJ:**

Well why don't you wait and see?

**MR PALMER:**
Okay.

**ELIAS CJ:**
We're warned.

**MR PALMER:**
The first point I wanted to make following up on one of the questions this morning was about bonded warehouses. Effectively the Customs controlled area is the modern version –

**McGRATH J:**
The new term.

**MR PALMER:**
– of the bonded warehouse.

**McGRATH J:**
Thank you.

**MR PALMER:**
Secondly, I should perhaps offer a plea of mitigation in relation to the complexity of the Table. I am told that the dashes in the Table are required for harmonisation internationally by the Kyoto Convention on Harmonisation and Simplification of Customs Procedures 1973. Thirdly, I wanted to reply to the question about the license and in relation to that I'm going to ask the Court to turn to the case on appeal volume 3, the red one, and at page 313 we have a series of documents which I'll just note for you. The first one is the application for the Customs controlled area licence. This is in relation to the denaturing of ethanol in 2003. So if you look over the page, at 314, the bottom of the page, there's the date, 2003. At the top of the page, question 6, the specific activity to be undertaken is the storage of ethanol and denaturing of ethanol. So that's the application.

On the next page is the license itself, 315, and we see that this is a Customs controlled area license for the purposes of the manufacture of goods and that it is granted subject to the terms, conditions and restrictions set out in the procedure statement. Which then takes us to the next page which is the procedure

statement. So this is the terms of the license as that first page 316 makes clear and so on 317 we have general information, ethanol is received for storage and denaturing with premium and regular grade gasoline and then on 318 we have the denaturing operations described. Ethanol denatured with 1% by volume, regular grade gasoline or premium grade gasoline. So that is how the licenses, what licenses look like.

**GLAZEBROOK J:**
So that means they don't actually have a license for mixing it or blending it with motor spirit or...

**MR PALMER:**
The easiest way of answering that, Your Honour, is to actually hand up a two page chronology, if I can ask permission to do that.

**ELIAS CJ:**
Yes.

**MR PALMER:**
Because there's a distinct absence of relevant facts in this case we had not thought it would necessarily be required to have a chronology and omitted to file one but this is the two pages of the facts that are relevant. We see on page 1 the documents that we've just seen on the 7th of October and the 10th of October, so that is the manufacturing license to denature ethanol 2003. Then in November 2007 we see the procedure statement updated, and you'll see that the references in the evidence are all on the right-hand side. I'm not going to take you to anything but the references are there. The procedure statement updated in 2007 was because, I believe, there was a change of name of the licensee and I think that's when you had the introduction of the change and arrangements between Gull and Terminals and then further down on the 23rd of September 2008 you see, "Terminals applies for a revised procedure statement to cover manufacture of bio fuels." So that is the blending of ethanol with motor spirit and you see the draft revised licence procedure statement on the 30th of October and it's issued 19th of May on the next page, 2009. That chronology also sets out the timing of the issuing of the audit report and when the claim was brought, in case that's of relevance.

So unless there are any other questions about that can I suggest that we return to my road map.

**WILLIAM YOUNG J:**
Sorry, just to add, did the later licenses actually refer to the blending of ethanol with motor spirits?

**MR PALMER:**
Yes.

**WILLIAM YOUNG J:**
Because the initial one is simply the denaturing, the mixing with the ethanol of a small amount of motor spirit.

**MR PALMER:**
Yes.

**GLAZEBROOK J:**
It's not clear to me exactly where they say that. It must be – because it's quite a much longer procedure statement, presumably because there's more procedures that need to be done.

**MR PALMER:**
Perhaps I can give Your Honours another reference without taking you to it. Mr Williamson's second affidavit, which is in the case of appeal volume 2 at tab 25, covers what happened in some detail with regard to licenses at paragraphs 23 to 43, but essentially you have the denaturing license in 2003 and the ethanol blending license in 2009. No license for butane.

**GLAZEBROOK J:**
It's actually probably of no moment, but it's interesting just to know how that fitted together.

**MR PALMER:**
Yes, so perhaps I could suggest that we turn to my road map and I'm at 1.3 –

**ELIAS CJ:**

Sorry, when does this potential liability go back to?

**MR PALMER:**

2002.

**ELIAS CJ:**

2002, thank you.

**MR PALMER:**

And we'll see how that works as well. There are only about three other things of significance that I want to take the Court to, but one of them will cover that. March 2003 my friend says they go back in terms of potential –

**McGRATH J:**

Not potential liability?

**MR PALMER:**

In terms of potential liability for the addition of butane in March 2003. So 1.3 of the road map the comptroller says that excise is a specific tax, it's an indirect tax and it's a tax on consumption. Now, my learned friend yesterday fundamentally disagreed with excise being a tax on consumption and I'd have to say that that submission flies in the face of all economic concepts of taxation. It is a tax on consumption by virtue of being a tax on commodities. That's the historical and inherent nature of excise duty.

**WILLIAM YOUNG J:**

Well, it becomes payable when the goods are released to consumption.

**MR PALMER:**

Exactly, and I'll just refer you without taking you to the comptroller's bundle of authorities, volume 2, tab 33 in the Palgrave Dictionary of Economics when one looks up the definition of excise duties it refers you to consumption taxes and indirect taxes. Consumption taxes are levied either directly or indirectly and this was perhaps another confusion which I can try to clear up. Excise duty is an indirect tax. You don't gather the excise duty from the consumer directly. You gather it from an

intermediate point from the person who manufactures or imports it. So it's indirect in that sense.

And it's specific, and this is covered, as the outline says, in the Comptroller's submissions as paragraphs 40 to 44, but it's specific and its characterisation as specific, as a specific tax, is important for this case because a specific tax is levelled at an absolute amount per unit of a commodity, and that's what you'll find at those submissions at paragraph 43. An absolute amount per unit of commodity. This is a feature of the excise regime and an indicator of Parliament's purpose because it's only by imposing duty with respect to specific units, so in respect of fuel per litre, that tax excise duty can be hypothecated, so – hypothecation I'll come to in a minute, but this is perhaps why my friend was so keen to avoid the implications of a hypothecated consumption tax, because that tells us how important it is to Parliament that excise is levied on the basis of volume.

So this takes us to 1.4. Excise duties on fuel are fully hypothecated, and I have to mention also that along with the excise duty on fuel there are also ACC and petroleum fuel monitoring levies, PFM. This is explained in the submissions, and they are levied on the same basis. But they are hypothecated which means that their proceeds are explicitly earmarked to address the consequences of the consumption of the goods, and that happens through the Land Transport Management regime, and this is the other significant thing that I do want to take the Court to. We won't spend a lot of time on it but I think it's important to appreciate how it works.

So if I can ask you to turn to volume 1 of the Comptroller's bundle of authorities, and to tab 3. This is the Land Transport Management Act 2003, and on page 10 –

**GLAZEBROOK J:**
Is this subsequent, isn't it?

**MR PALMER:**
This –

**GLAZEBROOK J:**
But was – I suppose my question is it is subsequent but was it tied in at the time or was there a previous regime?

**MR PALMER:**

At the – well, 2003 is actually the time that we're concerned with.

**GLAZEBROOK J:**

No, no, sorry, in terms of interpreting the 2002 change is what I'm asking about it, subsequent to that.

**MR PALMER:**

Yes.

**GLAZEBROOK J:**

And then it's just asking you what the – well, maybe you'll come to what the significance you say is for interpreting that 2002…

**MR PALMER:**

Yes, I will come to the 2002 amendments. The point of this material is that this is the current version but previous versions have done the same general thing.

**GLAZEBROOK J:**

That's what I was asking, yes.

**MR PALMER:**

Yes. They've done the same general thing which is to use the revenue gathered from excise duty for the maintenance of roads and the effects on the consumption of motor spirit. It does it more completely now so you can see it more easily, but the same effect –

**GLAZEBROOK J:**

But that was the question –

**MR PALMER:**

– existed before.

**GLAZEBROOK J:**

– so you say that the previous regime, a similar regime, is, it's legitimate to use that in terms of interpreting what Parliament was thinking in 2002?

**MR PALMER:**
Yes.

**GLAZEBROOK J:**
And earlier obviously because…

**MR PALMER:**
Yes, and I can refer Your Honour, if you want to take a reference, footnote 60 of the Comptroller's submissions reference the previous regime.

**GLAZEBROOK J:**
But for our purposes it's sort of similar but just not quite as comprehensive?

**MR PALMER:**
Yes, correct.

**GLAZEBROOK J:**
Is that…

**MR PALMER:**
Yes. So, just quickly with this Act, section 3 provides the purpose, purpose of the Act to contribute to the aim of achieving affordable integrated safe responsive and sustainable Land Transport system. Section 6 on the next page, we don't have all the sections, thankfully, but section 6 on the next page, the definition of Land Transport revenue means, paragraph B, "All excise duty and Excise-equivalent duty on motor spirits."

Moving on into the next page, section 9, so section 9 is of the hypothecation section. It starts with a hypothecation in relation to pleasure craft at 9(1), so this is an example, "The Crown may, without further appropriation in this subsection," so this is a permanent legislative Authority, "Incur expenses or capital expenditure in a financial year, up to an amount that is not more than an excise duty and Excise-equivalent duty estimated to have been paid by users of pleasure craft for," over the page, "For example search and rescue activities."

Then the one that's more relevant to us, subsection (3) the same formulation the Crown may incur expenses equal to the Land Transport revenue, which we know includes excise duty for that financial year less the amounts for the year they referred to in subsections (1) and (2) above for activities and combinations of activities approved under section 20.

So then if we go forward and see section 10(3), this is the creation of the National Land Transport fund. That fund must be used to pay for certain activities and certain activities only and then forward to section 19 the New Zealand Transport Agency, the NZTA, which is called the Agency in this statute may include activities so that the National Land Transport programme contributes to the aim and the outcomes specified in the Government policy statement. Forward to 20, this is the approval of activities and in section 20(5) when approving an activity, the Agency must be satisfied that the expenditure on the programme will not exceed the lesser of to things, which is essentially a funding limit based on excise duty and Excise-equivalent duty and other things, for these activities.

If we look forward to section 41 we see that the regime recognises that if you're not using excisable goods in a way which affects the roads, for example, in relation to fuel, then you can get a refund.

**ELIAS CJ:**
Farms.

**MR PALMER:**
Yes.

**WILLIAM YOUNG J:**
Or buying lawns or...

**MR PALMER:**
Or agricultural activities. So, we have persons using any motor spirits are entitled to a refund in respect of excise duty, Excise-equivalent duty, charged from the consideration for the supply of motor spirits to the extent that the amount of duty that is refunded forms part of the consideration and to the extent specified in the regulations. Perhaps I can give you a reference to the regulations.

**ELIAS CJ:**

Well, I'm just really wondering whether on this, it is useful, but you could probably just tell us what's in it and give us the references.

**MR PALMER:**

Yes, I'll just give you the reference and tell you what it is. It's volume 2, tab 9, the comptroller's bundle of authorities at tab 9 and essentially it sets out what you get refunds for and you get refunds for activities that do not involve the use of roads.

**GLAZEBROOK J:**

Do you know if that was in the previous regime or not?

**MR PALMER:**

We will determine that. I think it –

**GLAZEBROOK J:**

Again that's just in order to see how it relates to?

**MR PALMER:**

Yes. I think it was but I will check. So, what we have from this regime and I won't take you to the Government policy statements and the National Land Transport programme which are in the bundles which just reinforce it, but what you have here is an edifice which is based on Parliament levying since 1927, some form of targeted excise duty on domestic motor spirit consumption measured in specific volumes for the expressed purpose of paying for transport infrastructure and the proceeds are explicitly earmarked to address the consequences of consumption and that's 1.4A of the road map. 1.4B tells us that excise is levied on a defined per litre basis. This is important in the regime, it's very specific and this is why, again I won't refer to it. This is why there was a definition of motor spirit in the Act. There's no definition. It's just the reference is section 2(2) paragraph D of the Act. I'll read it. It says, "The term per litre in respect of the levying of excise duty for all excise items under the heading fuels in Part A of the Table means the quantity of product expressed in litres at a temperature of 15 degrees centigrade." So, it's a very precise definition of volume, which is important for this reason, because volume of motor spirit is as proxy for consumption on the road at the easiest tax collection point. That's what we're saying at 1.4B. 1.4C as I've mentioned, some purchasers whose consumption does not impact on the road system can receive refunds.

So these are all contextual features that are significant for illuminating the purpose of the Act and they are reflected in the text of the Act. So, taking seriously this Court's words in Fonterra to have regard to the context and particularly the statutory context.

**ELIAS CJ:**
That's what the statute says.

**MR PALMER:**
Yes, that's why we're referring to it and we say that the context and the statutory context all supports the comptroller's view of the purpose of the statute here. So, at 1.6, the excise on fuel is a tax on a good, not on his production technique. Parliament's purpose is clear and this is the purpose that the Court of Appeal accepted, it's along the lines that was submitted to it by the comptroller, but their words are that Parliament's purpose is to levy and collect excise duty calculated by volume on all motor spirit imported or manufactured locally.

So now we can move to the facts. I think the facts are clear enough to the Court already from what has gone on before. Terminals imports or buys from an imported motor spirit A. This is the comptroller's terminology. So, motor spirit A is what is imported and per Terminals adds to that up to 5% butane. It sells the resulting product which we call motor spirit B to Gull which sells it to consumers.

Now it is important, and this is the second of three things that I'd like to take the Court back to, it is important to understand the nature of motor spirits. So Mr Koutsaenko's affidavit at volume 2 of the case on appeal, at tab 32, that's the yellow one at tab 32, "Petrol comprises" – and this is paragraph 8 – "Petrol comprises many ingredients, primarily being a mix of many liquid hydrocarbons. Butane is one of the ingredients. Petrol cannot be characterised by one specific formula because it is a mix. Petrol is a blend or mix of a number of chemicals," and I think this is proposition that my friend initially resisted but then took the Court to here. "It is not a new substance produced as a result of chemical reaction. This is why it's possible to define its content." So that's petrol.

The next paragraph, "Butane". "Butane is not petrol. Taken alone it could not be or represent petrol, does not fit within the definition of petrol. It is a gas produced usually as a product of or in conjunction with oil or natural gas production. It is

reduced to liquid form for transportation and storage." There's an example of the difference that – the different boiling points. Paragraph 11, "Petrol is not butane." And this goes to the point that there was some interchange with my friend about. When asked, "What happens to the butane?" I think he accepted that the butane becomes part of the petrol which must be correct, but this sets it out. "If three litres of butane is added to 100 litres of petrol, the result is 103 litres approximately of petrol. The butane is still separately identifiable in a scientific sense, as my friend said. If the petrol was analysed as described above the three litres of butane become part of the petrol." So there's approximately three more litres than there was before.

And then 12, 13 and 14 go through the differences that happens to motor spirit B once butane has been added to it. So paragraph 12, "It is not the same petrol as it was before the mixing. Its vapour pressure will have changed. I would also expect there to be a slight change in the percentage volume evaporated at 70 degrees," and that's an expression – that's relevant to the petrol specifications, but in the complicated system, computer controlled system that they've got here for adding butane into petrol, the evidence says that different amounts of butane are added depending on the season and depending on the region to which the petrol is going to be delivered because it affects vaporisation, and if it's hotter in some seasons or in some regions then you want petrol with different characteristics. So it's not just different characteristics in a scientific sense. It's different characteristics in the usability of the petrol. Paragraph 13, "It changes the octane level." Indeed I think if you import petrol with insufficient octane you can add butane to it to get it up to spec. "And there'll be other changes such as density." So that's – are there any questions about that?

**ELIAS CJ:**

Well, what do you take from that?

**MR PALMER:**

I take from it that at paragraph – the outline 2.2, there is more motor spirit B than there is motor spirit A.

**ELIAS CJ:**

Yes.

**MR PALMER:**

Neither motor spirit A nor butane are the same as motor spirit B. They have different characteristics. Neither motor spirit A nor butane still exists in any usable form after they've been blended. You can get them back out if you conduct a further scientific process, just sort of like trying to get water out of dough, I think. You may not be able to get them exactly out, but you can try, but they're not the same thing and while my friend says in his submissions that they are, that motor spirit A and motor spirit B are essentially the same. This is a key pointed difference. The Comptroller says they're not the same.

**McGRATH J:**

A, B and C would apply at any instance of blending substances, wouldn't it?

**MR PALMER:**

Of butane?

**McGRATH J:**

Well, of anything, of vermouth if you want, if you like.

**MR PALMER:**

It might well do.

**McGRATH J:**

Yes.

**ELIAS J:**

How important is this though to your argument? In other words, do you accept the authorities that say it has to be different?

**MR PALMER:**

No, but even if it is, even if those authorities are correct –

**ELIAS CJ:**

So it's a fall back point?

**MR PALMER:**

– we say it's different, yes.

**ELIAS CJ:**
I see.

**MR PALMER:**
So, if we turn over the page of the road map to 2.3, we get – this is, I'm not going to go through this in a lot of detail, but when excise duty on motor spirit A is entered this is what happens. It's entered by the importer, it's passed by Customs for home consumption on the basis of its volume on removal from the CCA at Tauranga, after its importation and in all those sections of the authorities that we've already been through and I don't propose to take you back to it unless you want to.

Excise duty on the butane is paid on removal from its CCA before the butane is sold to Terminals of Gull and then the problem is here that no further excise duty is paid on the full final volume of motor spirit B before it is consumed. This avoids duty of 38 cents in the litre on some 24 million litres of butane and in order to understand this I'm going to take you to one other document. So this is the case on appeal volume 4, blue one.

**ELIAS CJ:**
When you say on 24 million litres of butane, do you mean on 24 million litres of new motor spirits? No.

**MR PALMER:**
Of butane.

**ELIAS CJ:**
Of butane.

**MR PALMER:**
This is the volume of butane that was added over this period.

**ELIAS CJ:**
No, I understand that, I'm just thinking about its characterisation, but it's not really butane anymore, but –

**GLAZEBROOK J:**
It's the additional.

**MR PALMER:**
The additional motor spirit.

**GLAZEBROOK J:**
Additional motor spirit, yes.

**MR PALMER:**
Yes, that's correct, yes. So, the blue volume at tab 37, page 507. Now this document is the audit report by Customs.

**GLAZEBROOK J:**
Sorry, I lost the tab.

**MR PALMER:**
It's page 507.

**GLAZEBROOK J:**
Thank you very much.

**MR PALMER:**
So this is the audit report, when this came to the attention of Customs because BP, a competitor, had complained that Gull was getting unfair advantage, Customs conducted an audit and this is the report of the audit and at page 507 we have the way in which Customs identified how much excise duty is payable. So, we see at 507 the heading two-thirds of the way down, excise liability for unaccounted removals, audit team initially identified adequate records were not held by Terminals prior to 2009. Terminals suggested that butane purchase records could be used in lieu of removal records. Preliminary assessment and then what we get over the page is see the bold assessment 1, so we have butane, the excise duty on the butane that was added 9.4 million minus something that was already paid, part payment, takes you to 9 million. Then the assessment 2 is the additional duty or the penalty that was envisaged to be assessed. I should make clear that the Comptroller has an open mind as to whether any of the additional duty maybe remitted but if it were not remitted this is the amount that, at the time of this audit was conducted, this is the

amount that the additional penalty duty would be, 13.4 million, that has more than doubled since then.

Over the page, assessments 3 and 4 we don't need to worry about so much. They are essentially because there was a change in the excise rates and so it was easier to issue another assessment so this is the mopping up of that. Assessments have not been issued, of course, because of the injunction.

If we then go to page 538 you'll see a Table. A Table, if you turn the thing sideways, "Excise due on butane/motor spirit blends." We have the month in the first column. The second column is the litres of butane that were added each month. The third column is the amount of excise that was paid on that butane at the 10 cents a litre rate. The fourth column is the amount that was actually due, given that it's now motor spirit, and then the fifth column is the difference. If you look forward all those months to page 541 you get a total difference, you should see it there. So that's how it was calculated so it's not – I think that answers some of the Court's questions earlier.

Now back to the road map, I think that my friend conceded yesterday, I maybe wrong about this, but I think he conceded that excise duty would be levied on the full final volume of motor spirit if it was manufactured domestically or if it was imported and the Comptroller says there is no third way here.

I should also note, before we leave the facts, that on a number of occasions in Terminal's submissions, my friend refers to dispatch activity. In the Comptroller's submission that expression minimises the process of blending butane with motor spirit and allows Terminals to try to confuse manufacture with removal, which it is not. What we have here is what he admitted, what my friend admitted was a sophisticated system. It has dedicated pumping and pipeline systems regulated by computer controlled valves. It is a manufacturing system in the Comptroller's submissions.

I should just note at this point, Your Honours, that this morning I handed up what I thought were regulations. I'm told that what was actually handed up were not regulations but were rules and so in the break we gave to the Registrar the regulations so you've now got two different things there. I'm not going to take you to

them but I discovered yesterday that there are rules for the entry of excise duty and excise-equivalent duty and you now have that.

**McGRATH J:**
Which we need not be concerned with.

**MR PALMER:**
You need not be concerned about, it's simply consistent with the legislative regime we've already seen and in essence it affirms that when goods are imported they must be entered for either home consumption or for export or for removal to a Customs controlled area. So section 3, applying the law to the facts, we have the definition of "manufacture" there at 3.1. Terminals concedes in its submissions that blending butane into motor spirit A is, "an operation or process". So we're not arguing about that. They also agree in their submissions that the goods that we are concerned about here is motor spirit B. So the simple issue here is whether the words "involved in the production of the goods" what they mean. Whether blending butane into motor spirit A is involved in the production of motor spirit B. In some ways you just simply have to state it like that in order to see the answer. But the Comptroller goes through in the Comptroller's submissions, her view of the plain meaning of the words, of what context, of the legislative history and of the purpose, which is encapsulated in the road map at paragraphs 3.2 to 3.5. So the plain meaning of the words supports the Comptroller because in terms of dictionary definition "production" means creation or bringing into existence of motor spirit B. This is a consistent theme of the dictionary definitions and we would say that motor spirit B is created or brought into existence.

The context supports the Comptroller because the point of imposing excise duty on fuel, on the basis of volume, is to apply the revenue to the purposes associated with its consumption, as we've just been through.

3.4, the legislative history supports the Comptroller in three respects. It consistently emphasises the levying of excise on fuel on the basis of volume. It also emphasises that manufactured products maybe further manufactured and when you look at the definitions that my friend took you to, in particular the change in 2002, you see that the definitions of manufacture change over time in response to changing technologies and that occurs because of the way in which excise duty is levied at the last point in the production process. So you recall that we talked this morning about

how when you are levying excise duty you do it at the point where the manufacturer can get revenue for it, for the good, and therefore be able to pay the duty. So that's the last point in the production process. The last point in the production process is different for different sorts of goods.

So fuel and alcohol are different and you can see why you might well want to specify in some detail, especially after the *International Bottling* case in 2002, why you might want to specify that the manufacture or alcohol occurs after you've done all that packaging because it's only then when you've got a product that you're able to sell, alcopops or whatever. Fuel is not like that. You don't need to change the definition of "fuel" in the same way. So, and this perhaps foreshadows our response to my friend's argument about the 2002 legislative history amendments. We say that Parliament changing the definition of "manufacture" in relation to alcohol, and re-enacting the definition of "fuel" substantively unchanged, which my friend agrees with, cannot be the basis for implying that the definition of "manufacture" in respect of fuel has been changed. You cannot – it is not safe to draw an implication on the definition of "manufacture" with respect to alcohol for the definition of "manufacture" in respect of fuel. 3.5 –

**ELIAS CJ:**
Sorry, is that simply saying that motor spirits can be augmented by these sort of processes but stays as motor spirit, so you don't need to think of different ways of packaging and providing different products to consumers from that?

**MR PALMER:**
Once it's a motor spirit you can buy and sell it.

**ELIAS CJ:**
Yes.

**MR PALMER:**
Yes.

**McGRATH J:**
Is this really your criticism of the comparison argument?

**MR PALMER:**

It's both the response to the comparison argument and to the 2002 amendment argument which is essentially a comparison argument as well, yes. So the purpose, this is 3.5, Parliament's purpose in the Court of Appeal's words which we adopt gratefully supports the Comptroller's argument to levy and collect excise duty calculated by volume on all motor spirit imported or manufactured locally and 3.6 –

**ELIAS CJ:**
But that's at the point when it's released for home consumption.

**MR PALMER:**
Home consumption and we say that motor spirit B, in this case, supplied to consumers, used on the roads, is an excisable good on which excise duty is levied by Parliament on its total volume per litre. So that's the Comptroller's case and that really leaves me with some arguments about why Terminals' arguments are incorrect.

Terminals does make a lot about the case law and the Comptroller's response to that is that as recorded in both the High Court judgment and the Court of Appeal judgment these cases involve different facts, they involve different definitions, they involve different regulatory contexts and different statutory purposes and it may be appropriate in the context of determining the country of manufacturing origin, so this is like the *Wellington City Council* road sweeper case, it may be appropriate to have a view to whether there's something new different from its constituent parts indeed, that is what the regulations say is exactly relevant to country of origin disputes. But that does not mean it's relevant here in the excise regime, which has a different statutory purpose. You're not deciding a dispute about whether something was made in one country or another. You're deciding that whether it was manufactured for the purpose of excise, given that all excisable goods have to have excise paid on them.

**McGRATH J:**
If you take, say, the *Wellington City Council* case, that did really rather seem to turn on the ordinary meaning of the word production or produced, didn't it? Rather than the contextual –

**MR PALMER:**
Manufacture, I think.

**McGRATH J:**
Rather than the particular contextual meaning of the type of –

**MR PALMER:**
Yes, it did, yes, it did, and we say that ordinary meaning is not – the meaning here has to be informed by the purpose.

**GLAZEBROOK J:**
That was just manufacture anyway, I think.

**MR PALMER:**
It was manufacture.

**McGRATH J:**
Yes.

**MR PALMER:**
Yes, so here we're dealing with production.

**McGRATH J:**
Yes, I mean I just – I understand what you're saying about the purpose, but purpose is only there to shed light on text and I'm not sure really if you're not putting a lot of weight on context, being the other parts around the text, the word production is potentially an ambiguous word and – but we need to find the meaning, as you say, that fits within purpose but we start with the ordinary meaning of –

**MR PALMER:**
Yes, absolutely and then cross check it with purpose.

**McGRATH J:**
And so to some extent the cases do throw light on that, the difference concept, don't they?

**MR PALMER:**

Well, the cases that relate that to interpretation, the word manufacture don't help very much because we're concerned with the interpretation of the word production.

**McGRATH J:**

Yes.

**MR PALMER:**

And the ordinary meaning, the plain meaning of production and this is recognised in some of the cases, do refer or it does refer to this concept of bringing something to existence, sorry, got it the wrong way around. Do refer to this concept, actually I'll put this at 3.2, yes, creation or brining into existence of the product. So we say that the ordinary meaning of the word "production" is bringing something into existence or creating it. And even if you get to the point of saying, well actually there's got to be something new –

**ELIAS CJ:**

How does that differ from manufacturing? I must say I struggle to see any difference between the two.

**MR PALMER:**

Yes and I do note His Honour Justice Young's observation that the manufacture may not always relate to organic processes perhaps. So that's one possible distinction but I have a similar struggle.

**WILLIAM YOUNG J:**

I produce wine. I don't think I'd normally describe myself as a wine manufacturer.

**ELIAS CJ:**

Yes but that's cultural.

**WILLIAM YOUNG J:**

No, well, man made with your hands.

**ELIAS CJ:**

Use of the language, yes.

**MR PALMER:**

And when you stand back from this Act, if you're producing wine, then you could, I think, safely assume that you're, it shall be excisable.

**WILLIAM YOUNG J:**

Yes.

**MR PALMER:**

And production needs to be viewed in that way.

**GLAZEBROOK J:**

And the reason you say you're bringing it into existence is because motor spirit B is different from motor spirit A.

**MR PALMER:**

It's different and there's more of it, I mean, otherwise you've got –

**GLAZEBROOK J:**

Which is important for your volume per litre argument.

**MR PALMER:**

Exactly.

**GLAZEBROOK J:**

I understand that.

**MR PALMER:**

Yes. So 4.1 is the point that I just made, I think, about the case law.

**ELIAS CJ:**

How important to your argument though is the motor spirit A, motor spirit B way of looking at it? I suppose it's just volume, is it, because you do buy into the, this is a

different product whereas isn't it enough, on your argument, that there's more product.

**MR PALMER:**

I think it is enough Your Honour. I think the motor spirit A and motor spirit B distinction came up in the course of argument in the High Court, and I can't remember why, but it just seemed to be a convenient way of making the point that they are different things. So even if you have to get to the point of saying it's the same thing or not, they are different things.

**GLAZEBROOK J:**

Well it is a different blend by nature. So motor spirit is a blend but this is a different blend because there's more butane in it than there is on the previous one.

**MR PALMER:**

And a different vaporisation rate and a different octane level –

**GLAZEBROOK J:**

Or whatever they are, yes.

**MR PALMER:**

Yes, exactly.

**GLAZEBROOK J:**

Well it could be a different octane, yes, so it could actually move into another part of the Table I suppose for that reason.

**MR PALMER:**

I think it would be difficult for that to happen. That gets into technical levels of my expertise –

**GLAZEBROOK J:**

Well exactly.

**McGRATH J:**

What do you say about the Court of Appeal's view that production was a wider term than manufacturer? That can't be right, can it?

**MR PALMER:**

Well my friend said that, disagreed with the Court of Appeal's view that production can't be simply manufacture because otherwise there'd be a tautology but I think that must be right that if, if you look at the definition and substitute the word "manufacture" for the word "production" then it would say manufacture means any operation or process involved in the manufacture of the goods. So that doesn't work. And I think the question about whether –

**McGRATH J:**

That supports the synonym argument, doesn't it?

**MR PALMER:**

Well I don't think it makes much difference actually in my submission. The question is how to interpret the word production and what we can gain in that exercise from the meaning of manufacture which it's said to mean. I'm not entirely sure...

**ELIAS CJ:**

Well Mr Palmer perhaps you might aim to conclude this within the next 20 minutes or so.

**MR PALMER:**

I think that's achievable Your Honour.

**ELIAS CJ:**

Thank you.

**MR PALMER:**

So, 4.1 we say the case law is distinguishable and both the High Court and the Court of Appeal went through that exercise and essentially agreed with that.

We say 4.2 is not safe to assume that Parliament intended anything about the definition in relation to fuel when in 2002 it changed the definition to alcohol and left the definition of manufacturing for the fuel explicitly substantively unchanged and especially when there's an alternative explanation available which is an explanation

that's in our submissions about why you would want to go through the definition of the ancillary processes in terms of licensed premises. It's not a significant point, but the point for the present purposes is that there is an alternative explanation for why that definition of change would have – could've been made and in the Comptroller's submissions was made.

4.3 is, I think what Your Honour McGrath J referred to as the comparison argument and we say that this argument ignores the differences in the goods. So, you'll recall that we say that the goods fuel and alcohol are ready for consumption at different points, you do different things to them, so therefore it's natural that the definitions to achieve that effect are different.

In 4.4, we say perhaps they don't accept this, but we say that Terminals must accept that the good produced is different from its constituent parts, for the reasons that we've already discussed and then 4.5 and 4.6 are what we, what the Comptroller says are implications of Terminals arguments that result in significant anomalies and undermine the integrity of the excise system.

In respect of 4.5A, I have heard my learned friend's argument based on Table A and Table B two or three times now and I'm afraid I still don't understand it. The best I can work it out, I think that the argument is for some third category of good, which is excisable for some purposes and not others and the Comptroller's submission is that there is no basis in the legislation for that. It would leave a large gap or hole in excise regime that you could probably drive a tanker through.

My friend also perhaps says that and sometimes explicitly says that once duty is paid you're not supposed to have to pay it again. Well, that is not the Comptroller's argument, the Comptroller says an insufficient amount of duty has been paid and it can't be a defence to pay against paying the rest that you didn't pay enough to begin with. You need to pay all the duty.

**McGRATH J:**
That's a better way of putting it, because they paid everything that was owing when it was owing.

**MR PALMER:**

Then they wouldn't be in this problem. And 4.5B, this argument that Terminals have is not available for importers, so if you import motor spirit B you're liable for the full amount. Manufacturers on the same product when excise duty is not paid on imported fuel, it's in the same situation as I think my friend conceded this morning. The pre-existing butane, remember there's already butane in motor spirit A, the argument doesn't relate to that and also ethanol and I'll come to ethanol again in a minute. C, the effect of Terminals' argument is that excise duty should be payable on butane as butane. But there isn't any butane left anymore. D, we say that Terminals argument cast doubt on what ingredients in motor spirit should be taxed at the motor spirit rate, because motor spirit inherently is a blend and that's according to the evidence. That's undisputed by Dr Koutsaenko.

4.6, Terminals agrees that it needs a licence to blend ethanol with motor spirit. Now my friend said today, again, that this is because of the ancillary process definition in subsection, in paragraph (c) of the definition of "manufacture". This simply cannot be right because the product that is a result is a fuel and fuels are governed by paragraph (b) not paragraph (c). And the Court of Appeal noted this, I've got the reference there, 4.6A at paragraph 133.

So the Comptroller says, and Terminal says, that when ethanol is added to motor spirit – sorry, I'll rephrase this. Terminals agrees that when ethanol is added to motor spirit A, that's manufacturing. Well what happens when ethanol is added to motor spirit B. So motor spirit B, we've got the butane in it. If we're adding both butane and ethanol at the same time –

**ELIAS CJ:**
Can you?

**MR PALMER:**
Yes. Press a button on the computer and all the little pipes, it flows through. So if you add butane and ethanol at the same time, what is the situation then? Terminals applied for, and got, a licence so the good that leaves the manufacturing area is motor spirit B with ethanol in this circumstance. It must be that you would have to levy excise duty on the full volume of motor spirit B, including the butane, plus ethanol, although it would be on a per litre of motor spirit basis. So this, then, has the effect that you pay the full amount of excise duty on the butane component, butane equivalent component, when you're adding ethanol into it, but you don't, according to

my friend's argument, when you're not adding ethanol into it. This does not make sense. The implication is at C there. On Terminals argument the butane component is excised at different rates depending on whether ethanol is added. The point that I think was covered adequately –

**GLAZEBROOK J:**
And that argument is because you can't take out the butane component at that stage because I suspect they would argue that you actually don't have to pay any more at all because mixing it isn't but that would be their argument I'm assuming?

**MR PALMER:**
I have tried to elicit an argument about this question before and I haven't been successful.

**GLAZEBROOK J:**
Well ethanol – wouldn't the argument be, it's not manufacturing to add butane so therefore, and you don't pay anything on ethanol, so you've already paid it when it came into the country.

**MR PALMER:**
But what is it that leaves the Customs controlled area. It's the motor spirit B plus ethanol.

**GLAZEBROOK J:**
Yes I just assumed they would say it isn't but I can see what your argument is on that.

**ELIAS CJ:**
They do have to measure it, I mean that's what's required by the different pricing for ethanol, so there's still a measurement of the motor spirits component so I don't see that there's any illogicality in what is being argued against you, if that's what you're suggesting here. That when you say you would have to pay it on the full amount, I don't see that that follows.

**MR PALMER:**

Well I would submit that it does follow for the reason that my friend accepts that once butane is added to motor spirit it becomes motor spirit. So –

**ELIAS CJ:**
Yes but doesn't this just simply buy into the principal contentions between the parties, really, it's not an additional argument –

**MR PALMER:**
No, no –

**ELIAS CJ:**
– you don't really gain strength –

**MR PALMER:**
No.

**ELIAS CJ:**
– from the addition of ethanol.

**MR PALMER:**
It's not an additional argument, but it illustrates the illogicalities that the Comptroller says exists in my friend's argument.

**ELIAS CJ:**
Well, I don't quite follow why it's illogical. It would be the same consequences they're contending for, surely.

**MR PALMER:**
Well, with the additional factor that because there is a license for manufacturing ethanol, there is a Customs controlled area and a good is removed for home consumption from it. So –

**GLAZEBROOK J:**
Yes, although on your argument there should've been a Custom controlled area for the other area that's why I think it probably is just the same argument effectively.

**MR PALMER:**

Yes, well, it may be, but I think it –

**GLAZEBROOK J:**
But I suppose it's gained strength by the fact that they've accepted a Custom controlled area.

**MR PALMER:**
Possibly not all legally. It probably doesn't gain legal strength in that point of view, but yes.

And 4.6E is perhaps the reason why there's a difference in argument. We say there's no distinction between these two things, but there is a practical distinction because of course blending ethanol, if you claim – if you get a license and you can then – are excisable on the per litre of motor spirit amount, you can excise benefit, but if you claim a licence, you have a licence for blending butane then you have an excise cost.

**ELIAS CJ:**
Isn't there a further argument, maybe I've picked it up from your submissions, but isn't there the further argument that the legislative scheme has specifically addressed ethanol by the reduced duty. So, -

**MR PALMER:**
And should've done the same with butane if they're meant to.

**ELIAS CJ:**
If they're meant to, yes.

**MR PALMER:**
Yes, hopefully that is in our submissions.

**ELIAS CJ:**
Yes.

**MR PALMER:**
But it's also, yes, and 4.7 just to round off, the Comptroller says that Terminals has no answer to the logic of the wider legislative purpose in respect of hypothecation

requiring duty to be levied on volume of fuel. But I have been over that ground so I won't repeat it. Unless there are any further questions, I think I'm five minutes early.

**ELIAS CJ:**
Thank you for that, Mr Palmer. Yes Mr Harrison.

**MR HARRISON QC:**
I'll just take up my learned friend's parting shot to begin with which was 4.7, Terminals has no answer to the logic of the wider legislative context of hypothecation of excise duty requiring duty to be levied of volume of fuel. He makes it sound as though we've remained in use on that topic from the very beginning of the litigation. In fact if Your Honours refer and you may just want to note to the judgment of Mallon J at paragraphs 89 to 98 which set out all these arguments that my learned friend was advancing and at 99 to 101 of Mallon J's judgment which is at around about page 76 of volume 1 of the case, Her Honour accepted our submissions in response, which in short form contain the answer, but that said, I thought I also addressed it in my opening submissions.

Perhaps if I can step back from this whole business about tax on consumption and hypothecation and look at why the parties are at odds over that. The best way to do that is to turn to my learned friend's written submissions at page 16 and work backwards, really, If you'll bear with me. At paragraph 49 of the submissions, after reviewing the legislative history, it said, "So since 1927 Parliament has levied some form of targeted excise duty on domestic motor spirit consumption (emphasised) measured in specific volumes, and for the express purpose of paying for transport infrastructure." And then it said, based on that, next paragraph, "The Comptroller must collect duty for every litre of petrol to be consumed in New Zealand, regardless of its origin. Parliament's wider purpose is to face consumers with the full costs of consumption."

Now it's at these points that I seriously take issue with my learned friend. I don't – the Terminal illogical dispute about whether it's a tax on consumption or not is really beside the point. In simple terms the submission is the tax points for motor spirit are upon importation and the – at that point the excise-equivalent duty is levied and payable, irrespective of what happens to that motor spirit further down the track. Whether it, in fact, falls through a hole in the pipeline and ends up in Tauranga Harbour or not, it's levied. In that sense it's not a sense on consumption. Likewise

manufacture the tax point is at the completion of the manufacturing process when the motor spirit leaves the licensed manufacturing area and ditto for butane. So we have both, we have each of those tax points in issue here. The importation one for the motor spirit and the manufacture point for butane both get the tax paid on them and that is the point of my argument around section 73 and 75 and Parts A and B of the Duties Table. The two are worded in a way that is mutually exclusive and I'm certainly not saying that there is a third alternative.

Now why is my learned friend arguing all this, because he wants to argue for a legislative purpose that taxes motor spirit on the basis of volume at any point where you can identify a specific volume or increase in volume and that – my points about that are, first of all, the enquiry is to why. The enquiry must be into the, a purpose discernible from the Customs and Excise Act. To go back to 1927 to look at legislation concerning the effect of –

**WILLIAM YOUNG J:**
Sorry, I'm going to distract you. I'm going back a bit. Isn't it the case the duty on the motor spirits which is imported becomes payable when it's released for home consumption?

**MR HARRISON QC:**
Well that's when it comes off the ship.

**WILLIAM YOUNG J:**
But doesn't it go in – isn't it a Customs controlled area that it goes into?

**MR HARRISON QC:**
The Customs controlled area is right there at the wharf.

**WILLIAM YOUNG J:**
Yes.

**GLAZEBROOK J:**
And it can be moved to another Customs controlled area though if that is for the purposes of manufacture.

**MR HARRISON QC:**

Yes it could be but it isn't.

**GLAZEBROOK J:**

But isn't in this particular case that it can be?

**WILLIAM YOUNG J:**

Oh I see, so by the time it gets into the area that you showed us on the photograph, that's not a Customs controlled area?

**MR HARRISON QC:**

That's correct.

**GLAZEBROOK J:**

Well it is for ethanol but it's not for butane is what you say?

**MR HARRISON QC:**

Well it isn't for motor spirit, more to the point.

**WILLIAM YOUNG J:**

Thank you, I can understand now.

**GLAZEBROOK J:**

Oh so butane or motor spirit?

**MR HARRISON QC:**

Yes.

**ELIAS CJ:**

So it's payable –

**GLAZEBROOK J:**

Well it is for motor spirit which is combined with ethanol, because that was the purpose of that second part of the licence, that came in 2008 as against 2003, so the denaturing as I understand it was 2003 and then changed, as we were told, to include ethanol and motor spirit so it is a Customs controlled area for ethanol and motor spirit from 2008.

**MR HARRISON QC:**

Yes, for the purpose of blending then.

**GLAZEBROOK J:**

Yes.

**MR HARRISON QC:**

But that area is the gantry area. It's not the entire premises.

**GLAZEBROOK J:**

No.

**MR HARRISON QC:**

So I come back to my point what is –

**GLAZEBROOK J:**

No, but that's the gantry area, as I understood it, where the mixing occurs both of butane and ethanol and where it does leave for home consumption and the other parts and their storage. Is that right? And there's presumably a denaturing part as well, which I don't think we were showing on the photos.

**MR HARRISON QC:**

The denaturing simply takes place by a squirt of motor spirit into the tanker truck –

**GLAZEBROOK J:**

That's what I understood, yes.

**MR HARRISON QC:**

Which is then unloaded into one of the smaller tanks. But if we're looking just at the motor spirit, the motor spirit is imported motor spirit and it comes in from the tanker vessel. There's a mini Customs control area at the point where it's unloaded. By the time it reaches the big storage tanks on our facility, duty has been paid so it's duty-paid fuel and then it's stored there. My only point is that for the importation, it's not possible to make the link in terms of the Customs and Excise Act to any intention to

levy duty on every litre of petrol to be consumed in New Zealand. The intent is to levy the duty on every litre of motor spirit imported into New Zealand. These are the importation. That is what the statute says.

**ELIAS CJ:**
I think everybody does understand that.

**MR HARRISON QC:**
Yes.

**ELIAS CJ:**
But surely the submission is available to Mr Palmer, that if one looks through to the substance of it, in total what the Act does is impose a regime which does amount to a tax on motor spirits to be consumed in New Zealand.

**MR HARRISON QC:**
No, I don't accept he can advance that submission on the basis of the CE Act itself. There's nothing in the CE Act to that effect. The effect of the CE Act, I argue, is that there is the Part A, Part B, two regimes, one regime dealing with the imports, another regime dealing with the manufacture. So, that the question is to what extent can one rely on the previous legislation and the legislation dealing with the destination of revenues collected by various means but including excise duty on fuel to impose a different meaning on the CE Act, then I submit emerges from it on its face and I argue and have argued that that cannot be done by reference to the Land Transport Management Act 2003 and it cannot really be done by reference to any of the previous history. We've had a standalone Customs and Excise regime for quite some time now, since the 1986 amendments set the present pattern of legislation. Since that time the CE legislation has not been concerned with the earmarking or hypothecation which my learned friend wants to assert. Now –

**WILLIAM YOUNG J:**
Well, what's the legislation that was the precursor to the Land Transport Act that were taken to? Did that legislation provide for an earmarking of the excise duties on fuel?

**MR HARRISON QC:**

We haven't been taken to it, but according to footnote 60 of my learned friend's submissions it's the Transit New Zealand Act 1989 and I suspect that he hasn't taken us there because as we get further back through these earlier much less precise regimes, we get to see that far from every litre being used on roads, it's much vaguer than that. Instead there's a diversion of the fund which the Government has quite a discretion about how it uses. It's been a perennial complaint since I've been paying attention, how the Government collects tax on fuels and doesn't use it on roads. So I just don't – but in any event, I don't accept that linkage can properly be made as a matter of interpretation. Whichever legislation one looks at, it's more appropriate to treat the CE legislation as stand-alone, to look at its purpose because let's not lose sight of the fact, we're only trying to identify purpose in relation to the definition of "manufacture" and what I'm quarrelling with is, with respect, the hyperbole derived from this study of previous legislation and other related legislation –

**GLAZEBROOK J:**
But where you have something absolutely explicitly referred to in another statute, and even if you don't, you would try and identify the purpose of a particular piece of legislation, not necessarily just looking at it on its own, but fitting it into the statute book in general, wouldn't you? And especially where you do have explicit references to other legislation?

**MR HARRISON QC:**
I don't accept that that's appropriate with legislation enacted subsequent to –

**GLAZEBROOK J:**
No, no, but that was why I asked your friend explicitly whether the previous legislation, because I would agree with you in respect of the 2003 or four, whatever, the subsequent legislation, but that's exactly why I asked your friend that question.

**MR HARRISON QC:**
Well there's a Court of Appeal decision on the point which Your Honour, I think, authored, from memory.

**GLAZEBROOK J:**
Oh did I? Well in that case have I changed mind?

**MR HARRISON QC:**

Yes. Of course you may. But the point is this, that when we look at all this associated legislation and when we look at something like the provision, this is at para 51 of my learned friend's submissions, the provision about defining the term per litre to refer to a quantity of product expressed in litres, fuel this is, at 15 degrees centigrade. It's over-egging the argument, with respect, to say that this demonstrates a legislative attempt, intention to tax every last litre of motor spirit that ever comes into existence at any one point in time. All that is –

**ELIAS CJ:**

But isn't the more powerful argument, leaving aside the references to the Land Transport Act which perhaps are slightly wider, it's the structure of the Act. It's the fact that importation plus manufacture is the whole lot that's used in New Zealand and while the legislature has identified a specific regime for ethanol, presumably for particular purposes, it hasn't for – I mean I understand your argument but the point that I'm putting to you is that it's a structure of the Act argument that you face.

**MR HARRISON QC:**

That I'm advancing?

**ELIAS CJ:**

No, no, that you face. That the Act is comprehensive construed as Mr Palmer argues.

**MR HARRISON QC:**

I don't accept that – can I just deal with this point about the per litre. The only reason that there is a temperature identified in that definition is that the volume of fuel expands and contracts markedly, dependent on its temperature, so that you need a standardised temperature in order to be fair to an assessment of how many litres and therefore how much duty is payable, at different times of the year. But that is not the structure of the Act which suggests that the definition of "manufacture" should be interpreted in any particular way and with respect I don't accept that my learned friend has pointed to anything in the structure of the CE Act. His entire edifice, to use his expression, is constructed around other legislation.

The structure of the Act is the section 73, 75, Part A, Part B of the Table indicating that there is one route which you may come down for your motor spirit which is imported and another route which is manufactured. Our motor spirit was always

imported therefore it's not within Part A. That is the structure in my submission. The structure of the Act equally is that when duty on fuels has been and indeed butane has been assessed, there's nothing in the Act to suggest that in relation to fuels there's going to be a second lot of duty imposed when you simply blend two duty paid components into one.

So, I don't accept the proposition that there's a structure of that sort. I also don't – I note that my learned friend puts a number of arguments in my mouth and generally speaking many of them I don't accept are rightly attributed to the appellant. We don't accept that the good in question is something different from its constituent parts. The good in question is motor spirit and it is unchanged as to its nature except that the volume is increased. At the end of the day, one has to ask why is an increase in volume to be regarded as falling within the definition of manufacture and in my submission one would expect especially given the history, express language to support that. Now, I just wanted to have a look at –

**ELIAS CJ:**
Sorry, can I just ask you, Mr Harrison, leaving aside the manufacture point, is it your argument that – and you've said that there's not a second – a second lot of duty can't be imposed, is it important that once duty has been levied, that's it? You can't levy another lot of duty? You can't make another assessment?

**MR HARRISON QC:**
Well, that is so unless you can point to something down the track which amounts to manufacture.

**ELIAS CJ:**
So if it was manufacture you'd accept that you can impose a different, another duty?

**MR HARRISON QC:**
Yes, I do accept that, but what I say is when we attempt to give content to that definition, we are attempting to do so in a context where both components are already duty paid, one under Part B, duly paid and one under Part B duly paid, so that while there is that possibility, if we have something which is a true act of manufacture, to get there we have to interpret the definition and the definition has to be interpreted against the clear signal that the tax points have already been reached for both these commodities, reached once and why do we – why should we feel a

need to interpret the definition so that the tax point gets reached a second time on the basis of a mere increase in volume.

Now on this topic of the, what I call the case law definition, I think I understand my learned friend to go so far as to submit that even if I'm right and the case law definition is incorporated in the definition of "manufacture", he would argue that the difference, as a result of our operation, is sufficiently marked to satisfy that test. I just wanted to take Your Honours back to the judgment of Justice Mallon on that topic which is at tab 9 of the case. It's paragraphs 119 to 121. This is part of Her Honour's overall assessment.

**GLAZEBROOK J:**
Sorry 100 and?

**MR HARRISON QC:**
Page 86 of the case, volume 1, paragraphs 119 to 121 and what Her Honour said is noting the arguments. "The relevant goods in this case, that is those that are subject to excise duty, are motor spirit and butane. The Comptroller does not contend that TNZ is involved in the production of butane. She contends that TNZ's operation is involved in the production of motor spirit. When butane is added to motor spirit, the resulting blend remains motor spirit, but there is now more of it. She submits that because there is now more motor spirit... there has been a production."

She says, "While at first blush that submission has an attraction, it is not persuasive on closer analysis." And she goes on further. But then I want to take you to over the page, 121, "In the present case there were X units of motor spirit (with some levels of butane already in the motor spirit mixture as imported) and Y units of butane before the operation. Afterwards there was motor spirit and butane with combined units of X and Y. A mixture had been made but it was no different from its constituent parts in any material way." So that was Her Honour's finding on the question whether the process or operation brought about a difference.

Now for completeness I refer to the Court of Appeal's only discussion of that, I think it's the only discussion, at page 129 of the same volume. This is paragraph 101, "Why we do not consider it necessary that the process would result in something different being produced the undisputed evidence of Dr Koutsaenko is that this indeed occurred. Of importance too is that the added butane becomes part of the

petrol and loses its separate identity other than for analytical purposes." And then they talk about ethanol and butane.

So it's a matter for Your Honours how para 101 is interpreted but I don't accept that that was an explicit overturning of the findings of Justice Mallon. I think it was Justice McGrath who put it to me that it was a matter of fact and degree. We have a finding of the trial Judge, which was not specifically challenged on appeal, and we do not dispute the evidence of Dr Koutsaenko, we dispute the inferences to be drawn from it. The proper conclusion on the evidence is that if the case law test applies, it has not been satisfied such as to trigger a liability for excise duty.

**ELIAS CJ:**
Why do you say that the Court of Appeal in that paragraph was not differing from Justice Mallon?

**MR HARRISON QC:**
Well they certainly didn't expressly differ and they did not identify –

**GLAZEBROOK J:**
I referred to paragraph 19 and 20 of the decision as being whether differences are identified which was the increase in volume and also that it changes the characteristics of the resulting product. So they quoted paragraph 12 and 13, so if you look at the footnote that's what they're relying on, referring back to the Koutsaenko evidence, is that how you pronounce him?

**MR HARRISON QC:**
I'm not sure, but let's pronounce it that way. It's not even clear from paragraph 101 whether the Court of Appeal is saying, "This is our application of the case law definition." It's hard to believe that it is, but against their conclusion is to be said the differing conclusion of Justice Mallon which I commend as the better view.

Just one small error in my learned friend's treatment of the facts in his skeleton argument where in 2.1 he says that Terminals imports or buys for an importer motor spirit A, it's Gull rather than Terminals that buys from an importer, no longer imports for most of the period we're concerned with and he says Terminals adds to motor spirit A up to 5% butane and sells the resulting motor spirit B to its sister company

Gull, that is not correct either. There's no sale by Terminals which is a mere custodian.

Other than that I think I have covered as much as can usefully be responded to unless Your Honours have any questions.

**ELIAS CJ:**
If Gull is not the owner, I don't think it has been –

**MR HARRISON QC:**
Gull is the owner.

**ELIAS CJ:**
Sorry, if Terminals is not the owner – oh, I see, it's that provision we were taken to which says if you're the custodian as well as the owner, you're both jointly and severally liable for the duty, is it?

**MR HARRISON QC:**
Well, yes, the problem which doesn't, in my view affect the interpretation issue or the definition is that –

**ELIAS CJ:**
No.

**MR HARRISON QC:**
– under section 85 you've got to be the licensee of the LMA which neither of them is and then you've got to, the manufacturer has to have purchased the ingredient which bears excise duty which TNZ hasn't done, so one way or another –

**ELIAS CJ:**
When the assessment is made it will become apparent, will it?

**MR HARRISON QC:**
Well, we're not conceding that that's the way the assessment should proceed, but both sides have, in the course of this case, recognise that the section may create problems.

**ELIAS CJ:**

Yes, I see.

**GLAZEBROOK J:**

But in fact what should happen is that if the Comptroller is right, there should be a Custom controlled area for manufacture and when it's transferred, whoever purchases it from the Custom controlled area when it arrives to the Custom controlled area for manufacture, there is no excise duty paid at that stage or Excise-equivalent duty paid at that stage because in fact it's being transferred from the one Custom controlled area to another.

**MR HARRISON QC:**

Yes, that may well be the case.

**GLAZEBROOK J:**

But whether anybody owns it or purchases it or not, but that seems to be the structure of the legislation that the only time you pay Excise-equivalent duty on importation is if it's released for home consumption. If it's released to a manufacturing area whether yours or not, you do not pay that.

**MR HARRISON QC:**

That's correct. My point around that provision has boiled down to its simplest being this, TNZ and set up is a storage facility for fuels. It's a high-tech, high security potentially dangerous operation which it's appropriate to have a dedicated skill operator full. It's fortuitous that the storage has been for the sister company Gull. It could just as easy be and maybe in the future that TNZ could own the facility and store for other fuel companies entirely. Now, if that happens and if there is the same sort of dispatch activity, TNZ as the custodian cannot bring itself within section 85 because it's storing other people's fuel. I mention that point simply to submit that that is an indication that the legislation is not looking at this kind of scenario, dispatch activity, in the context of either manufacture or credits for a manufacturer under 85 or indeed the joint liability provision. A common sense approach would be to say that that activity, a perfectly legitimate social activity should be permitted and not attract excise duty. Those are my submissions.

**ELIAS CJ:**

Yes, thank you Mr Harrison. Thank you counsel for your submissions. We'll reserve our decision in this matter.

**COURT ADJOURNS: 3.57 PM**